

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF:
CTC Retail, LLC
Weis Markets, Inc.
Applicants
For the Application

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OZAH Case No. CU 25-02

Robert R. Harris, Esq.
Lerch, Early & Brewer, Chtd
Attorney for the Applicants

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Opposing the Application

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Amy Presley

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Leslie Powell, Esq., Attorney for
Ajay Patel
Ishan Patel
Shanker Limited
Ark 25, LLC and
Aries Investment Group LLC

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Before: Khandikile Mvunga Sokoni, Hearing Examiner

HEARING EXAMINER'S REPORT AND DECISION

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I. STATEMENT OF THE CASE

CTC Retail LC filed this Conditional Use Application on September 9, 2024, requesting approval under Section 59.3.5.13.C of the Zoning Ordinance¹ to allow construction of filling station at 12825 Saint Clair. (Exhibit 1). Subsequent to this initial filing, on December 2, 2024, Applicant CTC Retail LC by its Attorney, Robert Harris, Esquire, filed a motion to amend the application to add Weis Markets Inc. as a co-applicant. (Exhibit 28). The record owner of the

¹ All Zoning Code citations in this Decision are to the 2014 Zoning Ordinance for Montgomery County, adopted September 30, 2014 (Ordinance No. 17-52) as amended.

property Third Try LC provided written authorization permitting CTC Retail LC and Weis Markets Inc. (“Applicants”) to file and pursue this Conditional Use Application. (Exhibit 7 and 7.a).

According to Applicants’ Statement of the Case submitted in connection with the application, Applicants seek to include gas pumps as part of the construction of a grocery-anchored retail core in Clarksburg Town Center area of Clarksburg. (Exhibit 3).

The Staff Report outlines the history regarding the development of the Clarksburg Town Center starting with the 1994 approval by the County Council of the 1994 Clarksburg Master Plan and Hyatt Special Study Area (Master Plan) which called for the creation of a Clarksburg Town Center with residential, office, and commercial retail uses. (Exhibit 36, p. 5-7). In 1995 the Planning Board approved Project Plan No. 919940040 and Preliminary Plan No. 119950420 for 1,300 residences, 100,000 square feet of office space, and 150,000 square feet of retail.

In 2005, a group of residents known as the Clarksburg Town Center Advisory Committee (CTAC) alleged numerous violations associated with the as-built conditions, against the previous developer, NNPII Clarksburg LLC (Newlands). To resolve the dispute, CYAC and Newlands reached a mediated settlement that culminated in a Compliance Plan that was approved by the Planning Board in June, 2006. (*Id.*).

The Office of Zoning and Administrative Hearings (OZAH) mailed out and published on its website, a Notice of Hearing scheduling a public hearing on January 23, 2025. (Exhibit 35). The Notice of Hearing also contained Notice of the Motion to Amend. No objections to this motion were received.

On December 9, 2024, the Planning Staff completed its Technical Staff Report (Staff Report), recommending approval of the Conditional Use Application with the following conditions:

1. The use is limited to automobile filling state and must meet all requirements of Section 59.3.5.13.C.
2. The Conditional Use will be limited to three fuel pumps (six positions)
3. Applicants must amend the Preliminary Plan, the Site Plan, and the Forest Conservation Plan to reflect the Conditional Use approval.
4. Hours of operation shall be limited to 6 a.m. through 12 a.m.
5. The filling station must dispense less than 3.6 million gallons of gas and fuel per year.

(Exhibit 36).

On January 10, 2025, OZAH received a transmittal dated January 9, 2025, from the Planning Board stating that at its regular meeting on December 19, 2024, the Montgomery County Planning Board reviewed Conditional Use Application CU202502, for a filling station use² on approximately 12,000 square feet, located at Parcel K on Plat 25584 in Clarksburg Town Center, in the CRT-0.75, C-0.25, R-0.5, H-65T Zone, and within the 1994 Clarksburg Master Plan area. Except for modifying Condition Number 4 to change the hours of operation from 4 a.m. to 12 a.m. (instead of the 6 a.m. to 12 a.m. recommended by Staff), the Planning Board concurred with the findings of the Staff report unanimously voted to recommend to the Hearing Examiner approval with conditions of the Conditional Use Application. (Exhibit 55).

² The Planning Board transmittal (Exhibit 55) and the Planning Staff Report in some places refers to the Applicant as CYC Retail, LC.

The OZAH hearings website contains a notice alerting the public that **“All material must be received at ozah@montgomerycountymd.gov by noon on Wednesday of the week BEFORE the scheduled proceedings for inclusion in the meeting.”** This notwithstanding, Ms. Amy Presley submitted a letter dated January 21, 2025 (Exhibit 41) requesting to have documents that she had hand delivered to OZAH that day added to the Record. (Exhibits 43-47 and Exhibit 50).

Leslie Powell, Esquire, entered appearance on behalf of a limited liability company owned by Shanker Limited, Ark 25, LLC, Aries Investment Group (Clarksburg), LLC, and the Patel family who are the owners of these companies (“the Patel Parties”)³, submitting a letter dated January 17, 2025. (Exhibit 49).

A total of three public hearings, on January 23, 2025 February 20, 2025 and March 6, 2025, respectively were held on this application. The first hearing was held as noticed in the Notice of Public Hearing referenced above (Exhibit 35). On the record during the January 23rd hearing, the Hearing Examiner adjourned the hearing to a second day of hearing on February 20th, 2025 at 9:30 AM at the same location as the first. Again, on the record during the February 20th hearing, the Hearing Examiner adjourned the hearing to a third day of hearing set for March 7, 2025, at 9:30 AM at the same location as the prior two.

The Record was held open until April 3, 2025, to allow for submission of the Court Reporter’s transcript within 10 business days of the last hearing, and then to further allow submission by the parties of proposed findings of fact as requested by the Hearing Examiner

³ See Exhibit 61.b (Attorney Powell’s motion papers). At the hearing on January 23, 2025 Ms. Powell referred to her clients collectively as “the Patel Parties”. That reference is used in this Decision.

pursuant to OZAH Rule 4.2(k). The parties represented by Counsel submitted proposed findings of fact on April 3, 2025.

By Order on May 1, 2025, served on all parties, the Hearing Examiner extended the 30-day deadline to issue a decision from May 5, 2025 to May 20, 2025 pursuant to Article 59, Appendix A of Article 59 of the Montgomery County Code (i.e. the Zoning Ordinance).

The various motions and preliminary matters that were argued in connection with this Conditional Use Application are addressed in Part III below.

Applicants called a total of five witnesses. Of those the following were qualified as expert witnesses by the Hearing Examiner: Kevin Foster, a principal with the firm of Gutschick, Little and Weber, where he serves as Director of Planning and Landscape (T. 149); Mr. David Samba, Mobility Engineer and Planner; Edward Steere, with Polestar Analysis and Mr. Tim Longfellow, Principal at GLW, Professional Engineer.

For the following reasons, the Hearing Examiner approves the conditional use application with conditions.

II. FACTUAL BACKGROUND

A. SUBJECT PROPERTY

According to the Staff Report, the subject property consists of six acres known as Parcel K on recorded Plat No. 25584 (future Parcel G, Block GG and 4.5 acres). The property located on St. Clair Road, approximately 270 feet north of Strington Road in Clarksburg. The property is an unimproved, rough graded parcel with no buildings or environmental features, and is part of the

14.5-acre retail and mixed-use core for the Clarksburg Town Center. The Property will be accessed from St. Clair Road, north of the Stringtown Road intersection. (Exhibit 36, p. 5).



Figure 2 – Subject Property

(Id.)

B. SURROUNDING NEIGHBORHOOD

To determine the compatibility of the proposed use with the surrounding area, it is necessary to delineate the “surrounding neighborhood”, which is the area that will be most directly impacted by the proposed use. Once this delineation is done, Staff must assess the character of the neighborhood and determine whether the impacts of the proposed conditional use will adversely affect that character.

The Staff-defined surrounding neighborhood is outlined in the bold yellow line in Figure 1 in the Staff Report reproduced below:



Figure1: Vicinity Map with Staff-defined neighborhood

(Exhibit 36, p.4).

Staff identified the surrounding neighborhood as being zoned CRT-0.75, C-0.25, R-0.5, H-65T and consisting of existing and planned mixed-use development including single-family detached, townhouses, multi-family, and commercial uses such as retail restaurant uses, with no Special Exceptions or Conditional Uses in the neighborhood.

