

CTC Retail, LC and Weis Markets, Inc.
Conditional Use Application No. CU-25-02
Proposed Findings of Fact

I. STATEMENT OF THE CASE

CTC Retail, LC, submitted this application for an automobile filling station on September 9, 2024, pursuant to Section 59.3.1.6, Section 59.3.5.13.C, and Section 59.7.3.1 of the Montgomery County Zoning Ordinance (OZAH Exhibit 1). The subject property is identified as Parcel K,¹ Clarksburg Town Subdivision, Tax Account No. 02-03848170, and is located in Clarksburg, Maryland (OZAH Exhibit 1). The property is zoned CRT 0.75, C-0.25, R-0.05, H-65T. *Id.* On November 25, 2024, Applicant amended the application to include Weis Markets, Inc., as a co-applicant (OZAH Exhibit 28). Along with the application, Applicant submitted multiple exhibits including a Certified Zoning Map (OZAH Exhibit 4), a Traffic Statement (OZAH Exhibit 6), an approved NRI/FSD Plan (OZAH Exhibit 10), a Final Forest Conservation Plan (OZAH Exhibit 11), Final Water Quality Plans (OZAH Exhibit 12), a Stormwater Concept Plan Approval Letter (OZAH Exhibit 13), a Fire Access Plan (OZAH Exhibit 16), a Circulation Plan (OZAH Exhibit 18), a Statement of Justification (OZAH Exhibit 23), an architectural exhibit (OZAH Exhibit 25), lighting plans (OZAH Exhibit 27), and a needs analysis (OZAH Exhibit 34), which was later updated (OZAH Exhibit 38).

OZAH originally scheduled a public hearing for January 23, 2025. Opposition parties Amy Presley (OZAH Exhibit 41) and the related entities of Shanker Limited ("Shanker"), Ark 25, LLC ("Ark 25"), Aries Investment Group ("Clarksburg"), LLC ("Aries"), and the Patel family (the "Patel Opponents") (collectively, "Opponents"), (OZAH Exhibit 49) sought to be made parties of

¹ Subsequent to the application filing, the property was recorded under a new record plat as "Parcel 5."

record in opposition to the application. Counsel for the Patel Opponents asked that the application be denied for alleged failure to meet the required standards for approval (OZAH Exhibit 49) and then submitted a Motion to Deny the Application (OZAH Exhibit 61B), to which Applicant replied (OZAH Exhibit 64). Following various preliminary arguments, OZAH scheduled the hearing on the merits to commence on February 20, 2025.

Staff of the Maryland-National Capital Park and Planning Commission ("Planning Staff" or "Staff") evaluated the case and prepared a report supporting the application with conditions (OZAH Exhibit 36). The Montgomery County Planning Board reviewed the application and its Staff's Report supporting the application at a hearing on December 19, 2024 (OZAH Exhibit 55). The Montgomery County Planning Board then voted unanimously to support the application and submitted its recommendation of approval with conditions. *Id.*

The public hearing proceeded in a hybrid format as scheduled on February 20 and March 6, 2024. The Applicants presented testimony by the following witnesses: Kate Kubit (CTC Retail), Jack O'Hara (Weis Markets), Kevin Foster (a professional planner with GLW testifying as an expert), David Samba (a professional traffic engineer with Kimley-Horn testifying as an expert), and Edward Steere (a professional needs analyst with Polestar also testifying as an expert). Opposition presented testimony by the following lay witnesses: Ishan Patel, Ajay Patel and Amy Presley.

The Hearing Examiner closed the record on March 6, 2024, subject only to the subsequent submission of the record transcript and the parties submittal of proposed findings of fact.²

² During the hearing on February 6, in response to testimony by Amy Presley, Applicant submitted as OZAH Exhibit 68, a copy of a Settlement Agreement entered in 2006 by certain residents and the developer of the Clarksburg Town Center at the time (T at 517). There was no objection to its admission. Subsequently, on March 17, 2025, Amy Presley objected to the incorporation of the exhibit because of the alleged confidentiality of it between the parties who signed it (OZAH Exhibit 67). She then modified her objection, seeking redaction of the document with respect to confidential information. Ultimately, the Hearing Examiner

