

IN RE:)
)
CONDITIONAL USE APPLICATION) CASE NO.: CU25-02
)
OF CTC RETAIL, LC FOR)
)
ELM STREET DEVELOPMENT)
)
AND WEIS MARKETS, INC.)

LINE

Pursuant to the Hearing Examiner's request, Shanker Limited, Ark 25, LLC, and Aries Investment, LLC (the "Patel Parties") submits proposed findings of fact in connection with the Conditional Use Application, CU25-02 (the "Application"). The proposed findings are attached hereto as Exhibit A.

Respectfully submitted,



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Dated: April 3, 2025

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Line and Proposed Findings of Fact in Application No. Cu 20-2502 was e-mailed and mailed first-class this 3rd day of April, 2025, to Robert R. Harris of Lerch, Early & Brewer, Chtd., 7600 Wisconsin Avenue, Suite 700, Bethesda, Maryland 20814, Counsel for Applicant.



Leslie A. Powell

EXHIBIT A

IN RE:)	
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CONDITIONAL USE APPLICATION)	CASE NO.: CU25-02
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ELM STREET DEVELOPMENT)	
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PROPOSED FINDINGS OF FACT

Testimony and argument on the Conditional Use Application CU25-02 were presented over a three day period on January 23, February 20, and March 6, 2025. Based on the evidence presented, the Examiner makes the following findings.

Introduction

1. The Applicant, CTC Retail, LC submitted Conditional Use Application 25-02 for permission to install an automobile filling station on September 9, 2024. Ex. 1 at 1¹.
2. The conditional use would be located in the Clarksburg Town Center on property which is zoned CRT-0.75, C-0.25, R-0.05, and H-65T. Ex. 1.
3. The Applicant describes the site as zoned mixed use including a retail core and 189 multi-family units. Ex. 3 at PDF 8-9².
4. Because the conditional use is for a gasoline filling station, the Applicant has the burden of proving not only the basic criteria for a conditional use set forth in Montgomery County Code 7.3.1.E.1, it also has the burden of establishing that a need exists to serve the general neighborhood. Montgomery County Code 7.3.1.E.5.

¹ All exhibit citations are to the Office of Zoning and Administrative Hearing exhibit numbers.

² PDF page references are included because the entire submission consists only of page 10s.

5. The Applicant bears the burden of proving, by a preponderance of the evidence, all facts in support of its Application.

The Applicant Failed to Analyze the Needs of the General Neighborhood.

1. The Applicant submitted a “needs” analysis dated September 24, 2024, for a gasoline filling station. Ex 34. The needs analysis reviewed the proposed use with an assumption that the Weis Market Trade Area as defined by Weis would be the “neighborhood” used to assess “need”.

2. An “updated” needs analysis was submitted thereafter although bears the same date. Ex. 38. The updated analysis is substantially similar to that presented in September 2024; no new data are presented.

