EXHIBIT A

Exhibit 66(a)
OZAH Case No: CU25-02

2020 WL 6623283
Only the Westlaw citation is currently available.
UNREPORTED *

Court of Special Appeals of Maryland.

Tom GRAUL, et al.
v.
RIVERWATCH, LLC, et al.

No. 978, Sept. Term,2018
|
November 12, 2020

Circuit Court for Baltimore County, Case No. 03-C-17-007659

Meredith, * Leahy, Beachley, JJ.

Opinion

Leahy, J.

*1 In this appeal, which arises out of one of the oldest towns in Baltimore County, we explore one of the newest issues in land use and zoning—statutory vesting. The sprawling procedural history of the underlying case is rooted in the 2015 decision of the Board of Appeals of Baltimore County (the "Board") to approve a special exception to allow the appellees, Riverwatch, LLC and Two Farms, Inc. (collectively, "Royal Farms"), to build a fuel service station, convenience store, and carry-out restaurant in Hereford, Maryland. The Sparks-Glencoe Community Planning Council, Tom Graul, Ken Bullen, Jr., and Ruth Mascari (the "Protestants") and the People's Counsel for Baltimore County (collectively, "Appellants"), petitioned for judicial review of the Board's decision to the Circuit Court for Baltimore County. Following a hearing, the court remanded the case to the Board for further proceedings to consider additional evidence.

In the time period between the remand order and the next Board hearing, the Baltimore County Council enacted Bill 56-16, which changed the zoning classification of the subject property. On remand before the Board, Appellants moved to dismiss Royal Farms' petition for a special exception on the basis that the new zoning classification applied and prohibited the fuel service station. The Board denied the motions to dismiss, holding that the former zoning classification applied because Royal Farms had obtained vested development rights by recording a plat in accordance with the provisions of Baltimore County Code ("BCC") § 32-4-264(b)(2) (2009). After holding another hearing to address the issues from the remand order, the Board affirmed its decision to grant the special exception to Royal Farms.

Protestants and People's Counsel sought judicial review, and during their second sojourn to the circuit court, challenged both the denial of their motions to dismiss and the Board's decision to grant the special exception. The court affirmed the Board's decisions, prompting the timely appeals by Protestants and People's Counsel to this Court.

We consolidate the two questions presented by Protestants, and five by People's Counsel, into the following two issues: [1]

1. Did the Board of Appeals err in denying the motions to dismiss filed by Appellants after concluding that Royal Farms' development plan had vested by virtue of its recordation of a plat in accordance with BCC § 32-4-264?

2. Did the Board of Appeals err in granting Royal Farms a special exception for a fuel service station and convenience store?

*2 In addressing these questions, we examine several predicate issues; such as whether "final" zoning approval, including any necessary special exception approval, is a prerequisite to vesting under BCC § 32-4-264. We hold that the Board did not err in denying the motions to dismiss brought by Appellants on the basis that Royal Farms had vested rights. We further hold that the Board did not err in granting a special exception because the Board's determination that there was a "need" for the products and services offered at Royal Farms was not in error and was supported by substantial evidence in the record.

BACKGROUND

A. The Property

Hereford is one of two designated rural villages in Baltimore County. Only eleven of Hereford's 104 buildings were built within the last 25 years, and Protestants claim that 42 of its 104 buildings are in the Maryland Inventory of Historic Properties. The Hereford Community Plan, adopted by the Baltimore County Council in 1991, states that "[t]he land use goal for Hereford is to provide for limited appropriate commercial growth in a centralized area that does not exceed environmental constraints." According to the Plan, "[c]ommercial services are to be limited to serving the needs of Hereford residents, the agricultural community, as well as tourists."

Riverwatch, LLC, owns roughly 5.88 acres of land at 118 Mount Carmel Road in the Hereford area of Baltimore County (the "Property"). Originally an unimproved cornfield, the Property has been subdivided into a 3.37-acre lot ("Lot 1") and a 2.51-acre lot ("Lot 2"). The Property is situated on the north side of Mt. Carmel Road between York Road to the east and I-83 to the west. It is located within a Tier IV area under the State's Sustainable Growth and Agricultural Preservation Act of 2012, which means that it is not planned for sewerage service and is zoned to prioritize preservation and conservation. To the east of the Property are several cottage-style houses occupied by residents and businesses. Just to the west, on Mount Carmel Road, is the Hereford Shopping Center, which includes a Graul's Market, the Hereford Pharmacy, and an M&T Bank. Other businesses in the vicinity include an Exxon fuel station, other banks, another pharmacy, and a 7-Eleven.

B. Initial Administrative Proceedings

Riverwatch, LLC and Two Farms, Inc.[2] proposed to build a fuel station, convenience store, and carryout restaurant site (collectively, the "Project") on Lot 2. The fuel station, as proposed, would consist of a canopy with six dual-sided fuel dispensers to permit up to 12 cars to pump fuel at the same time.

On December 6, 2013, Royal Farms filed a Petition for Zoning Hearing with the Office of Administrative Law for Baltimore County, requesting: (1) a special hearing for approval of illuminated signage; (2) a special exception to allow, as uses in combination, a fuel service station, a convenience store with a sales area larger than 1,500 square feet, and a carry-out restaurant; and (3) a variance to permit a wall-mounted enterprise sign exceeding the permitted size.[3] At that time, the Property was zoned B.L.-C.R., a Business Local zone in the Commercial, Rural District. Because the Property is outside of the Urban-Rural Demarcation Line ("URDL"), the fuel service station was permitted only by special exception under section 405.2.B.2 of the Baltimore County Zoning Regulations ("BCZR"). A special exception was also required, under BCZR 405.4, for a carry-out restaurant in combination with a fuel service station and, under BCZR section 405.4.E.1, for the proposed convenience store with a sales area larger than 1,500 square feet.

*3 People's Counsel for Baltimore County filed an Entry of Appearance as an interested party to the petition. A hearing on the petition was held before an administrative law judge ("ALJ") in the Office of Administrative Hearings for Baltimore County on January 27, 2014. Two days later, the ALJ granted all of Royal Farms' requests, subject to certain conditions.[4]

On February 18, 2014, Royal Farms filed an application under BCC § 32-4-106 with the Development Review Committee ("DRC"), for limited exemptions from the development review process.[5] Specifically, Royal Farms filed under § 32-4-106 (b) (8) as "[a] minor development that does not exceed a total of three lots[,]" for an exemption from the requirements for a community input meeting and a Hearing Officer's hearing. With the application, Royal Farms submitted copies of a development plan that showed, among other things, the area of the Project

site, applicable setbacks and zoning information, and the heights and dimensions of the proposed structures.

In a letter dated March 19, 2014, the Department of Permits Approvals and Inspections ("PAI") adopted the DRC's recommendations that Royal Farms' Project met the requirements of a limited exemption under § 32-4-106(b)(8). The letter advised Royal Farms of the documents that they needed to submit to further process the development plan. The letter from PAI constituted a final administrative order and decision.

The Protestants filed timely notices for a de novo appeal to the Board from both the January 29, 2014 ALJ Opinion and Order and the March 19, 2014 PAI approval of the limited exemption. The Board consolidated the appeals and held public hearings on eight days, starting on July 22, 2014 and concluding on March 26, 2015. While the appeals were before the Board, Royal Farms was simultaneously pursuing approval of the development plan by County agencies, including the Department of Environmental Protection and Sustainability ("DEPS").

On October 20, 2015, the Board issued a 67-page Opinion and Order approving the special hearing for illuminated signage; granting the special exception to allow a fuel service station and a convenience store and carry-out restaurant as uses in combination; and granting the limited exemption from the development review process. The Board's decision to grant the special exception was based, in part, on the finding that Royal Farms satisfied its burden of demonstrating a "need" for the Project, as required by BCZR § 259.3.E.

C. Plat is Recorded in Land Records

Several weeks after the Board issued its Opinion and Order, on November 13, 2015, PAI issued final approval of Royal Farms' Store #185 Development Plan (the "Development Plan"). On the same day, PAI and DEPS approved the plat for the Project (the "Plat"), and Royal Farms recorded the Plat in the land records of Baltimore County. As the Board noted in a later decision in this case, "[i]t is undisputed that neither the Protestants nor People's Counsel appealed the final approval of the [Development] Plan."

D. Proceedings in the Circuit Court

*4 On November 18, 2015, Protestants filed a petition for judicial review in the Circuit Court for Baltimore County and, on March 8, 2016, filed a memorandum in support of their motion requesting that the court reverse the decision of the Board to grant the special exception or, in the alternative, remand the case for another hearing. Specifically, Protestants contended that the Board committed reversible error by actions such as refusing to accept the testimony of their expert witness, Christopher Jakubiak; refusing to accept into evidence a petition signed by members of the community, and; construing narrowly the definition of "need" under BCZR § 259.3.E. The Protestants did not appeal the Board's decision to grant the limited exemption and only appealed the special exception approval.

On June 3, 2016, the parties participated in a hearing in the Circuit Court for Baltimore County. At the end of the hearing, the judge delivered a lengthy oral ruling from the bench, setting forth his findings and remanding the case to the Board. He found that the "Board was manifestly wrong to exclude the testimony of Mr. Jakubiak" and directed the Board to allow his testimony on remand. Next, after reviewing the applicable procedures of the Board of Appeals, along with rulings from the Court of Appeals instructing that "hearsay is admissible in administrative proceedings," the judge determined that the Board erred in excluding the petition on the ground that it was hearsay.[6]

Finally, the court addressed the issue of whether the Board erred in making its determination of "need" for granting a special exception in a C.R. District[7] under BCZR § 259.3.E(1).[8] Deferring to the Board's decision on how much weight to give the testimony of each party's expert witnesses, he found that there was substantial evidence in the record to support the Board's findings of supply and demand in relation to whether the Project was needed. However, the court

noted the Board's failure to consider duplication of services as one of the criteria for "need," and stated that "under the law it should have been considered." To conclude, the judge announced,

> I don't know that this is going to change the Board's decision, and I'm not reversing the decision. I'm only remanding this to consider the evidence and after they consider the evidence, the Board can decide the case possibly the same way. ... [A]nd I'm not directing how it should be decided only that this evidence, this additional evidence, should be considered.

Subsequently, the court issued an order remanding the case to the Board for further proceedings for the purposes of allowing the expert witness testimony; receiving the petition into evidence upon satisfactory authentication; and considering the "duplication or availability of services and products in the area" in evaluating whether there is a need for the Project.

E. On Remand to the Board of Appeals

1. Downzoning

*5 In September 2015, during the public filing period for the 2016 Comprehensive Zoning Map Process (CZMP), Protestant Ken Bullen had filed an application requesting a change in the zoning classification of the Property from B.L.- C.R. to R.C.C. (Resource Conservation – Commercial). The County Council concluded the 2016 CZMP on August 30, 2016, when it called for a final reading and vote on the CZMP bills for each of the seven Council Districts. The Council considered Mr. Bullen's request as part of Bill 56-16, the Comprehensive Zoning Map for the Third District. The requested change from B.L.- C.R. to R.C.C. was not included in the recommendations of the Planning Board, but, during the August 30 meeting, the councilman for the Third District moved to add the change and the motion passed unanimously. Significantly, the R.C.C. zone does not permit fuel service stations as of right or by special exception, though it does permit, on a smaller scale and subject to restrictions, convenience stores and carry-out restaurants as of right under BCZR §§ 1A06.2-3.

2. Motion to Dismiss

In September 2016, People's Counsel sent a letter informing the Board of the rezoning and requesting the Board to dismiss the case. The letter stated, in relevant part:

> In view of the [c]ircuit [c]ourt's June 8, 2016 remand of the [Board's] prior approval of the zoning petition, there is no doubt that the new zoning classification controls and supersedes the zoning upon which the petition depends and is premised. This is especially true here, where the Court remand negated the [Board's] approval.
>
> The case law is longstanding and consistent that new zoning legislation applies generally to pending litigation. **Generally speaking, there can be no vested rights until there is absolutely final court approval. Such new legislation applies retroactively unless the legislation explicitly has a prospective provision.** As with every such Baltimore County CZMP enactment, Bill 56-16 has no such prospective provision.

(Emphasis added).

The Board heard argument on the issue raised in People's Counsel's letter on October 6, 2016, the date set for a hearing on remand from the circuit court. People's Counsel, later joined by Protestants, moved to dismiss the proceedings as forecast in the October 6 letter, arguing that the rezoning barred Royal Farms from further pursuing the special exception.

Royal Farms countered that, pursuant to BCC § 32-4-264, the Development Plan vested when Royal Farms recorded the Plat well prior to the rezoning. Thus, according to Royal Farms, they were entitled to continue to pursue the special exception under the B.L.-C.R. zone and laws in effect at the time the Development Plan approval was obtained and the Plat was recorded.

3. Board Decides Vesting Issue

On November 7, 2016, the Board accepted legal memoranda from each party, and on December 6, the Board held a public deliberation. The Board's "Ruling on Motion to Dismiss" was issued on March 10, 2017.

The Board framed the issue before it as "whether Royal Farms obtained vested development rights by recording the Plat in the Land Records for Baltimore County." The Board considered the language of BCC § 32-4-101(ccc) which defines "vesting" as a "protected status conferred on a *Development Plan*" and further instructs that a "vested Development Plan shall proceed in accordance with the approved Plan and the laws in effect at the time Plan approval is obtained." (Emphasis added). Determining next that the subject Development Plan was for a non-residential development, the Board referred to the vesting statute, BCC § 32-4-264, which provides, in relevant part:

> (a) *In general.* A Development Plan vests in accordance with the provisions of this section.
>
> (b) *Non-residential Plan.*
>
> (1) A non-residential Plan for which a plat is not recorded vests when substantial construction occurs with respect to any portion of the Plan.
>
> (2) A non-residential Plan for which a plat is recorded vests when plat recordation occurs for any portion of the Plan.

The Board reviewed the procedures for approval of a plan and the "sequence of events which must be met before a plat may be submitted to PAI for approval[,]" further noting that "a plat can be recorded the same date that a plan is approved." Accordingly, the Board determined that both the Development Plan and the Plat complied with all of the requirements for approval, and that "[o]nce the Plat was recorded, Royal Farms acquired vested development rights under BCC, § 32-4-264(b)(2)."

*6 The Board rejected the Protestants and People's Counsel's arguments that the Development Plan should not have been approved because the Board had only issued an initial decision on the special exception on October 20, 2015, and the parties were still within the thirty-day appeal period in the special exception litigation when the County agencies issued final approval of the Plan on November 13, 2015. They argued that the Plan must comply with the zoning laws under BCC § 32-4-114(a) and that there was no zoning basis for the Plan since the special exception litigation was still pending. Because the Plan should not have been approved, Protestants continued, the Plat was a nullity.

The Board noted that "BCC § 32-4-281 (f) [ ] prohibits the recordation of a plat that is connected to a development plan when the plan is the subject of an appeal to this Board." The Board highlighted that "[i]t is undisputed that neither the Protestants nor People's Counsel appealed the approval of the Plan," and "[t]here is a critical distinction between the appeal of the special exception for the fuel service station and the appeal of a development plan." Consequently, the Board determined that it did not have jurisdiction to consider whether the Plan "should have been approved; should have been approved with conditions; or should have been disapproved."

The Board explained that "the BCC permit[ed] Royal Farms to simultaneously and separately pursue the special exception case and the Plan approval." The Board "acknowledge[d] that the special exception status may ultimately be denied since it is still subject to appeal[,]" but still posited that "the BCC does not prohibit a developer from making a business decision to expend costs obtaining plan and plat approval before obtaining zoning approval."

Agreeing with People's Counsel that the "*Yorkdale* Rule" applied, the Board quoted the rule from that seminal case, highlighting the language it found to be determinative:

> A change in the law after a decision below and before final decision by the appellate Court will be applied by that Court unless vested or accrued substantive rights would be disturbed or unless the legislature shows a contrary intent.

Yorkdale Corp. v. Powell, 237 Md. 121, 124, 205 A.2d 269 (1964) (emphasis added by Board). Looking to the legislative history of BCC § 32-4-264, the Board found evidence of the "County Council's intent to change the way vesting is accomplished – from building permits and substantial construction to plat recordation." Starting with the statutory language, the Board observed that in Bill 58-09, "the County Council expressed its unequivocal intent to change the process for vesting by use of the words 'supersedes' and 'abrogates[.]' "

After tracking the development of the Council's codification of vested rights, the Board concluded:

> In summary, Bill 58-09 reveals that plat recordation is the operative, watershed event as to whether a development plan would ever vest[.] The County Council made clear that if a plat is not recorded, a development plan only vests if there is substantial construction. BCC[ ] § 32-4-264(b)(1). Conversely, if the plat is recorded, a non-residential plat vests upon recordation.

The Board concluded, "[w]ith regard to People's Counsel's argument that general common law vesting principles apply here, we find the legislative history shows a deliberate intent by the County Council to move away from vesting by building permits for every development plan, and to require substantial construction only in the specified situation."

The Board then distinguished *Powell v. Calvert County*, 368 Md. 400, 795 A.2d 96 (2002), and *Antwerpen v. Baltimore County*, 163 Md. App. 194, 877 A.2d 1166 (2005), on which People's Counsel relied. The Board distilled the significance of those cases to be that, "when vesting is claimed *as a result of the very zoning relief which is being sought*, then rights will not vest until the final approval of the special exception or special hearing is granted." (Emphasis in original.) By contrast, in Royal Farms' case, "vesting [wa]s not claimed as a result of th[e] Board's initial grant of the special exception relief for Royal Farms' fuel service station, carryout restaurant or convenience store." Instead, "vesting [wa]s claimed by virtue of a statute that specifically dictates the moment in time when vesting of a plan will occur."

*7 Having ruled that once the Plat was recorded, Royal Farms acquired vested development rights under § 32-4-264(b)(2), the Board denied People's Counsel's motion to dismiss.

4. Hearing on Remand

The Board held a hearing on the issues remanded from the circuit court on March 27, 2017 and, on July of 2017, issued an "Opinion After Remand From Circuit Court and Order" reaffirming its prior Opinion and Order dated October 20, 2015. The Board first determined "that the testimony of [Mr. Jakubiak] has been assigned no weight." The circuit court had found that Mr. Jakubiak "testified to a level of knowledge and experience that demonstrated

a sufficient level of expertise and special knowledge to assist [the Board] as triers of fact." Though the Board, as directed by the Remand Order, accepted Mr. Jakubiak as an expert, the Board "unanimously agree[d] that Mr. Jakubiak's testimony, and the exhibits he provided, did not persuade the Board to change any of the factual findings or decisions contained in [the] Opinion and Order." The Board also stated that "none of Mr. Jakubiak's testimony assisted the Board in understanding any issue that [it] did not already understand."

The Board next determined "that the Petition signed by members of the community ... was admitted into evidence and has been assigned no weight[.]" The Board again asserted that the petition was hearsay because it "was offered for the truth of the matter asserted; i.e. that the Royal Farms was not needed because 1,283 citizens from Hereford were against the Plan." According to the Board, the petition "[was] not appropriate evidence for the Board to consider, even if 'need' for the proposed store/station is a factor for the Board to consider[,]" because "[the] Board – unlike legislators – does not represent the voters of Baltimore County, nor should [the] Board ever make a decision based on popular vote." Further, the Board said that "admitting this type of evidence eliminates the ability of the other party to cross examine the signers[,]" which then "eliminates the Board's ability to judge the credibility of the signers[;] to assess their understanding of the Plan[;] to verify their age of majority[;] to judge their competency, intent, motive(s), bias, relationship to the Protestants, relationship to the person conduction the Petition drive(s) and/or coercion, if any." Though the Board stated that the petition was "admitted without authentication by the alleged signers[,]" the Board ultimately concluded that "the only way to assign weight to [the] Petition per the Remand Order [was] for the Board to scrutinize each signature for genuineness, duplication, address location, correctness, completeness, and age of majority." After excluding all but 352 signatures, the Board determined that the remaining signatures did not change its conclusion about "need."

Lastly, the Board stated that it "considered the issue of duplication or availability of services and products in the area in making [its] determination of whether there is a 'need' for the proposed development ... and found, based on the evidence, that the products and services offered and sold by Royal Farms are neither duplicated nor available in the area and therefore, the Royal Farms ... is 'needed' in the area." In its Opinion, however, the Board stated that "[it] still [found] that the duplication of services is not a criteri[on] for determining whether a use is 'needed.' " Nevertheless, the Board was "persuaded by the evidence produced by Royal Farms, that the products and services sold [by] Royal Farms are not available or otherwise duplicated in Hereford."

F. Further Proceedings in the Circuit Court

*8 Protestants and People's Counsel filed petitions for judicial review in the circuit court challenging the Board's determination that Royal Farms' rights had vested. Both parties, citing *Yorkdale Corp. v. Powell*, 237 Md. 121, 205 A.2d 269 (1964), asserted, as they did before the Board, that although statutes are generally presumed to apply prospectively, in the zoning context, statutes that impact land use issues are applied retrospectively, unless the statute states otherwise. Because Bill 56-16 did not say that the downzoning on August 30, 2016 was to apply prospectively, they reasoned that the rezoning applied retroactively to preclude the Royal Farms Project. Quoting *Powell v. Calvert County*, 368 Md. 400, 409, 795 A.2d 96 (2002), Protestants urged that "[u]ntil all necessary approvals, including all final court approvals, are obtained, nothing can vest or even begin to vest[.]" Consequently, they claimed Royal Farms' Development Plan had not vested prior to the downzoning on August 30, 2016 because litigation was ongoing. The parties maintained, in light of the "rule" that "statutes are presumed not to alter or repeal common law," that BCC § 32-4-264(b)(2) did not alter or supersede the "common law principles" set forth in *Yorkdale* and *Powell*.

The parties also perceived various deficiencies in the plat approval and recordation process and argued that, as a result, Royal Farms' attempt to vest by recording a plat was ineffectual or invalid. Finally, both Protestants and People's Counsel asserted that the circuit court's remand extinguished any zoning approval that Royal Farms may have obtained.

Protestants further challenged the Board's decision on the merits that Royal Farms was entitled to a special exception and to a limited exemption under the development regulations.

A hearing on Protestants and People's Counsel's challenges took place in the circuit court on April 13, 2018. On June 18, 2018, the court issued an Opinion and Order affirming the Board's denial of the motion to dismiss and affirming the prior orders of the Board granting the petition for special exception. The court found that Royal Farms obtained vested rights under BCC § 32-4-264(b)(2) by recording the Plat. Because Royal Farms was not claiming vested rights under the common law, the court distinguished *Powell* and *Yorkdale* and concluded that "[o]btaining a final special exception is not a precondition to vesting under BCC § 32-4-264(b)(2)."

The court addressed the arguments challenging the Plat approval and recordation, beginning with Protestants' argument that because an appeal was pending before the Board, BCC § 32-4-281(f)(1) prohibited plat recordation. The court determined this argument had no merit because there was no appeal pending regarding the Development Plan, as required by BCC § 32-4-281(f)(1). The court also disagreed with People's Counsel's and Protestants' arguments that they were denied due process because the Plat was not approved in accordance with the requirements of BCC § 32-4-274. The court concluded that Royal Farms *was* required to obtain a special exception before recording a plat, and, contrary to the assertions of Protestants and People's Counsel, Royal Farms *did* have a special exception before the Development Plan was submitted for approval and the Plat was recorded. Furthermore, the court explained that by remanding the Board's decision for consideration of further evidence, the court had not reversed, vacated, or modified the special exception. Finally, on the merits of the special exception case, the court determined that the Board followed the court's remand instructions on all three issues.

Protestants and People's Counsel timely noted their appeals to this Court.

DISCUSSION

Standard of Review

The scope of judicial review of agency action is narrow. *United Parcel Serv., Inc. v. People's Counsel for Balt. Cty.*, 336 Md. 569, 576, 650 A.2d 226 (1994). In reviewing the final decision of an administrative agency such as the Board of Appeals, the appellate court "looks through the circuit court's ... decision[ ], although applying the same standards of review, and evaluates the decision of the agency." *People's Counsel for Balt. Cty. v. Surina*, 400 Md. 662, 681, 929 A.2d 899 (2007) (citations omitted). "The applicable level of judicial scrutiny depends often on the nature of the agency's process and/or action[.]" *Kor-Ko Ltd. v. Md. Dep't of the Env't*, 451 Md. 401, 409, 152 A.3d 841 (2017). Generally, "[a] court's role is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *United Parcel*, 336 Md. at 577, 650 A.2d 226.

*9 In matters involving purely discretionary decisions, particularly those involving "areas within that agency's particular realm of expertise," the appellate court "may not substitute its judgment for the administrative agency's ... so long as the agency's determination is based on 'substantial evidence.' " *Surina*, 400 Md. at 681, 929 A.2d 899 (citations omitted). The appellate court inquires whether the agency's determination "was supported by such evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citations and quotation marks omitted).

When reviewing the legal conclusions of an administrative agency, the appellate court is less deferential and "may reverse those decisions where the legal conclusions reached by that body are based on an erroneous interpretation or application of the zoning statutes, regulations, and ordinances relevant and applicable to the property that is the subject of the dispute." *Id.* at 682, 929 A.2d 899 (citations omitted). Appellate courts should, however, "give 'considerable weight' to 'an administrative agency's interpretation and application of the statute which the agency administers.' " *Bd. of Liquor License Comm'rs for Balt. City v. Kougl*, 451 Md. 507, 514, 154 A.3d 640 (2017) (quoting *Md. Aviation Admin. v. Noland*, 386 Md. 556, 572, 873 A.2d 1145 (2005)). Similarly, if the agency's decision involves "interpret[ation of] ordinances and regulations the agency itself promulgated[,]" the appellate court should accord a degree of deference to the position of the agency. *Surina*, 400 Md. at 682, 929 A.2d 899 (citation omitted).

In *Layton v. Howard County Board of Appeals*, the Court of Appeals addressed the following question:

> Whether one who challenges a decision of a zoning board may have, as Petitioners here seek, (a) the benefit of a legislated change in the basis of a decision of the zoning board and (b) demand application on judicial appeal of the 'new law'?

399 Md. 36, 38, 922 A.2d 576 (2007). The petitioners in *Layton* filed a petition for judicial review in the Circuit Court for Howard County after the Board of Appeals denied their request for an exception to operate an exotic wildlife sanctuary. *Id.* at 40, 44, 922 A.2d 576. Before any hearing took place before the circuit court, Howard County amended pertinent provisions of its Code. *Id.* at 44, 922 A.2d 576. Petitioners incorporated the change in law into their arguments before the circuit court, contending that the provisions should be retrospectively applied to their petition for the exception. *Id.* at 46, 922 A.2d 576. The circuit court declined to accept petitioner's argument, and this Court affirmed the decision. *Id.* at 46-48, 922 A.2d 576.

The Court of Appeals noted that the case did not turn on the Board's initial disposition of the case, as the Board made its determination pursuant to the Code in effect at the time. *Id.* at 50, 922 A.2d 576. Instead, the question of "whether the Circuit Court should have retrospectively applied (or remanded the case for the Board to consider) the changed Code" was "purely one of law" and thus was subject to de novo review. *Id.* at 50-51, 922 A.2d 576 (citing *Nesbit v. GEICO*, 382 Md. 65, 72, 854 A.2d 879 (2004) ("When the trial court's order 'involves an interpretation and application of Maryland statutory and case law, our Court must determine whether the lower court's conclusions are legally correct under a de novo standard of review.' ") (citation omitted)). In this case, the question regarding the new zoning and vesting of rights similarly involves "an interpretation and application of Maryland statutory and case law[.]" *Nesbit*, 382 Md. at 72, 854 A.2d 879. Unlike in *Layton*, however, the issue was first presented to the Board, and then in circuit court. Therefore, in reviewing whether the Board erred in its determination that Royal Farms obtained vested rights, we give appropriate deference to the Board's interpretation and application of the statutes it administers.

I.

ROYAL FARMS' DEVELOPMENT PLAN VESTED WHEN THE PLAT WAS RECORDED IN ACCORDANCE WITH BCC § 32-4-264

A. Applicable Law: Vested Rights in Zoning

***10** The vesting issue in this case implicates common law and statutory construction principles. We begin with a brief overview of the applicable laws before we zoom in on the issues presented.

1. Prospective and Retrospective Application

A retrospective[9] statute is one that "operate[s] on transactions which have occurred or rights and obligations which existed before passage of the act." *Muskin v. State Dep't of Assessments & Taxation*, 422 Md. 544, 57, 30 A.3d 962 (2011) (citation and quotation mark omitted). Generally, statutes that operate retroactively are disfavored, and therefore, "a statute is presumed to apply prospectively unless there is a 'clear legislative intent to the contrary[.]' " *United Ins. Co. of Am. v. Md. Ins. Admin.*, 450 Md. 1, 28, 144 A.3d 1230 (2016) (quoting *Langston v. Riffe*, 359 Md. 396, 406, 754 A.2d 389 (2000)). *See also John Deere Const. & Forestry Co. v. Reliable Tractor, Inc.*, 406 Md. 139, 146, 957 A.2d 595 (2008) ("Generally, the presumption is that statutes operate prospectively unless there is evidence of a contrary intent. We have said that [r]etroactivity, even where permissible, is not favored and is not found, except upon the plainest mandate in the act." (citation and quotation marks omitted)). The presumption in favor of prospectivity "is particularly applicable where the statute adversely affects substantive rights, rather than only altering procedural machinery." *John Deere*, 406 Md. at 146-47, 957 A.2d 595 (citation and quotation mark omitted). "Retrospective statutes that abrogate vested rights are unconstitutional generally in Maryland[.]" *Muskin*, 422 Md. at 557, 30 A.3d 962.

The Court of Appeals, in *Allstate Insurance Company v. Kim*, summarized the foregoing and established "four basic principles of Maryland law" regarding prospective and retrospective application of statutes:

> (1) statutes are presumed to operate prospectively unless a contrary intent appears; (2) a statute governing procedure or remedy will be applied to cases pending in court when the statute becomes effective; (3) a statute will be given retroactive effect if that is the legislative intent; but (4) *even if intended to apply retroactively, a statute will not be given that effect if it would impair vested rights*, deny due process, or violate the prohibition against *ex post facto* laws.

376 Md. 276, 289, 829 A.2d 611 (2003) (emphasis added). Building on these principles, the Court articulated a two-part analysis to apply "[w]hen an issue is raised regarding whether a statute may be given retroactive effect." *Id.* The first step is to determine whether the General Assembly intended for the statute to have retroactive effect:

> That implicates the first and third principles. Applying the presumption of prospectivity, a statute will be found to operate retroactively only when the Legislature "clearly expresses an intent that the statute apply retroactively."

Id. at 289-90 (quoting *Waters v. Montgomery County*, 337 Md. 15, 28, 650 A.2d 712 (1994)). Upon concluding that the "Legislature *did* intend for the statute to have retroactive effect," the next step is to "examine whether such effect would contravene some Constitutional right or prohibition":

> ***11** That implicates the second and fourth principles. As we pointed out recently in *Dua v. Comcast Cable*, 370 Md. 604, 805 A.2d 1061[ ] (2002), that analysis must take into account both Federal and Maryland provisions, as to which the standards differ.

Id. at 290. The Court of Appeals noted in *John Deere* that, "although [the Court of Appeals] ha[s] clearly established the analysis to be used *when* applying a statute retroactively, [it] has only provided limited analysis of *what* constitutes a retrospective application

of a statute." 406 Md. at 147, 957 A.2d 595 (emphasis added).

2. Land Use and Zoning Statutes: Retrospective Application "Generally"

In land use and zoning matters, "legislated change of pertinent law, which occurs during the ongoing litigation of a land use or zoning case, generally, shall be retrospectively applied." *Layton v. Howard County Bd. of Appeals*, 399 Md. 36, 38, 922 A.2d 576 (2007); *see also Grasslands Plantation, Inc. v. Frizz-King Enters., LLC*, 410 Md. 191, 220, 978 A.2d 622 (2009). The rule traces back to *Yorkdale v. Powell*, in which the Court of Appeals explained:

> an applicant for zoning to a more intense use of his property, who has been successful before the zoning authorities and the circuit court does not acquire a vested or substantive right which may not be wiped out by legislation which takes effect during the pendency in this Court of the appeal from the actions below.

237 Md. 121, 126, 205 A.2d 269 (1964). Accordingly, as observed more recently in *McHale v. DCW Dutchship Island, LLC*, the *Yorkdale* Court ruled that "in the context of a zoning or land use matter, [the Court] will apply a substantive change to a statute during the course of litigation." 415 Md. 145, 160, 999 A.2d 969 (2010) (citing *Yorkdale*, 237 Md. at 126-27, 205 A.2d 269). The *Yorkdale* Court further noted that its holding was "consistent with decisions in other areas of administrative law," including the "special rule of statutory construction that rights which are of purely statutory origin and have no basis at common law are wiped out when the statutory provision creating them is repealed, regardless of the time of their accrual, *unless the rights concerned are vested*." *Yorkdale*, 237 Md. at 127, 205 A.2d 269 (citation omitted) (emphasis added).

"*Yorkdale* and its progeny have never been overruled," so "[t]hey are still good law and are determinative in evaluating whether, in a land use or zoning case, a change in statutory law taking place during the course of a litigated issue should have retrospective application." *Layton*, 399 Md. at 58, 922 A.2d 576. The Court of Appeals clarified application of the rule in *McHale v. DCW Dutchship Island, LLC*, when the Court considered whether a recently amended provision of the Critical Area Law, Maryland Code (1973, 2007 Repl. Vol., 2009 Supp.), Natural Resources Article ("NR"), §§ 8-1801-8-1817, applied to a variance application that was filed three and one-half years before the General Assembly amended the statute "and where the object of the application was to cure violations of the Critical Area Law occurring prior to the effective date of the amendment." 415 Md. at 149, 999 A.2d 969.[10] The Court affirmed the judgment of the Circuit Court for Anne Arundel County and concluded that the amended provision of the statute did not apply retrospectively to the variance application because, upon careful reading of the statute, the General Assembly intended for the amendment to be applied prospectively only. *Id.* at 150, 173, 999 A.2d 969. Judge Harrell, writing for the Court, explained:

> *12 Our review of *Yorkdale* and its progeny indicates that, in land use and zoning cases, the general presumption is that, in the absence of contrary legislative intent, a substantive change to the law occurring during the pendency of land use litigation and before any substantive rights vest, is to be applied to the pending litigation matter, i.e., understood therefore to be applied retrospectively to some extent. *Yorkdale*,

> however, recognized the primacy of the Legislature's intent when determining whether a change to the law applies prospectively or retrospectively. *See Yorkdale*, 237 Md. at 124, 205 A.2d 269 [ ] (**"[A] change in the law after a decision below and before final decision by the appellate Court will be applied by that Court unless vested or accrued substantive rights would be disturbed or *unless the legislature shows a contrary intent.*"**) (emphasis added) (citations omitted). The *Yorkdale* doctrine thus is actually the default rule that we apply where there is no clear legislative intent directing retrospective application. The doctrine does not engage where there is clear legislative intent that the law shall be applied prospectively only.

Id. at 170-71 (italicized emphasis in original, bolded emphasis added). Thus, *McHale* clarifies that, as when the Legislature has expressed an intent that a statute apply prospectively, the "default" *Yorkdale* rule *does not* apply—with equal force—in cases in which "vested or accrued or substantive rights would be disturbed." *Id.*

We turn now to the methods by which a property owner can obtain a vested right and thereby avoid the retrospective application of a change in the zoning classification.

3. Establishing a Vested Right

i. Common Law Vesting Methods

Historically, "in order to obtain a vested right in an existing zoning use that will be protected against a subsequent change in a zoning ordinance prohibiting that use," the owner needed to obtain a valid permit and, in reliance on the valid permit, "make a substantial beginning in construction and in committing the land to the permitted use before the change in the zoning ordinance has occurred." *O'Donnell v. Bassler*, 289 Md. 501, 508, 425 A.2d 1003 (1981) (citations omitted). *See also Steuart Petroleum Co. v. Bd. of Cty. Comm'rs of St. Mary's Cty.*, 276 Md. 435, 443, 347 A.2d 854 (1975) ("A landowner will be held to have acquired a vested right to continue the construction of a building or structure and to initiate and continue a use despite a restriction contained in an ordinance where, prior to the effective date of the ordinance, in reliance upon a permit theretofore validly issued, he has, in good faith, made a substantial change of position in relation to the land, made substantial expenditures, or has incurred substantial obligations." (citation and quotation mark omitted)).

In *Prince George's County v. Sunrise Development Ltd. Partnership*, the Court of Appeals clarified the law of vested rights in the zoning context, noting that "[p]art of the rationale for the test of whether rights have vested is public recognition that the law is being observed or enforced." 330 Md. 297, 314 (1993). The Court reasoned that "[i]f the public could have seen that construction had started before the zoning change, the public can appreciate that the new law is not being violated[,]" but if construction had not started before the zoning change, the "public will expect the new law to be enforced." *Id.* Accordingly, in addition to the requirement that the work be completed pursuant to a validity issued building permit, the Court held that, "in order for rights to be vested before a change in the law, the work done must be recognizable, on inspection of the property by a reasonable member of the public, as the commencement of construction of a building for a use permitted under the then current zoning." *Id.*

***13** In 2015, we apprised the state of the common law method for obtaining vested rights in Maryland:

> In [*Sunrise Development, Ltd. Partnership*], the Court of Appeals held that rights to continue

construction after a change in the zoning law vest when (1) the work done is recognizable by a "reasonable member of the public," and (2) construction commenced pursuant to a building permit for a use then permitted under the zoning law. 330 Md. 297, 314[ ] (1993). Stated another way, vested rights are acquired when (1) there is actual physical commencement of some "significant and visible construction," (2) the construction was commenced in "good faith," with the intention to complete the construction, and (3) the construction was commenced "pursuant to a validly issued building permit." *Town of Sykesville v. W. Shore Commc'ns, Inc.*, 110 Md. App. 300, 305, 677 A.2d 102[ ] (1996).

Sizemore v. Town of Chesapeake Beach, 225 Md. App. 631, 648, 126 A.3d 225 (2015). In addition, we explained that "[o]nce acquired, a vested right in the permit protects the permit holder from changes to the zoning ordinance that would otherwise disallow the use being constructed." *Id. See also Sykesville*, 110 Md. App. at 328, 677 A.2d 102 (noting that once a property owner obtains a vested right, the owner's "right to complete and use [a] structure cannot be affected by any subsequent change of the applicable building or zoning regulations"). And just this year, the Court of Appeals summarized, "[w]ith respect to common law vested rights, this Court has explained that in order to vest rights in an existing zoning use that will be protected against a subsequent change in zoning use, the owner must obtain a valid permit and undertake a substantial beginning in construction before the change in zoning has occurred." *75-80 Properties, L.L.C. v. Rale, Inc.*, 470 Md. 598, 640, 236 A.3d 545 (2020) (citing *Sunrise Dev. Ltd.*, 330 Md. at 307–08, 623 A.2d 1296). [11]

ii. Statutory Vesting Methods

Vested rights in zoning litigation has, in large part, centered on what constitutes "substantial" construction or expenditures. 4 American Law of Zoning § 32:2 (5th ed.) (database updated April 2020). "The case-by-case, equitable determinations of vested rights and estoppel are difficult to reconcile and result in great uncertainty, particularly for the development community." Land Use Planning and Development Regulation Law ("LUPDRL") § 5:30 (3d.ed). Developers and banks are less likely to make substantial investments in planning when it is possible that no rights will vest in a proposed development, so "it is helpful for the developer to know exactly when his rights will vest in the proposed or begun development." 4 American Law of Zoning § 32:9 (5th ed.) (database updated April 2020). Accordingly, as observed by Professor Patricia Salkin, "[s]everal states are moving to earlier vesting from the majority requirement of a building permit." *Id.*, § 32:9. *See also id.*, § 32:2 ("[M]any states, either by common law or legislation, are relaxing the requirements of the landowner and letting rights vest earlier in the development process."); LUPDRL, § 5:30 ("[S]ome courts have changed the common law rule to be more developer protective. Legislatures also increasingly have stepped into the fray to pass statutes that enhance developer rights.").

***14** The Maryland General Assembly addressed the vesting issue during the 1995 session when it adopted legislation that authorized certain local governments to enter into Development Rights and Responsibilities Agreements (DRRA) with persons having an interest in real property. *See* 1995 Md. Laws, ch. 562 (H.B. 700). The General Assembly defined a DRRA as "an agreement made between a governmental body of a jurisdiction and a person having a legal or equitable interest in real property for the purpose of establishing conditions under which development may proceed for a specified time." [12] *Id.* The Act included a "freeze provision," which stated that "the laws, rules, regulations, and policies governing the use, density, or intensity of the real property subject to the agreement shall be the laws, rules, regulations, and policies in force *at the time the parties execute the agreement*." *Id.* (emphasis added); *see also Lillian C. Blentlinger, LLC v. Cleanwater Linganore, Inc.*, 456 Md. 272, 277, 173 A.3d 549 (2017) ("[O]ne of the key aspects of a DRRA is controlled by the "freeze provision" of the DRRA statute [ ] which permits parties to agree to freeze certain laws, rules, regulations, and policies as of the time of the execution of the DRRA."). In addition, the

Act instructed that "except to the extent affected by a development rights and responsibilities agreement, this Act is not intended to otherwise abrogate Maryland common law." 1995 Md. Laws, ch. 562 (H.B. 700).