II. FACTUAL BACKGROUND

A. The Subject Property.

Clarksburg Town Center is a vibrant, 205 acre, multi-used, planned development for which construction began approximately 25 years ago (OZAH Exhibit 3 at 6). The neighborhood is generally depicted in the Montgomery County Planning Board's review and approval of plans for the retail core approved February 29, 2024 (OZAH Exhibit 54 at 49). Today, Clarksburg Town Center consists of approximately 1100 fee-simple residential units that are built and occupied, an elementary school, and various amenities (two County-owned and run public parks, master-planned trails, a community "residents' club" with annex building, pools, pocket parks, outdoor amphitheater, playgrounds, etc.). *Id.* The only remaining area of the Clarksburg Town Center neighborhood that remains unbuilt is approximately 14 acres identified for a planned retail core. *Id.* In 2024, the Montgomery County Planning Board approved plan amendments for construction of the retail core including a grocery store (OZAH Exhibit 54).

Within the approximately 14 acres designated for the retail core, the approved plans (OZAH Exhibits 53 and 54) depict an approximately 5-acre site for the Weis grocery store and parking lot. At the time of the approval of the plans for the retail core, an area of the Weis parking lot was depicted as a location for "future development" given that the anticipated fuel pumps to be located there were deemed to first require Conditional Use approval (OZAH Exhibit 54 at 57). The fuel pumps will be located at the rear of the parking lot for the Weis grocery store with vehicular access to the parking lot from St. Clair Road (OZAH Exhibit 36 at 5 and OZAH Exhibit 36 at 11).

Plans for the Clarksburg Town Center neighborhood began in 1994, when the County Council approved the 1994 Clarksburg Master Plan and Hyattstown Special Study Area ("Master

agreed to delete the various attachments to the Settlement Agreement, leaving in the record only the two page agreement itself, substituting it as OZAH Exhibit 68.

Plan"). The Master Plan called for the creation of a town center alongside the Clarksburg Historic District, surrounded by residential, office and retail uses. In 1995, the Planning Board approved plans for 1300 dwelling units, 100,000 sq. ft. of office, and 150,000 sq. ft. of retail. (Exhibit 36 at 6). In 2005, a group of residents known as the Clarksburg Town Center Advisory Committee ("CTCAC") alleged numerous violations associated with the as-built conditions, against the previous developer, NNP II Clarksburg, LLC ("Newlands"), (OZAH Exhibit 43). To resolve the dispute, CTCAC and Newlands agreed to mediation. The mediation resulted in a Plan of Compliance ("POC") which was approved by Planning Board Resolution in June 2006 (OZAH Exhibit 45). In 2008, 2015 and again in 2024, the Planning Board approved various amendments to the prior approvals and to recommendations in the POC, including changes to the proposed retail center that included the Weis grocery store and its parking lot (OZAH Exhibit 36 at 6, Exhibit 66aC and T at 216-217).³ The proposed retail center with a grocery store was a central component of the Clarksburg Town Center neighborhood per the Master Plan (T at 225-227 and OZAH Exhibit 54 at 64), but challenges have prevented it for more than 25 years since development of the Clarksburg Town Center began (T at 217-221). A lack of new homes and sufficient population to support the retail, prevented it while, at the same time, the designated location for the retail center, internal to the community and off of any main thoroughfare, made access, visibility and attractiveness to shoppers an additional challenge (T at 217-221 and 259-261.) Additionally, there are other existing traditional grocery stores including Aldi, Giant and Safeway, and Harris Teeter, as well as mega-stores like COSTCO, Wegmans, Walmart, and others, combined with grocery delivery provided by Whole Foods, Amazon, and others, which have made it even more difficult

³ The earlier Settlement Agreement (OZAH Exhibit 68a), was turned into the POC (T at 114) and by its terms replaced the prior Settlement Agreement.

for new grocers to compete and for this proposed retail center to proceed. *Id.* These and other factors make the gas pumps essential for the proposed grocery store (T at 226 and 267-268).