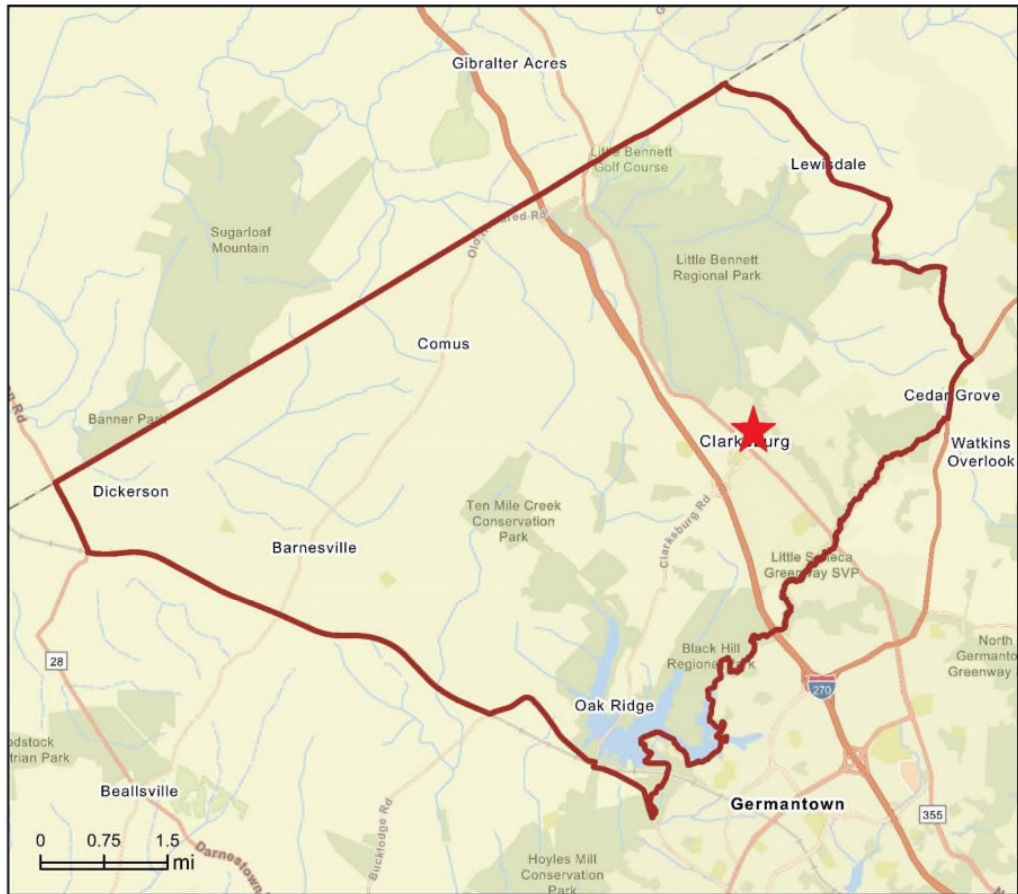
3. The Applicant has failed to demonstrate by a preponderance of the evidence that “a need exists for the proposed use to serve the population in the general neighborhood, considering the present availability of identical or similar uses to that neighborhood”. Montgomery Co. Code, 7.3.1.E.5. In the absence of such evidence, the Application is denied.

4. The specific fact findings in support of this determination follow.

- a. Applicant’s expert witness, Edward Steere, did not analyze the needs of the neighborhood or the needs of the Clarksburg Town Center in general. Instead, Edward Steere examined the needs of Weis Market’s stated trade area. Ex. 34 at 17-18; Ex. 38 at 8-9³.

³ References to Exhibit 38 are the page numbers actually appearing on the exhibit.

b. The trade area is shown here.



Ex. 34 at 18, Ex. 38 at 9.

- c. Mr. Steere defined a trade area as: “the area that we would expect customers to come from within to this use.” 3/6/25 Tr. at 369. He further testified that trade areas differ depending upon the use. *Id.*
- d. His entire analysis is based upon the population of this large geographic region which runs up to the Frederick County line. Ex. 34 at 17-18, Ex. 38 at 10, 11.
- e. This contradicts the neighborhood defined by Staff. Tr. 340-41, 370.

f. In contrast, Staff defined the neighborhood here:



Figure 1: Vicinity Map with Staff-defined neighborhood

Ex. 36 at 5.

- g. Mr. Steere himself contrasted the trade area with the neighborhood agreeing that they were two different things. Mr. Steere defines the neighborhood as the remainder of the Town Center. 3/6/25 Tr. 341. His analysis, however, was not based on the needs of the Town Center residents either.
- h. The neighborhood defined by Staff was not relied upon by Mr. Steere in his analysis. 3/6/25 Tr. 369-70. He disagreed with Staff's designation of the neighborhood and described the neighborhood as the Clarksburg Town Center but excluding rural areas north of Little Bennett Regional Park as having

“nothing to do with the Clarksburg Town Center”. 3/6/25 Tr. 370. (Emphasis added.)

- i. The map of the neighborhood of the Clarksburg Town Center as a whole is depicted here and outlined in red.