Local ordinances that address the vesting of development rights, such as the BCC provision at issue here, have also become more common, although we have not found a reported opinion in Maryland that directly examines how such an ordinance applies against the common law rule. Other jurisdictions have viewed statutory vesting methods as providing an alternative to the common law vesting methods. *See generally* LUPDRL, § 5:30 ("Generally, statutory vested rights laws do not abrogate the common law rule, which remains an alternative argument for one who does not gain protection from the statute."). In North Carolina, for example, there are "two methods for a landowner to establish a vested right in a zoning ordinance: (1) qualify with relevant statutes ...; or (2) qualify under the common law[.]" [13] *Browning-Ferris Indus. Of S. Atl., Inc. v. Guilford Cty. Bd. of Adjustment*, 126 N.C.App. 168, 484 S.E.2d 411, 414 (1997).

Fortunately, we need not speculate here because BCC § 32-4-264 clearly establishes that recordation of an approved plat for a non-residential development plan is an alternative to the common law vesting of development rights in Baltimore County.

4. Vesting Provisions of the Baltimore County Code

i. Roads to Nowhere Lead to Bill 58-09

In Baltimore County, before 2009, vesting under the BCC was governed primarily by § 32-4-273(d), which provided for the lapse of subdivision plats according to specified time limits, if the subdivision, section, or parcel had not been developed as provided. The predecessor to § 32-4-273(d), added by Bill 56-82 during the 1982 session of the County Council, provided that a subdivision, section, or parcel was considered developed if building permits had been issued *or* if substantial construction on required public or private improvements had occurred. Following the 2006 Supplement to the 2003 BCC, § 32-4-273(d) provided that a subdivision, section, or parcel was considered vested if a building permit had been issued *and* substantial construction had occurred, as confirmed by inspection by the county. Thus, prior to 2009, § 32-4-273 served as a partial codification of the common law vesting rule as articulated in cases such as *Sunrise* and *O'Donnell*.

***15** Then, on July 6, 2009, the Baltimore County Council enacted Bill 58-09, which amended various development provisions of the BCC and first introduced § 32-4-264 "Vesting of Development Plans." The Fiscal Note contained the observation that, following the effects of the economic downturn on the residential construction industry, "[b]uilders and lenders in particular want[ed] greater certainty regarding the concept of vesting." Baltimore County Council, Fiscal Note for Bill 58-09 (August, 2009). The Fiscal Note explained the "vesting" concern that the bill intended to address:

> Once a plan is approved and a plat is recorded for a residential subdivision, building may proceed in accordance with the plan and the plat and with the law in effect at the time of plan approval. However, laws and zoning classifications change. If a subdivision does not "vest", changes that occur to the law and the zoning after plan approval may affect the ability to build out in accordance with the laws and zoning in effect when the plan was approved.

Id. The Fiscal Note highlighted the issues with the vesting caused by the County's development laws, including the incentive to "construct phantom roads to nowhere":

> In practice, builders obtain an approved development plan, and then attempt to vest. The concept of vesting, as applied in Baltimore County, traditionally has meant that the development plan, once vested, is forever protected from any future changes in the law, including future zoning changes. This is not what the County development laws have ever provided or intended. Since a plat expires 8 years after plan approval, it is not possible to "forever" vest. Yet, in practice, this is what has been permitted.
>
> As a result of this practice, many builders attempt to artificially "vest" by needlessly clearing land, building crusher run roads, or digging sewer lines, not because they are ready to build the project to completion, but simply to protect their options forever.
>
> With the economic downturn, lenders are now forcing builders to vest so that the security for the loan is protected. So instead of a lot remaining in its original state, awaiting an upturn in the economy, the builder is required to construct phantom roads to nowhere.

Id. The goal of Bill 58-09, was not to "increase development or relax the rules for developers"; rather, the bill aimed to "[p]rovide security to the lending and building community as to how a project 'vests';" "[a]void the artificial disturbing of the land in order to 'vest';" and "[r]equire adherence to all future laws – including future downzonings – after expiration of the vesting period*[.]*" *Id.*

On August 3, 2009, the County Council passed Bill 58-09, repealing § 32-4-273 and adding the statute at issue in this appeal, § 32-4-264.

ii. BCC § 32-4-264

The vesting of development plans in Baltimore County is now governed by BCC § 32-4-264, which provides, in relevant part:

> 1. *In general.* A Development Plan vests in accordance with the provisions of this section.
>
> 2. *Non-residential Plan.*
>
> a. A non-residential Plan for which a plat is not recorded vests when substantial construction occurs with respect to any portion of the Plan.
>
> **b. A non-residential Plan for which a plat is recorded vests when plat recordation occurs for any portion of the Plan.**
>
> 3. *Residential Development Plan.*
>
> a. A residential Development Plan for which a plat is not recorded vests when substantial construction occurs with respect to any portion of the Plan.
>
> b. A residential Development Plan for which a plat is recorded vests when plat recordation occurs for any lot, tract, section or parcel thereof.
>
> *16 4. *Limitation on vesting.* Unless an extension has been granted under § 32-4-274, construction relating to a vested **residential** Development Plan that occurs more than 9 years after the Plan was granted final, non-appealable approval shall comply with all laws in effect at the time permits are issued unless the Development received growth allocation under Title 9 of this article in which case construction related to a vested residential Development Plan must occur within the latter of 15 years after: (1) the plan was granted final, non-appealable approval, or (2) the effective date of Bill No. 58-09. [14]

(Emphasis added). The definitions under BCC § 32-4-101 for "vested" and "non-residential plan" (also modified in 2009) are:

> (ccc) *Vested.* The term "vested" or "vesting" is a protected status conferred on a Development Plan. **A vested Development Plan shall proceed in accordance with the approved Plan and the laws in effect at the time Plan approval is obtained.**

> A property owner, developer or applicant obtains vested rights for a Development Plan in accordance with § 32-4-264 of this title.
>
> (ddd) *Non-residential Plan.* "Non-residential Plan" means a Plan of Development in which the dominant element of the Plan is (1) a commercial development, (2) an industrial development, or (3) a senior housing, assisted living, life care, continuing care or elderly housing facility, church, school, or other institutional use.

(Emphasis added).

By recording the plat for a development plan, a property owner demonstrates to the public that the plan complies with the zoning regulations and has received the requisite approvals. Accordingly, the process for obtaining vested rights under BCC § 32-4-264 aligns with the reasoning from *Sunrise Development Ltd.* that "[p]art of the rationale for the test of whether rights have vested is public recognition that the law is being observed or enforced." 330 Md. 297, 314, 623 A.2d 1296 (1993).

B. Vesting During "Ongoing Litigation"

1. The Parties' Contentions

According to Protestants, "[i]f, during litigation, there is a change in law, that new law applies because there can be no vesting of rights while litigation is ongoing." Under what Protestants label the "*Yorkdale* Rule" or the "Ongoing Litigation Rule," "to the extent any rights are created during litigation, they are merely inchoate and remain subject to changes in the law." Indeed, Protestants continue, "[i]t is a rule of law based on the fundamental principle that zoning rights cannot vest (under any method) until all litigation is completed." In support, Protestants rely on the following "rule" from *Powell v. Calvert County*:

> In instances where there is ongoing litigation, there is no different "rule of vested rights" for special exceptions and the like. Until all necessary approvals, including all final court approvals, are obtained, nothing can vest or even begin to vest. Additionally, even after final court approval is reached, additional actions must sometimes be taken in order for rights to vest.

***17** 368 Md. 400, 409, 795 A.2d 96 (2002).

Protestants contend that BCC § 32-4-264 "did not abrogate the ongoing litigation rule" so any attempt by Royal Farms to vest pursuant to the statute would be ineffective while litigation was ongoing. In Protestants' view, "the common law applies to any and all County statutes unless there is 'clear and unambiguous' language or legislative history indicating the Council intended otherwise. Here, there is none." Similarly, People's Counsel argues that nothing in the text of Bill 58-09 repeals or alters the common law principles from *Yorkdale*.[15]

***18** Protestants assert that "[w]hen the zoning was changed on August 30, 2016, Royal Farms still did not have a final special exception because litigation was still ongoing." Without a "final" special exception, Protestants continue, "Royal Farms' recordation of a plat on November 13, 2015 ... was ineffective to fully vest any rights[.]" Again, relying on *Powell*, Protestants conclude that "Royal Farms did not obtain a vested right because it 'never obtained a final, valid special exception, as [it] did not obtain a special exception that was free of all pending litigation."

Royal Farms contends that "the 'ongoing litigation' rule is part and parcel of the common law method of vesting" and "simply does not apply in this case" because Royal Farms acquired vested rights pursuant to the local vesting statute. Assuming that the "rule" did apply, Royal Farms continues, "there was no

ongoing litigation at the time of plat recordation that could suspend the vesting of Royal Farms'[s] rights."

2. Analysis

Appellants misconstrue *Yorkdale* and its progeny. In *Yorkdale*, the Court of Appeals instructed that "*unless vested or accrued substantive rights would be disturbed*" "a change in the law after a decision below and before final decision by the appellate Court will be applied by that Court." *Yorkdale*, 237 Md. at 124, 205 A.2d 269 (emphasis added). Appellants claim the vested rights qualification articulated in *Yorkdale* does not apply in this case and train their argument on the Court's more recent statement in *Powell* that, "a special exception approval, whose validity is being litigated, is not finally valid until all litigation concerning the special exception is final. Persons proceeding under it prior to finality are not 'vesting' rights; they are commencing at 'their own risk' so that they will be required to undo what they have done if they ultimately fail in the litigation process." 368 Md. at 410, 795 A.2d 96. Appellants miss the mark.

To begin with, the facts in *Powell* are fundamentally different from the facts in this case. In *Powell*, the Calvert County Board of Appeals granted a landowner a special exception to store certain materials, and his neighbors sought judicial review in the circuit court. *Id.* at 402, 795 A.2d 96. After the circuit court affirmed the Board's decision, the neighbors filed an appeal with this Court. *Id.* at 404, 795 A.2d 96. While the appeal was pending, Calvert County amended its Zoning Ordinance to repeal the section under which the landowner had obtained approval of his special exception. *Id.* at 405, 795 A.2d 96. Our predecessors, in an unreported opinion, instructed the circuit court to *vacate* the Board's decision and remand to the Board for further proceedings. *Id.* The Board decided to grant the special exception on remand, so the neighbors again sought judicial review. *Id.* at 406, 795 A.2d 96. The circuit court "found that although there was a change to the Zoning Ordinance so that a special exception could not have been granted, [the landowner] had obtained a vested right which protected him from the intervening change in the Zoning Ordinance." *Id.* The case eventually reached the Court of Appeals. *Id.* at 407, 795 A.2d 96.

The Court of Appeals held that the landowner "never obtained a final valid exception prior to the change in the law and, therefore, never obtained a vested right." *Id.* at 410, 795 A.2d 96. The critical distinction between *Powell* and the instant case is that the landowner in *Powell* relied on the very special exception that was being challenged in the ongoing litigation for the right to store his materials. He never attained a vested right under the common law to store his materials, however, as the Court observed that "[a]t no time was [the landowner] proceeding under a 'valid permit.' " *Id.* at 415, 795 A.2d 96. Rather, "[h]e started out storing his materials unlawfully and he never obtained a special exception clear of litigation that would have allowed him to store his materials under a valid special exception. Therefore, he never satisfied the criteria for a vested right." *Id.* at 416, 795 A.2d 96. The Court instructed, "we have held that a vested right does not come into being until the completion of any litigation ***involving the zoning ordinance from which the vested right is claimed to have originated.***" *Id.* at 412, 795 A.2d 96 (emphasis added).

***19** Royal Farms does not claim its vested rights originated under the common law rule or in the special exception that was granted under BCZR § 259.3. Royal Farms claims that its rights in the prior zoning laws that applied to its Development Plan, including the right to a special exception, vested because pursuant to BCC § 32-4-264 it obtained Development Plan approval and then recorded the Plat in the land records. The text of BCC § 32-4-264(b)(1) specifies that recordation of a non-residential development plat is an alternative to the common law requirement of substantial construction to obtain vested rights in a development plan.

We conclude that the underlying special exception litigation does not involve the ordinance "from which the vested right is claimed to have originated." *Powell*, 368 Md. at 412, 795 A.2d 96. Before we can declare that the *Yorkdale* "ongoing litigation" rule does not

apply in this case, however, we must decide whether the Development Plan had vested when the Plat was recorded in accordance with BCC § 32-4-264.

C. Various Challenges to Royal Farms' Vested Rights

Appellants claim Royal Farms did not obtain vested rights on several additional grounds that, in many respects, overlap each other. First, Appellants urge that an approved special exception for the Project was required before Royal Farms could obtain vested rights through approval of the Development Plan and Plat and recordation of the Plat. Next, they contend that Royal Farms lacked "final, valid zoning approval" for the Project because when the Plat was recorded, the Board "had only just issued its ruling and the appeal period had not yet expired." Protestants also point to BCC § 32-4-281(f)(1), which states that "a plat may not be recorded while an appeal is pending before the Board of Appeals," and assert the special exception case was still "pending" before the Board prior to November 18, 2015 (when the petition for judicial review was filed) because it was subject to the Board's revisory power. Even though Appellants did not appeal the Development Plan approval, they claim Royal Farms and PAI failed to comply with various procedures in the development plan and plat approval process. People's Counsel adds that "there was no effective public notice for development plan and record plat approval" for the Project. Finally, Protestants argue that the circuit court's remand order rendered the special exception only provisional; while People's Counsel asserts that Royal Farms' zoning approval was "invalidated" by the court's June 2016 order and that, "[g]iven remand of the initial approval, there was not any basis for vested rights."

1. Special Exception Approval

Protestants argue that Royal Farms did not obtain any vested rights by recording the Plat because Royal Farms lacked zoning approval at the time of recordation. Protestants note the "distinction and relationship between 'development' and 'zoning' ": "in order for land to be *developed* under the development regulations, the property owner must **first** have *zoning* approval, *i.e.*, the right to use the property for the intended purpose." (Emphasis in original). Protestants assert that development approval must precede plat approval and recordation, and that a plat is a "nullity" if it is recorded without zoning approval. They claim Royal Farms lacked "final, valid zoning approval for the development it proposed" when it recorded the Plat because the Board "had only just issued its ruling and the appeal period had not yet expired."

People's Counsel asserts similar arguments. People's Counsel points to § 32-4-104(b), which provides that "[p]roposed development shall be in compliance with the present zoning classification on the property to be developed." People's Counsel then offers the following "algebra[ ] and logic[ ]":

> ***20** (1) A fuel service station was permitted by special exception in the B.L.-C.R. Zone/District outside the URDL, but not at all in the R.C.C. Zone.
>
> (2) It is required that a development comply with zoning law.
>
> (3) To complete development approval, a developer must obtain not only development plan approval, but also record plat approval.

People's Counsel concludes that it "was thus necessary for Royal Farms to have special exception approval lawfully in place [ ] to have or retain valid development plan and record plat approval" and thereby obtain vested rights.

Royal Farms counters that no provision of the BCC or BCZR makes special exception approval a prerequisite to development plan approval or plat recordation, and, thus, special exception approval is not a prerequisite to vesting under § 32-4-264. Citing to provisions of the development subtitle of the BCC, Royal Farms asserts that "vesting by plat recordation is not contingent upon prior special exception approval." Royal Farms

emphasizes that "zoning" and "development" are "distinct land use processes" that are addressed in separate administrative proceedings and governed by separate provisions of the BCC. Royal Farms asserts that the requirement from § 32-4-104(b) that a proposed development comply with the present zoning classification was satisfied because the zoning classification was B.L.-C.R. at the time the Plat was recorded, and § 32-4-104(b) "does not require that any needed special exception be approved before a Development Plan is approved."

The parties do not dispute that, if Royal Farms has vested rights in the application of the B.L.-C.R. zoning classification, Royal Farms needs an approved special exception to build the convenience store, carryout restaurant, and fuel service station. The parties clearly disagree, however, as to whether Royal Farms needed the approved special exception before it could obtain vested rights through approval of the Development Plan and Plat and recordation of the Plat.

The Court of Appeals has described zoning regulations and subdivision controls as "regulat[ing] different aspects of the land use regulatory continuum." *Surina*, 400 Md. at 688, 929 A.2d 899 (citations omitted). "While zoning laws define the uses that are permitted in a particular zoning district, ... subdivision regulations inform how, when, and under what circumstances a particular tract may be developed." *Id.* at 689, 929 A.2d 899 (citing *Remes v. Montgomery Cty.*, 387 Md. 52, 74, 874 A.2d 470 (2005)). Though "zoning laws and subdivision regulations are separate forms of regulation, and typically are administered by different governmental agencies or bodies, they operate in practical application to ensure that land in a particular locality is developed in a relatively uniform and consistent manner."[16] *Id.* at 690, 929 A.2d 899.

***21** Because of the complementary nature of the two areas of regulation, "all proposed subdivision developments must comply with the applicable zoning ordinances in effect at the time the subdivision is proposed." *Id.* at 691-92, 929 A.2d 899 (citing BCC §§ 32-4-104 and § 32-4-114(a); *Wesley Chapel Bluemount Ass'n v. Baltimore Cty.*, 347 Md. 125, 129, 699 A.2d 434 (1997)). Stated differently, a property owner's ability to obtain approval of a development plan hinges on the property owner's compliance with zoning regulations. As explained in the American Law of Zoning:

> While the zoning power and authority to review plats are separate, it seems clear that plats should not be approved which violate existing zoning regulations. There is little to be said for approving a plat, for example, which discloses substandard lots. Such an approval would be a disservice to the developer who would be unable to build on the lots, and it would encourage deviation from those portions of the comprehensive plan which are implemented by the zoning regulations in issue.

4 American Law of Zoning § 31:24.

We followed this reasoning in *Miller v. Forty West Builders*, when we held that because the appellee's proposed subdivision plan, which had been reviewed under the Development Regulations of Baltimore County, "did not satisfy the applicable zoning requirements, the [County Review Group's] action in approving the plan was not in conformance with law." 62 Md. App. 320, 339, 489 A.2d 76 (1985). We noted that the "case arose within the context of approval of a subdivision plan, under the Development Review and Approval Process of the Development Regulations of Baltimore County[,]" but found that "[a]pproval by the [County Review Group] will necessarily entail review of and compliance with the applicable zoning regulations." *Id.* at 333, 489 A.2d 76. Accordingly, we "reverse[d] and remand[ed] the case to the circuit court with directions to reverse the determination made by the Board to approve the plan." *Id.* at 339, 489 A.2d 76.

When considered together with the principle that a development complies with zoning regulations when the use is permitted either as of right or by special exception, *see Surina*, 400 Md. at 688, 929 A.2d 899, *Miller* can be read to require compliance with zoning regulations, including obtaining approval of any necessary special exceptions, before a development plan can be approved.[17] The plain language of the Baltimore County Code, examined in both *Surina* and *Miller*, supports this interpretation.

The BCC defines "development" as including "[t]he improvement of property for any purpose involving building" and "[t]he subdivision of property[;]" and defines "development plan" as "a written and graphic representation of a proposed development[.]" BCC §§ 32-4-101(p), (q). Section 32-4-104(b) requires that proposed development "be *in compliance* with the present zoning classification on the property to be developed." (Emphasis added). The circuit court in this case reasoned,

> ***22** BCC § 32-4-104(b) does not mean merely that the development comply with the zoning regulations when it is ultimately built as Royal Farms argues. Rather, the "proposed development" must be "in compliance" with the zoning classification. To be "in compliance" with the present zoning classification, if a special exception is required, it must be approved for the proposed development.

Sections 32-4-221 through 32-4-224 set forth filing requirements and the required information for development plans. The required background information for development plans includes "[c]urrent zoning of the property and surrounding properties," and "[p]etitions for variances, special exceptions, [and] special hearings[.]" BCC §§ 32-4-222(a)(6), (9). While, as Royal Farms notes, BCC § 32-4-222(a) does not specify that the development plan contain approval of these petitions, we note that BCC § 32-4-225(a) instructs that PAI shall accept a development plan for filing only if the plan contains the required information *and* "[c]*omplies* with other related laws, regulations, or policies[.]" (Emphasis added).

Regarding the procedure for plats, for any subdivision, applicants must prepare a plat in accordance with the approved development plan. BCC § 32-4-271(a). The BCC defines "plat" as "the graphic representation of a development prepared in accordance with the approved Development Plan for the purpose of recording in the land records of the county." BCC § 32-4-101(kk). Section 32-4-272(a)(1) provides that applicants may submit a plat to PAI *after* development plan approval, again underscoring the fact that development plan approval is required before a property owner may validly submit a plat for filing. Applicants may only record a plat that has been "unanimously approved by the Directors of Permits, Approvals and Inspections and Environmental Protection and Sustainability" and has the approvals "noted on the plat." BCC § 32-4-272(d). *See also* BCC § 32-4-109(a) ("A person may not offer and the Clerk of the Circuit Court may not accept a plat for recording in the plat records of the county unless the plat has been approved for recording as required by this title."). "If a plat that has not been approved is recorded, the recording shall be considered a nullity." BCC § 32-4-109(b).

We conclude that compliance with applicable zoning regulations is a prerequisite to filing a development plan for approval under the Baltimore County Code. This interpretation is consistent with the Court's statement in *Surina* that "all proposed subdivision developments must comply with the applicable zoning ordinances in effect *at the time the subdivision is proposed*." 400 Md. at 691-92, 929 A.2d 899 (citation omitted) (emphasis added). In this case, Royal Farms needed a special exception for the Project in order to comply with the B.L.-C.R. zoning classification, *before* it could submit the Development Plan and Plat for approval, and then record the approved Plat.

The record in this case establishes that the Board granted Royal Farms a special exception to allow a fuel service station and a convenience store and carry-out restaurant as uses in combination on October 20, 2015. Royal Farms had the zoning approvals that were required before it received PAI approval of the Development Plan and then recorded the Plat on November 13, 2015. Appellants do not point us to any provision of the Code that required Royal Farms to wait until the time that Appellants had to file an appeal from the Board's approval of the special exception expired before they could pursue approval of their Development Plan and Plat. But regardless, even if the decision by the PAI to approve the Development Plan was premature, "or should have been approved with conditions; or should have been disapproved[,]" for the reasons explained in further detail in our discussion below, we agree with the Board's determination that, because the Appellants abandoned their appeal of the limited exemption, and there was never an appeal from the final approval of the Development Plan, the Board did not have jurisdiction to decide whether "the County agencies did something wrong and the Plan should not have been approved." We further note that simply because Royal Farms' rights in the prior zoning vested at the time the Plat was recorded, Appellants' right to challenge the special exception, under the prior zoning, was preserved when Appellants filed a timely appeal from that decision. [18]

2. No "pending appeal" Before Board

***23** Protestants assert that an appeal was still "pending" on November 13, 2015, when Royal Farms obtained approval of the Development Plan and then recorded the Plat, "because the 30-day period for filing a [petition for judicial review in] the [c]ircuit [c]ourt had not expired," and because "[Protestants] had not yet filed their [petition], and until they did, the Board retained jurisdiction of the case." Protestants also point to BCC § 32-4-281(f)(1), which states that "a plat may not be recorded in connection with a Development Plan that is the subject of the appeal." Protestants contend that the special exception case was still "pending" before the Board, prior to the petition for review filed in the circuit court, because it was subject to further consideration by the Board through a motion for reconsideration, and subject to the exercise of the Board's revisory powers. Protestants claim the Board erred in reading BCC § 32-4-281(f)(1) to apply only to appeals to the Board from a decision on the development plan itself. People's Counsel adds that the Board "made the sophistic excuse that the Plan appeal case was not before them and they lacked jurisdiction." People's Counsel urges that the Express Powers Act and County Charter give the Board "plenary review over agency approvals, originally or on review, of every agency approval."

Royal Farms asserts that "[w]hether a case remains 'pending' for decision by the Board and whether a party has time to seek judicial review (or move for reconsideration ...) after a decision by the Board are two very different inquiries." (Emphasis in original). Royal Farms argues that even if an appeal from the special exception case was "pending" when the Plat was recorded, that appeal did not trigger BCC § 32-4-281(f)(1) because Protestants chose not to appeal the approval of the Development Plan and thus it was never the "subject of the appeal."

In construing statutes, we do not "analyze statutory language in a vacuum. Rather, statutory language must be viewed within the context of the statutory scheme to which it belongs[.]" *Johnson v. Md. Dep't of Health*, 470 Md. 648, 674, 236 A.3d 574 (2020) (citations and quotation marks omitted). Section 32-4-281 of the Baltimore County Code sets out the procedure by which "[a] person aggrieved or feeling aggrieved by final action on a Development Plan" may appeal to the Board of Appeals. As defined in § 32-4-101(t), "final action" on a Development Plan is "[t]he approval of a Development Plan as submitted; ... [t]he approval of a Development Plan with conditions; or ... [t]he disapproval of a Development Plan by the Hearing Officer[.]" Pursuant to § 32-4-281(b), the person may file a notice of appeal with the Board and with PAI "within 30 days after the date of the final decision of the Hearing Officer." Section 32-4-281(f)(1) provides a restriction on issuing permits and recording plats during the appeal process: "*While an appeal is pending*

before the Board of Appeals, a permit may not be issued and a plat may not be recorded in connection with a *Development Plan that is the subject of the appeal*." (Emphasis added). Reading BCC § 32-4-281 in its entirety, the statute provides an avenue of appeal —for persons "aggrieved or feeling aggrieved by final action *on a Development Plan*"—*to "the Board of Appeals and the Department of Permits, Approvals and Inspections* within 30 days after the date *of the final decision of the Hearing Officer*." BCC § 32-4-281(b)(1) (emphasis added).

Appellants' appeal of the special exception proceeded under an entirely separate process under the BCZR from the final decision of the PAI approving the Development Plan under subdivision regulations. As the Board pointed out in its Ruling on the Motion to Dismiss, "[t]here is a critical distinction between the appeal of the special exception for the fuel service station and the appeal of a development plan." Consequently, Appellants' argument that the appeal of the special exception qualifies as an "appeal" that was "pending before the Board of Appeals" in "connection with a Development Plan that is the subject of the appeal" under BCC 32-4-281(f)(1) is not supported by a plain reading of the statutory scheme in this case. Moreover, Appellants' argument ignores the procedural history in the underlying case whereby Appellants abandoned the procedural path to a "pending appeal" under BCC 32-4-281(f)(1).

***24** Let us recall that Royal Farms filed under § 32-4-106 (b)(8) as "[a] minor development that does not exceed a total of three lots[,]" for an exemption from the requirements for a community input meeting and a Hearing Officer's hearing on the Development Plan. In a letter dated March 19, 2014, the PAI adopted the DRC's recommendations that Royal Farms' Project met the requirements of a limited exemption under § 32-4-106(b)(8) as a "[a] minor development that does not exceed a total of three lots." The letter from PAI constituted a final administrative order and decision, from which Protestants could, and did, file a Notice of Appeal to the Board on April 11, 2014. As we noted earlier, Protestants filed de novo appeals to the Board from both the Special Exception and the PAI approval of the limited exemption. After the Board affirmed the Hearing Officer's grant of the limited exemption, the *Protestants elected to appeal only the approval of the Special Exception to the circuit court*. As a result, Royal Farms pursued the approval of its Development Plan under a limited exception, "exempt from the community input meeting and the Hearing Officer's hearing[.]" BCC § 32-4-106(b). In short, there was no "pending appeal" relating to the Development Plan because Protestants declined to continue their challenge to the limited exemption. Accordingly, the restriction contained in subsection (f)(1)—that prohibits the recording of a plat or issuance of a building permit "*in connection with a Development Plan that is the subject of the appeal*—was not triggered.

We agree with the Board's determination that there was no appeal pending before the Board, within the meaning of BCC § 32-4-281(f)(1), on November 13, 2015 when Royal Farms recorded the Plat. [19]

3. Notice and Documentation

***25** People's Counsel asserts that "there was no effective public notice for development plan and record plat approvals." [20] More specifically, People's Counsel complains that the Property "was not posted"; "[c]itizens were provided no opportunity to be heard or participate"; and the County approvals occurred "within the space of one working day." In addition, People's Counsel, citing *United Steelworkers v. Bethlehem Steel Corp.*, 298 Md. 665, 673-81, 472 A.2d 62 (1984), argues that there is "no County documentation of review or reasoning for their approvals ... flout[ing] the settled rule that agencies must conduct an intelligent review and articulate the basis and reasoning for approvals."

In turn, Royal Farms emphasizes that the approval of the Development Plan "was not done in secret" because the Board proceedings reveal that all Appellants were aware that the Development Plan was being reviewed by and progressing through Baltimore County Agencies. Royal Farms then cites *People's Counsel for Baltimore County v. Elm Street*

Development, Inc., 172 Md. App. 690, 701-02, 917 A.2d 166 (2007) for the proposition that administrative officials need only explain the reasoning for their decisions when it is required by County law. According to Royal Farms, neither the BCC nor BCZR imposes any such requirement.

We reiterate that the Board granted Royal Farms a limited exemption under § 32-4-106(b)(8), so the Project was exempt from the community input meeting and the Hearing Officer's hearing. As the Board found, though there is a "chronological procedure to obtain plat approval," there is no restriction preventing a plat from being recorded on the same date that a plan is approved. People's Counsel does not refer this Court to any other requirements for public notice or participation in the BCC or elsewhere.

We reject People's Counsel's argument that the County failed to document properly its review and reasoning, in the absence of such a requirement in the applicable law. Though the Court in *United Steelworkers* noted that an agency official failed to document sufficiently his decision and thus his findings were inadequate for judicial review, 298 Md. at 679-80, 472 A.2d 62, the case does not represent any "settled rule" that agencies must articulate their reasoning, as suggested by People's Counsel. We have held that "when either the BCZR or the Code requires that the basis of an agency's opinion be set forth, it plainly imposes such a requirement." *Elm St. Dev.*, 172 Md. App. at 702, 917 A.2d 166. In *Elm Street Development*, the Court rejected the argument that the Board erred in accepting and relying on recommendations from certain agency directors because the recommendations were "not supported by facts and reasons." *Id.* at 701, 917 A.2d 166. We declined to "read a requirement into the BCZR or the Code that the Directors ... must articulate the 'facts and reasons' underlying their decisions." *Id.* More recently, in *West Montgomery County Citizens Ass'n v. Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission*, we declined to impose a requirement on a county planning board to "restate all facts upon which [the board's determination to approve a preliminary plan] rests" to enable judicial review. — Md. App. ——, ——, No. 579, Sept. Term 2019, slip op. at 22 (filed Oct. 29, 2020). "The [p]lanning [b]oard was required to do no more than determine whether the [p]reliminary [p]lan fulfilled" the statutory requirements. *Id.* at 30, 144 A.3d 1230.

*26 Here, § 32-4-272(a)(3)(ii) requires "[a]n agency that disapproves an item [to] provide a written statement of the reasons for the disapproval." In addition, § 32-4-272(c)(2) requires the Directors of PAI and DEPS, or their designees, to "notify the applicant in writing of the reasons for modification or disapproval" of a plat. All necessary agencies approved Royal Farms' Plat, so there was no documentation requirement. Section 32-4-272(d) only requires that the unanimous approvals of the Directors of PAI and DEPS be "noted on the plat" before an applicant may record the plat. The record shows that the requisite approvals were noted on the Plat. We cannot find, and People's Counsel does not point to, any other documentation requirements for the plat approval process. As a result, we agree with the circuit court's finding that "[t]here is no requirement that the County document its reasons for approving the plat."

4. Effect of the 2016 Remand Order

Protestants' next contention is that the circuit court's June 2016 order remanding the case back to the Board for further proceedings prevented Royal Farms from having a valid special exception or vested rights in the Development Plan before the zoning of the Property was changed in August 2016.[21] According to Protestants, "[i]n this context, the distinction between a reversal and a remand is an artificial one. A decision subject to further proceedings on remand is not a final decision and affords no rights." Protestants clarify that they do not contend the remand "was actually a reversal" or that it "destroyed" already vested rights; rather, Protestants' argument is that Royal Farms lacked "a valid and final special exception because the case had been remanded and was subject to further consideration and decision by the Board."

People's Counsel asserts that Royal Farms' zoning approval was "invalidated" by the court's June 2016

order and that, "[g]iven remand of the initial approval, there was not any basis for vested rights." The remand order, People's Counsel contends, "judged the 2015 zoning approval as defective and erroneous," requiring the Board to "decide anew if it were persuaded to approve the special exception." People's Counsel views the remand as "functionally equivalent to such an appellate reversal for improper and prejudicial exclusion of evidence" because of the "necessity [ ] for a new hearing, consideration, and decision." People's Counsel compares the present circumstances to those at play in *O'Donnell v. Bassler*, 298 Md. 501 (1981): "There, the special exception, use permit, and at-risk construction became invalid upon judicial review. Here, it was the special exception and dependent record plat which became invalid." In People's Counsel's view, the situations are "not distinguishable" for "the purpose of the vested rights analysis."

In response, Royal Farms contends that the court "only remanded the matter for the narrow purpose of requiring the Board to consider evidence offered by [a]ppellants" and "expressly did not vacate or reverse the Board's approval of the special exception." The special exception, according to Royal Farms, "has never been 'invalidated' in this litigation."[22]

*27 As we set out above, at the conclusion of the June 2016 hearing in the circuit court, the judge explained that he was remanding the case so that the Board could reconsider certain evidence:

> I don't know that this is going to change the Board's decision, and I'm not reversing the decision. I'm only remanding this to consider the evidence and after they consider the evidence, the Board can decide the case possibly the same way. ... [A]nd I'm not directing how it should be decided only that this evidence, this additional evidence, should be considered.

As the court explained in its subsequent June 18, 2018 Opinion and Order, it "**did not** modify the Board of Appeals' decision" or "**reverse** the Board's decision." Rather, the court "remanded the case to the Board of Appeals for further proceedings to receive and consider additional evidence."

As stated by the Court of Appeals, "[i]t is a fundamental principle of administrative law that a reviewing court should not substitute its judgment for the expertise of the administrative agency from which the appeal is taken." *O'Donnell*, 289 Md. at 509, 425 A.2d 1003. It follows that,

> if an administrative function remains to be performed after a reviewing court has determined that an administrative agency has made an error of law, the court ordinarily may not modify the agency order. Under such circumstances, the court should remand the matter to the administrative agency without modification.

Id. Moreover, "if an administrative function remains to be performed, a reviewing court may not modify the administrative agency's action even when a statute provides that the court may 'affirm, modify or set aside' because a court may not usurp administrative functions." *Id.* at 510-11, 425 A.2d 1003.

Appellants argued before the circuit court that *O'Donnell* supported their argument that a judicial remand to the Board invalidated the special exception. In *O'Donnell*, the special exception use permit was held invalid because both the Board of Appeals and the circuit court exceeded their authority in imposing and removing special conditions on the special exception

use. *Id.* at 514, 425 A.2d 1003. "The special exception use permit obtained by the owner was not valid as originally granted by the Board or as modified by the [c]ircuit [c]ourt." *Id.*

In his final Opinion and Order in this case, the circuit court judge distinguished *O'Donnell*:

> The facts in the present case are distinguishable from the facts in *O'Donnell*. This [c]ourt did not modify the Board of Appeals' decision. This [c]ourt expressly did not reverse the Board's decision. ... This [c]ourt did not set aside or vacate the Board's decision. In contrast to the [c]ircuit [c]ourt in *O'Donnell*, this [c]ourt remanded the case to the Board of Appeals for further proceedings to receive and consider additional evidence.

We agree that the circuit court judge in this case properly declined to substitute his judgment for the expertise of the Board by remanding the matter without modifying the Board's order. Because the Board's order granting Royal Farms a special exception was not reversed or modified, the subsequent downzoning could not take away Royal Farms' vested right to the Board's consideration, on remand, of the special exception under the B.L.- C.R. zoning requirements in the ongoing special exception litigation.

Conclusion (proper denial of motion to dismiss)

***28** We conclude that Royal Farms had the requisite special exception approval, granted on October 20, 2015, before it obtained approval of the Development Plan and Plat and recorded the Plat on November 13, 2015. Because no appeal from the limited exemption, or, consequently, from approval of the Development Plan was "pending," Royal Farms was not precluded from recording the Plat on November 13, 2015. We further determine that the circuit court's remand order explicitly did not invalidate the special exception.

The text of BCC § 32-4-264(b)(1) specifies that recordation of a non-residential development plat is an alternative to the common law requirement of substantial construction to obtain vested rights in a development plan. Accordingly, although we agree with Appellants that BCC § 32-4-264 does not abrogate the common law, we also agree with the Board and the circuit court that by recording the Plat in 2015, pursuant to BCC § 32-4-264(b)(2), Royal Farms obtained vested rights, and, therefore, the 2016 rezoning does not apply retroactively to the Development Plan. *McHale v. DCW Dutchship Island, LLC*, 415 Md. 145,170–71, 999 A.2d 969 (2010).

Because Royal Farms had obtained vested rights in the Development Plan, we further conclude: (1) that the *Yorkdale* "ongoing litigation" rule did not apply in the underlying special exception litigation; and, (2) that the prior B.L.-C.R. zoning applies to the Project in accordance with BCC § 32-4-101(ccc), which provides that a "vested Development Plan shall proceed in accordance with the approved Plan and the laws in effect at the time the Plan approval is obtained." We hold, therefore, that the Board did not err in denying the motions to dismiss brought by Protestants and People's Counsel on the basis that Royal Farms had vested rights in the B.L.-C.R. zoning.

II.

The Special Exception

Protestants challenge the merits of the Board's decision granting Royal Farms a special exception on several grounds. First, Protestants contend that the Board misunderstood the relevance of the petition they presented and erred in giving it no weight. According to Protestants, the Board failed to appreciate that the petition was offered to demonstrate "that there is no 'need' for products and services offered by a

Royal Farms." Protestants further assert that the Board did not have authority, following the court's remand, to revisit the issue of whether the petition should be considered by assigning the petition no weight and determining that it was not appropriate evidence. Second, Protestants assert that the Board erred in concluding that there is a "need" for the products and services offered at Royal Farms. In the Protestants' view, the Board ignored the circuit court's remand ruling on the definition of "need," and urge that the evidence demonstrates that there is no need in Hereford for the products and services sold by Royal Farms.

To the contrary, Royal Farms asserts the Board appreciated the court's remand order in respect to the petition because the Board "made repeated references to the 'need' issue in analyzing the [p]etition." Royal Farms also contends that the Board admitted the petition into evidence without requiring Protestants to produce evidence of admissibility, rather than revisiting the admissibility of the petition as Protestants assert. Finally, Royal Farms maintains that the Board applied the correct standard of "need," and that Royal Farms demonstrated the 'need' for the Project in Hereford.

A particular use complies with the applicable zoning ordinance when it is permitted either as of right or by special exception. As articulated by the Court of Appeals,

> ***29** It must be conceded, as a general rule, that, when a zoning ordinance enumerates specifically the permitted uses within a particular zone, the ordinance "establish[es] that the only uses permitted in the [ ] zone are those designated as uses permitted as of right and uses permitted by special exception. Any use other than those permitted and being carried on as of right or by special exception is prohibited."

People's Counsel for Balt. Cty. v. Surina, 400 Md. 662, 688, 929 A.2d 899 (2007) (alteration in original) (quoting *Kowalski v. Lamar*, 25 Md. App. 493, 499, 334 A.2d 536 (1975)). The special exception use is a zoning mechanism which allows for "some flexibility in the land use process," by permitting the local legislature to "identif[y] additional uses which may be conditionally compatible in each zone, but which should not be allowed unless specific statutory standards assuring compatibility are met by the applicant at the time separate approval of the use is sought." *Mayor of Rockville v. Rylyns Enters., Inc.*, 372 Md. 514, 541, 814 A.2d 469 (2002). *See also id.* at 542, 814 A.2d 469 (citations omitted) ("Put another way, a special exception use is an additional use which the controlling zoning ordinance states will be allowed in a given zone unless there is showing that the use would have unique adverse [e]ffects on the neighboring properties within the zone."). Special exceptions thus serve as "a 'middle ground between permitted uses and prohibited uses in a particular zone." *Mills v. Godlove*, 200 Md. App. 213, 228, 26 A.3d 1034 (2011).

As mentioned already, judicial review of the final zoning action of a local administrative body, such as the grant of the special exception in this case, "is narrow." *Montgomery Cty. v. Butler*, 417 Md. 271, 283, 9 A.3d 824 (2010). On appeal, " 'we look through the circuit court's and intermediate appellate court's decisions, although applying the same standards of review, and evaluate[ ] the decision of the agency.' " *Grant v. Cty. Council of Prince George's Cty.*, 465 Md. 496, 509, 214 A.3d 1098 (2019) (quoting *People's Counsel for Balt. Cty. v. Loyola Coll. in Md.*, 406 Md. 54, 66, 956 A.2d 166 (2008)). Following our independent evaluation of the agency's decision, we may fully concur with the well-reasoned decision by the circuit court, as we do in this case, especially when the issues that we are reviewing concern the agency's compliance with the circuit court's remand order.

To briefly review the relevant facts, the circuit court heard Protestants' arguments about the Board's decision to grant Royal Farms a special exception on June 3, 2016. In his oral ruling and subsequent written order, the judge remanded the matter to the Board with instructions to receive the petition Protestants offered, upon authentication satisfactory to the Board, and give the petition "the weight that the Board considered appropriate"; and to consider the duplication or availability of services and products in the area in determining whether there is a "need" for the Project under BCZR § 259.3.E.1.