Applicant CTC Retail has worked diligently since its acquisition of the property in 2011, to bring the retail and grocery store to fruition but, until now, has been unable to find a grocer willing to locate there (T at 217-221). Weis Markets now has agreed to build a store there on the express condition that they be allowed to have accessory gas pumps in the parking lot (T 221-224, 229-237, 241, 261, 263, and 267-268). Weis has explained that this component is essential because it encourages customers to shop at Weis and provides up to 10% of the likely store revenues which will enable Weis to compete against other, existing grocers (T at 261-263).

III. PROPOSED USE

As reflected in OZAH Exhibits 17, 18, 25, 26 and 36, Applicants propose the incorporation of three gas pumps for a total of six fueling positions, at the rear of the parking area for the Weis store. A canopy over the pumps would be provided (OZAH Exhibit 3 at 8–9). Weis anticipates up to 50% of its grocery customers will combine gas purchases with their grocery trip (T at 263). Applicants have indicated that current trends indicate the growing importance of gas pumps as part of a grocery business, akin to prior evolutions of the grocery business that added butchers, bakeries, pharmacies and other such departments (T at 221, 261-262).

IV. OPPOSITION

Ms. Amy Presley is a resident in the Clarksburg Town Center neighborhood, who opposes approval of the gas pumps alleging that the approval would be inconsistent with the POC, would not be in substantial conformity with the Clarksburg Master Plan, would not be harmonious with the character of the surrounding neighborhood and would otherwise cause undue harm to the neighborhood (OZAH Exhibit 40). She presented non-expert testimony as to these claims based

on her personal beliefs. The Patel Opponents argue that the application does not satisfy the requirement in Section 7.3.1.E of the Montgomery County Zoning Ordinance requiring evidence "that a need exists for the proposed use to serve the population in the general neighborhood, considering the present availability of identical or similar uses to that neighborhood." (OZAH Exhibit 49). They offered non-expert testimony supporting this claim (T at 394-418). Multiple local residents, as well as Clarksburg Homeowners Association, Inc., the community elected HOA for the Clarksburg Town Center neighborhood, support the application (OZAH Exhibits 39a-39i). In its Staff Report dated December 9, 2024 (OZAH Exhibit 36) Staff of the Maryland-National Capital Park and Planning Commission supported the application as did the Montgomery County Planning Board itself, by unanimous vote, on December 19, 2024 (OZAH Exhibit 55).

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A Conditional Use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set standards are both specific (to a particular use) and general (applicable to all Conditional Uses). The general standards (termed "Necessary Findings" in the Zoning Ordinance) for all Conditional Uses are found in Section 59.7.3.1.E. The specific standards applied for a filling station are in Section 3.5.13.C and in Section 7.3.1.E.5.

A. Necessary Findings (General Standards, Section 59.7.3.1.E).

1. To approve a Conditional Use application, the hearing examiner must find that the proposed development:

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

The subject property has current Project Plan, Preliminary Plan of Subdivision, Site Plan and Forest Conservation Plan approvals for development of a retail center, including the Weis grocery store as depicted in Exhibit 54, including pages 56 and 57. The most recent approval and

revisions to the underlying retail center plans reflected in Exhibit 54 provided for the potential gas pumps (filling station) in the parking lot of the grocery store (labeled "future development"), subject to approval of this Conditional Use Application. *Id* and OZAH Exhibit 36 at 11. The Patel Opponents argue that the Conditional Use would not substantially conform with the POC approved by the Montgomery County Planning Board in 2006 (Exhibit 44). (See, Motion to Deny Conditional Use Application (Exhibit 61b)). Ms. Presley argued that the original developers of Clarksburg Town Center, referred to as "Respondents" in the POC (OZAH Exhibit 45 at 6), had to "comply strictly" with the terms of the POC "except as otherwise required by or relating to physical project conditions unforeseen by the Board", which in her belief, would not allow approval of the accessory gas pumps (OZAH Exhibit 45 at 7).