One of Applicants' expert witness, Mr. Steere who testified on the gas needs analysis discussed later in this report, disagreed with the staff-defined neighborhood. Mr. Steere felt that neighborhood area must be slightly broader as depicted by the red boundary line in Applicants' Exhibit 54 at page 49 shown below:

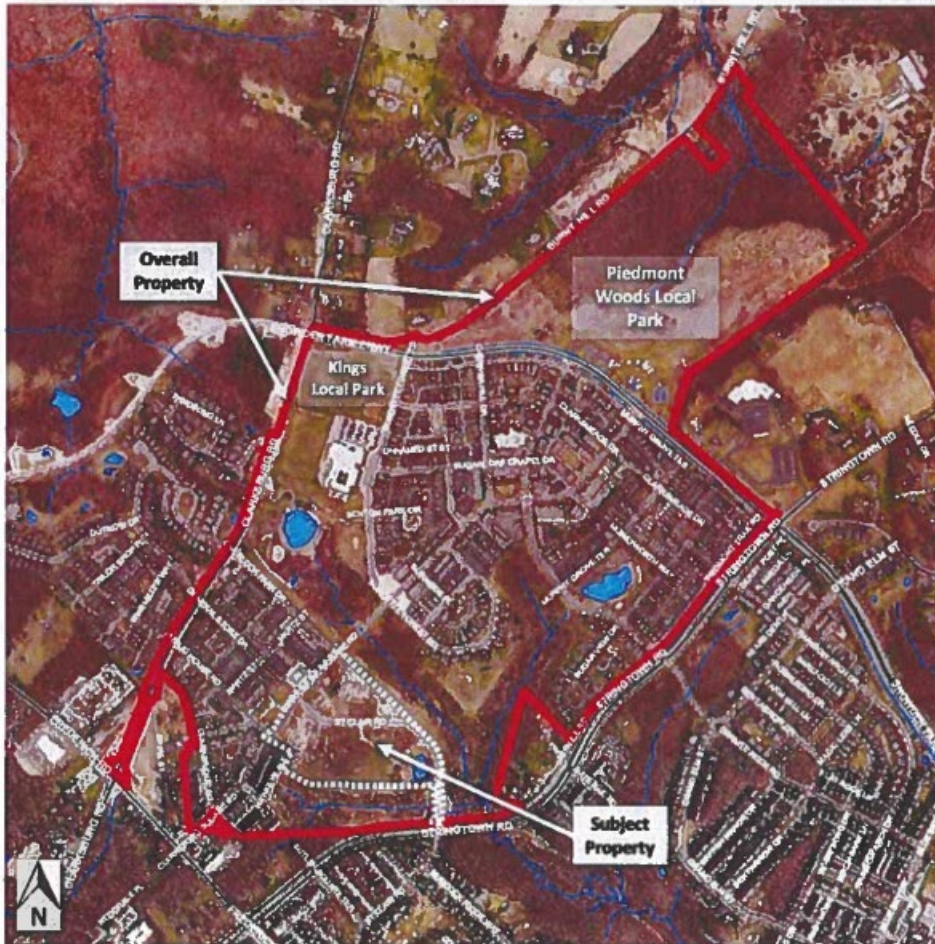


Figure 2- Aerial map of Clarksburg Town Center with Overall Property and Subject Property

Clarksburg Town Center 91994004E, 11995042E, 82007022I, F20230380 49

In some ways one could say this is like comparing apples and oranges. The staff-defined neighborhood is delineated for purposes of evaluating adverse impacts, whereas the neighborhood Mr. Steere was addressing was in the context of evaluating the need for gas in the general neighborhood. For purposes of evaluating adverse impacts on the neighborhood, the Hearing Examiner agrees with Staff's definition of the neighborhood and Staff's characterization of the

surrounding neighborhood. (*Id.*). The appropriate area for purposes of the needs analysis is addressed later in the report.

C. PROPOSED USE

Applicant proposes a three-gas-pump (six fueling positions) Filling Station in the proposed parking lot of the future Weis Grocery Store which will be accessed from the shared driveway for the Weis Grocery Store from St. Clair Road. (Exhibit 36, p. 6-7). The Staff Report analyzed a proposal with an operation running from 7 a.m. to 11 a.m. seven days a week, monitored by one employee in the kiosk. However, at the Planning Board hearing, the Applicant proposed to change the hours of operation to 4:00 a.m. to 12:00 a.m., a change the Planning Board agreed with. (Exhibit 55).

D. COMMUNITY CONCERN

A total of ten (10) letters of support were received urging approval of the Conditional Use Application to enable the gas station project to proceed. Of these, nine (9) indicated that they were Clarksburg residents. (Exhibit 39). One letter of support dated February 11, 2025 was from the President of the Board of Directors on behalf of the Clarksburg Town Center, Clarksburg Home Owners' Association Inc. stating that the inclusion of the gas pumps in the development of the Clarksburg Town Center is a minor variation from previous plans but one that the Board supports. The letter further expresses that based on available information the Board does not believe that there are significant adverse implications for allowing Weis Markets to install gas pumps. (Exhibit 39.g).

For the February 20, 2025, hearing, Clarksburg residents Steve Feather, Tabatha Ialacci⁴, Susana Gonzalez, Gaustavo Rojas attended via Zoom and although they did not testify in introducing themselves expressed support for the application. (T. 85).

Ms. Amy Presley submitted documents and testified opposing the approval of the Conditional Use Application. (Exhibits 40, 41, 43, 44, 45, 46, 47, 50 and 51).

Ajay Patel, Ishan Patel, Shanker Limited, Ark 25, LLC and Aries Investment Group (collectively the Patel parties), who are owners of a gas station in Clarksburg and are represented by Counsel, Leslie, Powell, Esq., submitted documents and testified opposing this application. (Exhibits 49).

III. PRE-HEARING MOTIONS AND PRELIMINARY ISSUES⁵

The various motions and preliminary matters that arose during this proceeding are addressed below in the order in which they arose.

At the duly noticed hearing on January 23, 2025, the parties presented arguments on preliminary issues including objections about notice. Objections⁶ that had been raised on January 21, 2025 by Applicants' attorney, Robert Harris, to Ms. Powell's entry of appearance for the Patel Parties and his objections to entry into the record of documents submitted by Attorney Powell and Ms. Amy Presley were subsequently waived. Based on that waiver of objections the Hearing Examiner

⁴ Tabatha Ialacci self-identified as a resident of Clarksburg and a member at large for the CTC HOA

⁵ The only pre-hearing motions that are addressed in detail in this decision are the ones on which the Hearing Examiner reserved ruling. A separate Order was issued on February 19, 2025, denying a subpoena request pursuant to OZAH Rule 3.8. (Exhibit 65).

⁶ When Mr. Harris raised these objections the Hearing Examiner stated that the substantive hearing on the merits of the application would not proceed on January 23, and that instead the hearing would be dedicated to addressing the motions, objections and responses thereto. However, Mr. Harris subsequently waived his objection to Ms. Powell's entry of appearance. (Exhibit 51).

offered Applicant's the option to proceed with the start of the hearing on the application. However, because the other parties were not ready to proceed, Mr. Harris opted to not proceed with the presentation on their case-in-chief, and requested instead to present their case at the next scheduled date of February 20, 2025. T. 41-42.

Amendment of the Conditional Use Application.

Section 59.3.1.D.3 allows an applicant to amend the application before the hearing if the Hearing Examiner approves a motion to amend after giving 10 days' notice to all parties entitled to original notice of filing. Applicants filed a timely request to amend the application. (Exhibit 28). The Notice of Hearing issued by the Hearing Examiner on December 3, 2024, outlined the amendments requested and urged interested parties who had objections to raise them within 10 days, no later than December 13, 2024, failure to which the amendment would be deemed granted. (Exhibit 35). No written objections to the proposed amendments were received. Therefore, the amendment was granted as on December 13, 2024.

Rule 22.0 of the OZAH Rules of Procedure provides that no written notice is required for amendments made during a public hearing. In this case Applicant's change of the hours of operation of 4 AM to 12 AM as opposed to the original hours of 7 AM to 11 PM were made at a public hearing of the Planning Board on December 19, 2024. (Exhibit 55). Therefore, no further notice of the amendment was required.

Notice.

Rule 2.4(a) of the OZAH Rules of Procedure provides that OZAH will send notice of the public hearing a minimum of 30 days before the scheduled hearing date to **all adjoining and confronting**

property owners⁷, any municipality within half a mile of the property, and civic, homeowners and renters associations that are registered with the Planning Board and located within 1/2 mile of the site. Notification to a condominium's council of unit owners satisfies this requirement for condominium developments. If the Hearing Examiner finds an error in the list of persons submitted by the applicant, the Hearing Examiner may require that notice be sent to the correct person. The Hearing Examiner may send notice of the filing to other interested persons, organizations, or agencies, at the Examiner's discretion.