A. Weight Given to Petition

In its 37-page "Opinion After Remand From Circuit Court," the Board provided detailed reasons why it decided not to accord any weight to the petition. First, the Board noted that the petition was hearsay because it "was offered for the truth of the matter asserted; i.e. that the Royal Farms was not needed because 1,283 citizens from Hereford were against the Plan." According to the Board, the petition "[was] not appropriate evidence for the Board to consider, even if 'need' for the proposed store/station is a factor for the Board to consider[,]" because "[the] Board – unlike legislators – does not represent the voters of Baltimore County, nor should [the] Board ever make a decision based on popular vote." The Board further explained:

> ***30** Even if one of the requirements that must be met under BCZR, § 259.3.E.1 in this case is the "Petitioner's obligation to document the need for the development at the proposed location," the Board does not interpret that section as being satisfied by the majority vote among "concerned citizens." It is not the same as a homeowner's association vote or a community association vote. If that were true, then § 259.3.E.1 requirement would be reduced to a popularity contest; the party with the most votes would win.
>
> The intended purpose of submitting this Petition was to impress upon the Board that there were 1,283 people from Hereford than those who testified, or would be testifying, who were opposed to the Plan. Mr. Jakubiak made this same point when he testified that he saw the Petition and thought it was "worth mentioning" that "1,300 people from the community" did not want the Royal Farms store[.]

The Board also observed that "admitting this type of evidence eliminates the ability of the other party to cross examine the signers[,]" which then "eliminates the Board's ability to judge the credibility of the signers[;] to assess their understanding of the Plan[;] to verify their age of majority[;] to judge their competency, intent, motive(s), bias, relationship to the Protestants, relationship to the person conduction the Petition drive(s) and/or coercion, if any." Though the Board stated that the petition was "admitted without authentication by the alleged signers[,]" the Board ultimately concluded that "the only way to assign weight to [the] Petition per the Remand Order [was] for the Board to scrutinize each signature for genuineness, duplication, address location, correctness, completeness, and age of majority." After excluding all but 352 signatures, the Board determined that the remaining signatures did not change its conclusion about "need."

On petition for review, the circuit court determined that the Board, as fact finder, "can give the Petition the weight it determines it should be given, even if that is no weight." The Court observed:

> The Board of Appeals admitted the Petition into evidence, and reviewed and analyzed the Petition in depth and devoted a significant amount of time and effort in its opinion to discussing the Petition. ...The Board did consider the Petition on the question of whether the Royal Farms store is needed, not merely that the signatories opposed the store.

We hold that the Board's determination of the weight that it ultimately assigned to the petition signed by members of the community was supported by substantial evidence in the record. We also conclude that Protestants' claim that the Board failed to appreciate that the petition was offered to demonstrate no 'need' for the Project is not supported by the record.

B. Determination of Need

Section 259.3 of the BCZR contains special regulations for C.R. Districts, and subsection 259.3.E

details the additional requirements for granting a special exception in the C.R. District:

> In addition to the requirements generally imposed in the issuance of special exceptions by Section 502.1, the following requirements shall apply to the granting of special exceptions in C.R. Districts:
>
> 1. ***The petitioner shall document the need for the development at the proposed location.***
>
> 2. The proposed development shall take into account existing and proposed roads, topography, existing vegetation, soil types and the configuration of the site. The proposed development ... will minimize disturbance to vegetated areas, wetlands and streams ... Infiltration will be maximized and stormwater management discharge will be decentralized.
>
> ***31** 3. Architecturally or historically significant buildings and their settings shall be preserved and integrated into the site plan.
>
> 4. The buildings shall be sited to protect scenic views from public roads and so that the natural rural features, including but not limited to pastures, croplands, meadows and trees, are preserved to the extent possible. Additional open space may be required to preserve and enhance the enjoyment of the natural amenities and visual quality of the site.
>
> 5. The proposed development will not be detrimental to neighboring uses and the tranquility of the rural area through excessive noise and will not result in a nuisance or air pollution from dust, fumes, vapors, gases and odors.

(Emphasis added).[23]

On remand, the Board considered "need" under BCZR § 259.3.E.1 and concluded that, based on the evidence presented by Royal Farms, "the products and services sold b[y] Royal Farms are not available or otherwise duplicated in Hereford." Specifically, the Board "found more persuasive [Royal Farm's expert] opinion that there was an abundant demand for products and services within the 4 mile radius of the Mt. Carmel location." The Board found that "each food item prepared at Royal Farms has an individual taste, a distinctive quality, a specific presentation and price," which "makes the Royal Farms products different than those sold at other places in Hereford." While other restaurants, gas stations, and grocery stores in Hereford sell some of same items offered by Royal Farms, the Board found "the availability and combination of foods prepared by Royal Farms, plus the selection of grocery and convenience store items, plus the availability of gas, makes the Royal Farms gas station and convenience store 'needed' in Hereford." No other store in Hereford "offer[s] all of the products and services that Royal Farms sells at one place."

The circuit court in its June 18, 2018 Opinion and Order determined that the Board did follow its remand instructions. First, the court noted that the Board "reviewed the evidence and found that food sold at Royal Farms is different and distinctive from food sold at other establishments in the Hereford area." Second, the court noted that there was no other combination of convenience store, gas station, and carry-out restaurant in Hereford. The judge concluded that the Board "did consider the duplication or availability of services and products in the area" and that "there [wa]s substantial evidence in the record to support the Boards' decision."

***32** In making his determinations, the circuit court judge relied on *Neuman v. City of Baltimore*, 251 Md. 92, 246 A.2d 583 (1967). In that case, the Board of Municipal and Zoning Appeals in Baltimore City granted a special exception to permit a "general practitioner of medicine, to occupy and use, as a non-resident doctor, an office" in a large apartment building. *Id.* at 93-94, 246 A.2d 583. Before the board, neighboring homeowners at the apartment building urged that there was no need for the doctor to have an office at the building because "anybody who need[ed] medical attention c[ould] very easily get it within the immediate neighborhood." *Id.* at 94, 246 A.2d 583. The board analyzed its zoning ordinance, which "permit[ted] the office of a non-resident physician where a need is established" and concluded that "there

[wa]s a need for [the doctor] in this area and that the continued use of the premises by him would not be detrimental to the health, safety or welfare of the community nor would it have an adverse effect upon the neighborhood." *Id.* at 95, 246 A.2d 583. The circuit court affirmed, and the homeowners appealed and argued, among other things, that the board erred in finding a need for the doctor's services in the area which warranted the special exception. *Id.* at 99, 246 A.2d 583. The Court of Appeals determined that "need ... must be considered as elastic and relative. Clearly, it does not mean absolute necessity. Need has been judicially held to mean 'expedient, reasonably convenient and useful to the public.' " *Id.* at 98-99, 246 A.2d 583 (collecting cases). In applying this definition, the Court held "there was enough before the [b]oard ... to show a population density within a reasonable distance of the [ ] apartments intense enough to make it expedient, reasonably convenient and useful to the public that a doctor practice from an office there located[.]" *Id.* at 99, 246 A.2d 583. *Accord Lucky Stores, Inc. v. Bd. of Appeals of Montgomery Cty.*, 270 Md. 513, 527, 312 A.2d 758 (1973) (citing *Neuman*); *Friends of the Ridge v. Balt. Gas & Elec. Co.*, 120 Md. App. 444, 488, 707 A.2d 866 (1998) ("The judicial gloss given to the definition of the 'need' requirement in Maryland special exception lore has been that it means 'expedient, reasonably convenient and useful to the public.' " (quoting *Neuman*, 251 Md. at 99, 246 A.2d 583.)), *vacated on other grounds*, 352 Md. 645, 724 A.2d 34 (1999); *see generally* Sara C. Bronin & Dwight H. Merriam, *Sufficiency and interpretation of standards—Public need, necessity or convenience standards*, 3 Rathkopf's The Law of Zoning and Planning § 61:26 (database updated Sept. 2020).

Applying *Neuman*, the circuit court concluded that "the mere fact that these items can be bought somewhere else in Hereford does not mean there cannot be a need for them to be sold in another store, particularly if they are distinctive, different, and sold in combination with other products and services." We agree. According the Board the appropriate deference due under the law, we hold that the Board's determination that there is a "need" for the products and services offered at Royal Farms was not in error and was supported by substantial evidence in the record.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANTS.

All Citations

Not Reported in Atl. Rptr., 2020 WL 6623283

Footnotes

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

* Meredith, Timothy E., J., now retired, participated in the hearing of this case while an active member of the Court, and, after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

1 The questions presented in Protestants' brief are:

> "1. Whether the Board of Appeals erred in denying the motions to dismiss filed by Appellants and concluding that Royal Farms' rights had vested by virtue of its recordation of a plat?

2. Whether the Board of Appeals erred in granting Royal Farms a special exception for a fuel service station and convenience store/carryout restaurant?"

The questions presented in People's Counsel's brief are:

"1.A. Does the Bill 56-16 legislative rezoning apply, based on the common law Yorkdale Rule for pending litigation, and did Bill 58-09 lack any explicit intent to alter it?

B. Anyway, does Maryland Declaration of Rights Article 5 effectively prohibit the County Council from alteration of this Maryland common law rule in the absence of authority from the General Assembly?

2. Furthermore, did the Circuit Court initial remand and effective reversal of the [Board of Appeals] zoning approval effectively invalidate the interim record plat approval and so erase any basis to argue for vested rights flowing from such plat approval?

3.A. Did the [Board of Appeals] improperly immunize Royal Farms' record plat approval from scrutiny and accountability and deny procedural due process to the opponents?

B. Was the record plat approval here invalid ab initio because approved irregularly and without supporting analysis and reasoning?"

2 The Petition for Zoning Hearing listed Two Farms, Inc. as the "Contract Purchaser/Lessee" and Riverwatch, LLC as the "Legal Owners (Petitioners)." Subsequent site and development plans listed Two Farms, Inc. as the "Developer / Contract Purchaser" and Riverwatch, LLC as the "Owner / Contract Seller."

3 Royal Farms later amended the petition to seek another variance to allow a front-yard setback exceeding the maximum allowed, contingent on the State Highway Administration's widening of Mount Carmel Road. On July 22, 2014, during the first hearing, Royal Farms presented an amended petition and revised site plan withdrawing the requests for variances for the mounted enterprise sign and front yard setback.

4 The ALJ's "Opinion and Order" contained the standard warning that "Petitioners may apply for appropriate permits and be granted same upon receipt of this Order; however, Petitioners are hereby made aware that proceeding at this time is at their own risk until such time as the 30-day appellate process from this Order has expired. If, for whatever reason, this Order is reversed, Petitioners would be required to return, and be responsible for returning, said property to its original condition."

5 In addition to the required approvals for use of the Property under Baltimore County's zoning ordinance, Royal Farms was also required to obtain development plan approval under the development regulations contained in Article 32 of the County Code.

6 Accordingly, the judge directed that the petition be admitted if the Board, after permitting Protestants to present an authenticating witness, was satisfied of its authenticity. He further noted that Protestants "[would not] have to call 1300 people to authenticate [the petition]," and that the Board could decide how much weight to give the petition.

7 Section 259.2.A of the BCZR provides the following statement of legislative intent for the C.R. (Commercial, Rural) District:

> 1. The C.R. District is established to provide opportunities for convenience shopping and personal services that are customarily and frequently needed by the rural residential and agricultural population and tourists. It is intended that the C.R. District be applied only to areas where such facilities are not available within a reasonable distance, where sewerage treatment and a potable water supply can be provided without an adverse effect on the environment and neighboring uses, and where public roads are capable of handling the anticipated increase in traffic without adverse impacts on surrounding areas. The commercial centers within C.R. Districts are not intended to be regional facilities providing specialty goods to a population outside of the rural area.
>
> 2. C.R. Districts may be assigned to areas of commercial development beyond the urban-rural demarcation line for which C.R. District designation is recommended in the Master Plan. The underlying zone may be B.L., B.M., B.R. or R-O. The C.R. District may also be applied to land zoned R.C.5 which is adjacent to a C.R. District, provided that the location, configuration and physical characteristics of the site and the potential for access to an adequate public road make the land suitable for commercial development.

8 Section 259.3 of the BCZR contains special regulations for C.R. Districts, and subsection 259.3.E details the additional requirements for granting a special exception in the C.R. District:

> In addition to the requirements generally imposed in the issuance of special exceptions by Section 502.1, the following requirements shall apply to the granting of special exceptions in C.R. Districts:
>
> 1. ***The petitioner shall document the need for the development at the proposed location.***
>
> 2. The proposed development shall take into account existing and proposed roads, topography, existing vegetation, soil types and the configuration of the site. The proposed development ... will minimize disturbance to vegetated areas, wetlands and streams ... Infiltration will be maximized and stormwater management discharge will be decentralized.
>
> 3. Architecturally or historically significant buildings and their settings shall be preserved and integrated into the site plan.
>
> 4. The buildings shall be sited to protect scenic views from public roads and so that the natural rural features, including but not limited to pastures, croplands, meadows and trees, are preserved to the extent possible. Additional open space may be required to preserve and enhance the enjoyment of the natural amenities and visual quality of the site.
>
> 5. The proposed development will not be detrimental to neighboring uses and the tranquility of the rural area through excessive noise and will not result in a nuisance or air pollution from dust, fumes, vapors, gases and odors.
>
> (Emphasis added).

9 The terms "retroactive" and "retrospective" may be used interchangeably as they have the same meaning in judicial usage. *Langston v. Riffe*, 359 Md. 396, 406, 754 A.2d 389 (2000).

10 The amendment at issue required that an applicant must prepare, and the local jurisdiction approve, a " 'restoration or mitigation plan ... to abate the impacts to water quality or natural resources as a result of the violation' " before a local jurisdiction could issue a permit, approval, variance, or special exception in the critical area. *McHale*, 415 Md. at 154, 999 A.2d 969 (quoting NR § 8-1808(c)(4)(ii)). "Because [the applicant] had not prepared or carried out an approved restoration or mitigation plan, McHale alleged in her complaint that the variances granted by the Board of Appeals were null and void by operation of § 8-1808(c)(4), as amended." *Id.*

11 The vested rights rule as articulated in these Maryland cases aligns with the "general majority rule [ ] that a vested right exists when a building permit has been issued by the municipality, substantial construction or expenditures in reliance on the building permit are in evidence, and the landowner acted in good faith." 4 American Law of Zoning § 32:2 (5th ed.). *See also* Land Use Planning and Development Regulation Law ("LUPDRL") § 5:28 (3d ed.) ("Under the majority rule to acquire a vested right a developer must (1) show substantial expenditures, obligations, or harm (2) incurred in good faith reliance (3) on a validly issued building permit."). In other words, the common law majority rule requires landowners to show "substantial reliance on a validly issued permit" and to "make expenditures in good faith." LUPDRL, § 5:28.

12 The provisions governing DRRAs are now codified in Maryland Code (2012, 2015 Supp.), Land Use Article ("LU"), §§ 7-301 to 7-306. The current definition for DRRA is: "an agreement between a local governing body and a person having a legal or equitable interest in real property to establish conditions under which development may proceed for a specified time." LU § 7-301(b). The term "local governing body" means "the legislative body, the local executive, or other elected governmental body that has zoning powers under this division." LU § 7-301(c).

13 The North Carolina Court of Appeals characterized the common law vested rights doctrine as a "constitutional limitation" on the state's police powers. *Browning-Ferris Indus.*, 484 S.E.2d at 415. Maryland's appellate courts have similarly noted that the doctrine of vested rights "has a constitutional foundation." *Prince George's Cty. v. Equitable Tr. Co.*, 44 Md. App. 272, 278, 408 A.2d 737 (1979). *See also Md. Reclamation Associates, Inc. v. Harford County*, 382 Md. 348, 360, 855 A.2d 351 (2004) ("It is the vested rights doctrine itself that allows a landowner to raise[ ] issues of constitutional protections.").

14 As explained in the Fiscal Note: "If the plan vests, neither it nor the plat (if required) expires. However, with respect to a residential development plan, the vested status may expire." Baltimore County Council, Fiscal Note for Bill 58-09 (emphasis in original).

15 People's Counsel makes an additional argument that Article 5 of the Maryland Declaration of Rights prohibits the County from altering the common law principles in the absence of authority from the General Assembly. Royal Farms asserts that this argument has not been preserved for review because People's Counsel did not raise this argument before the Board or the circuit court.

Our cases recognize a narrow "constitutional exception" to the administrative exhaustion requirement. *See YIM, LLC v. Tuzeer*, 211 Md. App. 1, 49, 63 A.3d 1078 (2013). Judicial determination without administrative exhaustion is permitted for "attack[s] made to the constitutionality of the statute as a whole and not merely as to how the statute has been applied."

Goldstein v. Time–Out Family Amusement, 301 Md. 583, 590, 483 A.2d 1276 (1984). People's Counsel's argument falls within the "constitutional exception," and thus was not waived *before the circuit court* by a failure to raise it before the Board, because People's Counsel challenges the County's authority to pass Bill 58-09, not merely the application of it in this case. *See United Ins. Co. of Am. v. Md. Ins. Admin.*, 450 Md. 1, 36, 144 A.3d 1230 (2016) ("[W]hen challenging the statute as a whole, an aggrieved party may proceed immediately to the court to seek a declaratory judgment or equitable remedy, regardless of the availability of an administrative remedy, because the 'sole contention raised in the court action is based on a facial attack on the constitutionality of the governmental action.' " (quoting *Ehrlich v. Perez*, 394 Md. 691, 700 n.6, 908 A.2d 1220 (2006)). However, because the issue was not raised before the circuit court, it is not preserved for consideration in this appeal. This Court "ordinarily" will not decide an "issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]" Md. Rule 8-131(a). In addition, even when a constitutional issue is properly raised and decided by the circuit court, "this Court will not reach the constitutional issue if it is unnecessary to do so." *Robinson v. State*, 404 Md. 208, 217, 946 A.2d 456 (2008) (citation omitted). "In light of this strong policy against reaching a constitutional issue unnecessarily, this Court has normally exercised its discretion to decide a constitutional issue, not raised below, only when the issue falls within a well-established exception to Rule 8-131(a), such as a jurisdictional matter." *Id.* at 218, 946 A.2d 456 (quoting *Burch v. United Cable Tel. of Balt. Ltd. P'ship*, 391 Md. 687, 696, 895 A.2d 980 (2006)).

People's Counsel's constitutional argument, raised for the first time on appeal, does not involve a jurisdictional issue or another exception to Maryland Rule 8-131(a). Therefore, we will not consider it.

16 In support of its argument that the Development Plan could be approved without approval of a special exception, Royal Farms notes "zoning" and "development" are "distinct land uses processes" that are addressed in separate administrative proceedings and governed by separate provisions of the BCC. In *Surina*, the Court made the same observation that zoning laws and subdivision regulations are administered by different governmental agencies and addressed in separate regulations. 400 Md. at 690, 929 A.2d 899. Contrary to Royal Farms' contention, however, the separate proceedings and provisions do not divide completely the two processes. Rather, as explained in *Surina*, the processes complement each other as proposed development must comply with any applicable zoning ordinances. *See id.* at 689-90, 929 A.2d 899.

17 During Oral Argument, Royal Farms cited *Miller* to support its argument that an approved special exception is not a requirement for development or subdivision approval. Royal Farms contended that its Development Plan complied with the zoning classification because the proposed use was permitted by way of special exception, even assuming the special exception was not fully in place. We do not agree, and read *Miller*, instead, to require compliance with the applicable zoning regulations, *Miller*, 62 Md. App. at 333-335, 489 A.2d 76; which in this case, required approval of the special exception *before* the Development Plan could be validly be approved.

18 In its Ruling on the Motion to Dismiss, the Board noted, after determining that it did not have jurisdiction to consider Appellants' challenge to the Development Plan, that "the BCC permits Royal Farms to simultaneously and separately pursue the special exception case and the Plan approval. We acknowledge that the special exception status may ultimately be denied since it is still subject to appeal."

19 Appellants also raise several arguments about the validity of Royal Farms' submission and recordation of the Plat. Primarily, the Appellants assert that Royal Farms did not comply with certain procedural requirements, including those set forth in § 32-4-272. Protestants point to several "technical violations" to illustrate their point. First, in violation of § 32-4-272(a)(1), "the Plat was submitted to PAI on November 12, 2015, the day *before* the Development Plan was signed and allegedly approved by PAI and DEPS." (Emphasis in original). Second, the Plat and Development Plan were both signed by PAI and DEPS on November 13, 2015, and there is no evidence showing whether, on November 13, 2015, the Plat was signed and approved after the Development Plan, as required by § 32-4-272(a)(2). Finally, Appellants claim there is no evidence showing "whether the stormwater management plans or public works agreements were approved or whether the Directors of PAI and DEPS reviewed the Plat and determined that it conforms with the Development Plan[,]" as required by §§ 32-4-272(b).

Royal Farms asserts that "[a]ll of Appellants' challenges to the Store Plat approval run afoul of BCC § 32-4-272(e), which provides that '[a]ppeal from the plat approval process is prohibited.' "

We agree with Royal Farms that the BCC specifies than an appeal from plat approval is prohibited (and, we have already established that Protestants abandoned their appeal of the Development Plan).

Despite this, we note that Appellants did have an opportunity to raise these contentions before the Board. As the circuit court observed, during the hearing before the Board of Appeals on October 6, 2016, the Board never "prevent[ed] or stop[ped] People's Counsel or [Protestants'] Counsel from presenting evidence, arguing or inquiring into the plan or plat approval process." At the close of the hearing, the Board chairman invited counsel to submit briefs on "[a]ll of the issues that you guys all raised here today[ ] ... [w]hatever it is that you feel we need to look at ahead of time."

Accordingly, even if Appellants' challenges were properly before us, we would defer to the factual findings of the Board and reject Appellants' contentions that Royal Farms violated §§ 32-4-272(a)(2) and (b) by failing to offer evidence of compliance. As the Board explained, section 32-4-272(a)(2) does provide that PAI "*may not* approve the plat *until* approval is issued, if required" for specified items, including stormwater management plans, public works agreements, and a "Development Plan, if required by the Baltimore County Zoning Regulations." (Emphasis added). The Board found, however, that "[t]he Plan was approved by representatives of the County agencies[;] [c]onsequently, under BCC § 32-4-272(a)(2), the Plat could be submitted for approval." Indeed, Appellants acknowledged that the Plat and Development Plan had been signed by both PAI and DEPS. Regarding the timing of plat approval, § 32-4-272(c)(1) provides that PAI and DEPS "[w]ithin 10 days after receipt of the plat, ... shall" approve; disapprove; or, with the consent of the applicant, modify the plat. There is, therefore, no restriction on same-day approval, nor is there a requirement that the applicant provide evidence of the order in which the approvals occurred.

20 Although People's Counsel's notice and documentation arguments suffer from the same jurisdictional problems as Appellants' other challenges to the Development Plan and Plat, we elect to address them here.

21 Protestants repeat their contentions that "(i) zoning approval was still the subject of ongoing litigation, (ii) an appeal was pending before the Board at the time of the putative recordation of

the Plat and therefore such recordation was a nullity, and (iii) Royal Farms did not have zoning approval at the time of the putative recordation." On the basis of those points, Protestants assert, "it does not matter if the [c]ircuit [c]ourt remanded the case or reversed the Board's decision." As we already discussed, however, there was no "ongoing litigation" that triggered the *Yorkdale* Rule, there was no appeal pending before the Board, and Royal Farms did have zoning approval when it recorded the Plat.

22 In further support of its argument that the circuit court's 2016 remand order did not destroy its vested rights, Royal Farms repeats its contention that special exception approval is not a prerequisite to vesting under the BCC. As we explained above, special exception approval is a prerequisite to vesting under the circumstances, and we need not rehash that discussion here.

23 "Special exception factors are applied by the Board against the backdrop of the case law governing special exceptions." *Bd. of Cty. Comm'rs of Washington Cty. v. Perennial Solar, LLC*, 464 Md. 610, 629, 212 A.3d 868 (2019). The seminal case in Maryland on special exceptions is *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981). *See People's Counsel v. Loyola Coll.*, 406 Md. 54, 87-101, 956 A.2d 166 (2008) (describing *Schultz* and its progeny). In *Schultz*, the Court summarized the special exception use as follows:

> The special exception use is a part of the comprehensive zoning plan sharing the presumption that, as such, it is in the interest of the general welfare, and therefore valid. The special exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any fact or circumstance negating the presumption. The duties given the Board are to judge whether the neighboring properties in the general neighborhood would be adversely affected and whether the use in the particular case is in harmony with the general purpose and intent of the plan.

291 Md. at 11, 432 A.2d 1319; *see also Loyola*, 406 Md. at 88, 956 A.2d 166.

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EXHIBIT B

BOARD OF APPEALS
for
MONTGOMERY COUNTY

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
www.montgomerycountymd.gov/content/council/boa/index.asp

(240) 777-6600

Case No. S-2743

PETITION OF HENDERSON CORNER AND 355, LLC
BY ARIS MARDIROSSIAN

OPINION OF THE BOARD
(Opinion Adopted May 20, 2009)
(Effective Date of Opinion May 29, 2009)

Case No. S-2743 is an application for a special exception, pursuant to Section 59-G-2.06 of the Zoning Ordinance, to permit an Automobile Filling Station. The Hearing Examiner for Montgomery County held a hearing on the application on February 27, 2009, closed the record in the case on March 13, 2009, and on April 13, 2009 issued a Report and Recommendation for approval of the special exception.

The subject property is contains 1.27 acres, identified in Liber 11784 at Folio 667 located at the intersection of Henderson Corner Drive and Ridge Road, Derwood, Maryland, 20855, in the C-3 Zone.

Decision of the Board: Special Exception **Granted** Subject To the Conditions Enumerated Below.

The Board of Appeals considered the Report and Recommendation at its Worksession on May 20, 2009. After careful consideration and review of the record in the case, the Board adopts the Report and Recommendation and grants the special exception subject to the following conditions:

1. The Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and representations of counsel to the extent that such testimony and evidence are identified in the Hearing Examiner's Report and Recommendation and in the Opinion of the Board.

2. Development of the property must be limited to:

a. A self-service automobile filling station, containing six multi-product dispensers (with 12 pumping stations) located on three pump islands;
b. A 3,188 gross square foot building, including a 1,674 square foot convenience food, beverage and customer patron area;
c. Two (2) underground storage tanks; and
d. A maximum canopy clearance height of 14'-6," and a total canopy height of 18'-6".

3. No more than seven (7) employees may be on site at any one time. Petitioner shall make a log or employee time and attendance sheets available for inspection upon request of the Department of Permitting Services.

4. Petitioner must submit of a revised Final Forest Conservation Plan to the Planning Board, showing the proposed development's layout.

5. Hours of operation of the automobile filling station and the convenience store are 24 hours/day, seven days a week.

6. The Petitioner must comply with stormwater and sediment control regulations of the Montgomery County Department of Permitting Services (DPS).

7. Fuel storage tank and fuel pump installation and use must comply with the control guidelines and air quality permitting requirements of the Maryland Department of the Environment (MDE).

8. Fuel storage tanks must meet required technical standards and must comply with all county, state and federal permitting requirements.

9. Permits must be obtained for the proposed signs, and copies thereof must be filed with the Board of Appeals prior to posting the signs.

10. Since the proposed use will require an amended preliminary plan of subdivision, in accordance with Zoning Ordinance §59-G-1.21(a)(9), approval of this special exception is conditioned upon approval of the amended preliminary plan of subdivision by the Planning Board. If changes to the site plan or other plans filed in this case are required at subdivision, Petitioner must file a copy of the revised site and related plans with the Board of Appeals.

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.

On a motion by David K. Perdue, Vice-Chair, seconded by Carolyn J. Shawaker, with Walter S. Booth, Stanley B. Boyd, and Catherine G. Titus, Chair, in agreement, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

Catherine G. Titus
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 29th day of May, 2009.

Katherine Freeman
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four months' period within which the special exception granted by the Board must be exercised.

EXHIBIT C

BOARD OF APPEALS
for
MONTGOMERY COUNTY

Stella Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
www.montgomerycountymd.gov/mc/council/board.html

CASE NO. S-2524

PETITION OF TWO GOSHEN OAKS CENTER, LLC AND 7-ELEVEN, INC.

OPINION OF THE BOARD
(Public Hearing Dates: October 14, 2002, December 6, 2002)
(Effective Date of Opinion: March 13, 2003)

Case No. S-2524 is an application for a special exception pursuant to Section 59-G-2.06 (Automobile Filling Stations) of the Zoning Ordinance to permit the construction and operation of an automobile filling station. The petitioner proposes to: (1) install five multi-product dispenser islands with two pumping stations at each island; (2) install a 128 x 24 foot canopy; (3) install a CITGO gas pricing sign adjacent to the existing 7-Eleven sign; and (4) operate the station twenty-four hours daily with existing staff.

Pursuant to the authority contained in Section 59-A-4.125 of the Montgomery County Code, the Board of Appeals referred the application to the Hearing Examiner for Montgomery County to conduct a public hearing. The Hearing Examiner held hearings on October 14, 2002 and December 6, 2002. The record in the case closed on February 8, 2003, and on February 19, 2003, the Hearing Examiner issued a Report and Recommendation for approval of the special exception. On February 24, 2003, the Board received a letter from Dennis Barnes of the North Village Homes Corporation, requesting oral argument on the Report and Recommendation. The Board also received a letter, dated February 28, 2003, from Barbara Sears, Esquire, opposing the request for Oral Argument.

The subject property is Parcel N873, Goshen Oaks Center Subdivision, located at 9051 Snouffer School Road, Gaithersburg, Maryland, in the Town Sector Zone.

Decision of the Board: Special Exception **granted**, subject to conditions enumerated below.

The Board of Appeals considered the Report and Recommendation, together with the request for oral argument, at its Worksession on March 5, 2003. The Board finds that the issues raised in the request for oral argument were fully addressed in the application and public hearing process. The Board agrees with and adopts the Hearing Examiner's finding regarding a need for the automobile filling station for the purposes of Section 59-G-1.24 of the Zoning Ordinance. The Board further finds that the Applicant's proposed vapor recovery system fulfills the requirements in Sections 59-G-1.21(a)(6) and 59-G-2.06(a)(1) of the Code that the use not create objectionable fumes, and that

the Hearing Examiner addressed this in his report. The Board finds that the Applicant's revisions to the canopy, together with the proposed use of non-reflective material under the canopy fulfill the requirement in Section 59-G-1.21(a)(6) that the use not cause objectionable glare. Therefore,

On a motion by Angelo M. Caputo, seconded by Louise L. Mayer, with Donna L. Barron, Allison Ishihara Fultz and Donald H. Spence, Jr., Chairman in agreement the Board voted to **deny** the request for Oral Argument; and

On a motion by Allison Ishihara Fultz, seconded by Louise L. Mayer, the Board voted to adopt the Hearing Examiner's Report and Recommendation and grant the special exception, subject to the following conditions:

1. Petitioner shall be bound by its testimony and exhibits of record, including, but not limited to Exhibit Nos. 4, 5, 7, 59(a), 59(c) and 83(a)-(j), the testimony of its witnesses and representations of its attorney, to the extent that such evidence and representations are identified in the Hearing Examiner's Report and Recommendation and in the opinion of the Board.

2. There will be no delivery of fuel to the filling station between the hours of 11:00 p.m. and 7:00 a.m.

3. The area under the canopy will be constructed of non-reflective concrete.

4. All evergreen plantings and understory shown on the landscaping plan (Exhibit 5) shall be installed and maintained.

5. Except as required for disabled customers or for customers to communicate with employees about emergencies, intercom boxes and external speakers are prohibited.

6. Petitioners shall provide and maintain pedestrian crossing stripes at the entry drive to Snouffer School Road to connect to the steps leading to the adjacent townhouse development.

The Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the resolution required by law as its decision on the above-entitled case.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 13th day of March, 2003.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.

EXHIBIT D

BOARD OF APPEALS
for
MONTGOMERY COUNTY

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(301)217-6600

Case No. S-2220

PETITION OF THE SOUTHLAND CORPORATION
(by: Henk J. Sterenberg, Senior Project Manager)
(Hearing held June 5, 1996)

OPINION OF THE BOARD
Effective date of Opinion: October 18, 1996

Case No. S-2220 is the petition of Southland Corporation for a special exception to permit an automobile filling station with four pump islands, pursuant to Section 59-G-2.06 of the Zoning Ordinance, to be operated in conjunction with a convenience store, a permitted use in the C-3 Zone.

The subject property is Parcel 543, consisting of approximately 27,967 square feet, located in the southwest quadrant of the intersection of Crystal Rock Drive and Darnestown-Germantown Road, Germantown, Maryland, in the C-3 zone.

Decision of the Board: Special exception GRANTED, subject to conditions enumerated below.

John Delaney, Esquire, represented the petitioner, Southland Corporation. He called three witnesses: Robert Fitzgerald, area real estate manager for Southland Corporation; Joseph Meara, transportation consultant; and Richard Hearney, an expert in civil engineering.

Sylvia Herring testified in opposition.

The property contains just under 28,000 square feet and is located in the southwest quadrant of the intersection of Crystal Rock Drive and Maryland Route 118. Crystal Rock Drive in this area is a private road in public use. A Pizza Hut occupies an adjacent property to the north. When it was approved several years ago, the parking lot and driveways which were to serve the entire site, including the subject property, were also approved. Garden apartments are located to the south, vacant property in the CT zone is located to the west, and an automobile filling station is located to the east across Crystal Rock Drive.

The special exception proposal for an automobile filling station includes four multiproduct dispensers under a canopy, three underground storage tanks and 13 parking spaces. It will operate in conjunction with a standard 7-11 convenience store of approximately 2,600 square feet which is a use permitted by right in the C-3 zone. Three employees will work during each shift. The petitioner has requested permission to be open on a twenty-four-hour basis.

To reduce the impact on the apartments to the south of the lights and noise from the proposed use, the petitioner has located the fueling pumps as far away as possible from the southern lot line. An access driveway and the convenience store building, which faces north, separate the apartments from the filling station. There are already some trees along the southern property line, and the proposal includes increasing the landscaping. The existing retaining wall and grading will be undisturbed to preserve the existing trees. In addition, a solid wood fence, eight feet tall, will add to the buffer.

Exhibit No. 19 is a photometric study which depicts the effect of the pole lights and the lights under the canopy. According to the study, while the light fixtures provide ample light in the area in front of the store and around the fuel pumps, none of it reaches the southern property line or the apartments. In addition,

Exhibit No. 20 indicates that any noise created by the use complies with the requirements of the County's noise ordinance.

Water and sewer service are existing and, according to the petitioner's engineer, are adequate. A stormwater management plan has been developed to compensate for the increase in the impervious area compared to the amount in the preliminary plan which was previously approved. It will be submitted to the Department of Environmental Protection for approval. Traffic generation anticipated for the proposed use is less than that assumed for the fast food restaurant already approved in the preliminary plan.

A study of residents and employees in the area as well as the other automobile filling stations satisfied Southland Corporation that there was significant business potential in this location. The petitioner would have built the station in 1987 except for constraints imposed by the Adequate Public Facilities Ordinance. The primary trade area includes the apartments to the south as well as residential development across MD Rte. 118. Office development is planned for the property to the west. Currently, within one mile the resident population is 11,600; within two miles it is 47,000. The employee population within one mile is 6,400; within two miles it is 11,000.

Even though four other filling stations are located in the area, Southland Corporation estimates sales for this location of 100,000 gallons a month based on the current population. None of the other stations has a full-size convenience store as contemplated for this site. They are traditional filling stations with service bays and small snack shops (Exhibit No. 26).

OPPOSITION

Sylvia Herring has operated the Exxon station across Crystal Rock Drive for 17 years. She testified that there is no public need for another filling station. Her station has a convenience store. Two of the other stations are located within 1/2 mile, and another one is part of a shopping center with a Giant grocery store, less than one mile away. All the nearby stations have 24-hour operations. Several of the dealers have reported a decrease in sales in recent years. According to Ms. Herring, the existing stations can adequately serve the existing and the future population in the area.

FINDINGS OF THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

Both the Planning Board and its Technical Staff recommended approval with conditions (Exhibit Nos. 13(a)-(b)).

FINDINGS OF THE BOARD

The Board finds that the proposed automobile filling stations meets the general requirements for a special exception in Section 59-G-1.21. The proposed use is a permissible special exception in the C-3 zone, and it is consistent with the Germantown Master Plan. It will in harmony with the character of the neighborhood, most of which is commercial. It will also be in harmony with the garden apartments to the south because the commercial activity is located away from the apartments, separated by the convenience store building and the access driveway along the southern property line. Based on Exhibit No. 19, the Board is persuaded that the lighting will not adversely affect the apartments because none of it will reach the common property line. The Board also finds that noise will not be a problem for the apartment dwellers. The apartments will be buffered by trees, a wooden fence, the building, and distance. Evidence indicated that projected noise meets the requirements of the County's noise ordinance.

Based on reasons explained above, the Board finds that the proposed special exception will not be detrimental to the use and peaceful enjoyment of the surrounding properties. The Board also finds that the area is not predominantly residential, and therefore the approval of this special exception will not alter a residential character. The Board has no reason to believe that the filling station will adversely the health, safety or morals of residents, visitors or workers in the area.

The Planning Board has determined the adequacy of public facilities in its approval of the preliminary plan of subdivision.

The proposed automobile filling station also meets the specific requirements for an automobile filling station in Section 59-G-2.06. It will not create a nuisance because of fumes, noise, odors or physical activity, and it will not cause a traffic hazard. Existing access points and driveways have already established circulation patterns.

The property will be screened by a sight-tight fence, eight feet tall, and additional landscaping will enhance existing trees and will provide additional buffering. Proposed signs will not obstruct visibility for vehicles in the area. Lighting will not have an adverse impact on residential areas as discussed above. The gasoline pumps are located behind the building line, and vehicles will not be parked anywhere so that they intrude into the right-of-way.

The Board also finds that the needs study, Exhibit No. 26, and the testimony on need is persuasive. While there are four other automobile filling stations in the area, there is also a large resident and employee population now and it is projected to increase in the future. Testimony by a competitor in opposition was not convincing to the Board. The Board cannot base its decision about need on issues of competition.

Accordingly, the Board grants the proposed special exception for an automobile filling station with four fuel pumps, to be operated together with a convenience store which is a permitted use in the zone, with the following conditions:

1. The holder of the special exception is bound by the testimony and exhibits of record.

2. The holder of the special exception must record a subdivision plat in conformance with the requirements of Chapter 50 of the County Code, the Subdivision Regulations.

3. The holder of the special exception will submit a landscape and lighting plan to Technical Staff for review and approval. One copy of the approved plan must be submitted to the Zoning Supervisor at the Department of Permitting Services. One copy must be submitted to the Board for its records. All plant material must be installed according to plan and maintained and replaced as necessary.

4. Construction must conform to Exhibit Nos. 17, 18, and 22.

5. In the event that the property is sold, the new holder of the special exception must notify the Board that the special exception has been transferred.

The Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland, that the Opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.

On a motion by Susan Turnbull, seconded by Allison Bryant, with Helen R. Strang, Chairman, in agreement, the Board adopted the foregoing Resolution. William S. Green and Judy Clark dissented from the foregoing Resolution. Mr. Green's dissenting statement appears below. Judy Clark, who was a member of the Board when the Resolution was adopted, is no longer a member of the Board. Donna Barron, now a member of the Board, was not on the Board when the Resolution was adopted.

I do hereby certify that the
foregoing Opinion was officially
entered in the Opinion book of
the County Board of Appeals
this 18th day of October, 1996.

Tedi S. Osias
Executive Secretary to the Board

NOTE: See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four-months' period within which the special exception granted by the Board must be exercised.

See Section 59-A-3.2 of the Zoning Ordinance regarding Use and Occupancy Permit for a Special Exception.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedures.

See the Board's Rules of Procedure for information about the process for requesting reconsideration.

EXHIBIT E

DISTRICT COUNCIL FOR PRINCE GEORGE'S COUNTY, MARYLAND
OFFICE OF THE ZONING HEARING EXAMINER

SPECIAL EXCEPTION
4846

DECISION

Application:	Gas Station and Food or Beverage Store
Applicant:	RF East-West Hyattsville, LLC
Opposition:	Donna Nelms, Chris Watling, et. al.
Hearing Date:	August 3, 2022
Hearing Examiner:	Maurene Epps McNeil
Disposition:	Approval

NATURE OF PROCEEDINGS

(1) Applicant RF East-West Hyattsville, LLC is requesting approval of a Special Exception to construct a Gas Station and a Food or Beverage Store on 1.90 acres of land in the CGO (Commercial General and Office) Zone.[1] The subject property is located in the southwest quadrant of the intersection of East-West Highway (MD 410) and Riggs Road, and identified as 1821 East-West Highway, Hyattsville, Maryland. The property does not lie within the boundaries of the City of Hyattsville.

(2) The Technical Staff recommended approval of the request with conditions, and the Planning Board accepted Staff's recommendation as its own. (Exhibits 3 and 62)

(3) Several individuals appeared in opposition to the request at the hearing held by this Examiner.