Applicants submitted a Reply to the Motion to Deny (Exhibit 64) providing detailed information on the background of the development of Clarksburg Town Center and the POC. That Reply explained how the POC addressed three different components of the earlier development violations. First, there were violations with respect to development that already had occurred, which could generally be identified as "construction violations." *Id*. Second, the development concepts attached to the POC included plans for a variety of amenity features, such a grand staircase at the Clarksburg United Methodist Church, a Greenway Bridge, Sinequa Square, an East Side Pool, Murphy's Grove Pond and certain park areas. *Id*. Design concepts for those elements were prepared at that time to illustrate how various amenity features might be constructed (OZAH Exhibit 44). Third, although construction of the future retail center was discussed in the POC documents, and the POC called for "a new site plan for the retail core," the POC provisions related to it were very general (OZAH Exhibit 45). Although the "design concepts" in OZAH Exhibit 44 included a rough concept for the retail core area, they provided no requirements or prohibitions

with respect to specific retail and commercial uses other than calling for a grocery store, and did not preclude a filling station or gas pumps accessory to the grocery store (OZAH Exhibits 44 and 45 and T at 110, 209, and 251-254). Moreover, as reflected in the Planning Board's approval of and revisions to the retail area plans over the years since the POC was approved by the Planning Board, a variety of specific concepts initially contemplated in the POC were deleted or revised (OZAH Exhibits 54 at 51-54 and 64aC). In this respect, Section 5 of the POC (OZAH Exhibit 45) reserved to the Planning Board "all lawful discretion to consider, approve, approve subject to conditions or disapprove any such future applications according to the law and merits presented at the time" noting further that nothing in the POC would be "construed to cede, relinquish, or otherwise impair the discretion, authority or jurisdiction of the Board to consider any future applications, plans or approvals" *Id.* Exhibit 54 at 51-54, thus reflects a number of these Planning Board approved revisions over the years and Exhibit 64aC includes a table of those revisions. Finally, when the Planning Board approved the retail center design last year, Staff responded to Ms. Presley's argument that the POC prevented the approval, confirming that the Planning Board does in fact have such discretion under the POC (OZAH Exhibit 54 at 62).

The "design concepts" reflected in the POC with respect to the retail area (OZAH Exhibits 44 and 64a) were general designs with little particularity and a great deal of flexibility. Again, as reflected in the multiple plan approvals for the Clarksburg Town Center area subsequent to the POC, even where there are very specific design concepts in the POC, the Board's approvals reflect the breadth of the Planning Board's discretion to approve variations. Here, where the POC makes no specific recommendation regarding specific retail uses or the proposed gas pumps, that discretion is the greatest. (The Opposition admitted (T at 110, 251-254) that there is nothing in the POC that discusses gas pumps one way or the other). Even when opponent Presley objected a year

ago to various changes to the retail area which were in direct conflict with concepts reflected in the POC, the Planning Board determined that it did have the discretion to approve such changes. (See, OZAH Exhibit 54 and 64aC).

With no express prohibition of the gas pumps in the POC, Opponents argued that the POC contemplated a walkable, pedestrian friendly environment and that the gas pumps would be in conflict (T at 99-102 and 110). The Planning Staff evaluated this issue and concluded in Exhibit 36 at 15-16 that pedestrian facilities in the area are adequate for the use and that “few pedestrian conflicts are anticipated with the gas pumps” because they are located in the far corner of the development, away from major pedestrian and bicycle access points and they will not adversely affect the walkability of the neighborhood (OZAH Exhibit 36 at 16). They concluded that the proposed use will be served by appropriate pedestrian facilities and that few pedestrian conflicts are anticipated (OZAH Exhibit 36 at 15-16) and that the application satisfied any applicable provisions approved under Section 59.7.3.1.

Claims that the gas pumps would preclude achievement of a "walkable, pedestrian-friendly neighborhood" were undocumented by opposition and were rebutted by expert testimony of Kevin Foster (T at 153-155, 203 and 210). David Samba testified that the number of vehicle trips related to the gas pumps will be small compared to the overall trip generation for Clarksburg Town Center and the retail center itself and both he and Mr. Foster determined that the number of vehicle trips would be less than previously approved by the Planning Board (T at 180, 184-186 and 307-313). Mr. Foster testified as to how the application is consistent with the POC further pointing out that other traditional neighborhoods with well-recognized, pedestrian-friendly and walkable qualities, such as Columbia, King Farm, Kentlands, Montgomery Village and others, all have full-service gas stations in them while being very walkable (T at 176, 183 and 195). He also provided a plan

showing the comprehensive pedestrian system for the area (OZAH Exhibit 18) and explained how the site would be very walkable (T at 153-155, 176, 203 and 210). The Staff report (OZAH Exhibit 36 at 11) indicates that the application satisfies any applicable prior approvals and Staff and the Planning Board supports the application.