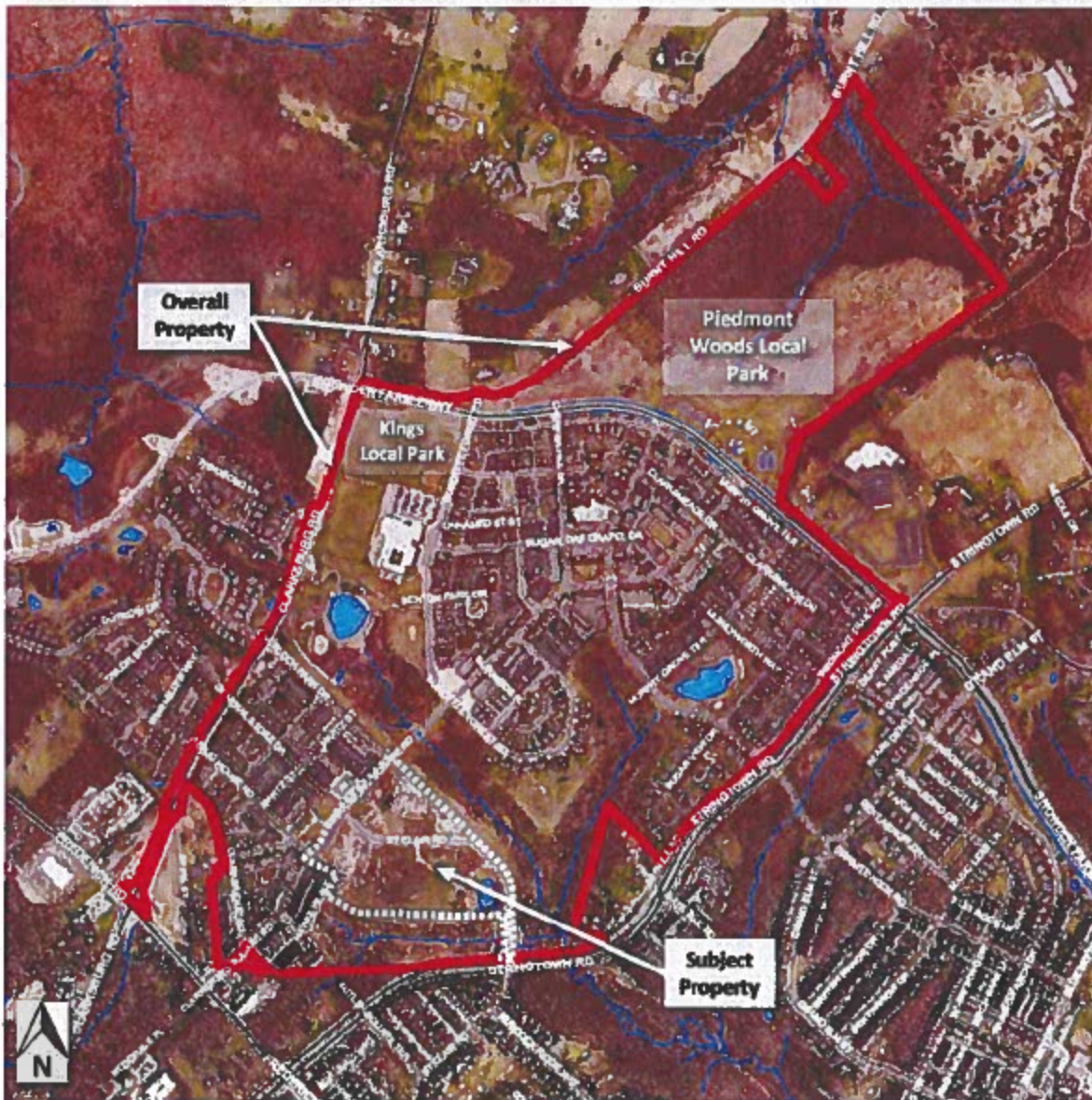


Figure 2 - Aerial map of Clarksburg Town Center with Overall Property and Subject Property

Ex. 54 at 49.

- j. The analysis of need, however, was based on areas that are significantly north and west of the Clarksburg Town Center and not included in either the neighborhood as defined by Staff or as defined by Mr. Steere. Compare Ex. 34 at 18; Ex. 38 at 9 with Exhibit 26 at 5 and Exhibit 54 at 49.
- k. Mr. Steere determined need for gasoline based on the Weis Market Trade area which is not a neighborhood. Compare Ex. 34 at 2, 17 and 18 with Tr. 369-70.

Ample Filling Stations Exist to Satisfy the Needs and Convenience of the Residents of the General Neighborhood.