(4) At the close of the hearing the record was left open to allow the submission of additional documents and the record was closed August 12, 2022. (Exhibits 85-91)

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[1] The property was in the C-S-C (Commercial Shopping Center) Zone prior to April 1, 2022, when the Countywide Map Amendment and the revised Zoning Ordinance took effect. The instant Application was filed and accepted prior thereto. Accordingly, it may be reviewed and decided in accordance with the Zoning Ordinance and Subdivision Regulations in existence at the time of acceptance. (Prince George's County Zoning Ordinance, Section 27-1703 (2021 Edition))

FINDINGS OF FACT

Subject Property and Surrounding Uses

(1) The property is improved with one structure, a shopping center, on one 1.9- acre parcel of land, Parcel A of the Parklawn subdivision, recorded among the Prince George's County Land Records in Plat Book WWW 17, page 79, dated June 1950. It was developed in the 1960s as a shopping center, and the 15,301-square-foot structure will be razed if the instant request is approved. (Exhibit 23)

(2) Most of the site is located outside of the designated network of the Countywide Green Infrastructure Plan of the 2017 Prince George's County Resource Conservation Plan, although a small area approximately 20 feet wide at its widest point is mapped within the regulation portion of the network. (Exhibit 62, Backup p. 16) The subject property has an approved Natural Resources Inventory Equivalency Letter (NRI-012-2021) that indicates there are no regulated environmental features on the property or no on-site regulated environmental features will be impacted. (Exhibit 28)

(3) The subject property is exempt from the requirements of the Woodland and Wildlife Habitat Conservation Ordinance because the site has less than 10,000 square feet of woodland, has no prior tree conservation plan approvals and was cleared and graded prior to enactment of the law. (Exhibits 47 and 62, Backup pp. 7-8, 16)

(4) The subject property is surrounded by the following:

North – East-West Highway (MD 410) and beyond, commercial/retail and single-family residential uses in the CGO and RSF-65 Zones

South - Parklawn Park and single-family residential dwellings which front on a service road parallel to East-West Highway, in the ROS and RSF-65 Zones, respectively

East - Riggs Road and beyond, retail/commercial uses in the CGO and RSF-65 Zones

West - Parklawn Park and single-family residential dwellings which front on a service road parallel to East-West Highway, in the ROS and RSF-65 Zones, respectively

(5) The neighborhood proffered by Applicant includes a mix of residential and commercial/retail uses. It has the following boundaries: the PEPCO right-of-way to the northwest; Ray Road and Sligo Creek to the southwest; the Northwest Branch to the east; and Drexel Street to the north. The neighborhood proffered by the Technical Staff is much smaller, and this Examiner finds Applicant's to more realistically capture the

environs of the subject property. Moreover, the "neighborhood" is of more import in the review of a rezoning request.

General Plan/Master Plan/Sectional Map Amendment

(6) The 2014 General Plan (Plan Prince George's 2035) placed the subject property within the Established Communities. These are areas appropriate for context-sensitive infill and low- to medium- density development that maintains/enhances existing public services, facilities and infrastructure to ensure that the needs of residents are met. (2014 General Plan, p.20) The General Plan's "Generalized Future Land Use" Map notes that one must refer to the property's relevant sector or master plan to identify the future land use designation for a specific site. (2014 General Plan, p. 101)

(7) The subject property is located in an area governed by the 1989 Master Plan for Langley Park- College Park- Greenbelt and Vicinity and Sectional Map Amendment for Planning Areas 65,66, and 67. The Master Plan designates the area as one to be used for retail-commercial uses. (1989 Master Plan for Langley Park-College Park-Greenbelt and Vicinity, Comprehensive Plan insert) Some of the objectives listed for commercial areas include:

- The enhancement of the economic base of the Planning Areas and the County, and to create more job opportunities
- To locate commercial activities where vehicular access is adequate and where pedestrian walkways and bikeways can be integrated into the design, and
- To maintain, intensify and expand existing commercial areas where appropriate

(1989 Master Plan for Langley Park-College Park-Greenbelt and Vicinity, p. 87)

(8) The Master Plan provided the following discussion of commercial areas, including the area surrounding the subject property:

> Except for the Greenbelt Center, all other commercial areas in the Langley Park-College Park-Greenbelt Planning Areas are clustered at highway intersections or are located along major highways. A substantial portion of commercial activity is located on University Boulevard/Greenbelt Road, U.S. Route 1, New Hampshire Avenue, Chillum Road, East-West Highway, Rhode Island Avenue and Riggs Road. Commercial development on U.S. Route 1 and some sections of University Boulevard and New Hampshire Avenue is almost continuous, has a distinct strip character with numerous fast-food stands, gas stations, and too many curb cuts. Often the design and development of these commercial areas has had little relationship to nearby land uses. Many of the commercial areas lack amenities and their designs are outmoded. In addition, some of these have been undergoing functional obsolescence and physical decline, including deterioration of building facades and signs.
>
> There are approximately 2,100,000 square feet of retail and approximately 1,400,000 square feet of office floor space in the Planning Areas, which is emerging as a major

> office center in the County because of the accessibility and attractiveness of its Beltway and Baltimore-Washington Parkway locations.
>
> **Existing Conditions**
>
> An analysis of the commercial development in the Planning Areas has identified several problems.... Most commercial areas have a basically single-purpose retail nature. They generally do not provide the various public service facilities that are needed to render a full range of community, social and recreational facilities.
>
> Most of the commercial areas display an absence of site plan review for conventional euclidean zoning that has resulted in poor siting of structures, poor vehicular circulation, inadequate parking, and a lack of pedestrian walkways. A majority of the shopping areas have very little or no landscaping along highways, no landscaping in the parking areas and no landscaping/buffering to protect adjacent residential areas....

(1989 Langley Park-College Park-Greenbelt Master Plan and Sectional Map Amendment, p. 88)

(9) The Master Plan also included transportation and circulation guidelines that urged the creation of trails and walks for pedestrians and bicyclists that could provide a connection between neighborhoods, commercial areas, employment areas,etc., and the incorporation of bikeways in the local road system.

(10) The Sectional Map Amendment retained the subject property in a commercial zoning category but placed it in the C-S-C Zone as the C-1 Zone was being phased out as an obsolete category.

Applicant's Request

(11) Applicant has entered into a long-term lease (with opportunity for renewals) of the subject property owned by Child Care Properties Limited Partnership. (Exhibits 21 and 62, Backup p. 1; T. 108) The State Department of Assessments and Taxation has issued a Certificate in Good Standing authorizing Applicant to conduct business within Maryland. (Exhibit 69)

(12) Applicant proposes to develop the site with a Gas Station with 8 multi-product fueling stations, able to service up to 16 vehicles, and located in the northeast corner of the site closest to the intersection of East-West Highway and Riggs Road. Applicant also requests approval to construct a 4,649-square-foot Food or Beverage Store (referred to throughout the record as a "convenience store")2. Both uses will be located

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[2] A condition of approval has been added for Applicant to revise the Site Plans to reference the correct square footage of the Food or Beverage Store since the amount varies within the record. This square footage is taken from the revised Need Analysis prepared by Applicant's witness accepted as an expert in the area of market analysis.

outside of the limits of the approved floodplain on site. (Exhibit 91) Applicant will provide a bicycle lane along its frontage on Riggs Road, subject to the Maryland Department of Transportation State Highway Administration's ("SHA") approval. (Exhibit 62, Backup p. 20) A condition of approval will also require Applicant to include a detail for bicycle racks on site.

(13) Mr. Tom Ruszin testified on Applicant's behalf. He is the fuel and environmental leader for Royal Farms charged with overseeing compliance with all applicable state and federal regulations. (T. 107-108) He was authorized to testify on Royal Farm's behalf. (Exhibit 77) Mr. Ruszin noted that Applicant chose the subject property for its Gas Station and convenience store because of its location at a well- traveled intersection, its zoning, the number of residences in the area and the demographics of the area. (T. 112). He is aware of several meetings that Applicant's agents had with various residents/civic associations in the area and of the additional information provided those requesting "more information about the operation, maintenance, [and] aesthetics of the stores." (T. 115) He proffered that If the request is approved approximately 30-40 full and part-time employees will be hired at an opening hourly wage of approximately $14.00. (T. 116)

(14) Mr. Ruszin also testified that the existing building is very old and there is virtually no stormwater management on site since it is fully impervious. If allowed to construct the uses he believes they will be of benefit:

> We would be putting in up to date stormwater management facilities. There's no landscaping there currently, so we will be meeting County's general landscaping [requirements].... [W]e will be bringing a modern design [that is] much more aesthetically appealing.... We'll also be providing ... gateway signage for the northern gateway imaging program.
>
> We've also worked very closely for more than two years with the MNCPPC and Department of Parks and Recs on making improvements to the Parklawn Park and have agreed to a recreational facilities agreement to provide significant upgrades to that park....
>
> [I]t's also worth mentioning that we're going to be bringing ... our world-famous fried chicken and food service offerings to this community, and along with commuters passing by this location. It's going to increase the tax base for motor fuel tax and sales tax along with real estate property tax. And this will be a location that's open 24/7 so very convenient for anyone at any time of the day stopping and ... us[ing] our amenities....
>
> In general [we agree with the technical staff report]. But there is one point of contention [concerning] the proposed parking. Generally, we like to provide about 50 spaces for our operation and that is for a couple of reasons.
>
> We're a very kind of peaky use. We get rushes. We get periods of rushes and then periods of downtime.... We need to have adequate parking facilities to ... let those

> people maneuver the site and park and then walk into our store. There appears to have been some requirements that they only ... recommended the 15 spaces to address our convenience [store] and not so much our food service, so we disagree with that.
>
> Another hot topic has been electric vehicle charging. We have a few different partners that we work with and it seems to be a very important part of this proposal. And as EV charging grows we would like to have more parking spaces available to expand and install EV chargers. Most of the partners that we work with will require four to eight spaces dedicated to EV charging, so if we don't have adequate spaces, you know around the perimeter to the site to put these amenities in, then we would not be able to offer those.

(T. 117- 120)

(15) Upon redirect, Mr. Ruszin explained that the State requires Applicant to construct a vapor recovery system. Royal Farms uses a below-ground fueling system that is 97% effective, at a minimum, in recovering all vapors from fueling. (T. 159-161) The witness also noted that "there are devices on any automobile that was manufactured after 2001 that has onboard refueling vapor recovery so it captures the vapors that ... would potentially come out of a nozzle during refueling of an automobile. " (T. 161) Mr. Ruszin provided additional information concerning Applicant's fuel system operations:

> Royal Farms has prepared this letter in order to outline its fuel system design; and highlight certain policies and procedures as they pertain to fuel system operations. Royal Farms and its team of petroleum industry experts take pride in designing and installing state of the art fuel systems that go above and beyond State and Federal guidelines in order to ensure that releases of petroleum to the environment do not occur.
>
> Royal Farms installs double-walled fiberglass reinforced plastic (FRP) tanks and sumps, supplied by Containment Solutions, Inc., that come with a 30-year warranty. The containment sumps are equipped with rigid entry fittings for the product piping and FRP entry fittings for the vent piping. Double-walled OPW Flexworks II product piping is installed within a corrugated plastic chase pipe, with all fittings located within liquid tight containment sumps.
>
> Royal Farms performs continuous interstitial monitoring of the double-walled tank and piping secondary containment. This is accomplished by installing liquid sensors in all containment sumps and in the interstice of the storage tanks (the space between the primary and secondary containment). These sensors are tied into an automatic tank gauge (ATG). The ATG continuously monitors the amount of fuel in the tanks through probes located in the storage tanks, and also monitors sensor status. This provides 24/7 monitoring of the secondary containment for the storage tanks and piping. Should liquid hit a sensor located in any of the containment sumps (liquid/fuel alarm), or if there is a change in level of brine in the interstitial space of the storage tanks (high level alarm/low level alarm) the ATG will sound an alarm inside the store. Additionally, the alarm is sent to the corporate headquarters where they are monitored daily. In all states of operation, with the exception of Delaware and New Jersey, any sensor fuel

alarm [will] trigger automatic shut-down of the fuel system.

Federal and State regulations require a form of release detection for storage tanks and pressurized product piping. Again, Royal Farms satisfies requirements for release detection of product piping by utilizing interstitial monitoring of double-walled product piping in conjunction with an automatic line leak detector. Royal Farms also pays a certified testing company to perform a precision tightness test of the product piping during its annual compliance testing of the fuel system, which constitutes a second form of release detection for the piping. During this annual compliance testing, the functionality of the ATG, along with each probe and sensor, are certified per manufacturer guidelines.

Though not required, Royal Farms contracts petroleum vendors and utilizes in-house technicians to perform preventative maintenance site visits on a semi-monthly (every other month) basis. However, Royal Farms performs preventative maintenance at stations located in well head areas, Delaware, and New Jersey on a monthly basis. During a portion of the preventative maintenance site visits, monitoring pipes are inspected for the presence [of]petroleum impact. Two permanent monitoring pipes are required to be installed vertically and in opposing corners of new or replacement storage system installations. Royal Farms installs four permanent monitoring pipes, with one located at each corner of the tank field.

Spill and overfill protection are required through Federal and State regulations. Spill protection is required in the form of spill catchment basins at the fill ports for the storage tanks. There are currently no regulations requiring double-walled spill catchment basins; however, these are standard on the fuel systems installed by Royal Farms. All underground storage tank (UST) systems receiving more than 25-gallons of fuel per delivery are required to have one form of overfill protection. Royal Farms utilizes two forms of overfill protection. Royal Farms installs an audible and visual high level alarm at the point of fuel delivery which engages when the fuel level in the storage tank reaches 90% capacity. This is also monitored through the ATG. In addition, Royal Farms installs automatic shutoff devices in the form of drop tube flapper valves, which cut off the flow of fuel to the storage tank should the level of fuel reach 95% capacity.

Royal Farms also provides a strong corporate structure and oversight to store level personnel to ensure that employees are informed and prepared. All store level personnel are required to complete a "UST Operator Training" through our World-Famous Training Centers "Learn" program. This training module addresses inspection of the fueling area, dispenser hanging hardware (i.e., hoses, nozzles, etc.), and aspects of the stage I vapor recovery system. Inspections of the fueling areas are required to be performed at a minimum of once every shift (i.e., three times per day). These inspections must be documented in Royal Farms "Blue Book", which are handed out quarterly. Daily inspections are reported to Royal Farms Facilities Support Center and are noted on a monthly log which is placed in a fuel compliance box in the manager's office and retained in the box for five years.

> Additionally, the training module informs the employees on how to respond in the event of fuel spills, both small and large. These instructions are also posted in the manager's office, and include contact information for emergency services and key corporate staff members. Procedures on how to respond to various ATG alarms are also posted at each location. Furthermore, all Royal Farms management team (i.e., District Leaders, Store Leaders, and Assistant Managers) are certified Class A/B UST Facility Operators, and the remaining store level personnel are certified Class C UST Facility Operators....

(Exhibit 81)

(16) Mr. Edward Steere, Managing Director of Valbridge Property advisors, prepared a Need Analysis in support of the instant Application, that found a need for both the Gas Station and the Food or Beverage Store. (Exhibit 27) It included the following reasoning in support of the finding:

> The proposed Royal Farms gas station in Hyattsville is a rectangular shaped land parcel bounded by MD-410 (East-West Highway) and MD-212 (Riggs Road). The proposed improvements to the site include a gasoline station with eight multi-product dispensers (MPD's) under a canopy. In addition, there will be a convenience store of approximately 4,64 sq. feet with indoor/outdoor seating.
>
> The Maryland Department of Transportation State Highway Administration published an estimated annual average daily traffic (AADT) count in 2020 on MD-212 between MD-410 and Red Top Road as 28,933 average annual weekday traffic (AAWDT). MD-410 serves as a major commuter route which runs through the inner northern suburbs of Washington DC., connecting the commercial districts of Bethesda, Silver Spring and Hyattsville. Additionally, it provides a highway connection to a transit and commercial hubs centered around Washington Metro subway stations in Bethesda, Takoma Park, Hyattsville, Silver Spring, and New Carrolton. This site location provides an opportunity for commuters and consumers traveling on MD-410 to have convenient access to fresh food and competitive fuel prices before continuing to and from home....
>
> Under the assumption that the special exception conditions have been met at the proposed site, we are of the opinion that granting the request is appropriate. Valbridge believes that the proposed convenience store with gas will be more convenient and therefore necessary to the residential households and commuters in the trade area. We do not believe that the proposed gas station will detract from or impair the health, morals, or welfare of residents in any conceivable way, given the considerable number of residential households and employment opportunities in the area as well as the significant volume of daily pass-thru traffic who are in need of expedient fuel and convenience store services. Recent industry surveys reveal that while the price per gallon is still one of consumer's top considerations when choosing a gas station, an increasing proportion of consumers are more likely to go out of their way to visit a certain brand of station which has the quality of in-store offerings such as fresh food and loyalty programs they value. This trend is likely to continue going forward as in-store sales numbers climb and more people report entering the store during their visit. Overall, we estimate total fuel demand

in the trade area at approximately 17.80 million gallons per year....

Our survey revealed 18 existing gas stations in the subject's trade area. Based on our assessment of each station and using the average motor fuel gallonages sold per month data from NACS , trade area stations are estimated to supply an aggregate of 16.1 [million] gallons per year. Throughout our survey we evaluated conditions that are important to the marketing of goods and services, such as clean, well-lit facilities, quality fresh food products, visibility and access from the highway and neighborhood, modern design and cover from the elements. Based on this analysis we found that for the majority, gas stations that populated this area followed a classic service station design with three or more service garage bays or were formatted as small kiosk/mini convenience stores. These stations are unlikely to draw the same volumes of customers as the subject site as further demonstrated by our estimates of annual fuel sales volumes which are slightly below average.

We believe that only two trade area stations are realistically competitive with the subject as these stations have larger convenience store formats and modern designs with service such as a Bank of America ATM. The remaining 16 trade area stations have little competitive advantage over one another in terms of the services they offer and benefit solely from the fact that they are well-positioned to capture traffic along commuter routes. On average, existing neighborhood stations do not meet modern consumer demands. Performance data from NACS and ITE traffic generation models reinforce that a modern convenience store such as the subject will generate more than double the customer traffic of the traditional and smaller gas stations....

Convenience Store

Although there are other existing convenience stores in the neighborhood, there are none that offer the selection of fresh foods and fuel proposed on this site. All of the other stores are smaller and limited in scope of offerings. Industry trends show that a majority of drivers who purchased fuel are also entering the food and beverage stores (52% in 2020 vs. 35% in 2015) and that younger consumers are likely to shop convenience stores daily, purchase healthy food offerings and base their fuel purchase decision on what they plan on purchasing inside the convenience store. The necessity or demand of the gas station creates a reasonable need for a food or beverage store, given the increase in sales for both product offerings when offered in unison. The establishment of a hyper convenience store with gasoline sales on East-West Highway will provide a convenient and expedient service to the community.

Conclusions

Valbridge concludes, therefore, that there is public need/necessity for the proposed Royal Farms automobile filling station and food and beverage store in Hyattsville, due to the facts presented above. The site and use is, "convenient, useful, appropriate, suitable, proper or conducive" to the public in this area, by providing a single location for the purchase of fuel and a wide variety of food and convenience options. The store and fueling station complement the surrounding retail character of the area and is positioned at one of the high traffic volume locations along MD-410. This area is a mixture of residential,

> commercial, and civic uses and the proposed site has the unique benefit of being in close proximity to two high ridership bus stop routes and the Sligo Creek Trail allowing it to serve pedestrian demand. Traveling to the site is unlikely to increase traffic on side roads or the distance traveled by residents/commuters on their standard daily journeys. the subject [property] will be an attractive improvement over existing commercial uses located at this site which are partially vacant.
>
> There are few opportunities in the market area for customers to find fuel and associated convenience items paired in a clean, well-lit environment that is in demand at this time. With two exceptions, the gas stations in the trade area are all outdated, and many do not offer a full range of fuels or convenience items. We judge that the few modern facilities, that offer larger convenience spaces and services are attractive to a broader market of consumers and present a greater convenience than the existing stock in the marketplace.

(Exhibit 79, pp. 1-4)

(17) Mr. Steere, accepted at the hearing as an expert in the area of market analysis, offered further support for the need for both uses at the subject property. He first noted that he revised his analysis because the original one was nearly two years old and he wanted to better capture any changes in the community since completion of the original. (Exhibit 79; T. 220) He next explained that the trade areas were not identical for his analysis of the Gas Station and the Food or Beverage Store because the statistical data (produced by the National Association of Convenience Stores or NACS) reveals that consumers will travel 10 minutes out of their way to get the cheapest gas, but usually select the nearest convenience store that sells whatever they're interested in purchasing at that moment. (T. 221) Mr. Steere evaluated every convenience store within the trade area, ranging in size from a kiosk in the middle of the Gas Station aisles, to a limited or traditional convenience store (roughly 2,000 square feet – the size of older 7-Elevens), and found on average they were constructed in 1966. (T. 226) Those gas stations that had a kiosk or smaller convenience store were located on small sites that "don't have the accommodations to bring in people, park them, and go into the convenience store and use gas [so] they are limited in their ability to meet the current consumer demands." (T.226) After examining the number of residences in the area, the number of people working in the area, and the number of drivers passing through the area he determined that the demand for gasoline in the area is 17.8 million gallons. (T.226-227) He believes there is "probably more demand than that, but it's very difficult to separate the overlap between the residential and...the workforce." (T.227)

(18) Mr. Steere did not agree with Mr. Manjarrez' testimony (discussed infra) concerning the lack of need given the number of gas stations in the area:

> I know of course the stations on New Hampshire Avenue are in Montgomery County and I can't include those .... We could have done a 10 minute drive time analysis, ... but that wouldn't make sense in an urban community such as this because 10 minutes is different at any time of the day in driving around this side of Prince George's County...

> [I do not agree that the trade area can be a 1.5 mile radius because] 1.5 miles isn't a factor in anybody's studies. Like I say, if anything, you would use a drivetime analysis or the vendor may use vehicle volume, pass by volume trips on the roads in front of their store, their store site. Those are more common.
>
> The other that Mr. Ruszin had mentioned is looking at the number of rooftops in the area, looking at ... customer base in the area. So that's why I run numbers on the population, the demographics of a community to see if there is a demand there. And what we end up with, and what was important to show on both my map and ... [Mr. Manjarrez'] ... map that was turned in before, is that the Royal Farms site is in the middle of the community. And almost all the other gas stations except for the Exxon across the street are on the perimeter.
>
> And those gas stations on the perimeter are serving other markets. So gas stations on New Hampshire Avenue and University Boulevard are really serving markets that are north of them or west of them. And this Royal Farms will be a—would be more dedicated to the actual community than those stations out there will.
>
> I think that this particular location is actually an excellent location for a proposed gas station. We have a median break in both roads—or a median—not a median break. We have a median in both roads in front of the station and the Exxon station across the street. So they will actually complement each other as far as gas production from morning and evening pass by traffic.
>
> And it's in the center of the community. You have a great pedestrian network on the road and on the trail behind it. And you have bus stops on both sides of the site. So the convenience ... of commuters ... to stop here and use this convenience store is something that doesn't exist today.

(T.229-232)

(19) Mr. Joseph DiMarco, accepted as an expert in the field of civil engineering, testified on Applicant's behalf. He and his firm prepared the Special Exception Site Plan, Landscape Plan and site development concept plan (the stormwater management plan). (Exhibits 26, 35-36, and 68; T. 170) He explained that the site is currently 100% impervious, improved with a building that has been the home of several retail uses over the years and parking.

(20) There are currently three entrances to the site -two from East-West Highway and one from Riggs Road. One access from East-West Highway will be closed, and the Riggs Road access will have a right-in, right-out entry and will be located further north towards the Parklawn Park property. (T. 177) The realignment of the Riggs Road access " is a better fit with the on-site drive that houses the underground fuel tanks" and will "add an additional parking island to the park parking lot itself." (T. 178) The realignment will also provide additional separation from the proposed bus shelter to the south on the Parkland

Park property and improves the pedestrian pathway along the park. (T. 179)

(21) Parking will be located around the perimeter of the site. At the suggestion of the Technical Staff the Special Exception Site Plan was amended to add additional sidewalks that would connect from both East-West Highway and from Riggs Road directly to the sidewalk along the frontage of the Food or Beverage Store. The Technical Staff also provided comments and made requests concerning the changes to the MNCPPC park, set forth in the Parklawn Park Concept Plan. (Exhibit 80; T. 176)

(22) The site has been granted stormwater concept approval (No. 1747-2021-00). (Exhibit 46) Exhibit 33 shows the existing floodplain delineation. Exhibit 34 reveals the proposed development plan overlaid over the site and what the resulting limits to the floodplain will be. Mr. DiMarco provided the following elucidation as to the impact to the floodplain as illustrated on Exhibit 34:

> [T]he area [in] purple on the bottom ... depicts a regrading along the southern portion of the site. It currently has a retaining wall on the south boundary that would be removed and graded into a hillside up to grade with the rest of the stie. That actually creates capacity within the floodplain itself by sort of taking that wedge and increasing the volume that exists within the floodplain.
>
> This impact that we have proposed here for the site development, that has gone through a process with [DPIE] site road division. And we've obtained a floodplain impact waiver approval that would allow for the impaction here....
>
> The area that is shown in purple is the area that we would be excavating within the floodplain creating additional capacity in the floodplain. I guess to be clear, the green area is sort of a continuation of the existing area floodplain modified for any of the site grading improvements. And one thing that I would like to note is that the fueling components of the site, the building, the pumps are located outside of the floodplain area [,including the underground tanks]....
>
> The tanks are actually shown here behind the building, but they've been shifted ... [as shown on Exhibit 75.] That shows it. And then it also shows increased landscaped area behind the building which we've actually further reduced impervious areas since this impact was approved.... [On Exhibit 34, a prior exhibit,] [t]hat area is being represented as a paved drive aisle and a service drive behind the building....

(T. 182-185)

(23) Subsequent to the hearing, an additional exhibit was submitted to clearly show the location of the underground tanks, and the delineated floodplain. (Exhibit 91)

(24) Mr. Joe Caloggero, accepted as an expert in traffic engineering, testified on Applicant's behalf. (Exhibit 71; T. 128) Mr. Caloggero noted that he is familiar with the subject property and the transportation network in the area. A traffic study was not required for this Application, but Mr. Caloggero and his coworkers prepared a trip generation analysis which found that the number of new vehicular trips expected to be generated if this request is approved would be approximately 102 during the AM peak hours and 88 in the PM peak hours. (Exhibit 41; T. 130-131) He also analyzed the number of new trips that would occur under the existing use and found it to be 114 during the AM peak hours and 113 during PM peak hours. Thus, the proposal would attract less net new trips to the site.

(25) Mr. Caloggero also stated that Applicant will remove a current access point along East-West Highway that is closest to the intersection. He opined that this will improve safety in the area. (T. 132) the remaining access will be designed as a right in, right out access. All of the accesses will require approval of permits from the State Highway Administration. (T. 35)

(26) The Technical Staff's Transportation Planning Section reviewed Mr. Caloggero's traffic analysis and found it acceptable. (Exhibit 51; discussed *infra*). The witness concluded that the Application will not adversely affect the adjacent properties or the surrounding neighborhood from a traffic engineering perspective. (T. 136) Similarly, the witness opined that the proposed uses would not detrimentally affect pedestrians since "the sidewalk is displayed around the entirety of the buildings as well as the subject property frontage along East-West Highway and Riggs Road [and there is] parking shown along the north, east and south frontages of the site [and] directly adjacent to the proposed building." (T. 137)

(27) On cross-examination, homeowners that live adjacent to what is described as an access road and a service road near the subject property asked whether he evaluated the effect that the removal of one access will have on traffic near them, or the number of accidents that occur at the location. (T. 142 – 147) Mr. Colaggero testified that Applicant was not required to do an accident analysis but believes changing the access to right in, right out should prevent accidents. (T. 147) Mr. Colaggero was also asked whether his analysis considered traffic flow when the school schedules and presence of school crossing guards or pedestrian traffic using the Sligo Creek Trail crosswalk, and he provided the following response:

> [T]oday there's an access point there already. So traffic coming in and out will have to make that maneuver today. So this isn't a new maneuver. And there's two other things. Traffic, you know, with traffic and [vehicles], they see and hopefully they're mostly familiar with this area because most of the people using this facility will more than likely be traveling through this intersection on a daily

basis anyway. They're going to know there's crossings at that location and it's up to the .. motorist to ensure that it is safe to exit the property or enter the property and watch for a pedestrian as well as pedestrians to ensure that they have a safe crossing....

They still have to follow the rules of the road. You know ... they're going to have to watch for pedestrians. Now, it doesn't mean because there's more cars and there's more pedestrians that it's an unsafe crossing because ... you can see the vehicles and the vehicles leaving can see the pedestrian scan the vehicles and the vehicles leaving can see the pedestrians....

(T. 154-155)

(28) Mr. Mark Ferguson, accepted as an expert in land use planning, testified on Applicant's behalf and submitted a Land Planning Analysis. (Exhibit 76) Mr. Ferguson prepared a neighborhood for the Application that varied from the one proffered by the Technical Staff, noting that staff "limited the ... zoning neighborhood to the subject property and 11 houses to the west."(T. 271) His proffered neighborhood has been accepted by this Examiner.

Mr. Ferguson also reviewed the applicable zoning and planning documents for the subject property – including the 1989 Langley Park, College Park, and Greenbelt Master Plan, the 1999 Sectional Map Amendment for Planning Areas 65, 66 and 67, and prior Master Plan and SMA for the area and determined that the property has been commercially zoned for approximately sixty years. He concluded that the request can be found to implement the various plans, reasoning as follows:

- Although the Growth Policy Map and Generalized Future Land Use Map in the 2014 General Plan designates the site for Residential Medium land use, the Generalized Future Land Use Map "is generally intended to replicate the recommendations of the Master Plan or Sector Plan in force at the time of the approval of the General Plan", and the 1989 Langley Park-College Park-Greenbelt Master Plan recommends retail commercial land use for the property (Exhibit , pp. 5-6). Moreover, the Generalized Future Land Use Map notes that designations for a specific property are identified in the relevant master or sector plan. (2014 General Plan, p. 101)

- The Master Plan suggested that the recommendations proposed for the US Route 1 commercial strip be considered for the retail/commercial uses along New Hampshire Avenue, Greenbelt Road, Riggs Road, Sargent Road, and Chillum Road. The instant request will implement many of those recommendations including increased landscaping where, as here, the use extends to a residential

street; minimization of commercial driveways; and upgrades to parking compounds. (Exhibit 76, p. 7)

- The Site Plan's design that "reduce[s] existing impervious area within the 100-year floodplain, while providing a pervious, landscaped compensatory storage are to offset the land disturbance in the floodplain necessary to safely reconfigure the existing entrance from Riggs Road" will implement the provisions in the Resource Conservation Plan. (Exhibit 76, p. 8)

- While the subject property is within 1,000 feet of the environmental setting of County Historic Site 65-008 (the former Digges' Chillum Castle Manor estate) the residence itself is beyond and is screened by intervening development and woodland, ensuring no impact to the Historic Sites and Districts Plan. (Exhibit 76, p. 8)

- Approval of the request will not conflict with the Countywide Master Plan of Transportation's recommendation that both East-West Highway and Riggs Road be 120' arterial roadways and that on-road bicycle facilities be located along East-West Highway. (Exhibit 76, p. 8)

(29) The witness' land planning analysis explains in detail why he opined that the request satisfies the purposes of the Zoning Ordinance, in general, and the purposes of the Commercial Zones and C-S-C Zone, in particular. (Exhibit 76, pp. 5-14) I agree with the analysis, and would highlight just a few of Mr. Ferguson's reasons for his position:

- This proposed redevelopment of a long-existing commercially-used property will promote a conservation of the existing community and will satisfy applicable adequate public facility laws. Moreover, as a redevelopment of an existing commercial use at the intersection of two arterial roadways the uses will generate fewer trips to the area (than the uses formerly operating on site),and the elimination of one access along East-West Highway will minimize traffic conflicts.

- The development will have to meet all regulations pertaining to fire, floodplain, stormwater management, setback distances and height regulations, thereby providing adequate light, air, and privacy, and protecting from fire, flood, panic, and other dangers.

- Constructing the use, paying property taxes, and hiring employees will help provide a broad, protected tax base, and will further the economic stability of the County.

- Approval of the Gas Station and Food or Beverage Store of the size requested, at this location will provide a useful and convenient site for a needed service.

- The redevelopment of this property with a combination of a retail commercial use and service commercial use will revitalize the existing development and increase the stability of commercial areas.

- The two uses are in keeping with the character of commercial uses in the area, and not incompatible with general retail uses.

(30) Mr. Ferguson also believes the Application satisfies Section 27-317, 355 and 358 of the Zoning Ordinance (2019 Edition), for the following reasons:

- The uses are in conformance with all applicable provisions of the Zoning Ordinance once the playground is removed.

- The proposed uses will not substantially impair the integrity of the Master Plan (for reasons noted above).

- Compliance with all applicable laws result in uses that "represent a high level of protection against adverse effects to the public health, safety and welfare." (Exhibit 76, p. 13)

- A relatively small amount of floodplain exists in the southeastern corner of the site and all of it is currently paved. If the request is approved 40% of the existing imperviousness will be removed and planted compensatory storage provide, thereby restoring a regulated environmental feature.

- The site has over 371 feet of frontage and direct vehicular access to East-West Highway, and over 215 feet of frontage on and direct vehicular access Riggs Road, two arterials with rights-of-way in excess of 70 feet. The two streets are designated as master plan arterials. East-West Highway has a right-of-way width of approximately 150 feet and Riggs Road has a variable right-of-way width of approximately 100 feet. Both access driveways are defined by curbing and are more than 30 feet wide. The subject property is a corner lot and the access driveways are more than 20 feet from the point of curvature and more than 12 feet from the side or rear lot line of any adjoining lot. Gasoline pumps are located approximately 60 feet from the right-of-way line of East-West Highway and over 50 feet from the right-of-way of Riggs Road. Sidewalks at least 5 feet wide are provided along both streets and wider ones are provided along the sides of the

proposed store. No repair service is proposed, nor storage or junking of wrecked motor vehicles. Architectural details for each façade demonstrate compatibility with the surrounding commercial character of the surrounding commercial development. The topography of the subject property and abutting lots is shown for a depth of at least 50 feet. The location and details for the construction of the trash enclosure is shown on the Special Exception Site Plan. No exterior vending machines or a vending area are proposed. Applicant states it will comply with the procedures that will be triggered upon the abandonment of the gas station. No lots containing schools, libraries or hospitals are located within 300 feet of the subject property. An outdoor playground does exist on the adjacent MNCPCC park but Applicant and the Parks Department have entered into an agreement to remove the playground.

- Once the playground is removed per the agreement between Applicant and MNCPPC Parks and Recreation the site meets the requisite 300-foot setback from a school, outdoor playground, library, or hospital.

- There will be no repair services, rental or display of cargo trailers, trucks, or similar uses nor storage or junking of any vehicles on site.

- Architectural elevations were submitted and indicate the structures on site will harmonize with the commercial character of the area.

In conclusion Mr. Ferguson opined that "because of: (1) the varied character of uses in the surrounding neighborhood; (2) the proposed deletion of one existing vehicular entrance from East-West Highway; (3) the provision of modern stormwater management; and (4) the provision of modern conforming landscaping, ... the approval of this particular application would not entail a more adverse impact on the public health, safety ,and welfare than those inherently associated with food or beverage stores or with gas stations, irrespective of their location in the C-S-C Zone." (Exhibit 76, p. 18)

(31) One resident provided the following testimony in favor of the Application:

I reside about a mile from this location.... And I have listened to everybody's testimony but also on the flip side, I have been here for 27 years and I have been president of my homeowner's association for 25 years. And we have 71 units and since living here we have not had too many establishments in our community where we could sit down, relax.

Now, I did get an opportunity to go look at a couple of the Royal Farms and you know, I like the seating, the atmosphere. I like having the variety of foods, like,

> health foods. All different types of foods. It's like a one-stop store and so I ... would like to see some type of establishment of that kind in our neighborhood.... I am truly in favor of having an establishment here. I do understand that there's a lot of traffic, but that space has been sitting there empty ... it started with it being pretty full and watched it become empty.
>
> And so just for the people in my community and as a resident of this area I am for having an establishment down on East-West Highway.

(T. 52-53)

Opposition Concerns:

(32) Eleven homes are located along an access/service road to the west of the subject property. One of the homeowners, Mr. Powell, questioned the continued safety of using what he described as a one-way road, especially if one of the accesses to the subject property is removed. (T. 142)

(33) Some in opposition questioned Applicant's assertion that the Food or Beverage Store would offer quality fresh foods. The area is believed to be a food desert, and "another fried chicken joint in the area that brings along a potential environmental hazard to our water ways" should be denied. (T. 80, 85)

(34) It was suggested that the uses would run counter to the County's Climate Action Plan since a main driver of climate change has been burning of fossil fuels, including gas. (T 41; 88-89, 98) Concern was also expressed as to the effect that the uses would have on groundwater and Sligo Creek, believing the underground gas storage tanks to be very close to the 100-year flood plain. (T. 42, 77, 83-84) Mr. Michael Wilpers and the Friends of Sligo Creek did not believe the proposal's two stormwater installations would prove sufficient, since "their ability to handle high impact storms doesn't seem to be descried in the available documents ... [nor] the crucial cross-section views that would allow us to see where the outfall pipes for each stormwater features would send overflow water in high rain events." (Exhibits 85 and 88)

(35) Others were concerned with the lack of concentrated economic development in this area, noting elsewhere along Route 1 in Hyattsville, Prince George's Plaza and Tacoma Park "the type of development that we see [is] ... sort of a more concentrated commercial type of district that's going to be multi-use occupancy." (T. 76-77)

(36) Many were opposed to the removal of the playground from the adjacent MNCPPC Park. (T. 84-85) Others shared concerns over the possibility of exacerbating the high volume of traffic in the area and an increase in the number of accidents in the area. (T. 11-13, 96-98)

(37) Mr. Chris Watling testified that he is opposed to the request due to concerns over pedestrian/bicyclist safety and the removal of the playground from MNCPPC property:

> As most of us know Sligo Creek Track runs behind the proposed site of Royal Farms. It receives heavy use from recreation and commuters, bikers, and ebikers, pedestrians, and also students ... and families going to and from Cesar Chaney Elementary school which is only a few hundred [feet] southeast of the proposed location.
>
> The plans for Royal Farms show an exit in the southbound direction of Riggs Road, immediately before the Riggs Road pedestrian crosswalk for the Sligo Creek Trail.
>
> The proposed Riggs Road entry and exit for Royal Farms is approximately the same locations as the [existing] one for the old Rite Aid. The bus stop is about 50 feet south of that entry/exist. The Sligo Creek Trail pedestrian crosswalk is another 40 feet south of there. Traffic volume is extremely heavy on Riggs Road at East-West Highway.
>
> The existing crosswalk is treacherous. A pedestrian or biker must rely on three lanes of southbound traffic to hopefully stop at flashing yellow lights and wait on a small concrete island then cross three northbound lanes whenever the oncoming traffic allows. Imagine if you were trying to cross Riggs Road just south of the Royal Farms egress and a bus stop at the bus stop in the right lane. Vehicles leaving Royal Farms and vehicle heading south on Riggs Road will swerve to the left to avoid the bus, directly into the path of the Sligo Creek Trail crosswalk enabling Royal Farms to build a gas station at this location will drastically compound the pedestrian and bicyclist safety issues at the Sligo Creek Trail... .
>
> [A] Gas station cannot be built within 300 feet of a playground. The solution apparently supported by MNCPPC and the County allows for the destruction and removal of the existing playground. ... [R]oyal Farms will [then] provide the equivalent of the cost of the playground in park improvements.
>
> The improvements that Royal Farms indicate they are going to make to the park land are vague and minimal. [I]t seems like they are going to raze the playground, add a couple of parking spaces, plant a few bushes, and create ... "multipurpose fields." The fields ... on the diagram are too small [for] regulation soccer league games per FIFA... .[And there] is an access hatch of the WSSC sanitary sewer lines [in the middle of a field] and that means this pad cannot be moved to accommodate a recreational field.
>
> To add further insult ... MNCPPC recommends a black vinyl-clad chain-link fence in between Royal Farms and the park land. These types of fences ... [are] extremely ugly.

(T. 16-19)

(38) Mr. Carlos Manjarrez debated the need for a gas station at this location. He was not recognized as an expert witness but has researched Market Watch, a magazine of the national petroleum news service, and Loopnet. These sources note that gas stations often fail after a few years, and at least one is for sale in the Hyattsville area. Additionally, gas stations may sit vacant until they are sold. (T.25-26) Mr. Manjarrez prepared an Exhibit showing all gas stations within ½ mile of the subject property. (Exhibit 83) Mr. Manjarrez stated there are approximately 20 stations; however, upon cross examination it was determined that one gas station was listed twice and a few others were located outside of the County and could not be considered. (T. 35-36) He argued it would be improper to approve the request at this location for the following reasons:

> Folding in another gas station does not mean that all boats will rise in terms of the gas station profits...[W]hat's likely to happen is it means that the slim projects that existing gas stations have to manage now will be further reduced when a shiny new gas station enters into their market.
> For independent owners, many of whom own only one gas station, and this is from the National Association of Convenience and Fuel retailers, this...could be devastating.... The community does not need another gas station....
>
> And for those who can't compete and are unable to sell their old gas station in a flooded market, we as residents have to bear the burden of living with another defunct property with potentially hazardous materials underground. If we allow this development to move forward...we do not really care what happens to the current merchants and vendors in our area....