Conclusion: The Zoning Hearing Examiner agrees and finds that the specificity in the POC with respect to various building and code violations, does not exist with respect to broad visions for the proposed retail center and that the discretion given to the Planning Board in Section 5 of the POC provides the authority for the Planning Board to approve the retail center and for OZAH to approve this Conditional Use, finding further that the gas pumps will not adversely affect the walkability of the neighborhood.

b. satisfies the requirements of the zone, use standards under Article 59.3 and to the extent the hearing examiner finds necessary to ensure compatibility, meets applicable general requirements under Article 59.6.

Conclusion: Mr. Foster testified extensively about the proposed conditional use, the retail center itself and how they conform with the Master Plan (T at 154-157 and 168-173). Staff examined these standards thoroughly in its report (Exhibit 36 at 12-13) concluding that the project complies. There was no testimony to the contrary. The Hearing Examiner finds that the application satisfies these requirements.

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

Conclusion: The property is within the boundary of the 1994 Clarksburg Master Plan OZAH Exhibit 36). The Town Center District area of that Master Plan was planned as a central focus of the larger area and a Clarksburg community, with a mix of residential, retail and office uses to support an active and accessible Town Center. *Id.* It specifically calls for a grocery store to anchor the retail area *Id.* at 14 and T at 241. Mr. Foster testified extensively about the proposed

conditional use, the retail center itself and how they conform with the Master Plan (T at 154-157 and 168-173 and see OZAH Exhibit 23 at 17-22). As Planning Staff found and the Planning Board agreed, the gas station associated with the approved grocery store and adjacent retail shopping center is one element of the Town Center vision (OZAH Exhibit 36 at 14 and Exhibit 55). Nothing in the Master Plan precludes the presence of the proposed accessory gas pumps. Contrary to the claims of the Patel Opponents (OZAH Exhibit 49 at 5), there is no evidence that the accessory gas pumps will be the "death knell" of the Town Center, nor that they will increase traffic beyond the level previously approved, increase noise or impact the ability of individuals to "commune with each other." Given their location and small size, the gas pumps will not be a "prominent feature" of the Town Center and will not adversely affect the street front retail nature of the approved retail center nor impact "gathering spaces" as opponent Amy Presley alleges (OZAH Exhibit 40).

The Hearing Examiner agrees that the use substantially conforms with the Master Plan.

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

Conclusion: The location of the proposed pumps, the topography of the site and the landscaping previously approved in the retail center site plan mean that the proposed pumps will be unobtrusive to the rest of the retail area. They will be limited to a very small portion of the overall retail area (approximately 12,000 sq. ft. of a 14 acre retail core) and will be located in a parking lot, away from any residential uses in the street-oriented retail along Clarksburg Square Road and St. Clair Road OZAH Exhibit 36 at 14 and Exhibit 63b). Staff, the Planning Board and Mr. Foster concluded the application meets this requirement and the Hearing Examiner agrees.

e. will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter

the predominantly residential nature of the area; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area.

Conclusion: There was no evidence of any other conditional uses in the area and Staff concluded from (Exhibit 36 at 14), that there will not be any adverse impacts on such areas.

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

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

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

Conclusion: Staff determined that adequate public facilities exist at the Property to serve the proposed project (OZAH Exhibit 36 at 14–18). The property is served by St. Clair Road and Clarksburg Square Road, both of which were designed and built to accommodate retail and mixed uses of an even higher density than now proposed. Staff reviewed the issues of public safety roadways, bicycle access, pedestrian facilities, transit service parking, local area transportation review and schools in its report (OZAH Exhibit 36 at 15–18). Applicant's transportation engineer testified that public facilities would be adequate (OZAH Exhibit 6 and T at 307-312). There was no testimony or evidence in opposition to these conclusions. The Hearing Examiner adopts Planning Staff's conclusions.

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

i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;

ii. traffic, noise, odors, dust, illumination, or a lack of parking; or

iii. the health, safety, or welfare of neighboring residents, visitors, or employees.