OZAH mailed out notices of the public hearing on December 3, 2024 notifying persons entitled to direct notice under Rule 2.4(a) that a hearing was scheduled for January 23, 2025. (Exhibit 35). In addition to the persons identified on the Notice of Public Hearing, the notice was mailed to individuals identified in the OZAH mailing list. (Exhibit 5.c)

At the very first hearing on January 23, 2025, Counsel for the Patel parties and Ms. Presley both raised objections regarding notice. T. 10.

Applicants Attorney, Mr. Harris introduced into the Record an Affidavit of Posting confirming that physical signs had been placed signs in a conspicuous location along the perimeter of the subject property as directed by OZAH, within five days of the filing of the Conditional Use Application CU 25-02. (Exhibit 48).

Attorney Powell raised the issue that her clients who own real estate and businesses in the Historic District of Clarksburg, and are located less than three tenths of a mile away from the proposed use, did not receive any notice. Ms. Powell explained that the only reason they became aware of this application is that one of the respondents happened to be driving by in the area and saw one sign.

⁷ Empasis added

(Exhibit 51). Ms. Powell also objected that due to the lack of adequate notice her clients were deprived of the opportunity to call expert witnesses to testify to the question of any need to an additional gas station, due to the lack of adequate notice.

Ms. Powell conceded that her clients were neither abutting nor confronting property owners but insisted that their basis for being entitled to actual notice was their proximity to the subject property.

Mr. Harris introduced into evidence an Affidavit of Posting confirming that the required number of signs provided by OZAH were posted along the perimeter of the subject property giving the public notice of the filing of this conditional use application. T. 14 (Exhibit 52).

Clearly notices were mailed to those that were entitled to notice under the OZAH Rules. It is also clear that the physical signs were not only posted as required but that they served the intended purpose because Mr. Patel confirmed that he only became aware of the application because he saw the sign some toward the latter part of December. T.15-19.

Once the issue of notice was raised, over the objections of the Applicants' Attorney, the Hearing Examiner postponed the substantive hearing from January 23, 2025 to February 20, 2025 in order to ensure that no party would have less than 30 days of notice before the substantive hearing started. (T. 33, 35). In the meantime, the parties that raised concerns about notice were able to submit documents into the record and were given the opportunity to call expert witnesses if they chose to.

It is my finding that notice was duly served on all those entitled to notice under the Zoning Ordinance and the OZAH rules. It is my further finding that due process has been given to those

with an interest who chose to participate by adjourning the hearing to ensure full participation. Notwithstanding the adjournment the Patel parties did not present any expert witnesses.

At the January 23, 2025 hearing, Attorney Powell raised another preliminary issue that the Hearing Examiner considered to effectively be a motion to dismiss the application. T. 42. Ms. Powell argued that by filing this Conditional Use Application without first seeking approval of the Planning Board to amend its previously approved plans as required by a specified Plan of Compliance which is a legally binding document. (T. 45).

Ruling: It is the ruling of the Hearing Examiner that all parties entitled to actual notice by mail under the Zoning Ordinance and OZAH Rules of Procedure received such notice. Constructive notice was also given by the posting of signs as required by the Zoning Ordinance and OZAH Rules. In the interest of justice, and to ensure due process, the adjournments to the proceedings adequately addressed any concerns about notice.

Compliance Plan Argument

Opponents to this application presented robust arguments that this Conditional Use Application could not be approved, and in fact must be dismissed, because it violates a legally binding Settlement Agreement known as the “Plan of Compliance. To address this argument some relevant history is important.

The Plan of Compliance, dated April 6, 2006, is in the record twice having been introduced by both Ms. Amy Presley (Exhibit 44) and Ms. Leslie Powell, Esq. (Exhibit 49.a). The Plan of Compliance was then approved and adopted by the Planning Board by Resolution No. MCPB 06-20 with a date of mailing of August 17, 2006, whose stated purpose was “... to memorialize the decision of the Montgomery County Planning Board ... to approve a certain Plan of Compliance

... in the matters heard...” and in accordance with the enabling provisions of Article 28 of the Annotated Code of Maryland at Section 7-116(h) and the implementing provisions of Section 59-D-3.6 of the Montgomery County Zoning Ordinance. (Exhibit 45 at p. 2).

According the 2006 Planning Board Resolution, the Plan of Compliance was intended by the Board as legally-binding “remedial measures”. (*Id.*)

Section 5 of the 2006 Planning Board Resolution expressly reserved Planning Board authority as follows:

“The Planning Board recognizes that the Compliance Program is conceptual in nature, and that additional review of more details plans may involve modifications. 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.”

(Exhibit 45 at p. 6).

All this came on the heels of a mediated Settlement Agreement, by which the Planning Board would forego proceedings to enforce compliance and collection of fines against the then Developer (Newland) for violations of Planning Board approvals. (Exhibit 68.a).⁸

Ms. Presley testified about her close involvement in the Plan of Compliance and the history of violations that were discovered by the Clarksburg Town Center Advisory Committee that led to a series of events culminating in a settlement agreement and the Plan of Compliance. T. 111 – 116.

⁸ At the hearing Mr. Harris introduced the full Settlement Agreement, however, following confidentiality objections raised by Ms. Presley after the hearing, the Hearing Examiner ordered the pages marked “Confidential” be excluded from the record. See Exhibit 69.

Ms. Presley testified that the Compliance Plan was not only corrective to address many construction violations by the developer, but it was also preventative to stop any further violations that had not yet occurred. (T. 497).

The Hearing Examiner rejects the notion that the Settlement Agreement that culminated in the Plan of Compliance adopted by the Planning Board could tie the hands of a zoning authority and prevent it from reviewing a conditional use application under a zoning ordinance. To accept that argument would go against well-settled law that prohibits a District Council from contracting away its zoning power. Attman/Glazer P.B. Co. v. Mayor and Alderman of Annapolis, 314 Md. 675, 552 A.2d 1277 (1989). If the Montgomery County District Council could not contract away its zoning police powers by settlement agreement, how then could its zoning authority be contracted away by a third party, i.e. the Planning Board?

Even though the County's District Council was aware of and supported the settlement agreement between the aggrieved members of the public and the then developer, Newland, to address violations of Planning Board approvals, it is the Hearing Examiner's position that the following factors prevent the Hearing Examiner from finding that the Plan of Compliance prohibits the prohibits any future review of a Conditional Use Application by the Hearing Examiner involving the Clarksburg Town Center:

1. The District Council was not a party to the Settlement Agreement or the Plan of Compliance. Therefore, not only did the District Council not contract away its zoning authority to review conditional uses involving the Clarksburg Town Center, the actual parties had no authority to contractually preclude zoning review by the District Council's zoning authority.

2. The Zoning Ordinance under which the Applicants have filed this Conditional Use Application had not even been enacted yet, in 2006 when the Settlement Agreement and the Plan of Compliance were adopted.
3. The Planning Board has no jurisdiction over conditional uses under the County's statutory zoning scheme. Arguments about whether the project for which this Conditional Use violates the Plan of Compliance are premature. These arguments are placing the wagon ahead of the horse. The sequence of things is that the Conditional Use Application would be reviewed by the zoning authority under the Zoning Ordinance that was enacted in 2014, and if approved (as is the case here), then the Applicants must file applications with the Planning Board to amend the Planning Board approvals that are in place. This is a recommendation that came from the Planning Board. The Hearing Examiner's approval of this application attaches a condition that: "(3) Before issuance of any building permits for the Conditional Use, Applicants must file appropriate applications with the Planning Board to amend Preliminary Plan 11995042E, Site Plan 82007022I, and Forest Conservation Plan 91994994 to reflect the Conditional Use approval." That will be an appropriate forum for reviewing whether the plans for this project comply with the Plan of Compliance.

Ruling: It is the ruling of the Hearing Examiner that the Settlement Agreement, the 2006 Planning Board Resolution and/or the Plan of Compliance do not preclude the filing of this Application. Further, the Settlement Agreement, the 2006 Planning Board Resolution and/or the Plan of Compliance do not preclude the zoning authority (i.e. the Hearing Examiner) from reviewing this Conditional Use Application under Section 59.3.5.13.C of the Zoning Ordinance.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both general and specific. General standards are those findings that must be made for all conditional uses. Zoning Ordinance, §7.3.1.E. Specific standards are those which apply to the particular use requested, in this case, Automobile Filing Station and Convenience Store. §59.3.5.13.

Weighing all the testimony and evidence in the record under a “preponderance of the evidence” standard (see Zoning Ordinance §59.7.1.1), the Hearing Examiner concludes that the conditional use proposed in this application satisfies all of the general and specific requirements for the use.