- 1. Even if the Trade Area constituted the general neighborhood, the Applicant's Needs Analysis is fatally flawed.
- 2. Mr. Steere did not consider the flow of commuter traffic in his determination as to whether additional gasoline stations were required to meet the needs analysis as defined by the Maryland Supreme Court in *Lucky Stores v. Board of Appeals of Montgomery County, et al.* 270 Md. 513 (1973). Mr. Steere's assertion that "having too many gas stations is not an issue" (Tr. 389) is contrary to the law regarding need as described in *Lucky Stores*.
- 3. Mr. Steere created an artificial limitation on the number of gasoline filling stations in two ways:
 - a. one, by restricting the area of available gasoline stations that would be used by the Clarksburg neighborhood to the Weis Market Trade Area thereby eliminating numerous gasoline stations located at points south within a five-mile distance of the proposed conditional use; and
 - b. two, by redefining a gasoline filling station to be a component of a grocery store and characterizing it as a "niche market" instead of analyzing the use itself.

Neither approach is appropriate.

4. Mr. Steere admitted that people are not restricted to the Weis Market Trade Area to obtain services and that demand is met with supply outside the Weis Market Trade Area. 3/6/25 Tr. 365, 371.

5. Mr. Steere further testified that gasoline was frequently purchased by consumers during their commutes. 3/6/25 Tr. 367. Nonetheless Mr. Steere did not analyze commuter purchasing in his study but relied only on the Weis Market defined Trade Area. *Id.* at Tr. 368.

6. The analysis of the conditional use must be made on the conditional use itself, not whether such use may be appended to a grocery store which is a permitted use. There is no separately defined use for a fueling station with an adjacent grocery store. Montgomery County Code §7.3.1.

7. Mr. Ishan Patel, is the general manager of the Patel business in Clarksburg. He used radii in preparing the information on available filling stations in the surrounding area because they show the commuter patterns of Routes 270 and 355. 3/6/25 Tr. 398.

8. Commuter traffic is overwhelmingly directed to points south in the morning and points north in the evening. Ex. 49c.

9. Applicant's traffic expert David Samba agreed. 3/6/25 Tr. 328.

10. By considering commuter routes an additional eight stations are available to residents of the Clarksburg Town Center. 3/6/25 Tr. 413, Ex. 49b.

11. Applicant's needs analyst, however, did not consider commuter patterns. 3/6/25 Tr. 366.

12. The available gasoline stations within close proximity to the proposed conditional use site and the Clarksburg Town Center residents is thirteen stations. Exs. 49B, 49 D; 3/6/25 Tr.

413. Mr. Ajay Patel testified that the thirteen stations, on a conservative basis could provide more than 24,850,000 gallons, an amount nearly twice the amount of the need asserted by Mr. Steere for the Weis Trade Area which he calculated to be 13,180,992 gallons. 3/6/25 Tr. 413-14.

13. Ample available and convenient filling stations exist, including one in the historic part of the Clarksburg Town Center (the Patel station).

14. No queuing is experienced at the Patel's gasoline filling station located less than a mile from the proposed conditional use and it has the capacity to serve more customers. 3/6/25 Tr. 397, 399.

15. Mr. Ajay Patel, has over 17 years operating and owning multiple gasoline filling stations and relied on actual data in preparing his analysis of the availability and need for additional fueling stations. 3/6/25 Tr. 410-11.

16. Of the stations within the Weis Market Trade Area, Mr. Ajay Patel calculated that the fuel stations had over ten million gallons in capacity calculated on a very conservative basis. 3/6/25 TR 412-413. Looking at the stations using a less conservative analysis, two stations alone within that area could provide ten million gallons alone without reference to the remaining three stations. 3/6/25 Tr. 412-413. This, added to the other three, exceeds the demand generated by the Weis Trade area as defined by Mr. Steere and are convenient to those within the Trade Area.

17. Mr. Steere did not consider capacity of the existing filling stations in his analysis but did consider amount necessary to serve the Weis trade area which he calculated at 13,180,992 gallons. Ex. 34 at 18; Ex. 38 at 11.

18. All gasoline stations in Weis Market Trade Area provide discount programs with the exception of the Patel gasoline station. 3/6/25 Tr. 377-78, 404.