Conclusion: Opponent Presley argued (OZAH Exhibit 40) that the conditional use would cause undue harm because it would restrict the use of the area, not facilitate peaceful enjoyment, and would harm the economic value of confronting properties. No substantive evidence, however, was presented to support these claims. To the contrary, Staff analyzed this issue in detail at pages 18–19 of its report (OZAH Exhibit 36) noting the difference between inherent and non-inherent adverse effects. It identified the following as inherent effects, necessarily associated with filling stations: customer trips, canopy lighting, fuel truck deliveries and fuel odors, in each case noting that any such effects were minimal and concluding that the use would not cause undue harm to the neighborhood. *Id.* Similarly, Mr. Foster explained how the retail center will be street oriented with the gas pumps at the rear of the grocery parking lot, well separated from the retail store fronts, and residential uses with appropriate screening and vehicular access so as not to cause undue harm to the neighborhood, and agreed with Staff’s conclusions with respect to this issue (OZAH Exhibit 63b and T at 157). The Hearing Examiner agrees.

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

Conclusion: Based on the testimony and Staff report, the Hearing Examiner finds that the property is zoned CR and is not located in a residential detached zone. Further, the Hearing Examiner finds that the proposed Conditional Use will not impact any low-density residential or agricultural uses and that the proposed use will be consistent with long-standing plans for a mixed use retail center at this location. For the reasons stated in this Report, the Hearing Examiner agrees with Staff that the project will be compatible with the surrounding area (OZAH Exhibit 36 at 19).

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

Conclusion: Staff noted that the application meets all the requirements for the filling station conditional use and, if approved, would be subject to an appropriate Preliminary Plan and Site Plan amendment (OZAH Exhibit 36 at 19). The Hearing Examiner agrees.

4. In evaluating the compatibility of an agricultural conditional use with surrounding Agricultural or Rural Residential zoned land, the Hearing Examiner must consider that the impact does not necessarily need to be controlled as stringently as if it were abutting a Residential zone.

Conclusion: The proposed filling station is not in an agricultural area and this section does not apply.

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

- a. filling station;*
- b. light vehicle sales and rental (outdoor)*
- c. swimming pool (community); and*
- d. the following recreation and entertainment facility use; swimming pool, commercial.*

Conclusion: Applicant submitted a comprehensive expert report discussing the need (OZAH Exhibits 34 and 38) and its expert witness, Ed Steere, presented detailed testimony on this topic (T at 334-386). The Patel Opponents testified, not as experts, but as the operator of a filling station in Clarksburg, arguing that they do not believe a need exists (T at 408-416). Their conclusion was based on a “tank capacity” study they themselves performed (OZAH Exhibit 49(d)) showing capacity of existing fuel tanks within the designated trade area of 10,150,000 gallons which included both gasoline and diesel fuel (T at 412). Mr. Steere, concluded, however, that the gasoline demand in the trade area⁴ for gasoline alone is 13,200,000 gallons per year (OZAH Exhibit 38) and planning Staff agreed (OZAH Exhibit 36). Additionally, Mr. Steere explained that the "need" requirement for a filling station does not mean "necessity" and that tank capacity or other examples of places where fuel could be purchased also are not the test (OZAH Exhibit 38 at 4-5 and T at 338-355). Rather, the need evaluation is whether the proposed filling station provides a service to the neighborhood that is "expedient, convenient or in the public interest." (*Id.*).

Mr. Steere concluded that the use will be “expedient, convenient and in the public interest” and that a need exists for the proposed use “to serve the population in the general neighborhood, considering the present availability of identical or similar uses to that neighborhood” as provided in the Zoning Ordinance (OZAH Exhibit 38 at 3-4 and T at 340-347). (Zoning Ordinance Section 59.7.3.1.E.5 and T at 340 and 355). Mr. Steere defined the neighborhood as the Clarksburg Town Center Area (T at 341). He observed that most people buy their gas either from convenience stores with gas pumps, traditional gas stations with service bays or at supermarket or membership club businesses (T at 343). In the case of gas pumps at a grocery store, customers are looking for the

⁴ Mr. Steere explained that he conducted a “trade area” analysis, including 9 census blocks, based on Weis Market’s anticipated customer base (T at 342) but explained further that the expediency, convenience and public interest test is meant for the neighborhood as well (T at 355-356).

convenience of one-stop shopping with a high-quality gas pump configuration (T at 344). The proposed gas pumps here, Mr. Steere testified, are important as another department of a grocery store, and that the benefit of rewards plans offered by grocery stores helps attract customers to the grocer (T at 344-347), noting the importance of the connection to the grocery store, particularly where the grocery store location itself is not ideal (T at 347). Mr. Jack O'Hara from Weis Markets confirmed this importance (T at 267-268).