A. Necessary Findings (Article 59.7)

The general findings necessary to approve a conditional use are found in Section 59.7.3.1.E of the Zoning Ordinance. Standards pertinent to this approval, and the Hearing Examiner’s determination for each finding, are set forth below.

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 previous approvals related to this property are outlined in the Staff Report as follows⁹:

“In 1994, the County Council approved the 1994 Clarksburg Master Plan and Hyatt Special Study Area (“Master Plan”). The Master Plan called for the creation of a town center alongside the Clarksburg Historic District, surrounded residential, office and retail uses. The plan envisioned up to 2,600 residences and 300,000 square feet of commercial space.

⁹ Exhibit 36 p. 5-6

In 1995, the Planning Board approved Project Plan No. 919940040 and Preliminary Plan No. 119950420 envisioning a neo-traditional community with 1,300 residences, 100,000 square feet of office, and 150,000 square feet of retail space.

In 2005, a group of concerned residents known as the Clarksburg Town Center Advisory Committee (CTCAC) alleged numerous violations associated with the as-built conditions, against the previous developer, NNPII Clarksburg LLC (Newlands). To resolve the dispute, CTAC and Newlands agreed to mediation. The mediation resulted in a Compliance Program which was approved by Planning Board resolution in June 2006.

The Compliance Program consisted of three stages. Stage I permitted the developer to proceed with the construction of certain residential units without further review by the Planning Board. Stage II required an interim review of certain residential units before construction. Stages I and II are completed.

To satisfy the requirements for Stage III, in 2008 the Planning Board approved Project and Preliminary Plan amendments along with new Site Plan No. 820070220. The approvals incorporated the necessary infrastructure and significant amenity improvements set forth in the Compliance Program.

In July 2013, the Planning Board approved Site Plan Amendment No. 82007022D to reduce the number of residential units, increase commercial space, revise the commercial, along with park amenity revisions. Although most Compliance Program elements were incorporated, the Board did not require all prior elements, such as parking structures in the retail core. The Board found that the amendment served the public interest by “providing significant community amenities and facilities that are comparable to the previously approved plans while responding to the aspirations and needs of today’s community.” Subsequently, over the years, the Applicant complied with the amendments and Compliance Program substantially completing the required infrastructure and amenities.

In June 2023, the Applicant filed the subject Applications to complete the commercial core. After more than a decade, the Applicant has secured a major grocery store anchor. With this anchor’s commitment, the Applicant is in a position to attract additional commercial tenants and new residents to complete the final phase of the Clarksburg Town Center.”

The Staff Report states that the site “has a recently approved Preliminary Plan 11995042E, Site Plan 82007022I, and Forest Conservation Plan 91994994” and that the “...previously approved plans show a potential future Filling Station¹⁰ at this proposed location. The Applicant will need

¹⁰ The subject site plan does not specifically reference a filling station but labels the site “Future Development”. However, this is a detail that potentially would be revised to reflect the Filling Station. This site plan can be viewed on the Planning website at: https://eplans.montgomeryplanning.org/UFS/34147/109184/07-BSITE-I-82007022I-004.pdf/07-BSITE-I-82007022I-004.pdf_V3/07-BSITE-I-82007022I-004.pdf

to amend Preliminary Plan No. 11995042E, Site Plan No. 82007022I, and Forest Conservation Plan No. 91994004E if the Hearing Examiner approves the Conditional Use application.”

(Exhibit 36, p.11).

Under Section 59-7.1.2 of the Montgomery County Zoning Ordinance, the Montgomery County Planning Board is authorized to review and approve (or deny) site plan applications. On this Record the initial Site Plan for the subject property was Site Plan Number 820070220 that was certified pursuant to Planning Board Resolution MCPB No. 09-15 adopted on July 16, 2009. Since then, the Planning Board reviewed and certified amendments to the Site Plan, retaining the same Case Number except for the addition of a letter at the end of the Site Plan Number indicating each subsequent amendment: 820070220A; 820070220B; 820070220C; 820070220D; 820070220E; 820070220F; 820070220G; 820070220H; and most recently 820070220I which was approved on February 29, 2024.

(Exhibit 36, Attachment C¹¹).

Even though the most recent Site Plan approval did not specifically identify a gas station, it did identify the site of the subject application as being a site for “future development”. Therefore, a condition of the approval of this Conditional Use Application is that Applicants must file with the Planning Board an application to amend that site plan number 820070220I.

Similarly, Applicants will also need to file applications with the Planning Board to amend the previously approved Project Plan No. 91994004E approved pursuant to Planning Board Resolution Number MCPB No. 24-025 on February 29, 2024.

¹¹ The various relevant Planning Board Resolutions regarding prior approvals for this property are collectively attached to the Staff Report (Exhibit 36) as Attachment C.

Conclusion: On the basis of the foregoing, the Hearing Examiner finds that the proposed development satisfies all previous approvals. Because Condition Number 3 requires Applicants to file applications with the Planning Board to amend the Planning Board's prior approvals, to the extent this Conditional Use requires adjustments to those plans that is the appropriate process to address those.

- 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: This subsection requires an analysis of the standards of the CRT-0.75, C-0.25, R-0.5, H-65T Zone contained in Article 59-4; the use standards for Automobile Filling Stations contained in Article 59-3; and the applicable development standards in Article 59-6. Each of these Articles is discussed below in separate sections of this Report and Decision (Parts III. B, C, and D, respectively).

- c) substantially conforms with the recommendations of the applicable master plan;*

According to the Staff Report, the site of this application "is located within the Town Center District of the Clarksburg Master Plan (Master Plan). 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.

Ms. Presley testified that the Master Plan does not say anything about a gas station. (T. 495).

Ms. Presley argued during the hearings that the Applicants' plans are not consistent with the Clarksburg Master Plan (and the Compliance Plan) because a gas station does not fit the pedestrian scale and orientation called for by the Clarksburg Master Plan. (T. 478,

The subject project is governed by the 1994 Clarksburg Master Plan and Hyattstown Special Study Area (Master Plan)¹², as amended. The 1994 Master Plan was the subject of a Limited Amendment by Resolution in 2011 to allow an exception to the retail staging provisions.¹³

Chapter two of the Master Plan titled "Vision for the Future", summarizes the guiding policies behind the Master Plan as policies that "will carefully guide the growth of Clarksburg from a rural settlement into a transit- and pedestrian-oriented town surrounded by an open space." (*Id.* at p. 15).

The Master Plan proposes a "transit-oriented, multi-use Town Center which is compatible with the scale and character of the Clarksburg Historic District." (*Id.* at p. 26). It explains that Clarksburg is one of the County's oldest and most significant early communities. It is designated as a historic district on the Master Plan for Historic Preservation for many reasons, one of which is that it retains a large degree of its early 19th – early 20th century character. The Master Plan further explains that it continues the historic function of Clarksburg as a center of community life and that it would be part of an expanded Town Center (635 acres) and a mix of housing types, assuring compatibility of future development with the historic district.

¹² Unless otherwise specified, references to "Master Plan" are references to the 1994 Master Plan.

¹³ See The Maryland-National Capital Park and Planning Commission Resolution Number 11-12 adopted on July 20, 2011. The Master Plan analysis in this decision is not directly impacted by the 2011 limited amendment. The 1994 Master Plan had specified a sequence of retail development and required a certain threshold of completion of the Clarksburg town before retail development could proceed in the Newcut Road/Clarksburg Village Center and the Cabin Branch Village Center. The 2011 limited amendment authorized these to proceed without being further held up by delays in the development of the Clarksburg Town Center.

The Plan then specifies that it:

- Provides a concentration of civic uses (library, post office, elementary school, etc.) to help define the Town Center as a focal point of public activities.
- Provides a street system which facilitates pedestrian as well as automobile movement.
- Retains the existing character of MD 355 as a “Main Street” for local traffic rather than a major highway for regional traffic.
- Proposes a transit stop in the Town Center.
- Proposes a buffer concept around the historic district to protect its character.
- Proposes a mix of housing types throughout the Town Center.
- Proposes a pattern of development similar to traditional “town squares”.
- Designates an area visible from I-270 for high-technology employment uses.

(Id).

Applicants’ expert, Mr. Kevin Foster explained that he has been involved with the Clarksburg Town Center for over 20 years, since 2003, with his firm having been brought in to take over and clean up the problems with the height and as built discussed in earlier parts of this Report. (T. 155).