(T.30-31)

(39) Mr. Manjarrez and Mr. Wilpers also provided some information as to the negative impact of benzene emissions which are a result of allowing clusters of gas stations in an area. (Exhibits 84 and 85; T. 31-32) Upon cross-examination Mr. Manjarrez did admit that he had not done any independent air quality assessment concerning the clustering of gas stations in the area of the subject property. (T. 35)

Agency Comment

(40) The SHA confirmed that an access permit will be required to close one of the accesses to the stie from East-West Highway and to reconstruct the remaining two. (Exhibit 62, Backup p. 30)

(41) The Department of Permitting, Inspections and Enforcement ("DPIE") confirmed that "the 2018 Water and Sewer Plan designates the property in Water and Sewer Category 3, ... in the Growth Tier, and within Tier 1 under the Sustainable Growth Act, approved for development on the public sewer system." (Exhibit 62, p. 29)

(42) The MNCPPC Countywide Planning Division noted that the proposed uses would be less than two miles from the Mall at Prince George's Plaza and close to a multifamily residential community, single family homes, retail/commercial uses, the Sligo Creek Trail, bus stops, and a Capital Bike Share Station. It therefore agreed with Applicant that the Food or Beverage Store would serve the needs of the community, and the Gas Station would be necessary to the surrounding residents/businesses, if those terms are defined as reasonably convenient and useful to the public. (Exhibit 62, Backup pp. 33-34)

(43) The Environmental Planning Section's comment notes that the site "is fully developed and is not associated with any regulated environmental features ..., such as streams, wetlands, or associated buffers" although the "approved floodplain study [indicates that] the southeastern corner of the site is within the existing 100-year floodplain." (Exhibit 62, Backup p. 16) This portion of the floodplain is within the primary management area associated with a stream located to the south of the site and is required to be preserved in a natural state to the fullest extent possible. Any impact to the area should be limited to those necessary for the development of the site. The Environmental Planning Section supports Applicant's proposal and Applicant's proposed impact to the area "for the removal and replacement of an existing parking lot, and for the installation of an underground [stormwater management] facility with associated water conveyance piping" and for off-site impacts proposed for road improvements and utilities. (Exhibit 62, Backup pp. 17-18)

(44) The Department of Parks and Recreation reviewed the request and the applicable Master Plan and Functional Master Plans, and provided the following comment:

> [T]he subject property directly abuts Parklawn Park Building to the south and west... a 15-acre M-NCPCC operated park which contains a playground, picnic benches, a one-open play fields. Vehicular access to the existing park is from East-West Highway, approximately 1,000 feet west of the subject property....
>
> As the applicant has stated, they have been [in] discussion with The Department of Parks and Recreation (DPR) regarding the playground for some time now. DPR staff has analyzed the playground facility, and determined that the existing playground is not heavily used (perhaps due to its poor location) and that other facilities or replacement amenities would better serve the Park and its patrons. The existing playground is in fact, towards the end of its useful life and will be slated for replacement or removal in the near term. The site has been evaluated for opportunities for redesign consistent with its use as a linear park due to the trail facility and stream located onsite.
>
> The applicant has proffered considerable Park improvements and amenities, to mitigate for the loss of the existing playground. The applicant and DPR have reached an agreement in principle and the playground will be removed should the Special Exception be approved. The new Park amenities and improvements are currently being designed in consultation with DPR staff. DPR staff and the applicant are reviewing both the proposed Royal Farms and Parklawn Park Building designs together so that the final developments for each will be compatible and harmonious with each other.

> As part of our concepts review, DPR staff recommends that there be no direct connection from the proposed Royal Farms store to the Park, especially along the southwest corner of the subject property. The corner of the property contains the dumpster and loading areas for the store and will contain a landscaped bufferyard. We recommend that in addition to the landscaping, a black vinyl-clad chain link fence (4' high at a minimum) be added along the property line to discourage the cut-through of the store patrons to our park. Appropriate locations for park entry are identified....
> In summary, DPR staff has no further issues with the applicant's request to develop a Royal Farms on the subject property. With execution of the RFA for additional park facilities and playground removal, Section 27-358 (a) (2) of the Prince George's County Zoning Ordinance will be met. DPR staff recommends approval of the Special Exception subject to the following condition:
>
> > 1. The existing playground at Parklawn Park Building shall be removed prior to the issuance of a Building Permit for the proposed Royal Farms.

(Exhibit 49)

(45) The Historic Preservation Section's comment noted that the site "does not contain and is not adjacent to any Prince George's County historic sites or resources and, therefore, "will not impact any historic sites, historic resources or known archeological sites." (Exhibit 62, Backup p. 27) The Subdivision Section commented that the subdivision plat pertaining to the property dates from 1950 and "the development proposed is exempt from resubdivision under Section 24-111(c)(2) of the prior Subdivision Regulations, because the total development proposed does not exceed 5,000 square feet of gross floor area (GFA)." (Exhibit 62, Backup p. 25)

(46) The Transportation Planning Section provided the following comment on the instant request:

> The subject application seeks to raze an existing building and replace it with a food and beverage store (specifically a Royal Farms) and a gas station. Specifically, the applicant proposes a 4,649 square-foot food and beverage store along with eight fueling dispensers. The property is located within the western quadrant of the intersection of East-West Highway and Riggs Road. Please note that the Special Exception application is subject to and was reviewed using the standards of Section 27 of the prior Zoning Ordinance...
>
> There are no prior conditions of approval on the subject property....
>
> This application is subject to 2009 *Approved Countywide Master Plan of Transportation* (MPOT)....
>
> The subject property fronts East-West Highway (MD-410; MPOT Route ID #A-15) along its northern border and Riggs Road (MD-212; MPOT Route ID #A-12) along its eastern border. The MPOT recommends East-West Highway as a 4-6 lane arterial roadway constructed within 100-120 feet of right-of-way. The MPOT recommends Riggs Road as

a 6-lane arterial roadway constructed within 120-feet of right-of-way. Both roadways fronting the subject property fall within the *1989 Langley Park – College Park – Greenbelt Approved Master Plan and Adopted Sectional Map Amendment* which recommends similar improvements. No additional right-of-way dedication is sought along either of these roads…

The 2009 Approved Countywide Master Plan of Transportation (MPOT) recommends the following facilities:

Planned Bicycle Lane: East-West Highway and Riggs Road
Hard Surface Trail: Sligo Creek Trail…

The applicant's submission displays a bicycle lane along the subject property's frontage of Riggs Road, subject to Maryland State Highway Administration (SHA) approval. Staff supports the design of this facility as depicted on the site plan. While the subject property's frontage of East-West Highway is also a planned bicycle lane per the MPOT, staff does not find the current lane configuration and available right-of-way to be suitable for a bicycle lane at this location. SHA can require the construction of the master plan recommended bicycle lane along this portion of East-West Highway as appropriate, or it may be installed by SHA as part of a future roadway repaving or capital improvement project.

Additionally, a portion of the Sligo Creek Trail has already been constructed to the immediate south and west of the subject property. This trail originates along Riggs Road south of the site and runs west-northwest, where it connects to East-West Highway, providing an additional pedestrian connection between the subject property to both roads…

The subject property falls with the *1989 Langley Park – College Park – Greenbelt Approved Master Plan and Adopted Sectional Map Amendment.* Pages 137-140 contain a series of guidelines related to circulation and transportation. Guidelines 17 and 21 are copied below:

> 17. A system of trails and walks for pedestrians, bicyclists and equestrians should be developed to connect neighborhoods, recreation areas, commercial areas, employment areas, and Metro stations.
>
> 21. As the local road system is expended and improved, bikeways should be incorporated in new highway designs, consistent with proposals in the Trails Plan and in this Master Plan.

Staff finds that the proposed uses do not impair the ability to make transportation related recommendations that are supported by an approved Master Plan or Functional Master Plan. In this case, staff has requested the installation of a bicycle lane on the subject property's frontage of Riggs Road, per MPOT recommendations. Additionally, staff believes that the recommendations for a bicycle lane is consistent with the Sector Plan guidelines 17 and 21 listed above.

In regard to circulation, the current configuration of the site allows for two points of

vehicle access along East-West Highway and an additional point of access along Riggs Road. The applicant's submission seeks to close the eastern most point of access along East-West Highway, thereby consolidating points of access to one point along each road frontage. Staff supports this design feature.

The applicant's submission includes a "Stop & No Left Turn" sign for vehicles egress at the access driveway along East-West Road. Staff supports the restricted movements at this location, but requests that the applicant provide a detailed sheet of the sign at the time of building permit. The point of vehicle access along Riggs Road functions as a right-in/right-out due to the center median which is currently in place along Riggs Road.

The proposed use results in a requirement of 58 onsite parking spaces and one loading space. The applicant's submission displays 63 parking spaces and one loading space. Staff finds the parking to be in conformance with the zoning ordinance.

Per staff request, the applicant has submitted a trip generation analysis comparing the proposed use for a convenience store/ gas station with the current uses. The analysis uses the Institute of Transportation Engineers (ITE) Trip Generation Manual 11th Edition. The applicant analyzed trips generated using 4,655 SF of convenience store/ gas station use which resulted in the generation of 102 AM peak period trips and 88 PM peak period trips. As a point of comparison, the applicant supplied trip generation for current uses which include 1,767 SF of retail use, 3,534 SF of fast food without drive-thru use, and 10,000 SF of pharmacy without drive-thru use, which resulted in 114 AM peak period trips and 113 PM peak period trips. Based on the results of the trip generation analysis, the site will generate fewer trips than the current uses onsite, and therefore will not have an impact to the existing road network. While the subject property does not fall under the purview of an approved preliminary plan of subdivision and therefore is not held to AM and PM peak-hour trips, staff finds the applicant's trip generation analysis to be suitable for the purposes of a special exception.

The applicant has also provided truck turning plans that shows truck access and circulation within the site, as well as access to the location of the underground gas tanks, which staff finds to be suitable. The truck turning plans show that trucks maneuvers to the fueling tanks onsite are sufficient. However, the trunk turning plans do not indicate how trucks will access the loading zone area, located directly west of the proposed convenience store. Staff believes that the loading area is adequate, and the site provides sufficient space for truck movements to the proposed loading area.

Lastly, regarding pedestrian circulation and facilities, a sidewalk is displayed surrounding the entirety of the building as well as along the subject property's frontage of East-West Highway and Riggs Road. Parking is shown along the north and east frontages of the new building, as well as along the north, east, and south frontages of the site. A continental style crosswalk is displayed at both points of vehicle entry. As discussed, a loading area is located to the west of the new building. Bicycle parking is provided directly adjacent to the proposed building. Staff request the applicant provide a detail sheet for the bicycle parking racks…

(Exhibit 51 and 62, Backup pp.19-22)

(47) The Technical Staff agreed with Applicant's Need Analysis and concluded that the Food or Beverage Store would satisfy all criteria in Section 27-355 of the Zoning Ordinance (2019 Edition) since: the use would be convenient to commuters traveling along the two adjacent Master Plan arterials; the two access points to the site would provide safe access and are designed in a manner to ensure adequate traffic flow on-site and within the surrounding neighborhood; the uses are proposed in an existing retail strip shopping center so there should be no effect on the availability of land or the balance of land uses; the property is not in the I-1 or I-2 Zone; and there will be no sales of alcoholic beverages. It also opined that the Gas Station satisfied all criteria in Section 27-358 of the Zoning Ordinance (2019 Edition) since: the property has 371 feet of frontage along East-West Highway and 200 feet of frontage along Riggs Road; East-West Highway has a right-of-way width of 150 feet and Riggs Road has a right-of-way width of 100 feet near the access points; the site is located at least 300 feet from any lot on which a school, library or hospital is located, and the playground on MNCPPC property is within 300 feet it will be removed prior to the issuance of a building permit; the plan does not include the display and rental of cargo trailers, trucks or similar uses, nor does it include the storage or junking of wrecked vehicles; the property is a corner lot and the two accesses are 35-feet-wide and 30.9-feet-wide, respectively, are more than 20 feet from the point of curvature and more than 12 feet from the side and rear lot lines of any adjoining lots; access driveways are defined by curbing; there is 13.2-foot-wide sidewalk along the front of the building, a 6.7-foot-wide sidewalk along the east side of the building, and a 4.7-foo-wide sidewalk along the west side of the building, and there is an existing sidewalk along both rights-of-way; staff recommends connecting all proposed and existing sidewalks to the building; all gas pumps are more than 25 feet behind the street line; there will be no vehicle repair services at the site; architectural elevations incorporate PVC trim, cementitious siding, brick veneer and stone veneer, and the gasoline pumps and canopy are designed to coordinate well with the architecture and materials of the main building.

(48) The Technical Staff ultimately recommended approval of the Gas Station and Food or Beverage Store, reasoning as follows:

> The purposes of Subtitle 27 … as set forth in Section 27-102(a)(1-15) of the Zoning Ordinance, are generally to protect the health, safety and welfare of the public, to promote compatible relationships between various land uses, to guide orderly development, and to ensure adequate public facilities and services. Staff finds that the proposed use will provide jobs within the area. The proposed use will provide services, including food, beverage, and gas for the convenience of the surrounding Community. There will be additional tax revenue created by sales tax and gasoline tax, ensuring economic stability within all parts of the County.
>
> [The site is located within the Established Communities policy area. The 2014 Plan Prince George's 2035 General Plan describes Established Communities as areas appropriate for context-sensitive infill and low-to medium-density development and recommends maintaining and enhancing existing public services, facilities, and infrastructure to ensure

that the needs of residents are met. The proposed food [or] beverage store, in combination with a gas station, serves the needs of both vehicles and pedestrians along the heavily trafficked MD 410 commercial corridor....

The subject property is located in the C-S-C Zone, and each of the proposed use designation are permitted as special exceptions. The master plan ... goal for commercial activities included locations that provided integrated transportation systems composed of pedestrian and bicycle movements, a variety of commercial uses and spaces, and commercial activities that are convenient to dwelling units, in order to minimize the need for frequent automobile trips. The proposed development displays a bicycle lane along the subject property's frontage of Riggs Road, subject to Maryland State Highway approval [and]...a condition has been added [concerning] sidewalks from the street frontages to food [or] beverage store for improved pedestrian circulation to and from the site. ...

The food [or] beverage store will screen the gas pumps from nearby residential development. ...The proposed development provides a safe, internal circulation for vehicles and pedestrians, in addition to safe ingress and egress of vehicles from surrounding public rights-of-way. The number of access points along MD 410 will be reduced from two to one, and an additional point of access will remain on Riggs Road. ...

Staff finds that the proposed use is compatible with the surrounding existing commercial and residential development. The development shall comply with required site design standards, physical features, and align with the harmony of the community ultimately, the proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood. ...

A special exception use is considered compatible with uses permitted by sight within the Commercial Shopping Center (C-S-C) Zone if specific exception criteria are met. A special exception must be approved if the applicant satisfies the criteria which are intended to address any distinctive adverse impacts associated with the use.

Based on the applicant's statement of justification, the analysis contained in the technical staff report associated referrals, and materials in the record, the applicant has demonstrated conformance with the required special exception findings, as set forth in Section 27-317 ..., Section 27-355 ..., and Section 27-358 of the prior Prince George's County Zoning Ordinance. ...

Therefore, staff recommends [approval] of Special Exception SE-4846 for Royal Farms #393, ... subject to ... conditions.

(Exhibit 62, pp 5-7,14)

APPLICABLE LAW

(1) As noted, *supra,* the subject property was rezoned to the CGO Zone upon the effective date of the Countywide Map Amendment (April 1, 2022). However, the recently revised Zoning Ordinance allows Applicant to choose to develop pursuant to the

provisions of the prior Zoning Ordinance provisions applicable to its prior C-S-C zoning. (Prince George's County Code, Section 27-1703) The District Council also amended the provisions in Section 27-358 upon its adoption of CB-48-2021. The bill included a new Section 27-358 (a)(12) that notes the new provisions would not apply to Applications accepted prior to January 1, 2022 and ultimately approved. The instant request was accepted on November 18, 2021. Accordingly, it is reviewed for compliance with the provisions of Section 27-355 in effect prior to the adoption of CB-48-2021. (I have included both versions of that Section below for ease of reference). Both uses may be approved if they satisfy Sections 27-317, 27-355 and 27-358 of the Prince George's County Zoning Ordinance (2019 Edition). These Sections provide as follows:

Sec. 27-317. Required findings.

(a) A Special Exception may be approved if:

(1) The proposed use and site plan are in harmony with the purpose of this Subtitle;

(2) The proposed use is in conformance with all the applicable requirements and regulations of this Subtitle;

(3) The proposed use will not substantially impair the integrity of any validly approved Master Plan or Functional Master Plan, or, in the absence of a Master Plan or Functional Master Plan, the General Plan;

(4) The proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area;

(5) The proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood; and

(6) The proposed site plan is in conformance with an approved Type 2 Tree Conservation Plan; and

(7) The proposed site plan demonstrates the preservation and/or restoration of the regulated environmental features in a natural state to the fullest extent possible in accordance with the requirement of Subtitle 24-130(b)(5).

(b) In addition to the above required findings, in a Chesapeake Bay Critical Area Overlay Zone, a Special Exception shall not be granted:

(1) where the existing lot coverage in the CBCA exceeds that allowed by this Subtitle, or

(2) where granting the Special Exception would result in a net increase in the existing lot coverage in the CBCA.

Sec. 27-355. Food or beverage store.

(a) A food or beverage store may be permitted, subject to the following:

(1) The applicant shall show a reasonable need for the use in the neighborhood;

(2) The size and location of, and access to, the establishment shall be oriented toward meeting the needs of the neighborhood;

(3) The proposed use shall not unduly restrict the availability of land, or upset the balance of land use, in the area for other allowed uses;

(4) In the I-1 and I-2 Zones, the proposed use shall be located in an area which is (or will be) developed with a concentration of industrial or office uses;

(5) The retail sale of alcoholic beverages from a food or beverage store approved in accordance with this Section is prohibited; except that the District Council may permit an existing use to be relocated from one C-M zoned lot to another within an urban renewal area established pursuant to the Federal Housing Act of 1949, where such use legally existed on the lot prior to its classification in the C-M Zone and is not inconsistent with the established urban renewal plan for the area in which it is located.

Sec. 27-358. Gas station. (As revised by CB-48-2021)

(a) A gas station may be permitted, subject to the following:

(1) The subject property shall have at least one hundred and fifty (150) feet of frontage on and direct vehicular access to a street with a right-of-way width of at least seventy (70) feet;

(2) The nearest gas pump on the subject property shall be located at least three hundred (300) feet from any lot on which a school, outdoor playground, library, hospital, or a structure used as a residence is located;

(3) The use shall not include the display and rental of cargo trailers, trucks, or similar uses, except as a Special Exception in accordance with the provisions of Section 27-417;

(4) The storage or junking of wrecked motor vehicles (whether capable of movement or not) is prohibited;

(5) Access driveways shall be not less than thirty (30) feet wide unless a lesser width is allowed for a one-way driveway by the Maryland State Highway Administration or the County Department of Permitting, Inspections, and Enforcement, whichever is applicable, and shall be constructed in compliance with the minimum standards required by the County Road Ordinance or Maryland State Highway Administration regulations, whichever is applicable. In the case of a corner lot, a driveway may begin at a point not less than twenty (20) feet from the point of curvature (PC) of the curb return or the point of curvature of the edge of paving at an intersection without curb and gutter. A driveway may begin or end at a point not less than twelve (12) feet from the side or rear lot line of any adjoining lot;

(6) Access driveways shall be defined by curbing;

(7) A sidewalk at least five (5) feet wide shall be provided in the area between the building line and the curb in those areas serving pedestrian traffic;

(8) Gasoline pumps and other service appliances shall be located at least twenty-five (25) feet behind the street line;

(9) Repair service shall be completed within forty-eight (48) hours after the vehicle is left for service. Discarded parts resulting from any work shall be removed promptly from the premises. Automotive replacement parts and accessories shall be stored either inside the main structure or in an accessory building used solely for the storage. The accessory building shall be wholly enclosed. The building shall either be constructed of brick (or another building material similar in appearance to the main structure) and placed on a permanent foundation, or it shall be entirely surrounded with screening material. Screening shall consist of a wall, fence, or sight-tight landscaping material, which shall be at least as high as the accessory building. The type of screening shall be shown on the landscape plan.

(10) Details on architectural elements such as elevation depictions of each facade, schedule of exterior finishes, and description of architectural character of proposed buildings shall demonstrate compatibility with existing and proposed surrounding development.

(11) At least two (2) Level 3 or DC fast charger electric vehicle charging stations must be provided on-site for public use.

(12) Any Special Exception or Detailed Site Plan application filed prior to January 1, 2022, and approved shall not be subject to this provision and shall be deemed a conforming use.

(b) In addition to what is required by Section 27-296(c), the site plan shall show the following:

(1) The topography of the subject lot and abutting lots (for a depth of at least fifty (50) feet);

(2) The location and type of trash enclosures; and

(3) The location of exterior vending machines or vending area.

(c) Upon the abandonment of a gas station, the Special Exception shall terminate and all structures exclusively used in the business (including underground storage tanks), except buildings, shall be removed by the owner of the property. For the purpose of this Subsection, the term "abandonment" shall mean nonoperation as a gas station for a period of fourteen (14) months after the retail services cease.

(d) When approving a Special Exception for a gas station, the District Council shall find that the proposed use:

(1) Is necessary to the public in the surrounding area; and

(2) Will not unduly restrict the availability of land, or upset the balance of land use, in the area for other trades and commercial uses.

Sec. 27-358. Gas station. (Prior to enactment of CB-48-2021 and used to evaluate the request)

(a) A gas station may be permitted, subject to the following:

(1) The subject property shall have at least one hundred and fifty (150) feet of frontage on and direct vehicular access to a street with a right-of-way width of at least seventy (70) feet;

(2) The subject property shall be located at least three hundred (300) feet from any lot on which a school, outdoor playground, library, or hospital is located;

(3) The use shall not include the display and rental of cargo trailers, trucks, or similar uses, except as a Special Exception in accordance with the provisions of Section 27-417;

(4) The storage or junking of wrecked motor vehicles (whether capable of movement or not) is prohibited;

(5) Access driveways shall be not less than thirty (30) feet wide unless a lesser width is allowed for a one-way driveway by the Maryland State Highway Administration or the County Department of Permitting, Inspections, and Enforcement, whichever is applicable, and shall be constructed in compliance with the minimum standards required by the County Road Ordinance or Maryland State Highway Administration regulations, whichever is applicable. In the case of a corner lot, a driveway may begin at a point not less than twenty (20) feet from the point of curvature (PC) of the curb return or the point of curvature of the edge of paving at an intersection without curb and gutter. A driveway may begin or end at a point not less than twelve (12) feet from the side or rear lot line of any adjoining lot;

(6) Access driveways shall be defined by curbing;

(7) A sidewalk at least five (5) feet wide shall be provided in the area between the building line and the curb in those areas serving pedestrian traffic;

(8) Gasoline pumps and other service appliances shall be located at least twenty-five (25) feet behind the street line;

(9) Repair service shall be completed within forty-eight (48) hours after the vehicle is left for service. Discarded parts resulting from any work shall be removed promptly from the premises. Automotive replacement parts and accessories shall be stored either inside the main structure or in an accessory building used solely for the storage. The accessory building shall be wholly enclosed. The building shall either be constructed of brick (or another building material similar in appearance to the main structure) and placed on a permanent foundation, or it shall be entirely surrounded with screening material. Screening shall consist of a wall, fence, or sight-tight landscaping material, which shall be at least as high as the accessory building. The type of screening shall be shown on the landscape plan.

(10) Details on architectural elements such as elevation depictions of each facade, schedule of exterior finishes, and description of architectural character of proposed buildings shall demonstrate compatibility with existing and proposed surrounding development.

(b) In addition to what is required by Section 27-296(c), the site plan shall show the following:

(1) The topography of the subject lot and abutting lots (for a depth of at least fifty (50) feet);

(2) The location and type of trash enclosures; and

(3) The location of exterior vending machines or vending area.

(c) Upon the abandonment of a gas station, the Special Exception shall terminate and all structures exclusively used in the business (including underground storage tanks), except buildings, shall be removed by the owner of the property. For the purpose of this Subsection, the term "abandonment" shall mean nonoperation as a gas station for a period of fourteen (14) months after the retail services cease.

(d) When approving a Special Exception for a gas station, the District Council shall find that the proposed use:

(1) Is necessary to the public in the surrounding area; and

(2) Will not unduly restrict the availability of land, or upset the balance of land use, in the area for other trades and commercial uses.

(2) The request must also satisfy the purposes of the commercial zones, in general, and the C-S-C Zone, in particular, found in Sections 27-446(a) and 454(a) of the Zoning Ordinance (2019 Edition):

Sec. 27-446. General purposes of Commercial Zones.

(a) The purposes of Commercial Zones are:

(1) To implement the general purposes of this Subtitle;

(2) To provide sufficient space and a choice of appropriate locations for a variety of commercial uses to supply the needs of the residents and businesses of the County for commercial goods and services;

(3) To encourage retail development to locate in concentrated groups of compatible commercial uses which have similar trading areas and frequency of use;

(4) To protect adjacent property against fire, noise, glare, noxious matter, and other objectionable influences;

(5) To improve traffic efficiency by maintaining the design capacities of streets, and to lessen the congestion on streets, particularly in residential areas;

(6) To promote the efficient and desirable use of land, in accordance with the purposes of the General Plan, Area Master Plans and this Subtitle;

(7) To increase the stability of commercial areas;

(8) To protect the character of desirable development in each area;

(9) To conserve the aggregate value of land and improvements in the County; and

(10) To enhance the economic base of the County.

Sec. 27-454. C-S-C Zone (Commercial Shopping Center).

(a) **Purposes.**

(1) The purposes of the C-S-C Zone are:

(A) To provide locations for predominantly retail commercial shopping facilities;
(B) To provide locations for compatible institutional, recreational, and service uses;
(C) To exclude uses incompatible with general retail shopping centers and institutions; and
(D) For the C-S-C Zone to take the place of the C-1, C-2, C-C, and C-G Zones.

(3) Applicant is requesting some indoor and outdoor seating at the Food or Beverage Store and the Special Exception Site Plan notes that there will be an "Eating or Drinking Establishment" on the site (Exhibit 40). This necessitates a brief review of the definitions section of the Zoning Ordinance. An "Eating or Drinking Establishment" and a "Food or Beverage Store" are defined in Sections 107.01 (a)(81.1) and (91.1), respectively, as follows:

(81.1) **Eating or Drinking Establishment:** An establishment that provides food or beverages for consumption on or off premise, which may be developed freestanding, on a pad site or attached to another building, or located within another building or located within a group of buildings, which may include a drive-through service, carryout, outdoor eating, music of any kind, patron dancing, or entertainment, excluding adult entertainment uses.

(91.1) **Food or Beverage Store:** A use providing the retail sales of food, beverages, and sundries primarily for home consumption, and may include food or beverage preparation. Does not include a Department or Variety Store that provides incidental sales of candy, gum and similar non-refrigerated items at a check-out counter, or in a standard vending machine.

Clearly, the "Food or Beverage Store" is defined in a manner that would allow limited indoor and outdoor seating since it merely adds that the use is "primarily for home consumption." Eating or Drinking Establishments, on the other hand, are defined to allow much more (i.e., drive through service, music, dancing and certain entertainment). Additionally, it is slightly nonsensical to refer to all of the proposed Store as a "Food or Beverage Store" but refer to the seating alone as an "Eating or Drinking Establishment". For these reasons I would remove "Eating or Drinking Establishment" from the Site Plan, and from the Parking and Loading Schedule. While the Parking Regulations in the Zoning

Ordinance do not specifically list a "Food or Beverage Store" use in the parking tables Section 27-571 notes "[f]or uses not specifically listed, the requirement of the most nearly similar use shall be applied." The uses are very similar, so it would be proper to use the Eating or Drinking Establishment parking calculations in determining how many parking spaces will be required for the amount of indoor and outdoor seating that will be provided with the Food or Beverage Store.

Necessity/Need

(4) The Zoning Ordinance and the County Code do not define the terms "necessary" or need. However, undefined words or phrases shall be construed according to common usage, while those that have acquired a particular meaning in the law shall be construed in accordance with that meaning. (Prince George's County Code, Section 27-108.01(a)) Webster's New World Dictionary (2nd College Edition) defines it as "essential" and "indispensable". The Oxford Languages Dictionary (online) defines "need" as "circumstances in which something is necessary" or "a thing that is wanted or required." Thus "need" and "necessary" share similar definitions.

(5) In Brandywine Enterprises, Inc. v. County Council, 117 Md. App. 525,540 (1997), the Court of Special Appeals addressed the definition of "necessary" in the County's Zoning Ordinance as it relates to rubble fills and noted that "'necessary'... means necessary rather than reasonably convenient or useful." The Court went on to note that the best method for determining need for a rubble fill would be to assess whether there would be an actual deficit of capacity. In a case involving liquor licenses, Baltimore County Licensed Beverage Association, Inc. v. Kwon, 135 Md. App. 178, 194 (2000), the Court of Special Appeals held that the meaning is dependent upon the context in which "necessary" is used. The Court then found that "'necessary,' in this instance, means that the transfer of the liquor license to the transfer site will be 'convenient, useful, appropriate, suitable, proper, or conducive' to the public in that area." Accordingly, I believe the proper standard to apply in the review of both special exception requests is whether the Gas Station/Food or Beverage Store will be "convenient, useful, appropriate, etc." given the nature of the use, and the District Council has adopted this definition of need/necessity in prior Gas Station Special Exception and Food or Beverage Store Special Exception heard by it.

Special Exception

(6) The Court of Appeals provided the standard to be applied in the review of a Special Exception application in Schultz v. Pritts, 291 Md 1, 432 A2d 1319, 1325 (1981):

> Whereas, the applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements, he does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community. If he shows to the satisfaction of the [administrative body] that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material . . . . But if there is no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the operation of the comprehensive plan, a denial of an application for a special exception use is arbitrary, capricious, and illegal.

CONCLUSIONS OF LAW

(1) The general purposes of the Zoning Ordinance are found in Section 27-102 (of the 2019 Edition). I agree with the expert land planner's analysis as to why/how the request meets all applicable purposes (Exhibit 76, pp. 5-13) but would note that the instant Application satisfies the following purposes for the following reasons in particular:

> ***To protect and promote the health, safety, morals, comfort, convenience, and welfare of the present and future inhabitants of the County***

The Gas Station will serve the needs of all County residents that rely on the automobile as a means of transportation. The Food or Beverage Store will further the comfort and convenience of all purchasing gas at the site as it will provide a "one-stop" shopping experience. It will also be convenient for pedestrians or others not purchasing gas in the area since it will provide an opportunity to purchase items of food or drink on their way to work, school, home, or exercise.

> ***To implement the General Plan, Area Master Plans, and Functional Master Plans***

The 2014 General Plan placed the property within the Established Communities. This proposal furthers the General Plan's vision of context sensitive infill development, and the requested uses are permitted in the zone. While the Master Plan has no particular recommendation for the subject property, it did address the need to update the older commercial centers in the planning area, and the SMA retained the commercial zoning of the site (imposing the C-S-C Zone due to the phasing out of prior obsolete zoning categories) thereby recognizing the need for retail/ commercial uses such as those proposed in the instant request. The record indicates no impact upon any Functional Master Plan. Accordingly, this purpose is satisfied.

To promote the conservation, creation, and expansion of communities that will be developed with adequate public facilities

Development of the subject property in the manner proposed by the Applicant will have no negative impact on the public facilities within the area since all vehicular trips are within the trip caps previously imposed on development on the property, no residential development is proposed, and no impact to other public facilities has been identified.

To promote the most beneficial relationship between the uses of land and buildings and protect landowners from adverse impacts of adjoining development

The two uses will be developed in accordance with all applicable laws once the playground is removed from the MNCPPC Park. The developer will be providing stormwater management and landscaping to a site that is currently 100% impervious, adding new sidewalks for safe access to the store and better connection to the adjacent trail, adding fencing between the store and the park property, and will decrease the current number of driveway accesses, thereby reducing the possibility of car/pedestrian accidents along two highly traveled arterials. The architectural elevations reveal that the uses will be designed in an attractive manner that should not detract from the other properties in the area. This purpose is, therefore, met.

To encourage economic development activities that provide desirable employment and a broad, protected tax base

Both uses ensure that a certain number of jobs will be provided and that sales taxes will be collected, thereby contributing to the County's tax base.

The Application satisfies the purposes of the commercial zones and the C-S-C Zone since the applicable general purposes of the Zoning Ordinance are implemented (for reasons noted *supra*); the uses will be a redevelopment of an existing commercial site and Applicant has demonstrated that both would serve the needs of the residents and businesses in the area; the site is of sufficient size to accommodate the proposed retail uses in a safe manner; these commercial/retail uses are located at a compatible commercial node which already includes a similar mix of uses; the development will satisfy all setback requirements, add landscaping and fencing, and should therefore adequately protect adjacent properties; the reduction of peak hour vehicular trips, removal of one access and relocation of the remaining two to reduce pedestrian or other conflict will improve traffic efficiency; the redevelopment of this site will provide stability to the commercial uses and the design of both uses will protect the character of development in the area; active uses on the site will conserve the aggregate value of land and will

enhance the economic base of the County; the new commercial/retail uses are being developed on a site that has been used for such uses for decades, and neither will detract from the character of the area; and the proposed uses are compatible with existing uses and with service and general retail shopping uses in general.

(Sections 27-317(a) (1), 446(a) and 454(a))

(2) The Food or Beverage Store and (once the playground removal occurs) the Gas Station can be found to be in conformance with the applicable provisions of the Zoning Ordinance. (Section 27-317 (a)(2))

(3) Again, both uses conform to the General Plan's vision of context sensitive infill development, the Master Plan's goals for existing, older commercial sites, the Functional Plans' requirements concerning bicycle lanes and environmental policies, and the SMA's determination that C-S-C zoning and uses should be preserved on the site. (Section 27-317(a)(3))

(4) The uses will offer needed services to residents, visitors, and employees within the area - useful and convenient to those who live/work near or travel in the area; the developer will be adding much needed landscaping, sufficient parking and lighting; and the site will be designed in an attractive manner that does not detract from the diverse character of the neighborhood. Accordingly, it will not adversely affect the health, safety, or welfare of residents/workers in the area, nor be detrimental to the use or development of adjacent properties or the general neighborhood. (Sections 27-317(a)(4) and 27-317(a)(5))

(5) The subdivision plan was approved for this property prior to the adoption of the Woodland and Wildlife Habitat Conservation Ordinance was enacted, the site is completely impervious, and the site has received an exemption letter from the requirement for a Tree Conservation Plan. Moreover, Staff has indicated there are no regulated environmental features on the site with the exception of the southeastern corner that lies within the existing 100-year floodplain, and it will be minimally impacted to provided underground stormwater assistance, to remove and replace existing parking and for safety improvements to the existing entrance on Riggs Road. (Section 27-317(a)(6) and (7))

(6) The subject property does not lie within a Chesapeake Bay Critical Area Overlay Zone. (Section 27-317 (b))

(7) The Food or Beverage Store satisfies the criteria found in Section 27-355 of the Zoning Ordinance. Applicant's expert prepared a market study that established a reasonable trade area near the site and noted that, given the dearth of fresh food options

at the other Food or Beverage Stores within said area, their age, and their smaller size, there is a reasonable need for the proposed store if need is defined as "useful, appropriate, and convenient." (Section 27-355 (a)(1)) The subject property is adjacent to two arterials, East-West Highway and Riggs Road; there is adequate parking; there are interconnecting sidewalks providing safe access to the Store; and,the Store is of sufficient size to offer a bevy of fresh and packaged foods. Thus, the Store can be found to meet the needs of the neighborhood. (Section 27-355 (a)(2)) The Store will be a redevelopment of an existing commercial property and is a use that works well with the mix of retail/commercial/residential uses in the immediate area, so approval should not unduly restrict the availability of land or upset the balance of land use in the area for other allowed uses. (Section 27-355 (a)(3)). The property is not located in the I-1 or I-2 Zones. (Section 27-355 (a)(4)) There will be no sale of alcoholic beverages in the Store, and a note will be added to that effect. (Section 27-355 (a)(5))

(8) Similarly, once the playground's removal is addressed the Gas Station can be found to satisfy the express provisions regarding its approval. The property has approximately 371 feet of frontage along East-West Highway, an arterial with 100-120-feet of right-of-way, and 200 feet of frontage along Riggs Road, an arterial with 120 feet of right-of-way. (Exhibit 62, p.10 and Backup p. 19). (Section 27-358(a)(1). However, this record is replete with differing by similar figures and the Special Exception Site Plan should be revised to expressly note the among of frontage and the right-of-way widths.

(9) There are no schools, libraries, or hospitals on a lot within 300 feet of the subject property. Applicant filed its request prior to January 1, 2022 and pursuant to the provisions of CB-48-2021 it is not required to provide a 300-foot setback from any lot on which a structure used as a residence is located, nor to provide electric vehicle charging stations. There is an existing playground on a lot within 300 feet of the Gas Station, but it is slated for removal and a condition of approval will prohibit the issuance of any building permits for the use prior to the playground's removal. (Section 27-358(a)(2))

(10) The Applicant states that there will not be any display or rental of cargo trailers, trucks, or similar uses; and the storage/junking of wrecked motor vehicles is prohibited. (Sections 27-358(a)(3) and (4)) However, notes to this effect should be added to the Special Exception Site Plan.

(11) There are two access driveways into the special exception site and each is over thirty feet wide, in excess of 12 feet from any side or rear lot line, and more than 20 feet from the point of curvature. (Section 27-358(a)(5)) However, the exact dimensions should be clarified on the Special Exception Site Plan since varying amounts, all beyond the minimum prescribed in the law, were discussed in the record.

(12) The access driveways will be defined by curbing. (Section 27-358(a)(6))

(13) There is 13.2-foot-wide sidewalk along the front of the building, a 6.7-foot-wide sidewalk along the east side of the building, and a 4.7-foot-wide sidewalk along the west side of the building, and there are existing sidewalks along both rights-of-way. (Section 27-358 (a)(7))

(14) The concrete upon which the gasoline pumps sit is more than 25 feet from the street line of Riggs Road and East-West Highway. (Section 27-358(a)(8))

(15) There will be no repair services offered on site, but a note to that effect should be added. (Section 27-358(a)(9))

(16) Applicant submitted architectural elevations which depict each façade and exterior finishes and the proposed building and canopy on site will not detract from the surrounding development. (Section 27-358 (a)(10))

(17) Applicant filed its request prior to January 21, 2022. It, therefore, need not provide electric vehicle charging stations on site. ((Section 27-358(a)(11) and (12))

(18) The Special Exception Site Plan shows the topography of the subject property and abutting lots for a depth of at least 50 feet, as well as the location and type of trash enclosure, and the location of air pump stations and vacuums. There will be no exterior vending machines. (Section 27-358(b))

(19) A note should be added to the Special Exception Site Plan to state what must be done upon the abandonment of the Gas Station. (Section 27-358(c))

(20) Applicant provided sufficient evidence to show that the Gas Station is necessary to the public in the surrounding area, in that it is reasonably convenient and useful to the traveling public within the trade area established by the expert marketing witness. It will not upset the balance of land use in the area for other trades and commercial uses, since it is a redevelopment of a fairly small parcel that has been slated for retail/commercial use for nearly sixty years, the 1.9 acres is a mere fraction of the total land area in the C-S-C Zone, and most of the surrounding properties are developed. (Section 27-358(d))

(21) The Technical Staff recommended a condition limiting the number of parking spaces on site and the Applicant objects. I believe the Applicant should be allowed the number of spaces shown on its site plan since the Staff Report only noted that the number of spaces far exceeds the minimum but did not give further justification for its position, while Applicant supported its parking request as the number of spaces requested is what they've found to be workable given the varied periods of rush and downtime that its stores experience, it would like to avoid folks parking in the Gas Station lanes and running into

the Store, and it would like to have sufficient spaces to convert into electric vehicle charging spaces in the future.

(22) The Technical Staff also requested that Applicant erect a vinyl-clad chain link fence between the park property and the subject property. I agree with the resident that noted such a fence would detract from the character of the neighborhood and have added a condition that the fence either be iron or board-on-board and that it be five-feet-tall (at a minimum) in order to reduce the possibility of customers wandering onto park property and to be aesthetically pleasing.

(23) Finally, I would commend all of the citizens that appeared at the hearing and offered testimony on the Application, and briefly address the majority of their concerns. Many were concerned with the possible increase in traffic and traffic accidents. Applicant's expert witness on transportation planning, the SHA and the Technical Staff's Transportation Planning Section reviewed the proposal and expressly or tacitly agreed that the proposed uses would generate fewer peak hour vehicular trips than those that have been permitted by right at the location, and that limiting the accesses will further reduce traffic conflict. Others testified to the increasing number and severity of storm events and believed the uses would adversely impact Sligo Creek or regulated environmental features. Again, the experts disagree: the site has an approved Natural Resources Inventory Equivalency Letter that determined no on-site regulated environmental features will be impacted, and Applicant is only allowed to disturb the small amount of floodplain on site to remove and replace an existing parking lot, install an underground much-needed stormwater management facility with associated water conveyance piping, and make changes to aid in the reconfiguration of Riggs Road. All of these limited impacts are permitted by law. Moreover, Applicant will be bringing stormwater management to a site that has none.