In terms of demand, Mr. Steere further noted that there has been rapid growth in the area over the past 15 years by approximately 80% and at the same time, only two gas stations were constructed in the broader trade area, neither of which is in the Clarksburg Town Center neighborhood (T at 348-349). Additionally, he noted that roughly 1,200 more residential units have been approved in the immediate area which will lead to even greater demand (T at 350). Even without those additional households, Mr. Steere concluded that there is demand for 13.2 million gallons per year (T at 352). Mr. Steere concluded from his study that gas stations in the area provide approximately 1.4 million gallons per year each on average for total of 7.2 million gallons, which is approximately 60% of his estimated demand of 13.2 million gallons (T at 354). Ultimately, Mr. Steere concluded that the combination of calculated gasoline demand, and the location of the gas pumps and their relation to the Weis store, would result in the operation being expedient, convenient and useful to the neighborhood, pursuant to the Zoning Ordinance test, noting further that, under the Zoning Ordinance, there is no identical or similar operation in the immediate area (T at 355-356).

Conclusion: Mr. Steere's testimony and the operational testimony from Jack O'Hara of Weis Markets, showed how the fuel pumps will be “expedient, reasonably convenient and in the public interest” for multiple reasons. He found that the accessory fuel pumps located behind the beer and wine store operated by the Patel Opponents, and the service those pumps provide, is considerably

different than that proposed by Weis Market. By offering the convenience of being able to purchase fuel in conjunction with a shopping trip to the grocery store, the rewards program Weis offers to its shoppers, the comfort of gas pumps under a canopy, and the convenient location next to the grocery store, the proposed gas pumps to provide a niche type of service not otherwise provided in the neighborhood, or even in the broader trade area (OZAH Exhibit 38). Base on the provisions of the Zoning Ordinance, Maryland case law and Montgomery County precedent, the Hearing Examiner finds that this satisfies the “need” requirement for a filling station.

In its Staff report at page 20 (OZAH Exhibit 36), Staff agreed that there is a demand for 13.2 million gallons of gasoline in the trade area and unmet demand of approximately 7 million gallons. Applicant submitted a Memorandum of Law (OZAH Exhibit 66) which included references to Maryland case law defining “need” as “expedient, convenient and in the public interest” and that “the mere fact that these items can be bought somewhere else... 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 another products and services” (OZAH Exhibit 66 at 4). Applicant also provided examples of Montgomery County filling station cases where new filling stations were approved, despite the fact that there were multiple filling stations in the immediate area indicating that the existence of such other stations did not preclude the finding of “need” under the Montgomery County Zoning Ordinance (OZAH Exhibit 66 at 3-4).⁵

⁵ The Patel Opponents argued that the case of Lucky Stores, Inc. v. Board of Appeals of Montgomery County, 270 Md. 513, 312 A.2d 758 (1973) affirmed the denial of gas pumps as an accessory use, but as Applicant’s counsel explained (T at 505-506) the denial there was based on the fact that the proposed filling station was virtually identical to one that already existed and that there were 20 other gas stations in close proximity.

Under the test of “expedient, convenient and in the public interest” in Section 59.7.3.1.E.5, as well as Maryland and County precedent regarding “need” (OZAH Exhibit 66), the Hearing Examiner agrees that the application meets the applicable “need” standards.

B. Use Standards – Filling Station (Section 59.3.13.C).

1. Per Section 59.3.5.13.C.2, where a Filling Station is allowed as a conditional use, it may be permitted by the Hearing Examiner under Section 7.3.1, Conditional Use, and the following standards:

a. access to the site from a street with a residential classification is prohibited if:

i. it is the only access to the Filling Station, or

ii. it is the primary entrance to a Filling Station with more than 1 entrance.