In response to a question by Counsel about how familiar he is with the Plan of Compliance, he responded:

“I wasn’t directly involved in the plan of compliance development... I was kind of on the sideline watching it. There was an architectural firm that handled most of the development of it. We’ve basically been the ones who have had to implement it all. And through the multiple site plans that have been approved since then, they were really implementing that vision, the

plan of compliance. Obviously, the plan of compliance was a concept plan. There was no engineering done back then. And, you know, things evolve as, you know, the rubber meets the road and you actually have to make them real. Things evolve, but the plan of compliance was used to really inform what has been developed today.” [sic]
(*Id.*)

Mr. Foster addressed the Master Plan proposal for Clarksburg Town Center being a transit-oriented multi use Town Center which is compatible with the scale and character of Clarksburg Historic District. He opined that Clarksburg Town Center as it has been built out certainly meets a lot of those criteria and helps to fulfill a lot of that goal. (T. 169). However, he did point out that over the last thirty years of development of Clarksburg transit has not come to Clarksburg. Therefore, even though it was envisioned as a transit-oriented community where people would work, live and walk, with transit being decades away, Clarksburg and other communities along the I-270 corridor are satellite communities where people live, shop and play, at the end of the day they still need to drive to work. (T. 170).

The Master Plan recognizes that retail uses are critical to the vitality of the Town Center, and that a grocery store is particularly important since this type of use can serve as a magnet for other commercial operations ... (*Id.* at p. 46; T. 172-173). However, it also identifies the challenge posed by having a retail center in the Town Center and how to integrate what has traditionally been an auto-oriented use in an area envisioned to be transit- and pedestrian-oriented. (*Id.*)

By this the Master Plan clearly anticipated that there would be an inevitable amount of driving in the Town Center. However, it appears the crafters of the Master Plan decided on a pragmatic and practical approach.

The Master Plan addresses those concerns as follows:

- The retail center designation is proposed east of the historic district as part of a large-scale mixed-use neighborhood. By incorporating the retail center proposal into a larger planned development, there will be a greater opportunity to assure a strong integration of the retail center to adjoining residential and public uses and to assure a compatible relationship to the Clarksburg Historic District.
- Proposing a maximum square footage of 150,000 square feet for the retail center.
- Setting design guidelines to help assure that the location, size, and scale of the retail center are compatible with the Plan's vision for the Town Center.
- Proposing that the balance of the proposed retail and office uses (70,000 to 105,000 square feet) be located throughout the Town Center District and consist of infill retail within the historic district (in accordance with historic preservation guidelines). (*Id.* at p. 47)

Mr. Foster testified that the whole Clarksburg Town Center is in fact designed to align with being a neo-traditional, pedestrian-friendly community consistent with the Master Plan. Using Exhibit 59 for orientation purposes, Mr. Foster walked us through the layout of the Clarksburg Town Center explaining that what is shown in white on the illustration of the Clarksburg Town Center is the area that is not yet completed, and that is basically organized around a single road, which is called Saint Clair Road, with commercial buildings lining the street, wide pedestrian sidewalks, lots of different materials including brick, concrete and benches in the urban plaza with a splash fountain which he described as an intricate pattern of development portraying a pedestrian zone. (Exhibit 59; T. 154). He explained that what is depicted as "... the larger white box..." on the illustration of the Clarksburg Town Center, is the grocery store. (T. 155). Whether it is on the south side or the north side, all the parking was put behind the buildings, not part of the pedestrian zone to make the pedestrian zone feel comfortable and walkable.

Mr. Foster further testified that even though the Master Plan does not specifically call for gas stations, to the extent that it emphasizes the importance of retail uses in the Clarksburg Town Center, gas stations are a retail use.

The Hearing Examiner agrees. In fact, to the extent that this particular gas station project is being proposed in connection with a grocery store, it is the kind of retail use that aligns with the conceptual goals of the Master Plan.

Conclusion: On the basis of the foregoing, the Hearing Examiner concludes that the proposed gas station furthers the goals of the Master Plan.

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

The Staff Report states that the location of the pumps, the topography of the site and landscaping previously approved on Site Plan No. 82007022I the proposed three pumps will be unobtrusive to the rest of the retail area. The gas pumps will be limited to a very small portion of the overall retail area (approximately 12,000 square feet of a 14-acre retail core) and will be located in the parking lot, away from any residential uses and the street-oriented retail along Clarksburg Square Road and Saint Claire Road. (Exhibit 36, p. 14).

Conclusion: The Hearing Examiner agrees with Staff and finds that the proposed use will not alter the character of the neighborhood in a manner inconsistent with the Clarksburg Master Plan.

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;*

- 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:*
- 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;*

The Staff report states:

“As set out in the Trip Generation-Person Trips table excerpted from the Staff report below and on the following page, Staff’s review of the LATR concluded that as the addition of three fuel pumps (six positions) to Preliminary Plan No. 11995042E, the subject to this analysis¹⁴, still results in an overall net reduction in trips generated when comparing to the 2023 Preliminary Plan No. 11995042E to Preliminary Plan No. 11995042A trip generation estimates. Even though the Hearing Examiner is not privy to the proceedings and analysis before the Planning Board, there is sufficient evidence in this record to conclude that the planned Filling Station will result in a net-reduction in trips generated. (Exhibit 36, p. 16).

Applicants’ expert Traffic Engineer, Mr. Samba testified that it is projected that six fueling stations will generate 62 trips in the AM and 83 trips in the PM for those fueling stations. (T. 318-324). Mr. Samba further testified that with this kind of configuration you are likely to get combined trips with people going to the grocery store and then purchasing their gas while they are there.

¹⁴ Staff’s analysis of traffic of this project appears to be have been taken out of its analysis from a recent review of the amendment to the Preliminary Plan.

The traffic generation trip charts in the Staff report are copied on the next pages and show the changes over the various iterations of the plans that have been reviewed by the Planning Board:

Table No. 1: Program Comparison of Subject Proposal to Previously approved Preliminary Plans 11995042A & 11995042E

Land Use	Approved 2008 Preliminary Plan Amendment 11995042A	Approved 2023 Preliminary Plan Amendment 11995042E	Proposed Conditional Use 25-02
Condominiums	287 DU	201 DU	201 DU
Townhomes	700 DU	686 DU	686 DU
Single Family Detached	219 DU	219 DU	219 DU
Multifamily (Garden Style)	-	189 DU	189 DU
Total Residential	1,206 DU	1,295 DU	1,295 DU
Retail	194,720 SF	106,920 SF	106,920 SF

Weis Filling Station, 16
Conditional Use No.CU202502

Gasoline Pumps	-	-	6 fueling positions
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(Exhibit 36 p. 16-17).

Land Use	Quantity	Vehicle Trip Adjustment Factor	AM Peak Hour Vehicle Trip Total	AM Peak Hour Person Trip Total	PM Peak Hour Vehicle Trip Total	PM Peak Hour Person Trip Total
Original Approval (Preliminary Plan 11995042A, 2008)						
Single Family Detached	219 DU	100%	161	249.6	201	311.6
Multifamily Housing Low Rise	987 DU	100%	484	750.4	507	786
Retail	194,720 sq ft	100%	424	586.4	1694	2343
Previously Approved Total			1,069	1,586	2,402	3,441
Approved (Preliminary Plan Amendment 11995042E, 2023 and Subject Application)						
Single Family Detached	219 DU	100%	152	236	208	323
Multifamily Housing Low Rise	887 DU	100%	355	550	452	701
Multifamily Housing Mid Rise	189 DU	100%	70	109	74	115
Retail	106,920 sqft	100%	377	521	965	1335
Gasoline/Service Station*	6 Fueling Positions	100%	62	81	83	109
Proposed Total			1,016	1,497	1782	2,582
Net New Person Trips (Proposed minus 2008 Approved)			-53	-89	-620	-859

(Id.)

Staff indicated that because this Conditional Use does not propose any new residential development there is no projected impact on schools. (Exhibit 36, p. 18).

With regard to transit service, the Staff report points out that there is a bus service, RideOn Route 75 along Stringtown Road which intersects with St. Clair Road south of the project. (Id.) However, considering this is a Conditional Use for a gas station, the Hearing Examiner views the transit service as a neutral consideration because presumably customers of the gas station will be driving motor vehicles.

Staff also pointed out that the sidewalk facilities along St. Clair Road exceed the eight-foot standard for width and include several connections to the existing sidepath. (*Id.*)

Conclusion: The Hearing Examiner agrees with Staff with respect to the adequacy of water and sewer as well as police and fire services; public school adequacy is irrelevant for this analysis. The Hearing Examiner finds the expertise of Mr. Samba and thoroughness of his analysis compelling and relies on the review and approval of the LATR by Staff and the requisite State and Local agencies and concludes that this application meets the adequate public facilities standard.