Some were opposed because they believed that the addition of a gas station would adversely impact the health of those residing in the area. I did read the materials provided concerning benzene admissions and would agree that this is an area of concern. However, the model used in the article concluded that clustering of gas stations causes additional harm and defined a "cluster" as four gas stations at an intersection, which is not a factor in this case. The article also assumed no buildings to be present when measuring emissions- also not a factor in this case. Applicant noted that, pursuant to State and Federal law, it is required to construct a vapor recovery system, and provided detail on its system and the checks and balances to ensure that vapors are not emitted, spills not occur, and constant monitoring takes place.

Many were concerned with the removal of the playground. However, the facts surrounding the removal are not germane to my review of the request since they pertain to a separate governmental entity and Applicant. The only issue for me is whether a

playground will be located within the required setback and a condition of approval will ensure that not be the case.

Finally, Applicant must only prove that its request satisfies the Zoning Ordinance and there is nothing in Sections 27-317, 355 or 358 that would mandate denial of the request based on testimony/articles that generically note that gas emissions may impact health, or because the food choices may be undesirable to some, or because the uses may limit competition, or because there is a trail and a creek near the property. Additionally, caselaw makes clear that Applicant need not prove that its request would be a boon to the community, just that it will not adversely affect the community at this particular location more than it would at another location within the Zone.(Rockville Fuel & Feed Co. v. Board of Appeals, 257 Md. 183 (1970)) I don't believe the impact of this Gas Station and Food or Beverage Store will more adversely impact its surroundings at this location since it is a redevelopment and improvement to an existing retail/commercial property and it implements many of the goals of the various planning documents. For these reasons I would approve the request.

DISPOSITION

Special Exception 4846 is Approved, subject to the following conditions:

1. Prior to signature approval of the Special Exception Site Plan, the following revisions shall be made:

    a. All plan drawings shall be revised to show 4,655 square feet or less square footage for the gross floor area of the Food or Beverage Store.

    b. The Gateway and Pylon sign setbacks shall be shown on the Special Exception Site Plan.

    c. A sign location key map shall be provided on the signage plan.

    d. The Special Exception Site Plan shall be revised to include notes addressing compliance with all provisions of Section 27-355 and Section 27-358 (in effect immediately prior to the adoption of CB-48-2021), including what must occur upon abandonment. The term "For Concept Purposes Only" shall be removed from the Special Exception Site Plan as well.

    e. The parking table shall be revised to: delete reference to an" Eating or Drinking Establishment" and insert "Food or Beverage Store"; to specify the

number of employees and the number of indoor seats provided; and, to show loading space dimension standards.

f. Include a general note that states that the EV charging stations provided will be Level 3 or DC fast charger stations.

g. Revise the Special Exception Site Plan to provide a 5-foot-wide sidewalk from each street frontage to the Food or Beverage Store.

h. Provide a six-foot-tall iron or (board on board fence) to be added along the southern property line between the park property and the subject property.

2. Prior to issuance of a building permit, Applicant shall revise the Special Exception Site Plan as follows and submit it to the Office of the Zoning Hearing Examiner for approval and inclusion in the record:

a. Remove the existing playground at Parklawn Park Building.

b. Provide a detailed sheet for the Stop & No Left Turn signage assembly at the point of vehicle exit along MD 410 (East-West Highway).

c. Provide a detail sheet for the bicycle racks, specifically an inverted U-style or similar model that provides two points of contact to secure a parked bicycle of at least 20 inches in width.

[Note: The Special Exception Site Plan Landscape Plan and accompanying plans and details are set forth in Exhibit 40]

EXHIBIT F

DISTRICT COUNCIL FOR PRINCE GEORGE'S COUNTY, MARYLAND
OFFICE OF THE ZONING HEARING EXAMINER

SPECIAL EXCEPTION
4816

AND

APPLICATION TO AUTHORIZE THE ISSUANCE OF BUILDING PERMITS FOR STRUCTURES WITHIN A PROPOSED RIGHT-OF-WAY

DECISION

Application:	Gas Station in Conjunction with a Food or Beverage Store
Applicant:	Two Farms, Inc.
Opposition:	Sangee and Sulojana Tharmarajah, et al.
Hearing Dates:	November 6, 2019, December 17, 2019, December 18, 2019, January 21, 2020, January 22, 2020, February 12, 2020, February 25, 2020, February 27, 2020 and March 5, 2020
Hearing Examiner:	Joyce B. Nichols
Disposition:	Approval with Conditions

NATURE OF PROCEEDINGS

(1) Special Exception 4816 is a request for permission to use approximately 2.94 acres of land, in the C-S-C (Commercial Shopping Center) Zone, located on the west side of MD 210 (Indian Head Highway), in the southwest quadrant of its intersection with MD 375 (Livingston Road), also identified as 15808 and 15812 Livingston Road, 100 Biddle Road, and 16001 Indian Head Highway, Accokeek, Maryland, for a Gas Station with an associated Food or Beverage Store.

(2) Application to Authorize the Issuance of Building Permits for Structures Within a Proposed Right-of-Way is for two (2) pylon signs, 22 parking spaces, free air station, five (5) multi dispenser gasoline pumps with canopy, large vehicle parking areas, all of the required landscaping, and a stormwater management facility, all within the proposed rights-of-way for F-11 and C-525. The original hearing on this Application was held April 10, 2019 and the Zoning Hearing Examiner issued its Decision dated May 1, 2019 recommending approval of this Application. On November 1, 2019, the District Council issued its ORDER of Remand to the Zoning Hearing Examiner to reopen the record and receive additional evidence regarding (1) the ownership of Accokeek Exxon and (2) any additional evidence relating to the statutory approval requirements of §27-259(g)(1)(A)-(D).

(3) Sangee and Sulojana Tharmarajah et al, appeared in opposition to the Applications.

(4) The Technical Staff (Exhibit 24) recommended approval of the Special Exception with conditions and the Planning Board did not elect to have a hearing but in lieu thereof adopted the recommendation of the Technical Staff (Exhibit 26).

(5) At the conclusion of the evidentiary hearing on March 5, 2020, the record was left open for the submittal of legal Memoranda from all counsel. Subsequent to the March 5, 2020 hearing date, emergency measures were adopted by the Prince George's County Council to help stem the spread of COVID-19. Deadlines for action on matters before the Legislative Branch were stayed by CR-10 and CR-35-2020 from March 17- July 18, 2020. Owner/Applicants filed their Joint Post-Hearing Memorandum on July 20, 2020. Protestants Dharam Singh Geiaya et al., filed their Proposed Finding of Fact and Conclusions of Law on July 20, 2020. The Memorandum of Accokeek, Mattawoman, Piscataway Creek Communities Council, Inc., in Opposition to Two Farms, Inc.'s Request for a Special Exception and Appendix was filed June 3, 2020[1]

FINDINGS OF FACT

Subject Property

(1) The Subject Property is comprised of four (4) parcels of unsubdivided acreage known as Tax Map 151, Grid E-4, Parcels 52, 53, 54 and 55. The Subject Property is triangular in shape, and is bounded on each of its edges with public roads: Indian Head Highway to the south and east, Livingston Road to the north, and Biddle Road to the west.

(2) The Subject Property is currently occupied by four main buildings, three of which are believed to be vacant. All of the buildings appear to have been constructed in the late 1950s, and all are visible on the M-NCPPC 1965 aerial photograph and a 1963 aerial photograph from a commercial source, but no development of the Subject Property existed in a 1957 aerial photograph from the same commercial source. From east to

[1] Madeline Kochen is not admitted to the Maryland Bar. Ms. Kochen may be admitted to the Bar in other states but has agreed that she is not admitted in Maryland. Ms. Kochen was advised as early as December 2019 that if she wanted to be accorded attorney status in the Application and be awarded all the rights and privileges thereof that she would be required to obtain admission to the Maryland Bar. Ms. Kochen has repeated refused to obtain admission to the Maryland Bar. On June 3, 2020, Ms. Mochen filed a self-styled "Legal Memorandum" in this Application in violation of Maryland Rules of Professional Conduct, Rules 305.5 and 305.7 regarding the Unauthorized Practice of Law. Ms. Kochen's Legal Memorandum is stricken from the record in this Application as it constitutes the unauthorized practice of law by an attorney not authorized to perform legal activities in the State of Maryland.

west, the buildings are: (1) the former Clagett Realty office; (2) a small retail building most recently occupied by a church, with accessory buildings to the rear that look to having been previously occupied as contractor's offices; (3) a contractor's office (currently occupied); and (4) a former electrical contractor's office, approximately 11,266 sq. ft. (GFA) in total. All of these existing structures are to be razed in the construction of a 4,649 sq. ft. Gas Station and Food or Beverage Store.

(3) Access to the subject site is available almost continuously across its Livingston Road frontage; channelization is limited to six curb depressions without any channelization and with paving running right up to the curb along almost 90% of the property's frontage; an entrance to the accessory buildings behind the retail building also exists off of Biddle Road. No medians exist on either Livingston Road or Biddle Road.

Master Plan and Sectional Map Amendment

(4) The Subject Property is located in Planning Area 83. The applicable Master Plan is the *Approved Subregion 5 Master Plan and Sectional Map Amendment*, approved on July 24, 2013. The Master Plan designated the Subject Property for "Commercial" Future Land Use.

The Approved Sectional Map Amendment retained the previous C-S-C zone.

The Growth Policy Map in the May, 2014 General Plan placed the property in the Established Communities category. The Generalized Future Land Use Map is too small a scale for the Subject Property to be legible; the PGAtlas site indicates that the Generalized Future Land Use is Commercial land use.

The site is not within a Priority Preservation Area.

Neighborhood

(5) The neighborhood of the Subject Property is described in the Technical Staff Report as having the following boundaries:

North	–	Livingston Road
West	–	Biddle Road
South & East	–	Indian Head Highway (Maryland Route 210)

This neighborhood definition appears to have been taken from a description of the project's surroundings in the Applicant's Statement of Justification, and is not an appropriate neighborhood from the perspective of an evaluation of the impact of the subject Application.

Because of the more rural character of the surrounding area, and the centralized character of the nearby commercial uses, the affected neighborhood is necessarily much larger than it would be in an urban or suburban location, and could even cross features which would uniformly be considered as barriers in denser locations. For example, a divided highway with (a minimum of) ~175' of right-of-way, functioning as an Expressway (and planned to be upgraded to a Freeway) would certainly be considered to be a barrier (and therefore a neighborhood edge) in almost any other case; the historic orientation of the surrounding community to the activity on Livingston Road, however, suggests that the neighborhood could very reasonably be deemed to extend across Indian Head Highway.

Accordingly, your Zoning Hearing Examiner accepts the neighborhood as proposed by the Applicant's expert land planner, Mr. Mark Ferguson, which is also the neighborhood for the Accokeek Community in the Master Plan (*id.*, at 250-251), with the following boundaries:

North	–	Piscataway Creek/Floral Park Road
East	–	Danville Road and Gardner Road
South	–	Mattawoman Creek (the Prince George's County limit)
West	–	Potomac River (the Prince George's County limit)

Surrounding Uses

(6) Across Livingston Road from the Subject Property to the north are a barber, a nonprofit organization, and the B&J's Carryout restaurant, all on land classified in the C-S-C Zone. Further to the north, beyond Bryan Point Road, are a Gas Station with vehicle repair, a Chinese food restaurant, and undeveloped land in the C-S-C Zone.

The planned Freeway roadway, Indian Head Highway, lies to the south and east. Beyond Indian Head Highway to the east, the commercial character of the immediately surrounding area continues, with the Accokeek Village Shopping Center occupying the northwest quadrant of the intersection of Livingston Road with Indian Head Highway, on land classified in the C-S-C Zone. The main line of that center is occupied by a Weis supermarket, a cleaner, a Chinese food restaurant, a pharmacy, a nail salon and a liquor store. Pad sites along Livingston Road include a Burger King restaurant, a Dunkin' Donuts/Baskin Robbins restaurant, and an Exxon Gas Station which also includes a Food or Beverage Store and a Jerry's Sub's restaurant. Beyond the Accokeek Village Shopping Center are a park & ride lot and the Accokeek branch library (approximately 1,500 feet distant from the nearest corner of the Subject Property), both in the R-R (Rural

Residential) Zone.

Beyond the commercial area surrounding the Subject Property as described above, the portion of the neighborhood to the east of Indian Head Highway is generally characterized by suburban residential development on quarter-acre (clustered lots) to half-acre lots in the R-R Zone, transitioning to an agricultural character (typically zoned R-A (Rural Agricultural)) beyond the line of Bealle Hill Road/Livingston Road. Exceptions of note to the foregoing are the developments in the M-X-T (Mixed Use-Transportation Oriented) Zone by the intersection of Indian Head Highway and Berry Road (MD 228), including : (1) the planned Signature Club at Manning Village, currently undergoing infrastructure construction, which will include attached dwellings; and (2) the Manokeek Shopping Center, which includes in its main line a Giant supermarket, an auto parts store, a cleaner, a hair salon, a nail salon, a cleaner, a barbeque restaurant, a Chinese food restaurant, a Starbucks coffeeshop, and on pad sites two banks, a barber, a tobacco store, a liquor store, a Wendy's restaurant and a 7-11 Gas Station with a Food or Beverage Store.

Across Biddle Road to the west are four single-family dwellings in the R-R Zone. For approximately one half mile to the north and west, the neighborhood character is more suburban, with single-family dwellings in the R-R Zone on lots between one-half and one acre in size (as well as a church just to the northwest of the Subject Property); beyond that, the character is more classically rural, with large-lot residential development on mostly-wooded lots predominating.

Applicants Proposal

(7) The proposed use for SE-4816 is the razing of the existing buildings and their replacement by a new Gas Station and Food or Beverage Store.

The new Food or Beverage Store will be located roughly in the center of the site, oriented with its front towards Indian Head Highway and its side towards Livingston Road. The eight pump islands (with sixteen MPDs) will face Indian Head Highway to the west, under a canopy.

Modern landscaping in conformance with the Landscape Manual will be provided, including enough tree planting to meet the Tree Canopy Coverage provisions of Subtitle 25.

The new facility will be provided with modern stormwater management using bioretention techniques where no stormwater management now exists.

The unchannelized, almost unrestricted entrances from Livingston Road will be modernized, reducing the number of points of access from six curb cuts to two modern channelized entrances, providing much greater safety, particularly for a site in close

proximity to a signalized intersection. The entrance closest to the intersection of Livingston Road with Indian Head Highway will be much further from the intersection, and will further be limited to a right-in, right-out operation. A third entrance is also proposed off of Biddle Road.

The Applicant is proffering the construction of an additional right turn lane onto eastbound Livingston Road.

(8) The Site Plan proposes a total of three points of vehicular access; one full access entrance and one right in and right out along the frontage of Livingston Road, and one full access along the frontage of Biddle Road. Direct access to Indian Head Highway (MD 210) is not proposed. The proposed site design places the primary Gas Station canopy with eight pump islands parallel to the alignment of Indian Head Highway (MD 210). Surface parking is proposed abutting the proposed Food or Beverage Store, and along the perimeters of the property to ensure safe and efficient on-site circulation. In addition, and more importantly, the proposed layout creates a safe environment for patrons utilizing all of the services offered by Royal Farms. Further the Owner/Applicant very strongly contends that its layout will result in a very successful and high quality development.

The Food or Beverage Store for the Royal Farms is designed to reflect a somewhat rural aesthetic which is a trademark of Royal Farms. The new model has been constructed throughout Maryland and most recently, on Sansbury Road and Ritchie Marlboro Road (Westphalia North), and at National Harbor. The building design incorporates a band of composite siding at the top portion of the building, brick veneer in the middle, and stone veneer at the base of the building. The main entrance projects from the rest of the building and features two side entry points. The front elevation is accented with a shed-style roof over the main entrance supported by stone veneer and painted steel columns and topped with a cupola, and over-size windows that help break up the horizontal mass. The rear elevation presents long uninterrupted bands of the composite siding, red brick and stone veneer, with one additional entrance to the Store. The Owner/Applicant is proposing two twenty-five foot tall pylon signs; one on its frontage on Livingston Road, west of the site entrance, and another along the frontage of Indian Head Highway (MD 210).

The proposed exterior building materials, which include stone, brick, and composite siding, are of notable quality and durability. The pumps and canopy are reflective of the architecture and materials of the main building. Due to the visibility of the pumps, canopy, and retail building, the design of these features are important and are of high quality. The Owner/Applicant anticipates that the proposed development will have a similar positive impact to the County in the form of new jobs, reinvestment, and increased taxes. As evidenced by DSP-13007, DSP-15012, DSP-08043-01, DSP-15020-02, DSP-16027, and DSP-17057, the Owner/Applicant uses high end finishes, and designs a project that is often used as the model for other similar uses. Indeed, from 2006-2008, the Owner/Applicant began to incorporate energy and water-efficient "green"

building features, and by 2010, the Owner/Applicant had fully embraced sustainability and has since incorporated LEED sustainable building designs into its construction. Exhibit 5.

(9) The Authorization to Issue Building Permits for Structures within a Proposed Right-of-Way includes two (2) pylon signs, 22 parking spaces, a drive aisle, free air station, five (5) pump islands (with 10 multi pump dispensers) with canopy, large vehicle parking area, all of the required landscaping, and a stormwater management facility within the proposed rights-of-way for F-11 and C-525.

LAW APPLICABLE

(1) A Special Exception for a Gas Station and a Food or Beverage Store in the C-S-C Zone is permitted pursuant to §27-461(b)(1)(B) in accordance with §27-358 and §27-355 of the Zoning Ordinance. All Special Exceptions must be found to comply with the general criteria of §27-317.

(2) Section 27-358 states:

> *(a) A Gas Station may be permitted, subject to the following:*
>
> *(1) The Subject Property shall have at least one hundred and fifty (150) feet of frontage on and direct vehicular access to a street with a right-of-way width of at least seventy (70) feet;*
>
> *(2) The Subject Property shall be located at least three hundred (300) feet from any lot on which a school, outdoor playground, library, or hospital is located;*
>
> *(3) The use shall not include the display and rental of cargo trailers, trucks, or similar uses, except as a Special Exception in accordance with the provisions of Section 27-417;*
>
> *(4) The storage or junking of wrecked motor vehicles (whether capable of movement or not) is prohibited;*
>
> *(5) Access driveways shall be not less than thirty (30) feet wide unless a lesser width is allowed for a one-way driveway by the Maryland State Highway Administration or the County Department of Public Works and Transportation, whichever is applicable, and shall be constructed in compliance with the minimum standards required by the County Road Ordinance or Maryland State Highway Administration regulations, whichever is applicable. In the case of a corner lot, a driveway may begin at a point not less than twenty (20) feet from the point of curvature (PC) of the curb return or the point of curvature of the edge of paving at an intersection without curb and gutter. A driveway may begin or end at a point not less than twelve (12) feet from the side or rear lot line of any adjoining lot;*
>
> *(6) Access driveways shall be defined by curbing;*

(7) A sidewalk at least five (5) feet wide shall be provided in the area between the building line and the curb in those areas serving pedestrian traffic;

(8) Gasoline pumps and other service appliances shall be located at least twenty-five (25) feet behind the street line;

(9) Repair service shall be completed within forty-eight (48) hours after the vehicle is left for service. Discarded parts resulting from any work shall be removed promptly from the premises. Automotive replacement parts and accessories shall be stored either inside the main structure or in an accessory building used solely for the storage. The accessory building shall be wholly enclosed. The building shall either be constructed of brick (or another building material similar in appearance to the main structure) and placed on a permanent foundation, or it shall be entirely surrounded with screening material. Screening shall consist of a wall, fence, or sight-tight landscaping material, which shall be at least as high as the accessory building. The type of screening shall be shown on the landscape plan.

(10) Details on architectural elements such as elevation depictions of each facade, schedule of exterior finishes, and description of architectural character of proposed buildings shall demonstrate compatibility with existing and proposed surrounding development.

(b) In addition to what is required by Section 27-296(c), the Site Plan shall show the following:

(1) The topography of the subject lot and abutting lots (for a depth of at least fifty (50) feet);

(2) The location and type of trash enclosures; and

(3) The location of exterior vending machines or vending area.

(c) Upon the abandonment of a Gas Station, the Special Exception retail services cease.

(d) When approving a Special Exception for a Gas Station, the District Council shall find that the proposed use:

(1) Is necessary to the public in the surrounding area; and

(2) Will not unduly restrict the availability of land, or upset the balance of land use, in the area for other trades and commercial uses.

(3) Section 27-355 requires:

(a) A food or beverage store may be permitted, subject to the following:

(1) The applicant shall show a reasonable need for the use in the neighborhood;

(2) The size and location of, and access to, the establishment shall be oriented toward meeting the needs of the neighborhood;

(3) The proposed use shall not unduly restrict the availability of land, or upset the balance of land use, in the area for other allowed uses;

(4) In the I-1 and I-2 zones, the proposed use shall be located in an area which is (or will be) developed with a concentration of industrial or office uses;

(5) The retail sale of alcoholic beverages from a food or beverage store approved in accordance with this Section is prohibited; except that the District Council may permit an existing use to be relocated from one C-M zoned lot to another within an urban renewal area established pursuant to the Federal Housing Act of 1949, where such use legally existed on the lot prior to its classification in the C-M ne and is not inconsistent with the established urban renewal plan for the area in which it is located.

(4) The Applicant must also satisfy the general purposes of Commercial zones (§27-446) and the specific purposes of the C-S-C Zone (§27-454).

(5) Section 27-446(a) states:

(a) The purposes of Commercial zones are:

(1) To implement the general purposes of this Subtitle;
(2) To provide sufficient space and a choice of appropriate locations for A variety of commercial uses to supply the needs of the residents and businesses of the County for commercial goods and services;
(3) To encourage retail development to locate in concentrated groups of Compatible commercial uses which have similar trading areas and frequency of use;
(4) To protect adjacent property against fire, noise, glare, noxious matter, and other objectionable influences;
(5) To improve traffic efficiency by maintaining the design capacities of streets, and to lessen the congestion on streets, particularly in residential areas;
(6) To promote the efficient and desirable use of land, in accordance with the purposes of the General Plan, Area Master Plans and this Subtitle;
(7) To increase the stability of commercial areas;
(8) To protect the character of desirable development in each area;
(9) To conserve the aggregate value of land and improvements in the County; and
(10) To enhance the economic base of the County.

(6) Section 27-454(a)(1) provides:

(1) The purposes of the C-S-C zone are:

(A) To provide locations for predominantly retail commercial shopping facilities;

(B) To provide locations for compatible institutional, recreational, and service uses;

(C) To exclude uses incompatible with general retail shopping centers and institutions; and

(D) For the C-S-C zone to take the place of the C-1, C-2, C-C, and C-G zones.

Necessity

(7) The Zoning Ordinance and the County Code do not define the term "necessary". However, undefined words or phrases shall be construed according to common usage, while those that have acquired a particular meaning in the law shall be construed in accordance with that meaning. (Prince George's County Code, Section 27-108.01(a)) Webster's New World Dictionary (2nd College Edition) defines it as "essential" and "indispensable". In Brandywine Enterprises, Inc. v. County Council, 117 Md. App. 525, 540 (1997), the Court of Special Appeals addressed the definition of "necessary" in the County's Zoning Ordinance as it relates to rubble fills and noted that "necessary'... means necessary rather than reasonably convenient or useful." The Court went on to note that the best method for determining need for a rubble fill would be to assess whether there would be an actual deficit of capacity. In a case involving liquor licenses, Baltimore County License Beverage Association, Inc. v. Kwon, 135 Md. App. 178, 194 (2000), the Court of Special Appeals held that the meaning is dependent upon the context in which "necessary" is used. The Court then found that "necessary,' in this instance, means that the transfer of the liquor license to the transfer site will be 'convenient, useful, appropriate, suitable, proper, or conducive' to the public in that area." Thus, the proper standard to apply in the review of the instant request is whether the Gas Station will be "convenient, useful, appropriate, etc." given the nature of the use.

(8) The Court of Appeals provided the standard to be applied in the review of a Special Exception Application in Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319, 1325 (1981):

> Whereas, the Applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements; he does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community. If he shows to the satisfaction of the [administrative body] that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material....But if there is no probative evidence of harm or disturbance in light of the nature of the ne involved or of factors causing disharmony to the

operation of the comprehensive plan, a denial of an Application for a special exception use is arbitrary, capricious, and illegal.

The record in this case reveals "no probative evidence of harm or disturbance in light of the nature of the ne involved or of factors causing disharmony to the operation of the comprehensive plan". It would, therefore, be proper to grant the requests once the conditions of approval addressed below are satisfied.

(9) The District Council may authorize the issuance of permits under certain circumstances pursuant §27-259, which provides in pertinent part, as follows:

(a) Authorization.

(1) With the exception of an arena (stadium) proposed to be constructed on land leased or purchased from a public agency, no building or sign permit (except as provided in Part 12 of this Subtitle) may generally be issued for any structure on land located within the right-of-way or acquisition lines of a proposed street, rapid transit route, or rapid transit facility, or proposed relocation or widening of an existing street, rapid transit route, or rapid transit facility, as shown on a Master Plan; however, the Council may authorize the issuance of the building or sign permit in accordance with this Section. For the purposes of this Section, "Master Plan" means the General Plan, the Functional Master Plan of Transportation, or any Adopted and Approved Area Master Plan or, if not yet approved, any such Master Plan adopted by the Planning Board, unless the Plan has been rejected by the Council.

(2) Notwithstanding the definition of a "street" (Section 27-107.01), building permits may be issued without such Council authorization for any structures on:

(A) Land which:
(i) Was in reservation but is now not in reservation; and
(ii) Has not been acquired and is not being acquired.

(B) Land which was subdivided after the adoption of a Functional Master Plan of Transportation, Area Master Plan, or the General Plan, but was not reserved or required to be dedicated for a street or rapid transit route or facility shown on the Plan.

(3) A permit may be issued without such Council authorization for the replacement of a legally erected sign if the replacement sign is otherwise in conformance with this Subtitle, is not an intensification of signage for the Subject

Property, and if the proposed transportation facility is not fully funded for construction in the adopted County Capital Improvement Program or the current State Consolidated Transportation Program.

(b) ***Application.***

(1) Where a Special Exception, Detailed Site Plan, Specific Design Plan, or Departure is pending, or where application for issuance of a permit has been made and recommended for denial pursuant to Sections 27-254 and 27-255 of this Subtitle, the owner of the land may make a written request to the District Council to authorize the issuance of the permit. In the latter case, the recommendation for denial of the permit shall not have been based on any failure of the applicant to comply with any requirement of this Subtitle (other than Subsection (a) of this Section), Subtitle 24, the Regional District Act, or any condition placed on the property in a zoning case or subdivision plat approval. The request shall be in writing and shall be filed with the Clerk of the Council within thirty (30) days after notice of the denial is given.

(2) Along with the application, the owner shall submit the following:

(A) A statement listing the names and the business and residential addresses of all individuals having at least a five percent (5%) financial interest in the Subject Property;

(B) If any owner is a corporation, a statement listing the officers of the corporation, their business and residential addresses, and the date on which they assumed their respective offices. The same statement shall also list the current Board of Directors, their business and residential addresses, and the dates of each Director's term. An owner that is a corporation listed on a national stock exchange shall be exempt from the requirement to provide residential addresses of its officers and directors.

(C) If the owner is a corporation (except one listed on a national stock exchange), a statement containing the names and residential addresses of those individuals owning at least five percent (5%) of the shares of any class of corporate security (including stocks and serial maturity bonds);

(3) For the purposes of (A), (B), and (C), above, the term "owner" shall include not only the owner of record, but also any contract purchaser.

* * * * * * *

(g) ***Criteria for approval.***

(1) The District Council shall only approve the request if it finds that:

(A) The entire property cannot yield a reasonable return to the Owner unless the permit is granted;

(B) Reasonable justice and equity are served by issuing the permit;

(C) The interest of the County is balanced with the interests of the property owner; and

(D) The integrity of the Functional Master Plan of Transportation, General Plan, and Area Master Plan is preserved.

(h) ***Conditions placed on approval.***

(1) If the Council authorizes the issuance of the permit, it shall specify the exact location, ground area, height, extent, and character of the structure to be allowed. The Council may also impose reasonable conditions which benefit the County.

CONCLUSIONS OF LAW

General Requirements

(1) §27-317(a) requires that the proposed Use and Site Plan be in harmony with the general purposes of the Zoning Ordinance, §27-102, the general purposes of Commercial zones, §27-446(a), and the specific purposes of the C-S-C Zone, §27-454(a)(1).

(2) The general Purposes of the Zoning Ordinance are listed in §27-102(a). The instant Application is in harmony with the general Purposes as follows:

(1) To protect and promote the health, safety, morals, comfort, convenience, and welfare of the present and future inhabitants of the County;

The proposed Gas Station will be developed to provide substantive environmental and safety upgrades to the Subject Property in the form of modern stormwater management (where none now exists) and a more-safely-located, reduced number of channelized vehicular entrances.

The Applicant is also proffering the construction of an additional lane on eastbound Livingston Road leading up to the Indian Head Highway intersection. The Traffic Impact Analysis (Exhibit 66) and the updated Traffic Impact Analysis (Exhibit 145) prepared by the Applicant's expert transportation witness, Mr. Michael Lenhart, indicates that this improvement would more than offset the effect of the traffic from the proposed Gas Station, instead raising the level of service of the Livingston Road/Indian Head Highway intersection in the evening peak hour from E (failing) to D (acceptable), such that the intersection would perform acceptably in both the evening and the morning instead of only in the morning.

At present, there is only one single Gas Station and no Food or Beverage Stores on the west side of MD 210 in Prince George's County south of Swan Creek Road; to get convenience goods, residents of this area must currently cross Indian Head Highway. If the subject Application is approved, Accokeek residents living west of Indian Head Highway will have the option of avoiding that road to meet more of their daily needs.

By virtue of these improvements to the existing site, by the proffered improvement to the adjacent intersection, and by reducing the need for residents to cross Indian Head Highway, approval of the subject Application will actively promote the health and safety of the present and future inhabitants of the County.

(2) To implement the (General Plan, Area Master Plans, and Functional Master Plans;

The relevant Plans which apply to this site are the 2014 General Plan (Plan Prince George's 2035), the 2013 *Approved Subregion 5 Master Plan and Sectional Map Amendment*, and a number of Functional Master Plans, including the Green Infrastructure Plan, the County Master Plan of Transportation, the Public Safety Facilities Master Plan, The Historic Sites and Districts Plan, and the Water Resources Functional Master Plan.

General Plan

As noted *supra*, the General Plan classified the subject site in its Growth Policy Map[2] in the Established Communities category, and the Generalized Future Land Use Map[3] - as reflected by the PGAtlas Generalized Future Land Use layer - designated it for Commercial land use.

"Established Communities" are described by the General Plan as "the County's heart – its established neighborhoods, municipalities and unincorporated areas outside designated centers,"[4] and recommends that, "Established communities are most

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[2] M-NCP&PC, Plan Prince George's 2035 – Approved General Plan (May, 2014), T.p.107.
[3] *General Plan*, T.p. 101.
[4] *Ibid.*, T.p. 106.

appropriate for context-sensitive infill and low- to medium-density development...."[5]

"Commercial" land use is described by the General Plan as, "Retail and business areas, including employment uses such as office and service uses. A range of services are provided at the neighborhood to regional level. New commercial areas have access to multimodal transportation options."[6]

Given its location at a site long used for retail and service commercial uses in a commercial cluster surrounding the Livingston Road/Indian Head Highway intersection, the approval of the subject Application will constitute context-sensitive infill.

Master Plan

As noted above, the applicable Master Plan is the *Approved Subregion 5 Master Plan and Sectional Map Amendment*, approved on July 24, 2013. Map IV-1, the Future Land Use Map, recommends the Subject Property for "Commercial" land use.[7]

The Master Plan describes the Subject Property as being within the Accokeek Community, which is delineated as being concurrent with Planning Areas 83 and 84. This is also concurrent with the neighborhood for the subject Application.

The Master Plan describes Accokeek as,

> Accokeek is the most rural portion of Subregion 5. Development is largely concentrated along MD 210, Indian Head Highway; east and west of this highway are areas dominated by woodlands, farm fields, nurseries, and open areas. The area west of MD 210 includes Piscataway National Park, operated by the National Park Service, and the Moyaone Reserve, a low density area (standard lot size of five acres), also within the Mount Vernon viewshed protection easement. The rural area east of MD 210 extends to Gardner Road, west of Brandywine.
>
> The linear mix of business, service, institutional, and residential uses along approximately two miles of Livingston Road between the U.S. Post Office, west of MD 210 (Indian Head Highway), and Kellers Market (near Bealle Hill Road), form the rural 'main street' of Accokeek. In addition to this stretch of Livingston Road, a community shopping center anchored by a grocery store, several restaurants, various businesses, and a church, located east of MD 210, along with B & J's BBQ establishment and various commercial businesses located west of MD 210 are recognized as the heart of Accokeek.[8]

The Subject Property is located right in the midst of this "main street." One of the Master Plan's Goals for all of its Communities is to, "provide for compatible new development in older, established communities of Accokeek, Brandywine, and Clinton."[9]

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[5] *Ibid.*, T.p.20
[6] *Ibid.*, T.p. 100.
[7] M-NCP&PC, Approved Subregion 5 Master Plan and Sectional Map Amendment (July, 2013), T.p. 32
[8] *Master Plan*, pp. 35-36.
[9] *Ibid.*, T.p. 36.

The Master Plan has a further discussion of the Livingston Road corridor:

With care and attention, the traditional character of Livingston Road, between the US Post Office west of MD 210 and Kellers Market, to the east, can be maintained and enhanced as additional development occurs. Today, the overall "feel" of the roadway is one of quiet, slow-paced rural life. Views are generally closed because of extensive tree cover behind buildings. The roadway can be divided into three segments: rural, residential, and commercial, based on adjoining land uses, views from the roadway, building location and settings, and landscaping and vegetation (Map IV-2: Livingston Road Corridor)[10]. To maintain and enhance the character of the Livingston Road corridor, the following guidelines should be applied when reviewing development applications, with due consideration given to site specific conditions and situations:

Overall guidelines, apply to all segments

- Limit the number of new access points onto Livingston Road.
- Use quality building materials, vernacular if possible.
- Use compatible materials on the roadway that blend in or look rustic, such as wooden or Cor-Ten guard rails instead of galvanized steel.
- Use random massing of new plant material to complement and reinforce existing vegetation.
- Use open fencing, such as post-and-rail.
- Create pedestrian linkages or provide footpaths between commercial and residential areas; specifically, provide pedestrian access between the residential and commercial segments.
- Soften overhead utilities, with landscaping especially in the commercial segment where there are fewer trees.

Commercial Segment

- Site buildings to orient the fronts or sides toward Livingston Road.
- Achieve consistent setbacks for public and private improvements.
- Locate parking to the side or rear of buildings. Screen parking along street edges. Encourage shared parking where possible.
- Limit height of freestanding signs to keep them visually below the tree line.
- Use muted lighting.
- Plant shade trees[11]

The subject Application addresses all of the foregoing guidelines which are

[10] Map IV-2 provides that the Subject Property is in the "Commercial Segment".
[11] *Master Plan*, T.p.. 37.

applicable:

The development will limit the number of access points to Livingston Road, will use quality building materials, random massing of new plant material, will provide pedestrian linkages, including new public sidewalks, and will provide new landscaping to soften overhead utilities in the commercial segment.

The proposed building will be sited with its side oriented toward Livingston Road, will have the great majority of its parking located in the side or rear yards from the Livingston Road perspective, and will screen it with landscaping along the street edges. Lighting will be accomplished with cut-off fixtures, and there will be fifty-two trees planted on a site where there now appear to be fewer than ten.

Specifically, the site design will:

- Reduce the number of curb cuts providing access from Livingston Road to the Subject Property from six (6) to two (2) modern channelized entrances. (Exhibit 86 p. 5);
- Orient the side of the proposed structure toward Livingston Road. (Exhibit 86 p. 9);
- Locate the majority of the parking areas on the side and rear yards from the perspective of Livingston Road. (Exhibit 86);
- Screen the proposed structure with landscaping along the street edges. (Exhibit 86);
- Install lighting with full cut-off optics/fixtures. (Exhibit 86); and
- Increase the number of trees located on the Subject Property from ten (10) to fifty-two (52). (Exhibit 86)

The Opposition did not present any expert testimony regarding the nature of SE-4816's potential impact on the surrounding neighborhood. Mr. Mark Ferguson, the Applicant's expert land planner, presented unrefuted expert testimony that the subject Special Exception will not substantially impair the Master Plan, which constituted the only probative evidence in the Zoning Hearing Examiner's evidentiary record with regard to this issue.

The text of the Master Plan includes substantive discussion of the Indian Head Highway and Livingston Road/Accokeek Road interchange:

> This plan recommends upgrading existing at-grade intersections along MD 210 to interchanges at Farmington Road, MD 373 (Livingston Road) **if deemed necessary** [emphasis added], and MD 228 (E-7). If an interchange at MD 210 and MD 373 is necessary, the preferred design to retain connectivity between communities east and west of MD 210, is for the MD 210 freeway (F-7) to run

beneath MD 373.[12]

The conditional nature of the Master Plan's recommendation is instructive, as the FEIS approved by the FHA does not recognize a need for an interchange at the adjacent intersection, reinforcing the appropriateness of the proposed development plan, and the continuity of use and character across the Indian Head Highway intersection, which is consistent with the Master Plan's land use recommendation, the zoning, and the proposed uses in the subject Application.

Other Applicable Functional Master Plans

The Subject Property is not mapped as containing any Regulated Areas of the County's Green Infrastructure Network; as such, the subject Application conforms to the Green Infrastructure Plan.

With regard to the Historic Sites and Districts Plan, no historic sites or resources are located within the vicinity of the subject site; as such, the approval of the subject Application will have no adverse impact on this Functional Master Plan.

The Water Resources Functional Master Plan addresses broad regulatory policy and large-scale watershed planning, and as such makes no recommendations which are directly applicable to the subject Application.

No proposed sites for Public Safety facilities are in the area affected by the subject Application.

The Countywide Master Plan of Transportation was discussed at length by Mr. Ferguson in the companion ROW case requesting approval of a permit to build in a proposed right-of-way. The extensive discussion in that case is hereby adopted by reference, including its conclusion that the integrity of the Functional Master Plan of Transportation would not be impaired, particularly given the FHA's approval of an FEIS which does not propose an interchange, and the conditional language in the text of the Master Plan (which amended the Countywide Master Plan of Transportation) which provides for interchange construction only in the case of a demonstrated need. (ROW, Exhibit 34) In conclusion, because the proposed Gas Station and Food or Beverage Store are not in conflict with the General Plan, the Sector Plan or the applicable Functional Master Plans, approval of the subject Application will be in harmony with the Ordinance's purpose of implementing those Plans.

(3) To promote the conservation, creation, and expansion of communities that will be developed with adequate public facilities and services;

Because this Application proposes the redevelopment of a site in accordance with

[12] *Ibid.*, T.p. 101.

provisions of the laws which assure the adequacy of local public facilities, approval of it would be in harmony with this purpose of promoting the conservation of a community which will be developed with adequate public facilities.

The proposed development would not burden schools, parks, or libraries. The square footage of the development of the Subject Property would actually decrease with the proposed Application (from 11,266 sq. ft. decreased to 4,649 sq. ft.); this fact, combined with the modern construction of the new buildings, its round-the-clock occupancy, and the safety improvements along the Livingston Road frontage, will materially reduce the associated probability of the need for public safety services.

Furthermore, the Applicant's proffered intersection improvement would raise the level of service of the Livingston Road/Indian Head Highway intersection from E to D in the evening peak hour, such that the intersection would perform acceptably were it to be subjected to a test for the adequacy of transportation facilities.

(4) To guide the orderly growth and development of the County, while recognizing the needs of agriculture, housing, industry, and business;

Approval of the subject Application would abet the orderly growth and development of the County because it will be a modernization of an obsolete developed site rather than new development, and thus will not consume greenfields. Furthermore, it is fully in accordance with the Master Plan's land use recommendation. As such, the subject Application in harmony with this Purpose of the Ordinance.

(5) To provide adequate light, air, and privacy;

The subject Gas Station and Food or Beverage Store will be in harmony with this Purpose as it will be developed in conformance with the various regulations in the Zoning Ordinance to ensure the provision of adequate light, air and privacy, both for the occupants of the subject site and for its neighbors. These principles include the provision of sufficient setback distances, provision of perimeter landscape planting and planting to meet the Tree Canopy Coverage requirements, and by conformance with height limitations in order to ensure access to light and air.

(6) To promote the most beneficial relationship between the uses of land and buildings and protect landowners from adverse impacts of adjoining development;

The proposed Gas Station and Food or Beverage Store would be in harmony with this Purpose as it will be developed in accordance with the various principles that have been codified in the Zoning Ordinance to promote the beneficial relationships between land and buildings, including conformance with the Table of Uses as laid out in the Ordinance, and in its conformance with the provisions of the Landscape Manual which

provide for the screening of service functions and the beautification of its perimeter along public roads.