The Hearing Examiner may allow a Filling Station with access on a residential street as a secondary entrance if it finds that the access will not have an adverse impact on neighboring residential houses.

Conclusion: The filling station is accessed from the private road (St. Clair Road) which does not have a residential classification. The private road connects to Stringtown Road which is a Town Center Boulevard and to Clarksburg Square Road which is a Town Center Street. As Planning Staff found, this section does not apply because these roads do not have a residential classification (Exhibit 36 at 9).

b. site lighting is a maximum of 0.1 footcandles at the lot line when the subject lot abuts a residential zone. Site lighting is a maximum of 0.5 footcandles at the lot line when the subject lot abuts all other zones.

Conclusion: Applicant submitted a lighting plan with this application (OZAH Exhibit 26). That plan shows the lighting reduced to 0.0 foot candles, 10 feet before reaching the property line. The surrounding properties are all zoned CRT.

c. any Filling Station facility designed to dispense a minimum of 3.6 million gallons per year must be located at least 500 feet from the lot line of any land with a dwelling unit; public or private school; park; playground; day care center; any outdoor use categorized as a Civic and Institutional use or a Recreation and Entertainment use; or any wetland, stream, river, flood plain, or environmentally sensitive area.

Conclusion: This filling station will be restricted to sales of less than 3.6 million gallons of gas or fuel per year and therefore this section does not apply, as Staff found (Exhibit 36 at 10).

d. product displays, parked vehicles, and other obstructions that adversely affect visibility at intersections or to station driveways are prohibited.

Conclusion: The filling station is located within the grocery store parking lot and therefore will not have any adverse effects on intersections or driveways. The filling station and kiosk are 300 feet away from the driveway entrance to the parking lot and Applicant is not proposing outdoor displays (OZAH Exhibit 36 at 10).

e. when such use occupies a corner lot, the driveways must be located a minimum of 20 feet from the intersection of the rights-of-way and must not exceed 30 feet in width.

Conclusion: The proposed filling station is not located on a corner lot and therefore this section does not apply to this application.

f. each gasoline pump or other service appliance must be located on the lot a minimum of 10 feet behind the setback line; and all service, storage, or similar activities in connection with the use must be conducted entirely within the building, except for car-share space.

Conclusion: The minimum side and rear setbacks for the CRT Zone are zero feet. The pumps and kiosk are proposed at 65.4 feet from the east property line and 98.7 feet from the rear lot line. (Exhibit 9).

g. there must be a minimum of 20 feet between driveways on each street, and each driveway must be perpendicular to the curb or

street line. The Hearing Examiner may waive the perpendicular driveway requirement if the Department of Transportation deems the alternative safe.

Conclusion: As established by Preliminary Plan No. 11995042E and Site Plan No. 820070221, the two driveways for ingress/egress to the parking lot where the gas pumps are located, are over 400 feet apart from each other and both driveways are perpendicular to the curb and street line (OZAH Exhibits 9 and 36 at 10).

h. vehicle parking that overhangs the public right-of-way is prohibited.

Conclusion: The vehicle parking and gas pump canopy does not overhang the public right-of-way. It is over 250 feet from the public right-of-way and parking is 200 feet away (OZAH Exhibits 9 and 36 at 11).

i. if the Filling Station facility includes a car wash, it must:

i. provide vehicle stacking space equivalent to 5 times the vehicle capacity of the automatic car wash and 3 times the vehicle capacity of the manual car wash bays; and

ii. demonstrate that the vehicles using the car wash will not queue off-site.

Conclusion: The Applicant is not proposing a car wash with this application. If the Applicant ever decides to add a car wash, the Applicant will need to amend the Conditional Use application at that time.

j. the Hearing Examiner must find there is adequate parking for all accessory uses.

Conclusion: The Applicant is not proposing any accessory uses with this application such that this section does not apply. The filling station itself is an accessory use to the grocery store, which provides 558 parking spaces, including two for the filling station. The parking for the grocery store

has been approved by the Planning Board as part of Preliminary Plan No. 11995042E and Site Plan No. 820070221 (OZAH Exhibit 36 at 11).