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.***

This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. The Montgomery County Zoning Ordinance defines the terms “inherent adverse effects” and “non-inherent adverse effects”, a legislative choice that has been upheld by the courts. Montgomery County v. Butler, 417 Md. 271 (2010). Inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use *necessarily associated* with a particular use, regardless of its physical size or scale of operations.” Zoning Ordinance, §1.4.2.¹⁵ Inherent adverse effects alone are not a sufficient basis for denial of a conditional use. Non-inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use

¹⁵ Emphasis applied

not necessarily associated with the particular use or created by an unusual characteristic of the site.”¹⁶ (*Id*). Non-inherent adverse effects alone, or in conjunction with inherent effects, are a sufficient basis to deny a conditional use.

Technical Staff in the Staff Report identified the following physical and operational characteristics necessarily associated with (i.e. inherent to) a Filling Station:

- Customer trips: Typically trips for the Filling Station will be in conjunction with the grocery store. In other words, the gas station is not generating many new trips on its own. Instead, people patronizing the adjacent retail and grocery store are likely to add trips to gas station as a matter of convenience. The Filling Station is located in the parking lot so the use will not have any affects on the surrounding neighborhood.
- Canopy lighting. The photometric plan submitted with the application shows 0.0 footcandles at the property lines.
- Fuel truck deliveries: Fuel deliveries are likely the delivery trucks for the grocery store. Typically, the fuel delivery trucks will make deliveries during normal daylight hours, and outside of peak travel times.
- Fuel odors and fumes: The pumps will be located several hundred feet away from houses and other commercial uses. The vapor recovery systems on today’s modern pumps help to minimize odors and fumes.

(Exhibit 36, p. 18-19).

Staff did not identify any non-inherent characteristics of the proposed use. (*Id*).

¹⁶ Emphasis applied

Conclusion: The Hearing Examiner found no evidence of any noninherent adverse effects and agrees with Staff that the proposed use will not cause undue harm to the neighborhood as a result of non-inherent adverse effects alone or the combination of inherent and non-inherent adverse effects. Therefore, the Hearing Examiner finds that this standard has been met and the conditional use will not cause undue harm to the neighborhood.

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.*

The zone that the subject property is located in is CRT-0.75, C-0.25, R-0.5, H-65T. (*Id.* at p.3).

Conclusion: The Hearing Examiner agrees with Staff that because the proposed conditional use is not located in a Residential Detached Zone, this finding does not apply.

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

Conclusion: The appropriateness of application approval is not reliant on whether the application satisfies all specific requirements for the conditional use, but on the substantial factual support for the proposed use having no known adverse impact on the surrounding area. As stated, the proposed use will not create any non-inherent adverse impacts on the surrounding area.

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: This finding is not applicable as the proposal is not for an agricultural conditional use.

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:

i. Filling Station;

The Filling Station use is one of several uses under the Montgomery County Zoning Ordinance that requires a specific finding of need. Section 59-7.3.1.E.5.a.¹⁷ The need finding for filling stations prescribed in subsection (5) is different from that outlined in subsection (6)¹⁸ which requires a finding by the Hearing Examiner from a preponderance of the evidence of record that a need exists for the proposed use due to an insufficient number of similar uses presently serving existing population concentrations in the County, and the uses at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood.

Applicants submitted into the record an needs analysis report prepared by Polestar Analysis (hereafter “Polestar”). (Exhibit 38). The earlier Needs Analysis by Valbridge (Exhibit 34) was replaced and superseded by an updated Needs Analysis by Polestar whose content is identical to the earlier one except for the change in identity of the authoring entity. The principal author of both reports is Mr. Edward M. Steere, AICP who testified on Applicants’ behalf. Mr. Steere’s resumé shows states that he was with Valbridge Property Advisors from 2017 to 2024, and with Polestar Analysis from October 2024 to present. (Exhibit 15.d). The Needs Analysis considered public need/necessity to mean “expedient or reasonably convenient and useful to the public” as defined in Lucky Stores Inc v. Board of Appeals, and “convenient, useful, appropriate, suitable,

¹⁷ So do (b) Light Sales and Rental (Outdoor); (c) Swimming Pool (Community) and (d) the following Recreation and Entertainment Facility use: swimming pool, commercial.

¹⁸ Governing the following uses: (a) Funeral Home; Undertaker; (b) Hotel, Motel; (c) Shooting Range (Outdoor); (d) Drive-Thru; (e) Landfill, Incinerator, or Transfer Station; and (f) a Public Use Helipad, Heliport or a Public Use Helistop.

proper or conducive to the public in the surrounding area as defined in Baltimore County Licensed Beverage Association, Inc. v. Kwon.

The Analysis outlined the Weis Markets rewards program which allows Preferred Shoppers Club Card members to earn gas rewards points by shopping at the Weis Markets where they would earn a \$0.10 discount per gallon for every \$100 grocery and/or pharmacy purchase during a set promotional period. (*Id.* at p. 10).

For purposes of the needs analysis Polestar defined the relevant gas station primary trade area to include the greater Clarksburg area, approaching Damascus in the Northeast, Frederick County line in the Northwest, the CSX railroad in the west, Little Seneca Lake in the south and Little Seneca Creek to the southeast, with the latter being a natural divider to the greater Germantown area and the far more urbanized areas of Rockville and Gaithersburg to the south. An excerpt of the map depicting the trade area is copied below from the Polestar report:

Trade Area Map



According to Polestar, in addition to the Census data, they consulted the Metropolitan Washington Council of Governments (MWCOG) data which tends to be more precise on local projections on population, household size, income and gasoline consumption patterns, and concluded that the demand for gasoline by households in this trade area will be approximately 13.2 million¹⁹ gallons per year. However, in addition to the demand for gasoline by local households, Polestar opines that businesses in the Clarksburg Weis trade area employ an estimated 5,384 workers in 2024. (*Id.* at p. 20-21).

The analysis adjusts for transient travelers (i.e. drivers passing through the area on the highway network in order to reach destinations outside of the area) and any overlap demographics among morning peak hour and evening peak hour travelers. (*Id.*)

In opposition Mr. Ishan Patel testified, as a fact witness. He stated that he has an MBA and is the General Manager of the Clarksburg Market property where he has worked for almost 19 years. (T. 394). Mr. Patel testified that in all the years of operation they only run out of gas one time in 2021 when there was a more widespread regional gas shortage. (T. 396). He analyzed Exhibit 49.b:

¹⁹ 13,180,992



Mr. Patel testified that Exhibit 49.b is a depiction he created using Google Maps of the 5-mile radius around the Clarksburg Town Center. Mr. Patel testified that they noticed a drop in traffic to their gas station when they moved from [Route] 355 to off of Clarksburg Road because it is a historic district and they are restricted in the kinds of signs they can put up²⁰. Therefore, their customer base is mostly comprised of residents who have to pass by the gas station to get to their housing development. (T. p. 401). Although they do not have a grocery store in connection with the gas station, they do concurrently operate a deli, beer and wine store and sell Italian ice.

Mr. Ajay Patel also testified as a fact witness. (T. p. 406-418). He testified that he has about 20 years of experience and mostly does strategy for the family businesses. (*Id.*) He walked us through Exhibit 49.d which shows two charts: the first chart lists the five gas stations in the Clarksburg area (i.e. the area identified in the Polestar report as the trade area) with a combined

²⁰ Mr. Patel clarified during re-direct that there was a three-year period during road construction that they were unable to operate the gas station. This was when they relocated from Rt 355.

capacity of 203,000 gallons per year. It is Mr. Patel's opinion that each gallon of tank capacity translates to an output of at least 50 gallons of gas per year. (Exhibit 49.d at p. 1). Therefore, a tank capacity of 203,000 gallons translates to 10,150,000 gallons per year. Then he pointed out the thirteen gas stations that are in the 5-mile radius area which include five Clarksburg gas stations and eight in Germantown. Adding the gas stations that are in the 5-mile radius yields a capacity of 497,000 gallons. (T. 413). He concluded that using the formula above, this translates to an output of at least 24,850,000 gallons per year. (Exhibit 49.d)

The Hearing Examiner finds the premise of Mr. Ajay Patel and Mr. Ishan Patel that each gallon of tank capacity can output at least 50 gallons of gas per year too speculative. Admittedly their claim is based on their "personal experience owning and managing gasoline stations." (*Id.*). However, that is not a scientific methodology that can supersede the conclusions of Applicants' valuation experts without more. The Hearing Examiner is also not persuaded that the opposition's 5-mile radius (which encompasses Germantown) is a more accurate area of review than Applicants' trade area. The Hearing Examiner's considered view on this record is that Applicants' defined trade area is more in line with the general neighborhood contemplated by Section 59-7.3.1.E.5.a of the Zoning Ordinance. In fact, Polestar refutes the feasibility of Clarksburg residents driving all the way to the more congested suburbs of Germantown for their daily needs when they could get those at Weis. (Exhibit 38, p. 2). Polestar opines instead that Weis correctly assumes that in addition to the residents of the trade area, most grocery customers from the rural northern parts of Montgomery County will travel to either Clarksburg or Damascus for groceries, and purchase gas while there. (*Id.*).