**The Applicant Failed to Satisfy Requirement 7.3.1.E.A.3,
and failed to Put Forth Sufficient Evidence to Establish
Necessary Findings 7.3.1.A.1. and 7.3.1.E.1.a, c. and g.**

1. The Proposed Use is not consistent with existing approvals that apply to the proposed site. Nor did Applicant establish that the changed hours of the operation of the Conditional Use would not harm the use and peaceful enjoyment of abutting and confronting properties or the general neighborhood.

2. Section 7.3.1.A.3. requires that:

A conditional use application must satisfy the conditions and binding elements of, and be consistent with, any effective previous approvals on the subject property.

3. Section 7.3.1.E.1. sets forth the necessary findings. Among others, the proposed conditional use must:

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

...

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

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

...

4. In addition, the Conditional Use must not harm:

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

5. As with the other criteria, it is Applicant's burden to present facts supporting these findings.

Facts relating to the Compliance Plan and Master Plan.

1. The Clarksburg Master Plan (“Master Plan”) was approved by the County Council in June of 1994. Ex. 46 at 2.
2. The Master Plan called for creation of a Town Center (“Town Center”) in Clarksburg, which would include the Historic District as a focal point and surrounded by a mix of office, residential and retail uses. *Id.*
3. In December of 1994, both a Project Plan (#9-94004) and a Preliminary Plan (#1-95042) were submitted for review by Piedmont and Clarksburg Associates. *Id.* Ex. 46 at 2. The Project Plan was approved in June of 1995 and the Preliminary Plan was approved in March of 1996. *Id.*
4. Following nearly a decade of development, numerous violations of the Montgomery County code came to light. Ex. 46 at 2.
5. Substantial violations were found and over \$1,000,000 in fines were assessed and over \$2 million were pending when the issues were referred to mediation. Ex. 46 at 2-3; Ex 45 Att. 4 at 14.
6. In June 2006, the Planning Board along with the full Maryland-National Capital Park & Planning Commission (M-NCPPC) approved Staff recommendations via the Resolution which put the Compliance Plan into effect. Ex. 61.b.i.E.
7. The Compliance Program requirements were intended as “remedial measures that shall be legally required in order to address certain violations. . . with respect to the Project Plan, various site plans and certain amendments thereto”. Ex. 61.b.i.E. at 2 (PDF 35). The Compliance Plan and Settlement Agreement were supported by material consideration: “it

resolved all findings of violations in the CTC (Clarksburg Town Center) including alleged violations that have not yet been resolved by the Planning Board.” Ex. 61.b.i.C at 14.

8. The Compliance Plan dictates the process for, among other things, review of a new Site Plan for the retail core. Ex. 61.b.i.E at 4 (PDF 37). The terms and conditions of the Compliance Program were to be strictly followed. *Id.* at 6 (PDF 39).

Except as otherwise required by or relating to physical project conditions unforeseen by the Board or applicable law (including the requirements of the Montgomery County Zoning Ordinance, Subdivision Regulations or other legal requirements applicable to any future Board action pertaining to the project), the Planning Board intends to require only such modifications that are reasonably consistent with the Compliance Program.

Id. at 7 (PDF 40).

9. The only power preserved by the Board in conjunction with its plan review is restricted to modifications that do not call for the deviation from the “express terms of this Resolution and the Compliance Program”. Ex. 61.b.i.E at 7 (PDF 40). The Board’s discretion is explicitly limited by the Resolution. *Id.* at 6 (PDF 39).

10. In December 2011, Third Try, LC purchased the remaining undeveloped property from the original developer for \$1.00.

11. The deed specifically states the conveyance is:

SUBJECT TO: all easements, encroachments, rights of way, site plans, development plans and agreements, subdivision plats, and other matters of every kind and nature which are of public record or are discernable from a visual inspection of the property.

Ex. 61.b.i. at PDF 81.

12. The current developer is bound by the strictures of the Compliance Plan.

13. There is no evidence in the record that CTC Retail, Third Try or Elm Street has ever made any proffer of a payment to Montgomery County in exchange for being relieved of any settlement obligations set forth in the Compliance Plan.