(7) To protect the County from fire, flood, panic, and other dangers;

The proposed Gas Station and Food or Beverage Store would be in harmony with this Purpose as it will be developed in conformance with regulations established in the body of the Zoning Ordinance, as well as other County Ordinances, which are intended to protect from fire, flood, panic and other dangers, namely: the floodplain regulations, Stormwater Management Regulations, the Fire Prevention Code, the Building Code, and the Tables of Permitted Uses for the various zones.

(8) To provide sound, sanitary housing in a suitable and healthy living environment within the economic reach of all County residents;

Because the subject use is commercial in nature, this Purpose is not directly applicable to this Application.

(9) To encourage economic development activities that provide desirable employment;

The redevelopment of the Subject Property as a Gas Station and a Food or Beverage Store would be in harmony with this Purpose because it would augment the tax base of the County directly and through the employment provided to its workers.

(10) To prevent the overcrowding of land;

The subject Gas Station and Food or Beverage Store would be in harmony with this Purpose as it will be developed in accordance with various principles that have been codified in the Ordinance to ensure the prevention of overcrowding, including the provisions of the Table of Uses that provides for the compatibility of uses, and the Regulations which provide for height limits and setbacks.

(11) To lessen the danger and congestion of traffic on the streets, and to insure the continued usefulness of all elements of the transportation system for their planned functions;

The approval of the proposed Gas Station and Food or Beverage Store would be in harmony with this Purpose because of the channelization of the existing largely-unrestricted and unchannelized entrances into the Subject Property from Livingston Road down to two defined points of access, one of them further limited to right-in, right-out operation. This modernization will materially lessen the danger to local traffic.

Furthermore, the Applicant's proffered intersection improvement would act to

lessen the congestion of traffic by raising the level of service of the Livingston Road/Indian Head Highway intersection.

Finally, the proposed Gas Station and Food or Beverage Store will be developed in accordance with the regulations established in the body of the Zoning Ordinance (and other County Ordinances) which are intended to lessen the danger and congestion of traffic on roads, such as the requirements for the provision of adequate off-street parking, and the separation of entrances from nearby intersections.

(12) To insure the social and economic stability of all parts of the County;

As the Zoning Ordinance is the principal tool for the implementation of the planning process by enacting legal requirements which implement the planning goals that strive to maintain the social and economic stability of the County, conformance with the requirements and regulations of the Zoning Ordinance will be prima facie evidence of the Application's harmony with this Purpose.

Beyond that, however, the subject Gas Station and Food or Beverage Store would promote the economic and social stability of the County by contributing to the tax base, and providing a useful and convenient service to the surrounding community particularly by giving the Accokeek residents who live west of Indian Head Highway the option of avoiding crossing that road to meet more of their daily needs.

(13) To protect against undue noise, and air and water pollution, and to encourage the preservation of stream valleys, steep slopes, lands of natural beauty, dense forests, scenic vistas, and other similar features;

Because the subject Gas Station and Food or Beverage Store would be a redevelopment of an existing commercial site, approval of the subject Application will have no impact to the natural features in the County: It will not itself generate noise pollution, and the use will be in compliance with the County's Woodland Conservation policies by virtue of its exemption from the requirement for approval of a Tree Conservation Plan (because no woodlands exist on the Subject Property). No steep slopes or scenic vistas will be affected. The proposed site development will be provided with stormwater management measures, and will thus better act against water pollution and protect the stream valleys than the existing development at the Subject Property. By conformance to these principles and regulations, the approval of this Application would be in harmony with this Purpose.

The final two Purposes,

(14) To provide open space to protect scenic beauty and natural features of the County, as well as to provide recreational space; and

(15) *To protect and conserve the agricultural industry and natural resources.*

are not directly applicable to the approval of this Gas Station and Food or Beverage Store because it would constitute the redevelopment of an existing commercial site. §27-317(a)(1)

(3) In addition to the general Purposes, there are Purposes for Commercial zones generally and the C-S-C (Commercial Shopping Center) Zone specifically. The ten purposes of Commercial zones generally are laid out in Section 27-446(a), as follows:

(1) To implement the general Purposes of this Subtitle;

As noted *supra,* the subject proposal will implement the general Purposes of the Zoning Ordinance.

(2) To provide sufficient space and a choice of appropriate locations for a variety of commercial uses to supply the needs of the residents and businesses of the County for commercial goods and services;

The approval of this facility at this location will allow the Gas Station and the Food or Beverage Store to provide a useful and convenient site for a needed service. There are at present no Food or Beverage Stores on the west side of MD 210 in Prince George's County, south of Swan Creek Road. To get convenience goods, residents of this area must currently cross Indian Head Highway. If the subject Application is approved, however, Accokeek residents living west of Indian Head Highway will have the option of avoiding that road to meet more of their daily needs.

(3) To encourage retail development to locate in concentrated groups of compatible commercial uses which have similar trading areas and frequency of use;

The uses on the north side of the Subject Property and on the east side of Indian Head Highway form a concentrated group of compatible commercial uses. Furthermore, because the proposed Gas Station involves the replacement of a several buildings, several of which have most recently been occupied by service commercial uses, the redevelopment of the site with a compatible service commercial use (which is permitted by approval of a Special Exception) and a retail commercial use will arguably improve the retail character of the immediate area. As such, the approval of the subject Application will be in harmony with this Purpose of Commercial zones.

(4) To protect adjacent property against fire, noise, glare, noxious matter, and other objectionable influences;

The approval of the subject Gas Station and Food or Beverage Store would implement this Purpose by the perimeter landscaping which provides screening between it and its residential neighbors across Biddle Road. The separation of the intervening road rights-of-way and the use of cut-off fixtures will protect adjoining property from fire, noise and glare.

(5) To improve traffic efficiency by maintaining the design capacities of streets, and to lessen the congestion on streets, particularly in residential areas;

The approval of the subject Application will improve traffic efficiency by the channelization of vehicular entrances and by the proffered intersection improvement.

(6) To promote the efficient and desirable use of land, in accordance with the purposes of the General Plan, Area Master Plans and this Subtitle;

Because the subject Gas Station and Food or Beverage Store will meet the intent for the land use provided for in the Sector Plan, it will fulfill this purpose for Commercial zones.

(7) To increase the stability of commercial areas;

The replacement of obsolete vacant buildings use with a new, modern retail use and a complementary service commercial use will promote the stability of the surrounding commercial area.

(8) To protect the character of desirable development in each area;

Because the subject Gas Station and Food or Beverage Store will: (1) be developed and operated in accordance with the provisions specifically provided in the Ordinance to promote the safe and orderly layout and operation of Gas Stations, (2) meet a need for convenience goods on the west side of Indian Head Highway, and (3) be compatible with the materials, scale and character of the architecture of the surrounding commercial development, the approval of this Application will fulfill this Purpose.

The final two purposes,

(9) To conserve the aggregate value of land and improvements in the County; and

(10) To enhance the economic base of the County.

are fulfilled by allowing for the redevelopment of an existing developed site that will

enhance the tax base and provide additional employment for residents of the County. §27-317(a)(1)

(4) In addition to the Purposes for Commercial zones generally, there are also four Purposes for the C-S-C (Commercial Shopping Center) Zone specifically, which are laid out in Section 27-454(a)(1), as follows:

(A) To provide locations for predominantly retail commercial shopping facilities;

While the subject Application proposes the redevelopment of the Subject Property as both a retail use and a compatible service commercial use, it is not in conflict with this Purpose. The construction of the Gas Station and Food or Beverage Store – which does not propose visually disruptive auto repair services – will maintain the character of commercial uses which are found around the neighboring intersection.

(B) To provide locations for compatible institutional, recreational, and service uses;

As described above, the Gas Station component of the subject Application – when redeveloped in accordance with the provisions of the Ordinance that promote a safe and orderly operation – fulfills this Purpose by being a compatible service use.

(C) To exclude uses incompatible with general retail shopping centers and institutions; and

Because these uses are compatible with general retail uses (and one of them is in fact a general retail use), it fulfills this Purpose.

(D) For the C-S-C ne to take the place of the C-1, C-2, C-C, and C-G zones.

This Purpose is not applicable to the subject Application. §27-317(a)(1)

(5) Based upon the Special Exception Site Plan (Ex 28) (and fulfillment of the conditions of approval) with the issuance of a permit to construct the improvements in the proposed right-of-way, the proposed use will be in conformance with all of the applicable requirements and regulations of the Zoning Ordinance. §27-317(a)(2)

(6) As discussed *supra*, the subject Application is in harmony with the Purposes of the Zoning Ordinance generally to implement the General and Master Plans and to provide for the efficient and desirable use of land in accordance with those Plans. Accordingly, the approval of the subject Application will not impair the integrity of either the approved Master Plan or the County's General Plan. §27-317(a)(3)

(7) The conformance of the subject Application with the principles laid out in the Purposes of the Zoning Ordinance, its compliance with the provisions of the Zoning Ordinance, its compliance with the provisions of other State and County regulations for environmental protection, and building construction, represent a high level of protection against adverse effects to the public health, safety and welfare.

Beyond those basic principles, however, several of the specific features of the subject Application will actively improve the health, safety and welfare of residents and workers in the area as compared to the development currently existing on the Subject Property. Those improvements have been discussed *supra*.

First, the subject Application, if approved, would represent the first Food or Beverage Store on the west side of Indian Head Highway in Prince George's County, south of Swan Creek Road (a distance of almost seven miles). Its approval would allow Accokeek residents living west of Indian Head Highway to have the option of avoiding that road to meet more of their daily needs.

Second, the Applicant will provide modern stormwater management to an existing developed site which has none. This will improve the water quality of the surrounding watersheds, and will diminish the runoff volumes in the existing storm drain network north of Livingston Road.

Third, the Applicant has proffered an intersection improvement which will more than offset the traffic associated with the proposed development, and will act to raise the level of service at the Livingston Road/Indian Head Highway intersection from failing to passing.

Fourth, the frontage improvements along Livingston Road will convert the Subject Property from almost-unrestricted, uncontrolled access to two modern, controlled, channelized entrances, one of which will be limited to right-in, right-out operation. This will be materially safer than the existing situation, which is almost an extension of the paving of Livingston Road, right up to the existing intersection. §27-317(a)(4)

(8) Opposition testified that emergency response times are very poor in the area surrounding the proposed Royal Farms.

Sandra Miles testified,

[I]n the first nine months of 2019 police districts 5 and 7 which serve Accokeek, Fort Washington and Brandywine had priority emergency times that exceed the 10 minute emergency benchmark every month.[13]

Kelly Canavan spoke of six fires she had personal knowledge of and that "in all

[13] 12/17/19 T.p. 43

cases response time were a problem."[14] A contributing factor to slow response times is the overburdened Indian Head Highway/Livingston Road/210 intersection. Holiday Wagner explained, "I've seen the fire truck and the EMT's sitting there and sitting there and sitting there, because they can't, we can't move out of their way."[15] Assistant Fire Chief Kathryn Lucus testified that adding Royal Farms to this location "will gravely affect our mission"[16] by making it more difficult for the Fire Department to safely and quickly negotiate the Indian Head Highway/Livingston Road intersection. The instant Application proposes road improvements at this intersection which will improve the existing hazardous conditions testified to by the Opposition.

(9) As noted by Technical Staff, transportation adequacy is not a required test at the time of Special Exception, but is tested at the time of Preliminary Plan of Subdivision (PPS). The subject Application is exempt from the requirement of a PPS, as less than 5,000 square feet of gross floor area of development is proposed. However, in accordance with the *2020 Prince George's County Transportation Review Guidelines,* Part 1 (Transportation Review Guidelines, Part 1), Staff compared AM and PM peak-hour trips for the existing uses to the proposed use of the site utilizing data from the *Institute of Transportation Engineers Manual* 10th Edition. The Transportation Review Guidelines, Part 1 (page 30) states:

> In cases where the new traffic impact would exceed 100 peak-hour trips, applicants are encouraged and may be requested to prepare a TIS as described in Section 3. This is done to ensure that applicants, the reviewing agencies, and the general public are aware of the traffic impacts of larger Special Exception Applications and also to consider conditions that are necessary to protect surrounding properties or the general neighborhood.

Through Staff's analysis of the subject Application, in accordance with the Transportation Review Guidelines, Part 1, Staff has concluded that the subject Application will generate 54 additional trips in the AM peak and 3 additional trips in the PM peak, posing no major transportation impacts, as outlined in the Transportation Planning memorandum dated June 17, 2019 (Thompson to Cannady II). Exhibit 24

(10) It is undisputed that a traffic impact study is <u>not</u> required for SE-4816 under any of the applicable provisions of the Zoning Ordinance. *See* Exhibit 24, pp. 16-17. However, out of an abundance of caution, the Applicant engaged Michael Lenhart of Lenhart Traffic Consulting, Inc., qualified as an expert in the field of transportation engineering, to prepare a Traffic Impact Analysis (TIA) to determine whether SE-4816 would adversely impact safety in the area surrounding the Subject Property. *See* 12/18/2019 T.p., 150-151. *See also* Exhibit 145 (TIA)

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[14] 2/25/20 T.p. 100
[15] 12/17/19 T.p. 93.
[16] 2/25/20 T.p. 40

The TIA prepared by Mr. Lenhart indicated an existing level of service ("LOS") of "E" at the intersection of Livingston Road and MD 210 during both the AM and PM peak hours, with or without the construction of the Gas Station and the Food or Beverage Store proposed in SE-4816 (assuming no road improvements occur).[17] *See* Exhibit 145, p. 18. However, in conjunction with SE-4816, the Applicant has proposed to include one of two possible roadway improvements to this intersection. The first proposal, which would include restriping lanes at the intersection to create additional turn lanes and widen Livingston Road, would not affect the LOS during the AM peak hour, but would mitigate any traffic impact from SE-4816 during the peak PM hour. *Id.*

The second option offered by the Applicant involves more extensive improvements to the surrounding roadways and intersection, including "split phasing" the traffic signal at the intersection, and restriping eastbound and westbound minor street approaches to create a single left turn lane, one shared thru/left turn lane, and one right turn lane. *Id.* This more extensive series of improvements would provide 100% mitigation of all traffic impacts resulting from SE-4816, and would further raise the LOS to "D" for both the AM and PM peak traffic hours. *Id. See also* Exhibit 146. Accordingly, the impact of SE-4816 upon traffic would not adversely impact the health, safety or welfare of the community. To the contrary, due to the roadway improvements that would accompany this development, SE-4816 would provide a valuable benefit to the community by increasing the LOS of the Indian Head Highway/Livingston Road intersection.

Mr. Lenhart also responded to concerns raised by citizens at the Zoning Hearing Examiner Hearing relating to traffic traveling westbound through the MD 210 and Livingston Road intersection, and shortly thereafter slowing down and turning right into the B&J Carryout's parking lot, and driving north through the lot to access the local road to the north. *See* 3/05/2020 T.p., 169-170. Vehicles may also, at times, travel southbound from the local road, then cut-through the B&J Carryout's parking area to turn right on to Livingston Road, then immediately turn left onto Biddle Road to avoid the traffic light at the intersection. *Id.* In response to these concerns, Mr. Lenhart suggested an additional road improvement proposal that would provide a new right turn lane for westbound traffic on Livingston Road after the MD 210 intersection, which would be used for traffic in and out of the BJ's driveway, while also providing a second westbound lane for traffic to bypass any turning vehicles. *Id.* at 170-172. *See also* Exhibit 146, Roadway Improvement Proposal. The Roadway Improvement Proposal would also improve the intersection by split phasing the eastbound and westbound traffic on Livingston Road at the intersection, as described in detail by Mr. Lenhart. *Id.* at 172.

(11) Opponents to SE-4816 presented no probative evidence regarding adverse impacts resulting from SE-4816. Generalized fears regarding increased crime

[17] Adequate Public Facility Ordinance ("APFO") and the testing required therein is not applicable in this matter, and there is no legal requirement that this development meet any APFO test. The development is exempt from Subtitle 24 (Subdivision) of the County Code.

(12/17/2019 T.p., 36, 2/25/2020 T.p., 97-99, 142, 162; 2/27/2020 T.p., 44), traffic dangers (12/17/2019 T.p., 10, 30, 39, 49, 62, 97, 99; 2/25/2020 T.p., 49-53, 142, 149, 155-156), and air pollution (2/25/2020 T.p., 52) are not sufficient to establish adverse impacts unless they are based on evidence that those circumstances will arise as a result of the proposed use. Moseman v. County Council of Prince Georges County, 99 Md. App. 258, 265, 636 A.2d 499, 503 (1994)(citing Rockville Fuel v. Board of Appeals, 257 Md. 183, 191-93, 262 A.2d 499 (1970)). The Opposition's generalized fears regarding the proposed use, are, at best, merely possible adverse impacts, all of which are inherent to the use. Based upon well-established case law it is clear that any Special Exception use is presumed to have some adverse impacts, but the Opponents presented no probative evidence to demonstrate that any of the possible adverse impacts from the proposed use upon the Subject Property would be "above and beyond those inherently associated with such a special exception use irrespective of its location within the ne." Schultz v. Pritts, 291 MD 1, 291 MD 1, 432 A.2d 1319, 1331 (1981). *See also*, People's Counsel for Baltimore Cty. v. Loyola College of Md., 406 MD 54, 106 (2008); Clarksville Residents Against Mortuary Def. Fund, Inc. v. Donaldson Props. 453 MD 516, 541 (2017); and Mayor & Council of Rockville v. Rylyns Enterprise, Inc., 372 MD 514, 542 (2002).

(12) None of the evidence produced by the Opponents at the Zoning Hearing Examiner Hearing demonstrated that SE-4816 would, in any way, adversely affect the health, safety, or welfare of the community. Ms. Sangeetha Tharmarajah, the daughter of the owners of the Accokeek Exxon gas station operating just across MD 210, engaged her friend, Sharjeel Chaudhry, a 4th year medical student, to provide testimony relating to the available food choices in the area, and his view on the impact of a Royal Farms Food or Beverage Store. *See 2/25/*2020 T.p., 203; 3/05/2020 T.p., 115-116. Despite the Opposition's efforts to qualify him as an expert witness in the field of public health, Mr. Chaudhry was not accepted as an expert in that field or any other professional field, and provided his testimony strictly as a lay witness. *Id.*

For the purpose of these proceedings, Mr. Chaudhry and his company, Access Strategies, LLC, prepared a document titled "Health Impact Assessment." Exhibit 115 (HIA) In the HIA, Mr. Chaudhry attempted to identify what he described as establishments offering "unhealthy food options" within a 10-mile radius of the Subject Property – generally, along the MD 210 corridor.[18] Exhibit 115, pp. 10-12. *See* also 3/05/2020 T.p., 48-49. In doing so, Mr. Chaudhry identified 79 such locations, and then included a survey in the HIA in which he categorized the items sold at those establishments as either sweet and salty snacks, fast food, or fried chicken. Exhibit 115, pp. 12-14. Based upon this survey, Mr. Chaudhry concluded that "Accokeek, Maryland and the surrounding 10-mile radius" was a "food swamp," a buzz phrase that he used repeatedly throughout the HIA and in his testimony. *Id.* at 15, 19, 24, 36. In the HIA, Mr. Chaudhry defined "food swamp" as an area where:

[18] Although it is not abundantly clear it appears that Mr. Chaudhry identified retail establishments within a 10-mile area of the Subject Property that only operated as either gas stations, convenience stores, fast food eateries, tobacco shops or liquor stores. Exhibit 115, p. 11.

> **[D]ue to a lack of grocery stores**, food swamps have an abundance of unhealthy food options, such as convenience stores and fast food stores that are more readily available and accessible **than healthy food outlets such as supermarkets**.

Id. at 24 (emphasis added). Upon cross examination, it became apparent that Mr. Chaudhry's "survey" was nothing more than his subjective, lay opinion as to what constituted unhealthy food options. A scientific approach was not utilized. The following constitutes just a few examples of the inconsistencies in Mr. Chaudhry's survey, analysis, and testimony:

- Mr. Chaudhry admitted that he alone determined whether a food option at one of the 79 establishments constituted a "sweet and salty snack," versus some other category, by simply eyeballing the food items at the store. 3/05/2020 T.pp., 45-47, 67-68. This was a subjective determination only, utilizing no objective criteria whatsoever.

- Although conveniently omitted in the HIA, Mr. Chaudhry admitted that there were three (3) major grocery stores located in shopping centers within only a few miles of the Subject Property, notably the Weis Market just across MD 210 from the Subject Property in the northeast quadrant of the MD 210/Livingston Road intersection. Again, Mr. Chaudhry did not include any of these grocery stores among the 79 establishments identified in the HIA, nor did he consider their presence in concluding that the area was a "food swamp." *Id.* at 50-52[19] His failure to include the grocery stores in his "survey" completely undermines his conclusion, since the definition he claims to have used and relied upon for determining that the area is a "food swamp" requires a comparative analysis of food options, **specifically to include access to grocery stores**. Exhibit 115, p. 24.

- Mr. Chaudhry admitted that he could not provide a definition for the term "oversaturated," in his conclusion that the area was "oversaturated with an inequitable distribution of unhealthy food, tobacco, and alcohol," and ultimately admitted that he only subjectively made that determination himself. *See* 3/05/2020 T.pp., 70-71. Again, this conclusion was made without regard to the presence of multiple nearby grocery stores, and without any type of relative analysis to other areas.

- Mr. Chaudhry admitted that his determination as to whether any restaurant in the area constituted a "fast food establishment" was, again, based upon his own subjective opinion. *Id.* at 76-77.

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[19] There is also a Safeway grocery store located approximately 4.1 miles north of the Subject Property. Exhibit 10, p. 25.

- Further demonstrating the ambiguity and imprecision of his definitions, Mr. Chaudhry admitted that grocery stores would fall under the definition of "convenience store" provided in his report. *Id.* at 77-78. Yet, as noted above, Mr. Chaudhry was aware of three (3) grocery stores within the vicinity of the Subject Property, and failed to include them in his analysis.

- Despite the definition of "food swamp" provided in the HIA, which specifically requires a lack of grocery stores or fresh food choices in a particular area, Mr. Chaudhry refused to acknowledge, on cross-examination, that the presence of the three nearby grocery stores provided access to fresh, healthy food options. *Id.* at 90-91.

- Mr. Chaudhry testified that the area he investigated for "social detriments of health" was the same area identified as the "trade zone" in the Valbridge Needs Analysis prepared by Mr. Steere. Id. pp. 17, 21. However, Mr. Chaudhry identified the region he surveyed for unhealthy food options as being an area encompassing a 10-mile radius of the Subject Property from the "MD 210 Ramps to and from I-495/I-295" to "MD 228." Exhibit 115, pp. 10-11. On cross examination, Mr. Chaudhry acknowledged that the 10-mile area he investigated extended along the MD 210 corridor from the Charles County line up to just south of the Beltway at Wilson Bridge Drive in Oxon Hill, which is consistent with the area he identified in the HIA – **but much of that area is also clearly well beyond the northern boundary of Mr. Steere's trade area.** 3/05/2020 T.pp., 145-146. Yet in the face of this undisputed fact, Mr. Chaudhry would not concede that any of the 79 establishments he identified in the larger 10 mile zone in the HIA were located outside of Mr. Steere's trade area. *Id.* at 147.

These examples constitute only a small sample of Mr. Chaudhry's testimony during cross-examination, in which he demonstrated a pattern of using key terms in the HIA that lacked clear and objective definition, using terminology based solely on his own subjective observations, and of willfully ignoring the presence of healthy food options available at many, if not most, of the 79 stores identified in the HIA, including the three major grocery stores located within minutes of the Subject Property. The grocery stores were intentionally omitted from the HIA — the presence of these three (3) grocery stores alone entirely undermines Mr. Chaudhry's characterization of the Accokeek area as a "food swamp." In addition, Mr. Chaudhry's refusal to concede obvious and undisputed facts during his cross examination renders his testimony unreliable.

Mr. Chaudhry was not qualified as an expert witness, and his lay testimony was inconsistent and unreliable at best. Beyond that, Mr. Chaudhry failed to demonstrate any educational training or experience that would give him any basis to make a determination as to whether the Accokeek area constitutes a food swamp. Mr. Chaudhry failed to

employ a scientific approach to support his conclusion. Furthermore, due to his lack of expertise, the HIA constitutes nothing more than a compilation of observations and conclusions by a lay witness lacking the professional expertise or technical background to draw any conclusion about food options available in the area, and, more critically to the issue, the impact of those food options on the health of the community.

(13) A Food or Beverage Store under 125,000 square feet is a use permitted by right in the Table of Uses for the C-S-C Zone. *See* §27-461. The only reason that the request for a Food or Beverage Store is included in Special Exception 4816 is because it is proposed in combination with a Gas Station, which requires a Special Exception to operate in the C-S-C Zone. The Food or Beverage Store to be built at the Subject Property would include only 4,649 square feet. *See* Exhibit 28. *See also* Exhibit 24, p. 11. Within this context, it is significant to note that not only would the proposed Food or Beverage Store, as a stand-alone use, be permitted upon the Subject Property, but fast-food restaurants such as McDonald's, Burger King, and Wendy's are also uses permitted by right in the C-S-C Zone, and thus, upon the Subject Property, subject only to Detailed Site Plan Approval. *See* §27-461. Accordingly, the District Council for Prince George's County, in enacting the Table of Uses contained in the Zoning Ordinance, has already determined that food service establishments offering far fewer healthy options than Royal Farms are permitted to operate in the C-S-C Zone without the additional scrutiny required by a Special Exception.

(14) For opponents to argue that the Royal Farms Food or Beverage Store would pose a health hazard to the community constitutes nothing more than an attempt to misuse the "health, safety, and welfare" concerns contemplated by the District Council in §27-317(a)(4), as the District Council has clearly determined that fast-food restaurants are proper and appropriate uses in the C-S-C Zone.

(15) Several considerations protect the adjacent properties and the general neighborhood from adverse effects to their uses and development.

First, the Subject Property is set apart from all of its neighbors by surrounding roads; the physical separation this condition affords is a substantive protection to both the use and the development of the adjacent properties.

Second, the proposed Gas Station is a compatible service commercial use in an existing commercial area on an existing commercially-developed site which has historically been occupied by service commercial uses. As a result, the adjacent properties and the general neighborhood are accustomed to this type of activity on the Subject Property.

The Subject Property is a part of an existing commercial area which is both planned and zoned to continue as the commercial anchor for the surrounding community. It does not represent an extension of new commercial uses or even new service commercial

uses; those have been previously existing at the site. The uses proposed are consistent with and complementary to the other existing land uses in the existing commercial area.

Finally, the proffered intersection improvements will improve the level of service at the adjacent intersection from a failing level to a passing level. This fact would operate to enable the development of adjacent properties or the general neighborhood to the extent that it makes a finding of adequacy of public facilities possible when it might not now be. §27-317(a)(5)

(16) The Technical Staff concluded in its Staff Report that the use proposed by SE-4816 will not be detrimental to the use or development of adjacent properties or the general neighborhood:

> The subject Application proposes to add a gas station use, in combination with a food and beverage store. The proposed development will not detrimentally impact the use or development of adjacent properties, as the proposed gas station and food and beverage store, pursuant to the conditions recommended, will be in architectural harmony with the existing surrounding developments and will provide goods and services, which will supplement those on abutting properties.

Exhibit 24, p. 8. The Land Planning Analysis and Mr. Ferguson's testimony regarding SE-4816's lack of impact upon the surrounding neighborhood, as set forth above, also demonstrates that the proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood. Exhibit 86, pp. 8-9. The Subject Property has historically been occupied by service-oriented commercial uses (including a prior fueling station), and the proposed Gas Station and Food or Beverage Store is simply a modernization and consolidation of the commercial uses that have existed at the Subject Property for decades. The proposed Gas Station and Food or Beverage Store on the Subject Property, therefore, are not only planned for, as evidenced by the Subject Property's commercial zoning but will also be a more comprehensive and better-planned use. *Id.* at 16-17. Finally, Mr. Ferguson noted that the intersection improvements proposed by the Applicant at Livingston Road and MD 210 will raise the level of intersection's service from a failing level to a passing level, which not only further justifies the conclusion that these uses will not be detrimental to the use or development of adjacent properties or the general neighborhood, but it will actually enhance the neighborhood. *Id.* at 17. §27-317(a)(5)

(17) The Subject Property is exempt from the requirement for approval of a Tree Conservation Plan because no woodland exists on the Subject Property. §27-317(a)(6)

(18) No regulated environmental features exist on the subject site. §27-317(a)(7)

(19) As the site is not located within the Chesapeake Bay Critical Area, the provisions

of §27-317(b) are not applicable to the subject Application.

Gas Station

(20) Both Indian Head Highway and Livingston Road have rights-of-way widths of at least seventy feet, though direct vehicular access is not available to Indian Head Highway. The Subject Property has direct vehicular access to Livingston Road and the Subject Property has 526.74' of frontage on Livingston Road. §27-358(a)(1)

(21) On February 25, 2020, Kelly Canavan, a local resident and President of the AMP Creeks Council, appeared at the Zoning Hearing Examiner Hearing and provided testimony in opposition to SE-4816. In her testimony, Ms. Canavan attempted to argue that a "school" that was part of the Accokeek First Church of God (the "Church") was located within 300 feet of the Subject Property. See 2/25/2020 T.p., 82-84. Ms. Canavan testified that the Church held Sunday school classes, and offered a bible instruction program requiring a registration fee and which included a textbook provided to attendees. *Id.* at 82-83. Although Ms. Canavan provided testimony regarding these activities occurring at the Church, it is noteworthy that no member of the Church appeared during any of the six (6) days of the Zoning Hearing Examiner Hearing to testify in opposition to SE-4816, or to provide any corroborating testimony regarding this issue.

Ms. Canavan's effort to characterize the Church as a school in the context of §27-358(a)(2) is unsupported by the evidence. If it is a school at all, the "school" she referenced in her testimony would have to be classified as a "private school," which is defined in the Zoning Ordinance as:

> A private school or training institution which offers a program of college, professional, preparatory, high school, middle school, junior high school, elementary, kindergarten, or nursery school institution; or any program of trade, technical, professional, or artistic instruction.... The term does not include; ... (B) Any activity offering instruction which is carried on by a single teacher, tutor, or instructor having a total enrollment of less than six (6) students.

§27-107.01(a)(206). The only "evidence" relating to this issue is the uncorroborated description of the purported activities on the Church property by Ms. Canavan. Not only does her description of these activities fail to satisfy the definition of a "private school" as set forth in the Zoning Ordinance, but there was no probative evidence to allow the Examiner to conclude that her testimony was either accurate or current. Similarly, there is no way of determining whether the information shown on Exhibit 96 is either accurate or current. Furthermore, the Applicant submitted into the record the printed information from the Prince Georges County Department of Permitting, Inspection and Enforcement, showing the use shown on the Use and Occupancy Permit for the Church is noted as "Church or Synagogue" – without any mention of a school.

(The Examiner stated that while this document could not be entered into evidence, she would take administrative notice of it as a government document.) *Id.* at 118-119. There is no evidence in the record to demonstrate that the purported "school" is licensed as such with the Maryland State Department of Education, or any other governmental agency. Quite simply, there is no probative evidence in the record whatsoever to prove that the Church does, in fact, operate a "Private School" as defined in the Zoning Ordinance, or that a "school" exists at that location under any definition.

Finally, the church property is located in the C-S-C Zone, and a "private school," such as the one described by Ms. Canavan, would fall into the "All Others" category in §27-461(b), and is subject to Special Exception approval in that zone. The only other possible category in which a school would be permitted in the C-S-C zone would be under §27-463, but this Section requires not only Detailed Site Plan approval, but also that the school offer "a complete program of nursery school education accredited by the Maryland State Department of Education, or a complete program of nursery school education accredited by the Maryland State Department of Education, or a complete program of academic elementary (including kindergarten), junior high (middle), or senior high school education...." This section also requires that the property upon which the school is located be at least five (5) acres in size, but the Church property, according to the PGAtlas, consists of only 1.23 acres. Ultimately, absolutely no evidence was presented by Ms. Canavan to demonstrate that the Church (or the church property) met the academic requirements for a school, as set forth in the Zoning Ordinance, or had either a Special Exception or Detailed Site Plan approval to operate a private school. Accordingly, a "school" does not exist within the three hundred (300) feet of the Property.

(22) No lots containing schools, hospitals or outdoor playgrounds exist within 300' of the subject site. The nearest such facility appears to be the Accokeek Branch Library parcel on Livingston Road, located approximately 1,510' away to the east as the crow flies. §27-358(a)(2)

(23) No display or rental of any vehicles is proposed at the subject site. §27-358(a)(3)

(24) No storage or junking of any vehicles is proposed at the subject site. §27-358(a)(4)

(25) The Special Exception Site Plan (Exhibit 28) indicates that each of the proposed two-way access driveways will be 35' wide, and the two lanes of the right-in-right-out entrance will be 20' wide, in accordance with the requirements of the Maryland State Highway Administration. The edge of the westernmost of the proposed driveways along Livingston Road is approximately 80' east of the point of curvature of the intersection with Biddle Road; the edge of the easternmost proposed driveway along Livingston Road is approximately 155' west of the point of curvature of the intersection with Indian Head Highway. The proposed entrance from Biddle Road is approximately 260' south of the intersection with Livingston Road. §27-358(a)(5)

(26) The Special Exception Site Plan (Exhibit 28) indicates that the access driveways are to be defined by curbing. §27-358(a)(6)

(27) The Special Exception Site Plan (Exhibit 28) indicates that a 5' wide sidewalk is proposed between the building and the proposed sidewalk along the site's frontage along Livingston Road. §27-358(a)(7)

(28) The dimensions of the gasoline pumps to the street line are indicated on the Special Exception Site Plan (Exhibit 28) to be not less than 78.1' from the nearest right-of-way line. §27-358(a)(8)

(29) No repair service is proposed. (Exhibit 28). §27-358(a)(9)

(30) The architectural details of the proposed structure are compatible with the roadside commercial character of the surrounding neighborhood, including the nearby commercial shopping center to the east and its pad sites. *Supra* §27-358(a)(10)

(31) Topography of the subject lot and its surroundings has been shown on the Special Exception Site Plan. (Exhibit 28). §27-358(b)(1)

(32) The location of a trash enclosure has been shown on the Special Exception Site Plan. (Exhibit 28). §27-358(b)(2)

(33) No exterior vending machines or a vending area are proposed; sales will be inside the proposed Food or Beverage Store. §27-358(b)(3)

(34) §27-358(c) requires:

> *Upon the abandonment of a gas station, the Special Exception shall terminate and all structures exclusively used in the business (including underground storage tanks), except buildings, shall be removed by the owner of the property. For the purpose of this Subsection, the term "abandonment" shall mean nonoperation as a gas station for a period of fourteen (14) months after the retail services cease.*

This Requirement is noted on the Special Exception Site Plan (Exhibit 28) §27-358(c)

(35) §27-358(d) requires:

> *When approving a Special Exception for a gas station, the District Council shall find that the proposed use:*

(1) Is necessary to the public in the surrounding area:

(36) As the Technical Staff recognized in its Staff Report, there is a "reasonable need" for the proposed Gas Station proposed in SE-4816 as required under §27-358(d)(1). Exhibit 24, p. 9-10. The meaning of the term "need" or "necessity" in the context of Maryland's zoning laws has not been interpreted to mean "absolute necessity" but has instead been defined as requiring that the proposed use be convenient and useful to the public. As held by the Court of Special Appeals:

> The judicial gloss given to the definition of the 'need' requirement in Maryland special exception lore has been that it means 'expedient, reasonably convenient and useful to the public.' 'Need' does not mean absolute necessity. The term is elastic and relative, infusing the designated local government decision-maker with a degree of discretion, not unfettered or to be arbitrarily exercised, in interpreting and applying the facts of each case to this requirement.

Friends of the Ridge v. Baltimore Gas & Elec. Co., 120 Md. App. 444, 448, 707 A.2d 866, 888 (1988), affirmed in part, vacated in part, 352 Md. 645, 724 A.2d 34 (1999)[20] *See also* Neuman v. City of Baltimore, 251 Md. 92, 98-99, 246 A.2d 583, 587 (1968) (holding that, "need has been judicially held to mean expedient, reasonably convenient and useful to the public."); Lucky Stores, Inc. v. Bd. Of Appeals of Montgomery Cty., 270 Md. 513, 528, 312 A.2d 758, 766 (1973) (quoting the Court's definition of "need" in Neuman in the context of a surrounding neighborhood and further holding that the terms "neighborhood" and "need" do not suggest the authority of a zoning board to consider whether the use will harm competing businesses); Baltimore Cty. Licensed Beverage Ass'n Inc. v. Kwon, 135 Md. App. 178, 193-95, 761 A.2d 1027, 1035-1036 (2000) (citing Neuman and holding that the term "need" in the context of zoning should be "considered in light of what is necessary for the accommodation of the public").

(37) In support of SE-4816, Mr. Edward Steere, Valbridge Property Advisors, accepted as an expert in the field of market analysis, prepared an analysis of the need for a Gas Station in the neighborhood, and provided testimony regarding that analysis at the Zoning Hearing Examiner Hearing on January 21, 2020 and March 5, 2020. Exhibit 10 (Needs Analysis). In his Needs Analysis and testimony, Mr. Steere originally defined the applicable trade area as being generally bound on the east by Maryland Route 301, on the north by Fort Washington Road, and on both the west and the south by the Potomac

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[20] Friends of Ridge involved a request for both a variance and a special exception. The petition for certiorari to the Court of Appeals did not challenge the holding on the special exception, and the Court of Appeals' subsequent decision vacated only the portion of the Court of Special Appeals' holding regarding the need for a variance, because a variance was not required. 352 Md. 645, 662, 724 A.2d 34, 42 (1999). The Court of Appeals explicitly noted that the special exception was not at issue, and affirmed the remainder of the Court of Special Appeals' holding which included the need analysis in the context of special exceptions. *Id.*

River (the "Trade Area"). Exhibit 10, p. 14.[21] The Trade Area includes census tracts from 2010 in both Prince George's County and Charles County, and captures the majority of the commuters and consumers likely to travel through or do their shopping on the MD 210 corridor, which borders the Subject Property to the east. *Id.* at 15.

The Needs Analysis prepared by Mr. Steere indicates that residential consumers in the trade area will use approximately 58 million gallons of gasoline during the calendar year of 2019 and a total of approximately 77.60 million gallons when combined with commercial, workforce, and pass-through consumers. *Id.* at 21. Despite the 77.60 million gallon demand, the Needs Analysis demonstrates that only about 25.20 million gallons of gasoline are being supplied to these consumers by the thirteen (13) Stations located within the trade area.[22] *Id.* at 29. Therefore, there is a 52.40 million gallon shortfall in output in the trade area, which includes the proposed location of SE-4816.

Mr. Steere was also asked to provide an analysis of the supply and demand for the eight (8) census tracts within his Trade ne that are located solely within Prince George's County. Exhibit 84, (Alternate Needs Analysis). In his Alternate Needs Analysis, Mr. Steere determined that the total demand from residential and commercial sources in this smaller segment of the Trade Area was at least 21.49 million gallons of gasoline per year. *Id.* at 4. Mr. Steere also determined that the total supply within this more limited trade area was 14.7 million gallons. *Id.* at 5.

(38) Sangeetha Tharmarajah appeared at the Zoning Hearing Examiner Hearing on February 27, 2020 and offered lay testimony in opposition to Mr. Steere's Needs Analysis. In her testimony, Ms. Tharmarajah identified a map that she had prepared, and which purported to show the following four (4) gasoline stations located within the Trade Area defined by Mr. Steere which were omitted from his analysis:

(1) Friendly Market, 11500 Old Fort Road, Fort Washington, Maryland 20744;
(2) Shell Gasoline, 11001 Livingston Road, Fort Washington, Maryland 20744;
(3) Falcon Fuel, 9500 Allentown Road, Fort Washington, Maryland 20744; and
(4) Shell Gasoline, 10901 Fort Washington Road, Fort Washington, Maryland 20744.

2/27/2020 T.p., 59-60, 72-87[23] The map prepared by Ms. Tharmarajah was taken from Google Maps. *Id.* at 63.

(39) In response, Mr. Steere prepared a supplement to his Alternate Needs Analysis and testified again on March 5, 2020. Exhibit 151. Contrary to Ms. Tharmarajah's

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[21] A map of the Trade Area with the precise boundaries is included at Exhibit 10, p. 15
[22] The Needs Analysis identified thirteen (13) gas stations in the trade area, each with the ability to dispense approximately 2.1 million gallons of gasoline annually. *Id.* at 28-29. The thirteenth station has only a single pump, therefore it is not considered to contribute overall output of the trade area. *Id.* at 28.
[23] The Trade Area map from Exhibit 84 was used for the purpose of comparison. 2/27/2020 T.p., 107.

testimony, this Falcon Fuel station is not located within the Trade Area identified in Mr. Steere's Alternate Needs Analysis, as it lies approximately one-half mile to the north of the Trade Area boundary line. 3/05/2020 T.p., 251-251. *See* also Exhibit 151, p. 7. Mr. Steere's Supplemental Needs Analysis took into account the impact of the additional three stations identified by Ms. Tharmarajah, and, with regard to only the Prince George's County census tracts, the adjusted gasoline supply was 16.8 million gallons, while demand was 21.06 million gallons. 3/05/2020 T.p., 252. Mr. Steere also noted that the three stations addressed in his Supplemental Needs Analysis had a total of five (5) gas pumps, and that each of the remaining seven stations in the Prince George's portion of the Trade Area averaged five (5) pumps per station. As a result, the combined contribution to the gasoline supply of the three additional stations was equivalent to only one station, or 2.1 million gallons of gasoline. *Id.* p. 253-254.