Now I would be remiss if I did not address the difference between the "trade area" and "the general neighborhood" in assessing need. The Zoning Ordinance requires a determination of need in the

“general neighborhood”, whereas Polestar here has defined trade area more broadly in doing its needs analysis, although not as broadly as the opposition feels is warranted. Mr. Steere explained his approach. He testified that while the Zoning Ordinance requires a “neighborhood” analysis, it goes further and requires an analysis of need considering the present availability of identical or similar uses in the neighborhood. (T. 340). However, at present there is grocery store in the neighborhood nor are there neighborhood gas stations except for one small one. Naturally, under the circumstances people leave the neighborhood to accommodate their needs, whatever they may be. (*Id.*)

For purposes of the needs analysis the Hearing Examiner agrees that looking at the broader Clarksburg Town Center area as depicted by the bold red boundary line at Exhibit 54 page 49 is acceptable. (T. 341-342). Mr. Steere conceded that his conclusion of need would not have been different whether you look at the trade area delineated in the needs analysis or the staff-defined neighborhood in the staff report. (T. 343).

Conclusion: The Hearing Examiner finds that this standard is met as a preponderance of the evidence establishes that there is an unmet need for gas in the general neighborhood of the Clarksburg Town Center. There is a demonstrated need of 13.2 million gallons of gas per year and there is approximately 7 million gallons per year in net unmet need. Meanwhile, with the condition that this gas station must dispense less than 3.6 million gallons of gas per year, there would still be an unmet need for gas.

6. The following conditional uses may only be approved when the Hearing Examiner finds from a preponderance of the evidence of record that a need exists for the proposed use due to an insufficient number of similar uses presently serving existing population concentrations in the County, and the uses at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood:

i. Funeral Home; Undertaker;

- ii. Hotel, Motel;*
- iii. Shooting Range (Outdoor);*
- iv. Drive-Thru*
- v. Landfill, Incinerator, or Transfer Station; and,*
- vi. a Public Use Helipad, Heliport or a Public Use Helistop.*

Conclusion: This finding is not applicable as the application does not include a request for the uses listed.

B. Development Standards of the Zone (Article 59.4)

To approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the zone where the use will be located – in this case, the CRT-0.75, C-0.25, R-0.5, H-65T Zone. Section 4.5.1.C defines the CRT zone as “intended for small downtown, mixed-use, pedestrian-oriented centers and edges of larger, more intense downtowns. Retail tenant ground floor footprints are limited to preserve the town center scale.” Density and height limits are calculated as an allowed floor area ratio (FAR) and set out in Section 4.5.2.A.3:

The Development and Parking Standards chart for this zone is copied below from the Staff report:

Conclusion: Based upon the above information, and having no evidence to the contrary, the Hearing Examiner concludes that the application meets the development standards of the CRTF Zone.

B. Use Standards for a Vehicle Service/Filling Station (59.3.5.13)

The specific use standards for approval of a Vehicle Service/Filling Station are set out in Section 59.3.5.13.C.2 of the Zoning Ordinance. Standards applicable to this use are set forth below, along with the Hearing Examiner’s findings of fact and conclusions of law on each standard.

- 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.

The Staff report confirms that the proposed Filling Station is to be accessed from the private road St. Clair Road which does not have a residential classification. This private road connects to Stringtown Road which is a Town Center Boulevard, and Clarksburg Square Road which is a Town Center Street. (Exhibit 36, p. 9). Mr. Foster who testified on behalf of the Applicants agreed testified confirming the road classifications. (T. 158)

Conclusion: The Hearing Examiner finds that this standard is not applicable as access to the site is not from a street with a residential classification.

- 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.*

The Staff report confirms that the Applicants submitted a lighting plan with the application. (Exhibit 26). According to Staff, the photometric plan shows the lighting reduced to 0.0 footcandles ten feet before reaching the property line, and that the surrounding properties are all zoned CRT. (*Id.*)

As testified to by Mr. Foster and outlined on applicants' Lighting Plan, the site lighting will not exceed the maximums allowed. T. 159; Exhibit 26.

Conclusion: The Hearing Examiner finds that the proposed lighting plan will fully comply with this standard.

- 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: The Hearing Examiner finds that this standard does not apply because the proposed Filling Station will dispense less than 3.6 million gallons of fuel per year. This is a condition of approval.

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

The record contains Conditional Use Plans submitted by Applicants consisting of a Cover Sheet (Exhibit 9.a); Approval Sheet (Exhibit 9.b); Conditional Use Site (Exhibit 9.c); Site Details Sheet (Exhibit 9.d); and Landscape Plans and Details (Exhibit 9.e.).

According to the Staff report the proposed Filling Station is not proposing any outdoor displays. (Exhibit 36, p. 10). The Staff report also explains that the proposed Filling Station is located within a grocery store parking lot and therefore will not have any adverse effects on the intersection or driveway. The Filling Station and kiosk are 300 feet away from the driveway entrance to the parking lot. (*Id.*). This was confirmed by Mr. Foster's testimony. (T. 160).

Mr. Foster testified that whether it is on the north side or the south side, all parking was placed behind buildings, and not part of the pedestrian zone. (T. 155) He further testified that no outdoor displays or storage are proposed in connection with the planned Filling Station. T. 168.

No evidence or information pertaining to possible obstructions was presented or produced.

Conclusion: On the basis of the foregoing, the Hearing Examiner finds that this standard is met.

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.

Mr. Foster testified that this is not a corner lot. T. 160.

Conclusion: The Hearing Examiner finds that this standard does not apply.

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.

Mr. Foster testified that the pumps and kiosk will be located roughly 65 feet from the rear property line. T. 161. According to the Staff report the required minimum side and rear setbacks for the CRT zone are 0 feet. Although there appears to be slight discrepancy between the Staff report and Mr. Foster's testimony about what the rear set back is proposed (65 feet or 98.7 feet); either way with a 0 feet setback in this zone, whether the planned rear set back 65 feet or 98.7 feet there set back requirement is a non-issue because they are both numbers in excess of the 10 feet required. (Exhibit 36 p. 10).

Conclusion: The Hearing Examiner finds that this standard is met as the distance of the gas dispensers from the setback line exceeds the 10-foot minimum and no activities are contemplated that would violate the requirements of the standard.

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.

According the Staff report as established in Preliminary Plan 11995042E and Site Plan
820070221

Conclusion: The Hearing Examiner finds that this standard is met.

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

According to the Staff report, the planned vehicle parking and gas pump canopy do not overhang the public right of way. The proposed canopy is over 250 feet away from the public right of way and parking is 200 feet away. (*Id.*) At the hearing, Mr. Foster testified that there are no vehicle overhangs over the public right of way. T. 162. No evidence was introduced to contradict this submission.

Conclusion: The Hearing Examiner finds that this standard is met.

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.

The record establishes that there is no car wash planned in connection with this planned Filling Station. Although this standard does not apply, the Hearing Examiner is adding a condition that: “Physical improvements to the Subject Property are limited to those shown on the Applicants’ Conditional Use Site Plans, Open Space Plan, Circulation Plan, , and Lighting Plan (Exhibits 9a-e, 17, 18, and 26)”. Therefore, departure from these plans would require an amendment to the Conditional Use.

Conclusion: The Hearing Examiner finds that this standard is not applicable as the conditional use will not include a car wash.

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

As noted in the Staff report the Applicants are not proposing any accessory uses in connection with the planned Filling Station. In fact the Filling Station itself is an accessory use the planned Weis Markets grocery store onsite which itself is planned to have 558 parking spaces which will

include 2 parking spaces for the Filling Station. (Exhibit 36, p. 11). This was confirmed by Mr. Foster's testimony. T. 163.

Conclusion: The Hearing Examiner finds that this standard is met.

D. General Development Standards (Article 59.6)

Article 59.6 sets requirements for site access, parking, screening, landscaping, lighting, and signs. The applicable requirements, and whether the proposed use meets these requirements, are discussed below.