14. CTC Retail, Third Try, and Elm Street have not sought to arbitrate any modifications to the Compliance Plan.

15. The Applicant asserted that it believed that the application was consistent with the 1994 Master Plan and that the conditional use was “compatible with the commercial nature of the 14.5 acre site”. Ex. 3 at PDF 14.

16. The Applicant did not put forth any statements or facts in its Application demonstrating that the proposed conditional use was consistent with the Compliance Program and requirements thereof. Instead, it argued that it did not apply or was not prohibited. *See e.g.*, 2/20/25 Tr. 224, 225, 253.

17. As to compliance with the Master Plan, the Staff report noted that the

Town Center District is planned as a central focus for the larger plan area and Clarksburg community with a mix of residential, retail and office uses to support an active and accessible Town Center. The gas station associated with the approved associated grocery store and adjacent retail shopping center is one element of this Town Center vision.

Ex. 36 p. 14. Why this is so is not explained.

18. The Applicant and the County are bound by the terms of the Resolution and the Compliance Plan. Ex. 45, Att. 4 at 17, 63.

19. The proposed conditional use of a gasoline filling station is not consistent with the previously adopted compliance plan for the following reasons:

- a. The concept plan as incorporated in the Compliance Program is detailed and promotes a pedestrian scale town center and does not include a gasoline filling station.
- b. The vision reflected in the concept plan shows an area for pedestrian gatherings, meeting spaces, and a plaza.
- c. The emphasis in the plan is on small shops, and a grocery store with residential units incorporated into the Town Center that was to be in keeping with the historic district.
- d. A conditional use has inherent adverse effects on the surrounding neighborhood which is inconsistent with the vision of the Concept Plan and requirements of the Compliance Plan.
- e. The compliance plan made no provision for the allowance of conditional uses and expressly provides that all development is to be in strict compliance with the Compliance Plan.
- f. No gasoline filling station was ever contemplated in the Compliance Plan.
- g. No area for a gasoline filling station is reflected in the Concept Plan that was incorporated into the Compliance Program.
- h. There is no policing body of the State of Maryland that will limit the amount of gasoline sold at any gasoline filling station.

20. The installation of a filling station creates an automobile centric Town Center rather than the pedestrian scale contemplated by the Master Plan and Compliance Program. The goal of the Compliance Plan was to create an attractive, charming pedestrian-oriented retail core. Ex. 45, Att. 4 at 78-80. Residents desired to reduce further development of their community in favor of moderate changes to the historic character of the Town. *Id.* at 63-65. Applicant failed to demonstrate that the proposed conditional use is consistent with the “previous approvals on the subject property.” Section 7.3.1.A.3

**Lack of Evidence Presented by Applicant to Demonstrate
That The Peaceful Enjoyment of the Residents of
the Neighborhood Would Not be Affected.**

21. CTC Retail initially described in its application that the gasoline station will be open at times consistent with the hours of an adjacent grocery store: 7:00 a.m. to 11:00 p.m. 3 at 10 (PDF 10). However, it indicates that it may open earlier if “demand requires it”. *Id.*

22. At some point during the hearing process and identified as a condition of approval by the Planning Board, the hours of Operation changed to 4:00 a.m. to Midnight.

23. The Needs Analysis was prepared based on hours of operation of the grocery store, not the revised hours of 4:00 a.m. to Midnight.

24. The Applicant stated that it would not offer more than 3.6 million gallons of gasoline per year for sale at three pump stations which can serve up to six customers. Ex. 3 at PDF 10. There is no available mechanism by which this restriction can be policed. *See* 3/6/25 TR. 430.

25. The change in hours of the Conditional Use from 7:00 a.m. to 11:00 a.m. to 4:00 a.m. to midnight increases traffic and noise within the development during the early hours of the morning to late hours of the evening.

26. Applicant did not present evidence demonstrating that the changed hours of the proposed conditional use would not harm the use and peaceful enjoyment of the abutting and confronting properties or the general neighborhood.

27. The open space proposed sits in the middle of the parking lot adjacent to the filling station and is unlikely to be utilized by any pedestrians or visitors to the Town Center nor would it enhance the pedestrian scale or walkability of the Town Center. *See* Ex. 17.

Conclusion

Based on the foregoing findings of fact, the Conditional Use Application CU25-02 is denied.