(40) In it's unreported opinion in Mohammed Anvari, et. al. v. County Council of Prince George's County, et. al., the Court of Special Appeals upheld the findings of the Zoning Hearing Examiner in Special Exceptions SE-4436, who in discussing how the term "necessary" should be construed, concluded that "...the proper standard is one that addresses whether the Gas Station is 'convenient, useful, appropriate, suitable, proper or conducive' to the public in the surrounding area...."

The establishment of a Gas Station use at the subject site in an established commercial area at the intersection of a collector roadway with a planned freeway is suitable and appropriate, as it is convenient and useful to the substantial traffic (2019 ADT 54,681 vehicles per day on Indian Head Highway, 2015 ADT 3,451 vehicles per day on Livingston Road (west of Indian Head Highway)) which passes the site. §27-358(d)(1)

(41) Finally, Section 27-358(d)(2) requires that, "the District Council shall find that the proposed use ... Will not unduly restrict the availability of land, or upset the balance of land use, in the area for other trades and commercial uses."

The preponderance of the zoning in the surrounding commercial area is C-S-C, but outside of the Accokeek Village Shopping Center (which also contains a Gas Station with a Food or Beverage Store), many of the existing land uses are (or have been) service commercial in nature, whether vehicle repair or contractor's offices. The Gas Station component of the proposed Application is a service commercial use that is representative of the service commercial uses which have been on the Subject Property and are sprinkled through the rest of the surrounding commercial area, but because of both its lack of repair facilities and the presence of the Food or Beverage Store, it is a much more retail-commercial-compatible use.

There is only one Gas Station on the west side of the southernmost seven miles of Indian Head Highway in Prince George's County. As such, there is not a preponderance of this land use type.

Undeveloped land for other retail commercial land uses is available in both the northwest and southeast quadrants of the Livingston Road/Indian Head Highway intersection.

Because the proposed use would replace historic service commercial uses with a compatible service commercial use (with a permitted retail commercial component), because it is in the midst of a group of complementary commercial uses, (including other service commercial uses), because it will be constructed to a high standard of site planning and architectural detail, and because it does not propose vehicle repair or vehicle storage and the attendant visual disruption caused by these activities. It will not upset the balance of land use, or restrict the availability of land for other trades and commercial uses.

Food or Beverage Store

(42) A Needs Analysis for Convenience Store (Exhibit 49) was prepared for the subject Application and Technical Staff concurred with the Analysis finding that the proposed Food or Beverage Store is reasonably convenient and will serve the needs of the community. Exhibit 24, p.11. The following are excerpts from the Analysis:

> "Valbridge has examined the community of Accokeek and determined that the entirety of the land mass west of Indian Head Highway (MD-210) is devoid of convenience services. Specifically, census tract 8013.02 lies entirely west of MD -210, between Piscataway Creek, the Potomac River and the Charles County line. The most distinctive feature of this trade area is that all the residents, business and institutions like the Fire Department, must cross MD-210 to access any type of convenience services and groceries.
>
> We examined this trade area, in contrast to the larger gasoline trade area, based on consumer demand for convenience food and beverage. Although consumers will travel 10 minutes out of their way for cheaper gas, food and beverage retail prices are relatively static among convenience retailers. There are, however, different preferences noted in coffee and other specialty prepared foods, which may draw consumers from greater distances. Effectively, the trade area for a convenience store is much smaller than gasoline sales. The "convenience" factor is moot if consumers are passing one or more stores to reach another farther away. For the consumers on the west side of MD-210 this would be the most convenient location relative to all other existing convenience stores in and around Accokeek."
>
> "Using the demographic statistics, we estimate the number of households

in the defined trade area at 976 in 2019. This community is stable and not experiencing any growth in the recent 10 years and forecast five years. Those households have the following socio-economic characteristics:

Median Household Income (2019)	$122,963
Average Household Size –Persons (2019)	2.93
Average Owner-Occupied Home Value (2019)	$400,640
Estimated Homeownership Rate (2019)	88.0%
Average Vehicles per Household (2013-2017)	2.5
Workers Driving Alone to Work (2013-2017)	72.5%
Travel Time to Work 30+ minutes (2013-2017)	72.0%

This trade area is a very stable suburban space with no planned growth. A high median income of $125,894 enables a very solid 86.9% homeownership rate with homes being valued at an average of $400,640 in 2019. The Census Bureau's American Community Survey for 2013-2017 estimates that there are 2.5 vehicles per household on average and that the vast majority (72.5%) of workers drive alone to work. Nearly three-quarters of workers commute more than 30 minutes to work.

The trade area's aggregate income is calculated as $120,011,888 in 2019:

976 households x $122,963 average income = $120.0 Million Aggregate Income

Convenience Store Demand

The NACS and Nielson conducted a national count of convenience stores as of December 2018 and determined there are 153,237 stores operating in America. Of those, 121,998 sell gasoline. Based on a national population of 327.2 million people, there is approximately one store for every 2,100 people.

327,000,000 people ÷ 21,998 C-stores w/gas = 2,682 people/store"

"There are no food and beverage businesses in census tract 8103.02. Census statistics suggest there are a total of 79 businesses in the tract, of which seven are classified as retail and 35 are classified as "other businesses," which typically cover various home occupations. There are 893 employees in the tract, which would be expanded by 4.5% with the addition of 40 employees at Royal Farms.

Valbridge Property Advisors believes that census tract 8013.02 is

underserved with convenience store options. Based on the national average of one store per 2,100 people (or 2600 people) alone, the community is not served. However, the greater need is demonstrated by the convenience of accessing this retail use on the west side of MD-210.

This entire community on the west side of MD 210 is not presently serviced with any conveniences, and that at this site there will be pedestrian accessibility and seating, further providing an asset to the community that is not available even on the east side of the highway.

The proposed store will also improve the neighborhood with highway frontage improvements, access controls, curb and gutter with stormwater management, sidewalks and socially advantageous indoor and outdoor seating, with conventional architecture emphasizing natural elements such as locally sourced stone and muted natural colors and effects. These elements would not be available to the neighborhood if the existing four parcels were independently developed. Today the site is underperforming with three vacant spaces, which brings down the property values, offers no income taxes, and depressed property tax revenue for the entire community. The Royal Farms will not only boost the economy of the community, by adding revenues to the county and state coffers, but also contribute to the overall accessibility of the commercial intersection and provide enhanced environmental and social benefits by providing infrastructure at no cost to the public. Therefore, the convenience factor for the 2700 people living on the west side of MD-210, as well as the various other businesses and the fire department are multiplied by the community benefit provided by Royal Farms."

"In the alternative, an analysis of a greater Accokeek trade area demonstrates that there is still an unmet demand for convenience stores.

Valbridge expanded the trade area to extend east of MD-210 to include a total of three census tracts:

- 8013.02
- 801310
- 8013.11

This area is bounded (clockwise) by the Potomac River, and Piscataway Creek, Tinkers Creek, Steed Road, Piscataway Road (MD-223), Tippet Road, Butler Branch, Piscataway Creek, Windbrook Drive, Floral Park Road, South Springfield Road, Accokeek Road (MD-375), Gardner Road and Mattawoman Creek which generally represents the Charles County Line to Billingsley Road, then northwest to the Potomac River."

Using the demographic statistics, we estimate the number of households in the defined trade area at 5,667 in 2019. This community has had slight growth. Those households have the following socio-economic characteristics:

Median Household Income (2019)	$130,778
Average Household Size –Persons (2019)	2.99
Average Owner-Occupied Home Value (2019)	$388,916
Estimated Homeownership Rate (2019)	87.5%
Average Vehicles per Household (2013-2017)	2.5
Workers Driving Alone to Work (2013-2017)	77.8%
Travel Time to Work 30+ minutes (2013-2017)	74.8%

This trade area is a very stable suburban space with minimal planned growth. A high median income of $130,778 enables a very solid 87.5% homeownership rate with homes being valued at an average of $388,916 in 2019. The Census Bureau's American Community Survey for 2013-2017 estimates that there are 2.5 vehicles per household on average and that the vast majority (77.8%) of workers drive there alone to work. Approximately three-quarters of workers commute more than 30 minutes to work.

The trade area's aggregate income is calculated as $2,215,379,320 in 2019.

16,940 households x $130,778 average income = $2.22 Billion Aggregate Income"

"Census reports that there is a total of 278 businesses in this trade area, of which five are food and beverage stores, which includes Exxon, 7-11, Giant Food and Weis. There are only 47 retail businesses.

16,940 people ÷ 2,135 C-stores/person = 793 stores

16,940 people ÷ 2,682 C-stores/person = 6.32 stores

Since there are only five food and beverage stores in the greater Accokeek area, there appears to be an unmet demand for at least two stores. If we were to differentiate the food and beverage definition among grocery stores vs. convenience stores, we would find an even greater unmet demand."

"Whether testing the Accokeek neighborhood area only on the west side of MD-210 or the greater Accokeek area of southern Prince George's County, there is unmet demand for convenience store services. However, the greatest need is for the convenience of access to this type of retail on the west side of the highway.

> The necessity or demand of the gas station creates a reasonable need for a food or beverage store, which will provide convenience and expedient service to the community.
>
> The establishment of a convenience store with gasoline sales on the west side of Indian Head Highway will provide a service not presently available to the community while also reducing congestion and cross traffic on Livingston Road at MD-210. This is a safer space for this type of food and beverage outlet, not only because it will serve an underserved community, but also because it will channel traffic better by eliminating the need for left turn movements and cross traffic. Additionally, the site will be pedestrian friendly with sidewalks and indoor and outdoor seating, which also does not exist in the community."

(43) The subject Application would represent the first Food or Beverage Store on the west side of Indian Head Highway in Prince George's County, south of Swan Creek Road. Its approval would allow Accokeek residents living west of Indian Head Highway to have the option of avoiding that road to meet more of their daily needs, which speaks directly to the 'convenient, useful, appropriate, suitable, proper or conducive' standard. §27-355(a)(1)

(44) Vehicular access to the site is provided via two entrances on Livingston Road located on the east side of the site, and a singular access drive along Biddle Road. The 4,649-square-foot building will be an appropriate size for the site and conforms to the regulations applicable in the C-S-C Zone. The size and location of the building, as well as access points to the Food or Beverage Store, are oriented toward meeting the needs of the neighborhood. §27-355(a)(2)

(45) Neither the availability of land nor the balance of land uses will be restricted or upset by the proposed Food or Beverage Store component of the subject Application. Food or Beverage Stores are ordinarily permitted in the C-S-C Zone without any special conditions of approval; in fact, historically, these specific conditions of approval were only applicable to Food or Beverage Stores in the C-M Zone, where the concern was that introducing retail uses would restrict the availability of land for service commercial uses.

Staff notes that there are 13 similar uses located within the subject site's trade area. As shown within the analysis of their Report, Staff believes that development of the site will not unduly restrict the availability of land or upset the balance of land use in the area, based upon the market analysis.

The proposed uses at the Subject Property are representative of and complementary to the other uses in the surrounding commercial area. Furthermore, substantial amounts of undeveloped commercially-zoned land remains available for development on both sides of Indian Head Highway, in both the northwest and southeast

quadrants of the Livingston Road/Indian Head Highway intersection. §27-355(a)(3)

(46) The Subject Property is not located in the I-1 or I-2 zones. §27-355(a)(4)

(47) No retail sale of alcoholic beverages is proposed. §27-355(a)(5)

Authorization to Build in Right-of Way

(48) The Subject Property is located within the Subregion V Master Plan and Sectional Map Amendment. The 1993 Subregion V Master Plan and Sectional Map Amendment shows the entire property within the proposed interchange of MD 210 (Indian Head Highway) (F-11) (Master Plan Freeway) and MD 375 (Livingston Road) (C-525) (Collector Road). (ROW, Exhibits 32 and 34)

(49) In September, 2004, the Maryland Division of the Federal Highway Administration issued its Record of Decision selecting Alternative 5A Modified for propose infrastructure improvements along F-11 (Indian Head Highway). (ROW, Exhibit 5, p. 6 and Exhibit 34)

(50) ROW Exhibit 9 are the scaled plans showing Alternative 5A Modified, MD 210-I-95/I-495 to MD 228. ROW Exhibit 9(o) is the section along the frontage of the Subject Property. The Subject Property is in yellow and the Alternative 5A Modified is shown in red across part of the frontage along MD 210.

(51) The 2009 Subregion V Master Plan and Sectional Map Amendment continued to carry forward the 1993 Subregion V Master Plan and Sectional Map Amendment designation of the complete taking of the Subject Property by the right-of-way needed for the F-11/C-525 interchange. The 2009 Subregion V Master Plan and Sectional Map Amendment did not acknowledge FHA/SHA's endorsement of Alternative 5A Modified which discarded the 1993 large intersection and provided minimal effect on the Subject Property. (ROW, Exhibit 29)

(52) The November 2009 Countywide Master Plan of Transportation retains the 1993 Subregion V designation of the entire property within the proposed interchange of F-11 and C-525. (Exhibit 28) The 2009 Master Plan of Transportation does not reflect the 2004 right-of-way along the Subject Property as selected by the FHA/SHA.

(53) As a result of legal challenges which are not relevant to the Subject Property, the Subregion V Master Plan and Sectional Map Amendment was readopted in July, 2013 retaining the 1993 Master Plan and Sectional Map Amendment's acknowledgment of the total taking of the property by the (no longer) proposed interchange. (ROW, Exhibit's 31(a) and (b)) However, 'Table VI-4: Recommended Road Improvements by 2030' shows a shift in this perspective as it includes the MD 210 and MD 375 interchange with the added proviso "if deemed necessary". (ROW, Exhibit 31(c))

(54) The County's Priority Project's List for the Fiscal Year 2019-2024 State Consolidated Transportation Program notably fails to include the MD 210 and MD 375 interchange. (ROW, Exhibit 35, FHA/SHA approval of Alternative 5A Modified).

(55) Interestingly, PGAtlas does not show the total taking provided in the 1993, 2009 and 2013 Subregion V Master Plans and the 2009 Master Plan of Transportation, nor does it provide the very limited taking envisioned by the 2004 FHA/SHA approval of Alternative 5A Modified. Instead, PGAtlas provides an unsupported right-of-way designation across approximately 40 percent of the Subject Property. (ROW, Exhibit 3)

(56) The Owner/Applicants raised the following issue at the December 17, 2019 Zoning Hearing Examiner remand hearing on the ROW – that the Owner/Applicants strongly disagree with the underlying predicate of the remand, being the assumption that the ultimate right-of-way for the proposed Indian Head Highway/Livingston Road interchange impacting the Subject Property is as shown on PGAtas. As noted at the December 17, 2019 hearing on the Right-of-Way, it is the Owner/Applicant's position that the ultimate right-of-way for this proposed interchange is actually as shown on the County's Master Plan of Transportation, upon which all four of the parcels constituting the Subject Property would be eliminated in their entirety by the proposed interchange. *See generally* 12/17/2019 T.p., 55-57 and Exhibits 12 to 17. The Land Use Article of the Maryland Code, Section 21-203(B)(1) and (2), requires that "[t]he resolution [adopting the plan] shall refer expressly to the maps and the descriptive and other matter that the Commission intends to form the whole or part Commission." Quite simply, the Master Plan of Transportation for the County includes that information, and is signed as required, while PGAtlas has no such information, and is not signed as required. *See* Exhibit 14. Indeed, PGAtlas specifically provides "[a]ll maps, imagery, and associated data are intended to provide general information and are not to be used as a recognized reference or for official purposes."

(57) The record in this case demonstrates that Owner/Applicants have proven all of the required findings to obtain the requested Authorization, as set forth in Zoning Ordinance §27-259(g)(1)(A)-(D) and as determined by the Zoning Hearing Examiner in her May 1, 2019 Decision on this Application. The Order of Remand does not require that these be revisited or otherwise addressed; said Order, instead, sets forth contain specific issues to be addressed, and it is those issues that were addressed during the hearings before the Zoning Hearing Examiner on this Order of Remand, as follows.

(58) The first issue to be addressed by the Zoning Hearing Examiner under the Order of Remand is identified as follows:

> The ownership of the Accokeek Exxon – i.e. – testimony or evidence shall be received on whether the parents of Sangeetha Tharmarajah owns the business entity as a corporation, a general partnership, a joint venture, a limited liability company, a limited partnership, or a

> sole proprietorship. Once ownership is clarified on remand, if necessary, the person, persons, or entity may register to become a party or person of record in this case.

See Order of Remand, p. 5. As noted above, Sangee Tharmarajah and Sulojana Tharmarajah claim to hold an ownership interest in a business entity, Saraniya Fuel Marketing Corporation ("SFMC"), which operates as the Accokeek Exxon across MD 210 from the Subject Property. However during the Zoning Hearing Examiner Hearing on December 17, 2019, evidence that SFMC was not in good standing with the Maryland State Department of Assessments and Taxation ("SDAT"). *See* 12/17/2019 T.p., 5. In response to that issue, the Zoning Hearing Examiner told counsel for SFMC: "I'm going to hold your part of the case in abeyance until tomorrow morning ... Tomorrow morning you need to provide evidence that the Council has asked for on remand." *Id.* at 54-55. That testimony, however, did not occur until the third day of the Zoning Hearing Examiner Hearing, which was held on January 21, 2020, during which it was found that SFMC was still not in good standing with SDAT. *See*, 1/21/2020 T.p., 34. Furthermore, and more importantly, during the portion of the Zoning Hearing Examiner Hearing on January 21, 2020, it was determined that:

(a) Neither the Tharmarajah family nor SFMC owns the land upon which Accokeek Exxon is located. *Id.* at 5;

(b) As evidenced by Exhibit 30B, SFMC is a franchise to two entities, namely Alliance Energy, LLC and Global Montello Group Corp. *See also Id.* at 6-7; and

(c) Pursuant to Exhibit 30C, SFMC leases the property from both Alliance Energy, LLC and Global Montello Group Corp., but the property upon which the Accokeek Exxon is located is actually owned by a third party, which Ms. Tharmarajah testified was a party she referred to as "Getty." *Id.* at 21.

Accordingly, the only evidence in the Zoning Hearing Examiner's record on this issue demonstrates that neither Sangee Tharmarajah, nor SFMC have any personal or property ownership rights that would be adversely affected by the granting of the building within a right-of-way. Aside from the prevention of competition, which is not a basis for aggrievement, there is no other basis to find that there is any interest by those parties that would be affected specifically and differently from the general public. Bryiarski v. Montgomery Cty. Board of Appeals, 247, Md. 137 (1966). *See also* A Guy Name Moe, LLC v. Chipotle Mexican Grill of Colo., LLC, 447 Md. 425 (2016); Gosain v. County Council of Prince George's County, 178 Md. App. 90 (2008); and Kreatchman v. Ramsburg, 224 MD 209, 219-20, 167 A.2d 345, 350-51 (1961). Therefore, neither the Tharmarajahs nor SFMC, had standing to file the May 31, 2019 Tharmarajah Exceptions to the Zoning Hearing Examiner's Decision approving the Right-of-Way.

(59) The second issue identified in the Remand Order requiring presentation of additional testimony and evidence is as follows:

> The criteria for approval to authorize the issuance of a permit within proposed rights-of-way—i.e.,-- the Tharmarajahs, or any other party or person of record, shall be allowed, through their attorney or *pro se*, to present additional testimony or evidence, if any, relating to the specific criteria for approval outlined in PGCC Sec. 27-259(g)(1)(A)-(D).

See Order of Remand, p. 5. Aside from the Tharmarajahs' testimony with respect to ownership issues concerning the Accokeek Exxon station and the land upon which it operates, the only other party who sought to testify about the right-of-way as a new party of record was Dharam Singh Goraya. During the hearing, Owner/Applicant objected to the testimony of Mr. Singh, since he would be entering his appearance and testifying as a new party of record, and not as a party of record from the Right-of-Way hearing proceedings that occurred prior to the Order of Remand. Owner/Applicant objected to Mr. Singh's testimony since the relevant issue established by the District Council related solely to parties or persons of record that were already accepted as such through the prior record in this case, and not to any new parties or persons of record. *See* 12/18/2019 T.p., 47-53. While Mr. Singh's testimony was permitted by your Hearing Examiner, the Owners/Applicant argue that his testimony was impermissible, and do not concede the correctness of the Zoning Hearing Examiner's ruling. With regard to the substance of his testimony, however, while Mr. Singh attempted to testify to §27-259(g)(1)(C) (i.e. "The interest of the County is balanced with the interest of the property owners"), the Hearing Examiner expressed great skepticism regarding Mr. Singh's requisite basis to do so. *Id.* p. 53. In the end, however, the only testimony given by Mr. Singh regarding the proposed authorization to construct within a proposed/ultimate right-of-way was his statement that "I strongly oppose anything this space used by any kind of business," and "[i]t will be bad". *Id.* p. 56-57. Not only does Mr. Singh's testimony ignore the commercial zoning of the Subject Property, but absolutely no basis was given for his testimony. Therefore, his testimony was conclusory only, and entitled to little if any weight.

(60) The third issue under the Remand Order is posed as follows:

> Whether the entire property cannot yield a reasonable return to the owner if PGAtlas only depicts the proposed interexchange to encumber approximately +/- 40 percent or +/- 1.14 acres of the property[.]

See Order of Remand, p. 9. As noted above, four parcels of land have been assembled for the proposed use of a Gas Station in combination with a Food or Beverage Store, which require approval of SE-4816 and the ROW. The four parcels are located in the southwest quadrant of the MD 210/Livingston Road intersection in Accokeek, and are designated on Prince George's County Tax Map 151, Grid E-4, as Parcels 52, 53, 54 and

55. Mr. Mark Ferguson, who, as noted above, was qualified as an expert in land planning, testified to the location and approximate acreage of each, as follows: Parcel 52 (Clagett Properties) -- .5170 acres; Parcel 53 (America's Best Home Improvement) -- .50 acres; Parcel 54 (H. Manning & Christine Clagett) -- .333 acres; and Parcel 55 (B&H Hardware) – 1.6 acres. *See* 12/17/2019 T.p., 78-80. Regarding the amount of encumbrance to each of those four properties as shown on the PGAtlas version of the ultimate right-of-way for Livingston Road and Indian Head Highway along the frontage of these properties, Mr. Ferguson testified that, as shown on Exhibit 18, the proposed taking encumbered approximately ten percent of both Parcels 52 and 53, approximately fifty percent of Parcel 55, and one hundred percent of Parcel 54. *Id.* Mr. Charles Clagett then testified that he has an ownership interest in Parcels 52 and 54, and he also testified as to the current uses on each of the four subject Parcels as follows: Parcel 52 – Vacant; Parcel 53— Home Improvement; Parcel 55 – Vacant; and Parcel 54 – Vacant. *Id.* at 81-88.

(61) Mr. Michael Lenhart, who, as also noted *supra*, was qualified as an expert in the field of transportation and transportation engineering, first confirmed the percentage of encumbrance upon each of the four parcels under PGAtlas scenario, as being approximately ten (10) percent of Parcels 52 and 53, fifty (50) percent of Parcel 55, and one hundred (100) percent of Parcel 54. If those four Parcels are assembled as proposed in the Right-of-Way Application, as well as the accompanying Special Exception Application, Mr. Lenhart testified that of the approximately four hundred fifty (450) feet of frontage along Livingston Road between MD 210 and Biddle Road, the proposed right-of-way as shown on PGAtlas would take approximately one hundred eighty (180) feet, leaving approximately two hundred and seventy (270) feet of frontage. *See* 12/17/2019 T.p., 90. Livingston Road between MD 210 and Biddle Road is owned and controlled by the Maryland State Highway Administration ("SHA"), and any access and/or improvements along that portion of Livingston Road will require a permit from the SHA, and compliance with the SHA's Guidelines for access to a State roadway. According to Mr. Lenhart, the recommended corner clearance by the SHA is one hundred fifty (150) feet, which is the separation between an intersection and a driveway, without including the turn radius. *Id.* at 90-91. Taking into consideration the turn radius at the MD 210 interchange, as well as the curb radius of Biddle Road and Livingston Road, the required corner clearance of one hundred fifty (150) feet could not be obtained. *Id.* Mr. Lenhart testified that the SHA has a minimum seventy-five-foot (75) corner clearance, which could be obtained even with the proposed taking, but that reduced corner clearance would not be able to support a full movement access, only a right-in, right-out access, likely with a median, to assure no left turns in or out, and this would be limited to one access point on Livingston Road between Indian Head Highway (MD 210) and Biddle Road. *Id.* at 90. Mr. Lenhart also testified that Biddle Road is only a twenty (20) foot right-of-way, and as a result of that minimal right-of-way width, and in its current configuration, it could not accommodate commercial traffic. In order to do so, Biddle Road would have to be a dedicated seventy (70) foot right-of-way, which would require an additional fifty (50) feet of dedication from the adjacent commercial parcels, thus further reducing the amount of developable area upon the Subject Property. *Id.* pp. 96-97.

(62) The next witness, Mr. Edward Steere, who, as also noted above, was qualified as an expert in the field of market analysis, testified that with the single right-in/right-out limitation on access from Livingston Road into the Subject Property, and also based upon the amount and location of the proposed taking for the right-of-way (per the PGAtlas configuration), the three properties that could be developed (the fourth, being Parcel 54, which would be taken in its entirety under any scenario) would not be able to accommodate parking along the Livingston Road frontage. Specifically, Mr. Steere testified that, "parking in front of the storefront is eliminated by the right-of-way and parking is critical to any retail use. The access, the front door is critical to any retail use." *Id.* p. 102. Regarding the largest of the three remaining developable parcels, Parcel 55, Mr. Steere testified that given the impact of the proposed SHA taking upon this Parcel, the buildable area would be in the rear of this property closer to Biddle Road, which would require not only a significant amount of additional dedication, but also a significant upgrade to the size and quality of the right-of-way and the need to raze the existing building where a church was formerly located. *Id.* pp. 102-103. As a result, according to Mr. Steere, "[Y]ou end up with a parcel that has exceptional development costs, investment in road right-of-way, drive lanes and so forth for what would amount to a small building's footprint." *Id.* p. 103. Considering that the area of Parcels 52 and 53 combined is only about two thirds the size of Parcel 55, and that with the taking, the access to both parcels would also need to be from Biddle Road, with the consequent requirement of additional dedication and cost of right-of-way improvements for those parcels as well (whether developed individually or collectively), it is not difficult to conclude that the taking proposed under the PGAtlas scenario would virtually eliminate any economically viable development of Parcels 52, 53 or 55 individually. It should be noted that while a technical problem resulted in the failure to capture all of Mr. Steere's opening testimony, he testified that in addition to the limiting factors discussed *supra*, the acres limitation previously testified to by Mr. Lenhart (right-in/right-out only on Livingston Road), as well as the elimination of parking along the Livingston Road frontage, are additional factors that would significantly limit the development and market potential of Parcels 52, 53 or 55 individually. *Id.* at 104. In consideration of all of those factors, Mr. Steere concluded that, in his expert opinion, as assemblage of all four parcels "is critical in order to get appropriate access on Livingston Road, ... in order to widen Biddle Road, all the way along there and to dedicate the appropriate right-of-way ... and then parking could be accommodated appropriately, a larger building could be paced in there and the result of all that is that the property value escalates significantly." *Id.* p. 103.

(63) Mr. Steere then discussed two different types of retail uses – pass-by and destination. He described pass-by uses as:

> uses that depend on pass-by traffic is what we call impulse buys, and where you're driving down the highway and you go oh shoot I got to stop and get that on my way to wherever I'm going, you know, or I need gas I better pull over now and take care of that before I go farther down the highway.

He then described destination uses as:

> uses that you plan to head to, such as a major grocery store outing or furniture or you know a sit down restaurant, some like that, where it isn't something you thought of as you saw it, it's something that you knew you were headed to. *Id.* p. 105-106.

Mr. Steere testified that the value would be higher for a pass-by then a destination use. *Id.* p. 111. In further discussing the factors involved in determining whether a proposed purchaser would find a particular property attractive for a pass-by use, and with regard to the access limitation testified to by Mr. Lenhart, Mr. Steere stated:

> ... access is key to the convenient pass-by user. That access point needs to be, if at all possible, on Livingston Road a full access, a full directional access in order, and they have to have visible available parking. That's critical to a convenient use to a retail that is depending on customers showing up .... Pushing parking behind a building is an issue in a suburban atmosphere.... In the suburban atmosphere, people want to pull up to the front, get out of their car, go straight in. And so from the vendor's point of view they want to have a site where they can have their building set behind parking with easy access to the highway. *Id.* p. 107-108.

He then testified that destination uses, on the other hand, do not require that type of access, stating:

> the destination user, the vendor of a destination use is not interested in paying a premium for that visibility, that frontage and that accessibility that is demanded by the high volume retailers... the assemblage creates the right economy of scale for redevelopment of the entire site to accommodate all those infrastructure improvements. Individually each of these parcels can't accommodate the improvements to Livingston Road or Biddle Road as part of their developments, redevelopment. *Id.* p. 109, 112.

(64) The next witness to testify for the Owner/Applicant was Mr. Daniel LaPlaca. While Mr. LaPlaca was qualified as an expert in the field of real estate transactions, the Zoning Hearing Examiner stated that he could also testify with regard to the values of property in this case because he served as the real estate agent for the Owners of the four parcels. *Id.* p. 140. Mr. LaPlaca testified that he was originally retained by the owner of Parcel 55 to list its property for sale, but he later realized that an assemblage of all four of the parcels would be far more valuable than simply selling that one parcel alone. Mr. LaPlaca stated:

> And as Mr. Steere testified, we knew that the highest end and best use for a three acre site, C-S-C zoned site on that highway was going to be as he called them the

> pass-by retail uses, gas stations, fast food restaurants, pharmacy, something like that, that benefit from the exposure and access of a highway. *Id.* p. 143.

He then stated the following:

> So we came up with a price of approximately a million dollars an acre.... Which was about twice what any of them could have gotten for that property marketing it individually and we reached out to Wawa, Royal Farms, 7-Eleven and said we got a great site for you and every one of them agreed and it created a bidding war. And ultimately the buyer at that point was Visconsi Development who was a developer for Royal Farms went out and the sales price was significantly higher than what we listed it for. *Id.* p. 144.

Mr. LaPlaca testified that the annual rental income for the Clagett property on the corner (Parcel 52) would be in the range of $27,000.00 to $30,000.00, and Parcel 53 could yield approximately $33,000.00 to $35,000.00 per year." *Id.* p. 150. He also estimated the annual rental value for Parcel 54 to be approximately the same as for Parcel 52 (approximately $27,000.00 to $30,000.00), and) and testified that Parcel 55 had been rented for $3,500.00 per month, or $42,000.00 per year. *Id.* pp. 148, 142. Mr. LaPlaca then testified that Royal Farms rents sites within Prince George's County, and that they are paying rents of $30,000.00 to $35,000.00 per month:

> So you're comparing rent of $30,000.00 a year against rent of $360,000.00 a year. So the potential value to a property owner who can attract one of these pass-by retail uses is extreme. *Id.* pp. 152-153.

In comparing the potential value of destination uses upon the four parcels at issue, as opposed to a pass-by use of the four parcels, Mr. LaPlaca gave some examples of possible destination uses upon these properties, but then stated:

> there is nothing you could put there that would approach the value of one of these highway retail uses ... in my experience it [destination uses] would be 25 to 30 percent of what you could get for the pass-by uses. *Id.* p. 154.

Finally, Mr. LaPlaca testified that:

> the contract with Visconsi Development which was later assigned to [Applicant], was for all or none. They are reciprocal and contingent upon all four owners conveying their properties, all four owners participating in the special exception. If one of them is excluded or terminates for any reason, then the purchaser has no obligation to complete the purchase. *Id.* pp. 160-161.

(65) In sum, the testimony clearly established that the value of the four parcels assembled far exceeds the value of each of the four parcels valued separately. With the

encumbrance as shown on PGAtlas, and without the authorization to construct within the proposed right-of-way, there is likely to be only one right-in/right-out access point along Livingston Road; Biddle Road would need to be widened from its current twenty (20) foot right-of-way to a seventy (70) foot right-of-way and improved; at least one existing building on Parcel 55 would need to be razed; and each of the three developable parcels would almost assuredly be limited to attracting only destination retail uses, which would be likely to generate only approximately thirty percent (30%) of what could otherwise be generated by a pass-by retail use upon an assemblage of the four parcels. Since a pass-by retail use upon an assemblage of the parcels would require a full and unlimited access along Livingston Road, which could not occur without approval of the ROW, as well as parking along the Livingston Road frontage, the entire property cannot yield a reasonable return to the owner with the ultimate right-of-way as shown upon PGAtlas, even though it would only encumber approximately +/-forty percent or +/-1.14 acres of the property.

(66) The fourth issue that the District Council ordered the Zoning Hearing Examiner to take additional evidence upon in the Order of Remand is as follows:

> The Table of Uses in the C-S-C zone for the Subject Property which would not require issuance of a permit or permits to build within proposed right-of-way as depicted by PGAtlas.

See Order of Remand, p. 9. At the hearing on this matter, the Table of Uses for the C-S-C Zone, which are found at §27-461, was submitted into the record as Exhibit 23. In point of fact, however, it is impossible to determine any particular uses "which would not require issuance of a permit or permits to build within proposed rights-of-way as depicted by PGAtlas" as stated in the Order of Remand. Any use permitted by right in the C-S-C Zone could occupy any of the existing buildings on any of the four parcels. However, if one wishes to obtain a permit to build a new structure upon any of the subject parcels, the proposed use will not be relevant to whether one would be required to obtain permission to build within the proposed rights-of-way depicted on PGAtlas. The determination of whether a use can locate upon a particular property encumbered by a proposed right-of-way is not dependent upon the proposed use. Rather, it would depend upon the size and configuration of the property, the size of the building for the contemplated use, access requirements, the location of the use upon the property, the amount and location of parking that would be required to support the use, landscaping requirements, and other technical requirements of the Zoning Ordinance such as setbacks and minimum lot size and frontage. This finding, therefore, cannot be addressed without the evaluation of a site plan to review these and other factors for any specific use in the Table of Uses contained in § 27-461. *See* 12.17.2019 T.p. 185-186.

(67) The next issue identified in the Remand Order upon which additional evidence was to be taken is:

> The existing uses on the Subject Property and the return to the owner

> without issuance of a permit or permits to build within proposed rights-of-way as depicted by PGAtlas.

See Remand Order, p. 9. As discussed in the response to the third issue addressed *supra*, Mr. Daniel LaPlaca, the real estate agent for the property owners, testified that the annual rental income for the Clagett parcel on the corner of Livingston Road and Biddle Road (Parcel 52) would be in the range of $27,000.00 to $30,000.00, and the amount rental income for Parcel 53 would be approximately $33,000.00 to $35,000.00, and the annual rental income for Parcel 53 would be approximately $33,000.00 to $35,000.00 per year. *See* 12/17/2019 T.p., 150. The annual rental income for Parcel 54 was estimated by Mr. LaPlaca to be about the same as that of Parcel 52 (approximately $27,000.00 to $30,000.00), and the annual rental income for Parcel 55, (based upon the actual rental amount for a church that was located there in the recent past for $3,500.00 per month) was estimated to be approximately $42,000.00 per year. *Id.* at 142, 149. *See also Id.* pp. 163-164. As also previous noted, Charles Clagett testified that with the exception of a home improvement business upon Parcel 53, the buildings located upon Parcels 52, 54 and 55 are all currently vacant. Id. p. 82-83. Since the Authorization to Build within a Proposed Right-of-Way would only become an issue in connection with a redevelopment of any or all of the parcels, the testimony by Mr. LaPlaca with regard to the current rental values for each of those properties would represent the return to the owner without the issuance of a permit or permits to build within proposed rights-of-way as depicted by PGAtlas.

(68) The final issue upon which additional evidence was to be taken by the Zoning Hearing Examiner as required by the Remand Order was:

> How the integrity of the 2014 General Plan or Plan 2035 will be preserved if the District Council approved issuance of a permit or permits to build within proposed rights-of-way as depicted by PGAtlas.

See Remand Order, p. 9. Evidence on this issue was provided by the testimony of Applicant's expert witness in land planning, Mr. Mark Ferguson. Mr. Ferguson testified that the recommendation for an interchange at MD 210/Livingston Road intersection is conditional only, in the sense that Plan Prince George's 2035 states that the interchange should be built only "if necessary." *See* 12/17/2019 T.p., 183, 185. *See also* Subregion 5 Master Plan, pp. 100, 101, 104. Since the State's final Environmental Impact Statement, which was approved by the Federal Highway Administration, did not recommend the construction of the interchange at this location, but only intersection improvements, the interchange cannot at this time be found to be "necessary." *Id.* at 183. Additionally, Mr. Ferguson testified that the General Plan "recommends deprioritizing improvements like this in any case, instead directing them toward centers and transit options." *Id.* For these reasons, Mr. Ferguson concluded that "even with an entire encumbrance of the property, the integrity of those plans, including the General Plan,

would be preserved. Under the PGAtlas taking with a smaller encumbrance of the property it would still be preserved for the same reasons." Id. Based upon this testimony, the integrity of the 2014 General Plan and Plan 2035 will be preserved if the District Council approves this Application.

Parking Regulations

(69) In accordance with the Parking and Loading Regulations contained in Part 11 of the Zoning Ordinance, 44 parking spaces, including 3 handicap accessible parking spaces, are required. The subject Site Plan shows 69 parking spaces being provided, including 3 handicap-accessible parking spaces, exceeding the parking requirements for this site. The Site Plan (Exhibit 28) also correctly shows one loading space required and provided. In addition, six bicycle spaces are provided on-site, proximate to the building entrance. The location and sizes for the proposed parking and loading areas are in accordance with the requirements of Subtitle 27.

Landscape Manual

(70) In accordance with §27-450 of the Zoning Ordinance, the proposed development is subject to the 2010 *Prince George's County Landscape Manual* (Landscape Manual), specifically Section 4.2, Requirements for Landscape Strips Along Streets; Section 4.3, Parking Lot Requirements; Section 4.4, Screening Requirements; Section 4.6(c)(1)(C)(2), Buffering Development from Special Roadways; Section 4.7, Buffering Incompatible Uses; and Section 4.9, Sustainable Landscape Requirements, and is in compliance with the Landscape Manual.

Tree Canopy Coverage

(71) Subtitle 25, Division 3, the Tree Canopy Coverage Ordinance, requires a minimum percentage of the site to be covered by Tree Canopy for any development projects that propose 5,000 square feet or greater of gross floor area or disturbance and require a grading permit. The subject site is zoned C-S-C and is required to provide a minimum of 10 percent of the gross tract area to be covered by Tree Canopy. The revised Landscape Plan provides the required schedule showing the requirement being met through landscape trees that also are planted to meet the requirements of the Landscape Manual, which is allowed in the Tree Canopy Coverage provisions of the Code.

Sign Regulations

(72) The one 439-square-foot fuel canopy sign; one 212-square-foot building-mounted sign; two 25-foot-high pylon signs; and one 3-square-foot directional arrow sign are all in accordance with the Sign Ordinance. Exhibit 28

DISPOSITION/RECOMMENDATION

SE 4816 is Approved subject to the Following Conditions:

1. Prior to certification of the Special Exception, the Site Plan shall be revised as follows:

    a. Delineate an 8-foot-wide sidewalk (or shared-use path) along the site's entire frontage of MD 210 (Indian Head Highway) and a 5-foot-wide sidewalk along the site's entire frontage along Biddle Road.

    b. Revise the building and canopy sign table so that the allowable square footage for the canopy sign is applied at a ratio of 1-square-foot for each lineal foot of the canopy width, and show the percentage of signage to be divided between the building and canopy is applied to the allowable square footage shown in the table, consistent with Section 27-613(c)(3)(G) of the Prince George's County Zoning Ordinance.

    c. Label the underground gas tanks.

2. In accordance with the 2013 *Approved Subregion 5 Master Plan and Sectional Map Amendment*, the Applicant and the Applicant's heirs, successors, and/or assignees shall provide:

    a. An 8-foot wide sidewalk (or shared-use path) along the site's entire frontage of MD 210 (Indian Head Highway), unless modified by the Maryland State Highway Administration.

    b. Provide a 5-foot-wide sidewalk along the site's entire frontage along Biddle Road, unless modified by the Prince George's County Department of Public Works and Transportation.

3. Prior to approval of building permits, the Applicant and the Applicant's heirs, successors, and/or assignees shall:

    a. Demonstrate that Prince George's County District Council authorization to construct within the proposed master plan rights-of-way of MD 210 (Indian Head Highway) and Livingston Road (C-525), pursuant to Section 27-259 of the Prince George's County Zoning Ordinance, has been obtained.

    b. Provide a financial contribution of $420 to the Prince George's County Department of Public Works and Transportation for placement of a "Share the Road with a Bike" sign on Livingston Road.

c. Provide detailed access permit plans and all supporting documentation to the Maryland State Highway Administration for detailed review.

Authorization to Build in Right-of-Way is recommended for Approval
The Approved Site and Landscape Plan is Exhibit 28