1. Site Access Standards

Section 59.6.1 of the Zoning Ordinance imposes site access standards on conditional uses in Residential Multi-Unit, Commercial/Residential, Employment, Industrial, and Floating zones, with the intent of "to ensure safe and convenient vehicular, bicycle, and pedestrian circulation within and between lots on the same block face and to reduce traffic congestion."

Section 6.1.3.A requires that any development:

1. allow a vehicle, pedestrian, or bicycle to enter and exit the property to and from a street or an abutting site safely;

Mr. Foster testified that with regard to access, the overall site is unchanged from the preliminary plan and the site plan, and that the proposed Filling Station will share all access points with the grocery store that have already been approved. T. 166.

The Staff report contains a Development and Parking Standards chart which breaks down the requirements in this zone. The chart is copied below from the Staff report:

Table 1: Development and Parking Standards CRT-0.75, C-0.25, R-0.5, H-65T

Development Standard Section 59.4.5.3.C	Permitted/ Required	Proposed
Minimum Lot Area	N/A	N/A
Minimum Lot Width at Front Building Line	N/A	N/A
Minimum Lot Width at Front Lot Line	N/A	N/A
Maximum Density	0.75 FAR, C-0.25, R-0.5	0.05 FAR
Minimum Front Setback	0 feet	300 feet
Minimum Side Setback	0 feet	65.4 feet (east)
Minimum Sum of Side Setbacks	N/A	N/A
Minimum Rear Setback	0 feet	98.7 feet
Maximum Height	35 feet*	35 feet
Vehicle Parking Requirement (Section 59.6.2.4.B)	3.5 spaces/1000 sq. ft.= 2 space	3.5 spaces/.500= 2 space

*Maximum height per approved Site Plan 820070221

(Exhibit 36, p. 12)

Conclusion: The Hearing Examiner finds that on the basis of the foregoing this standard is met.

d. Parking Lot Lighting

Parking lot lighting must satisfy Section 6.4.4, General Outdoor Lighting Requirements.

Section 59.6.4.4.E requires the outdoor lighting of conditional uses to be “directed, shielded, or screened to ensure that the illumination is 0.1 footcandles or less at any lot line that abuts a lot with a detached house building type, not located in a Commercial/Residential or Employment zone.” As discussed in the Use Section 59.3.5.13, Mr. Foster testified that the site lighting will not exceed 0.5 footcandles at the property boundary lines. In fact the lighting plan shows 0.0 footcandles at the property line closest to the filling station. T. 168.

Conclusion: The lighting plan submitted by the applicants is consistent with the testimony and Staff conclusions and additional provisions of the Zoning Code. The Hearing Examiner finds that the proposed lighting will comply with the applicable standard.

3. Signage

Section 59.6.7.12 controls permitted signage in Commercial/Residential, Employment, or Industrial zones.

1. Freestanding Sign

- a. One sign is allowed at each customer entrance to the building or drive-way.
- b. The maximum sign area for a lot or parcel is 2 square feet for each linear foot of frontage.
 - i. Where a lot or parcel has frontage on more than one street, signs may be erected facing each street, or may be erected at a location which allows it to be seen along each street on which the site has frontage.
 - ii. For a lot that has less than 50 feet of frontage, the sign area is based on the length of the lot line closest to the street toward which the sign is to be oriented. The applicant is restricted to using only one street and the property line closest to that street.
- c. A sign must be set back at least $\frac{1}{4}$ of the distance required for the building setback for the zone.
- d. The maximum height of the sign is the height of the tallest building on the same premises as the sign or 26 feet above the ground, whichever is less.

As stated earlier, Mr. Foster testified that the Applicants are not proposing any new signage with this application as the signage will be included with the Weis Grocery Store as part of the site plan previously approved and the Applicants that will have to be updated. Id. Because this approval is conditioned on Applicants filing amendments to the prior site plans, this would be addressed there. However, as far the Conditional Use Application.

Conclusion: The Hearing Examiner is satisfied that no signage is planned specifically for the gas station.

Parking, Queuing and Loading Section 59-6.2

According to the Staff report, the fueling station requires one parking space per 1,000 square feet of gross floor area (GFA) pursuant to Section 59.6.2.4.B. The Staff report says that the Project proposes 500 square feet of GFA which requires two additional parking spaces. As noted earlier Mr. Foster testified that the grocery store site already proposes 558 parking spaces, to be shared by the retail uses. (Exhibit 36, p. 12). Given that this particular project will likely have a lot of overlap clientele (i.e. customers who are already there for the grocery shopping then decide to also fuel up), the evidence proffered by the expert witnesses and the analysis of staff confirms adequate parking for this use.

Landscaping and Outdoor Lighting. Section 59.6.4

The Staff report confirms that the Conditional Use area is restricted to the gas pump canopy area only, and that the areas around the Conditional Use contain proposed landscaping that has already been approved at Site Plan and given that a condition of this approval requires amendments of those site plans the Hearing Examiner finds that landscape is adequately addressed. There is no screening required for this project under Section 59.6.6.

IV. CONCLUSION AND DECISION

Based on the foregoing findings and conclusions and a thorough review of the record, the application of CTC Retail LC and Weis Markets Inc 12825 Saint Clair, Clarksburg, Maryland is hereby GRANTED, subject to the following conditions:

1. The use is limited to automobile filling state and must meet all requirements of Section 59.3.5.13.C.
2. The Conditional Use will be limited to three fuel pumps (six positions)
3. Before issuance of any building permits for the Conditional Use, Applicants must file appropriate applications with the Planning Board to amend Preliminary Plan 11995042E,

Site Plan 82007022I, and Forest Conservation Plan 91994994 to reflect the Conditional Use approval.

4. Hours of operation shall be limited to 4 a.m. through 12 a.m.
5. The filling station must dispense less than 3.6 million gallons of gas and fuel per year.
6. Transfers to successor conditional use holders must follow the procedures in Rule 27.0 of OZAH's Amended Land Use Rules of Procedure.
7. Physical improvements to the Subject Property are limited to those shown on the Applicants' Conditional Use Site Plans, Open Space Plan, Circulation Plan, and Lighting Plan (Exhibits 9a-e, 17, 18, and 26).
8. The Applicant and any successors in interest must obtain and satisfy the requirements of all Federal, State, and County licenses, regulations, and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the conditional use premises and operate the conditional use as granted herein. The Applicant and any successors in interest shall at all times ensure that the conditional use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements, including the annual payment of conditional use administrative fees assessed by the Department of Permitting Services.

Issued this 20th day of May, 2025.

Office of Zoning and Administrative Hearings



Khandikile Mvunga Sokoni
Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Any party of record may file a written request to appeal the Hearing Examiner's Decision by requesting oral argument before the Board of Appeals within 10 days issuance of the Hearing Examiner's Report and Decision. Any party of record may, no later than 5 days after a request for

oral argument is filed, file a written opposition to it or request to participate in oral argument. If the Board of Appeals grants a request for oral argument, the argument must be limited to matters contained in the record compiled by the Hearing Examiner. A person requesting an appeal, or opposing it, must send a copy of that request or opposition to the Hearing Examiner, the Board of Appeals, and all parties of record before the Hearing Examiner.

Additional procedures are specified in Zoning Ordinance §59.7.3.1.f.1. Contact information for the Board of Appeals is:

Montgomery County Board of Appeals
100 Maryland Avenue, Room 217
Rockville, MD 20850
(240) 777-6600
<http://www.montgomerycountymd.gov/boa/>

Any party wishing to appeal this decision should visit the Board of Appeals' website, review the Notice of Re-Opening or contact Board of Appeals Staff for office hours and filing instructions, as these may change.

The Board of Appeals will consider your request for oral argument at a work session. Agendas for the Board's work sessions can be found on the Board's website and in the Board's office. You can also call the Board's office to see when the Board will consider your request. If your request for oral argument is granted, you will be notified by the Board of Appeals regarding the time and place for oral argument. Because decisions made by the Board are confined to the evidence of record before the Hearing Examiner, no new or additional evidence or witnesses will be considered. If your request for oral argument is denied, your case will likely be decided by the Board that same day, at the work session.

Parties requesting or opposing an appeal must not attempt to discuss this case with individual Board members because such ex-parte communications are prohibited by law. If you have any questions regarding this procedure, please contact the Board of Appeals by calling 240-777-6600 or visiting its website.

NOTIFICATIONS SENT TO:

Robert Harris, Esquire

Leslie Powell, Esquire

Amy Presley

Barbara Jay, Executive Director

Montgomery County Board of Appeals

Patrick Butler, Planning Department

Mark Beall, Planning Department

Victor Salazar, Department of Permitting Services

Michael Coveyou, Director of Finance