BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS
Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF:	*	
POWER FUEL, AND TRANSPORT, REAL	*	
ESTATE HOLDING COMPANY (MD), LLC	*	
Petitioner	*	
	*	
Rubem Garcia	*	
Craig Hedberg	*	
James Glascock	*	Board of Appeals No. S-1471-A
For the Petitioner	*	(OZAH Case No. 05-44)
* *	*	
Fran Hayward, for the Intervener-	*	
Bentley Road Civic Association	*	
Patricia Lansdale	*	
Opposed to the Petition, in Part	*	
* *	*	
Martin Klauber, Esquire, People's Counsel	*	
Opposed to the Petition	*	
* *	*	

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

Petition No. S-1471-A, filed on April 1, 2005, seeks to modify an existing special exception to bring an existing automobile filling station located at 501 Olney-Sandy Spring Road, Sandy Spring, Maryland into compliance with the terms and conditions of its special exception, to change certain operational and site conditions, and to transfer the special exception to the current landowner and operator of the filling station. The .7 acre parcel is zoned C2 (General Commercial) and is also located in the Sandy Spring/Ashton Rural Village Overlay Zone (hereinafter, the "Sandy Spring Overlay Zone" or just the "Overlay Zone"). The Tax Account Number is 03015441. The Petitioner is Power Fuel, and Transport, Real Estate Holding Company (MD), LLC, which company currently owns the land and operates the filling station, but the special exception is held by the former land owner and station operator, Rubem Garcia, who supports the petition, including transfer of the special exception.

According to Petitioner (Exhibit 36(a)), the site has been operated as an automobile filling station since 1930, and it continued as a non-conforming use when the area was classified in the C-2 Zone in 1981. In December of 1987, the current special exception (S-1471) was granted to permit reconstruction of the filling station in accordance with site and landscape plans filed with the Board and to operate as "Garcia's Service Station," with gas pump hours specified during the hearing in the case as 6:00 a.m. to 11:00 p.m., Monday through Friday, and 8:00 a.m. to 11:00 p.m. on Sunday. Nov. 6, 1987 Tr. 18-19.[1] All the proposed changes relate to the current special exception under which the automobile filling station is operated, and that fundamental use would continue.

[1] There are four transcripts of proceedings in this case, the original 1987 hearing transcript (cited in this report as "Nov. 6, 1987 Tr. [page reference]);" the show-cause hearing transcript (cited in this report as "May 25, 2005 Tr. [page reference]);" the first portion of the hearing on the current modification petition (cited in this report as "Oct. 28, 2005 Tr. [page reference]);" and the final portion of the hearing on the current modification petition (cited in this report as "Jan. 13, 2006 Tr. [page reference])." The hearing Examiner takes official notice of all proceedings in the underlying S-1471

On November 21, 2002, the Department of Permitting Services (DPS) issued a Notice of Violation (NOV) regarding the service station. Exhibit 10. That notice was rescinded and replaced by an NOV dated December 18, 2002. Exhibit 39. The alleged violations included, *inter alia*, changed hours of operation, a host of failures to follow the approved site and landscape plans and unapproved expansion of the "convenience store." Petitioner requested an administrative modification to the special exception to bring it back into compliance, but on July 7, 2003, the Board denied that request and instead required Petitioner to file a petition for a major modification. After Petitioner failed to do so for a year and a half, the Board, on January 31, 2005 scheduled this matter for a hearing on March 9, 2005, to show cause why the special exception should not be revoked. Exhibit 36(b) in the underlying S-1471 file.

The show cause hearing was postponed until May 25, 2005. In the meantime, on April 1, 2005, Petitioner filed the subject modification petition (S-1471-A), and a hearing was scheduled for September 9, 2005. The fact of that upcoming hearing was urged as a basis for not revoking the special exception at the May 25, 2005, show cause hearing, even though years had passed since the NOV's were issued. In recognition of the pending modification hearing, the Board elected not to revoke the special exception at the show cause hearing, but rather issued an resolution on June 2, 2005, requiring Petitioner to correct certain of the violations immediately.

On September 7, 2005, two days before the scheduled hearing on the subject modification petition, Petitioner's counsel requested, in writing, that the hearing be postponed until October 28, 2005, to complete a traffic study required by Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC). Exhibit 28. The requested continuance was granted to allow Petitioner time to perform the traffic study and to amend his petition. Exhibit 29.

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special exception file. No party objected to the Hearing Examiner taking such official notice when the issued was raised during the hearing. Jan. 13, 2006 Tr. 143. All exhibit references are to the current file, S-1471-A, unless otherwise noted.

Nevertheless, Petitioner failed to complete that traffic study prior to the scheduled October 28, 2005, hearing. As a result of this and other failures, Technical Staff filed their report, dated October 25, 2005, recommending denial of the modification petition.

At the October 28 hearing, Petitioner's counsel stated (Oct. 28, 2005 Tr. 7) he would be able to complete and file a traffic study in three weeks (*i.e.*, by November 18, 2005), and the hearing was adjourned until January 13, 2006, to give Petitioner the opportunity to do so and Technical Staff time to review the study. Oct. 28, 2005 Tr. 89. On December 5, 2005, the Hearing Examiner wrote to Petitioner's counsel because he had been advised by Technical Staff that the traffic study had still not been completed, though Staff had asked for it in September. That letter (Exhibit 35) warned Petitioner as follows:

> The purpose of this letter is to remind you of what I said at the hearing. The hearing will go forward on January 13, 2006, and the burden of proof is on the Petitioner. If Technical Staff is unable to complete their review prior to the hearing because of your second failure to timely file the required traffic study, the results of that failure will be borne by the Petitioner. It is also your burden to insure that the petition accurately reflects what you are requesting, including the food and beverage store, well in advance of the hearing, so that all interested parties receive notice and time to prepare.

Remarkably, Petitioner's counsel did not respond to that letter until January 12, 2006, the day before the scheduled January 13, 2006 hearing. In that response (Exhibit 36), Petitioner's counsel, Roger K. Bain, stated that his traffic engineer, Craig Hedberg, had not received the raw data in time to meet the date promised for the traffic study (November 18, 2005). Mr. Bain's letter, which was dated January 11, but received on January 12, 2006, also enclosed a revised statement from Petitioner including, *inter alia*, a request for "396 square feet convenience store as ancillary use to the filling station" (Exhibit 36(a)); a copy of the traffic study, dated "December, 2005" (Exhibit 36(b)); and the "Revised Site and Landscape Plan and Elevations" (Exhibits 36(c) and (d)). Technical Staff filed a Supplemental Report dated January 11, 2006, once again recommending denial of the modification

petition.[2] Exhibit 38. According to Technical Staff (Exhibit 38, page 7), the traffic study was not provided to Transportation Planning Staff until December 27, 2005, and there were some technical errors that needed to be corrected. The corrected Traffic Study was not submitted until January 12, 2006, the day before the hearing. Exhibit 37(a). Moreover, before Transportation Planning Staff could give its final approval, an additional 45 days would be needed for Technical Staff to receive comments on the Traffic Study from the Department of Public Works and Transportation (DPWT) and from the State Highway Administration (SHA), thus resulting in further delays.

When Petitioner attempted to introduce the traffic study and other exhibits at the hearing on January 13, 2006, the People's Counsel strenuously objected, since neither he nor the other parties had been given the statutorily required 10 days notice of a petition amendment and time to prepare to meet this evidence. Jan. 13, 2006 Tr. 10-12. Francine Hayward, on behalf of the Bentley Road Civic Association, which opposes parts of the modification petition, joined Mr. Klauber in his objection. Jan. 13, 2006 Tr. 18. The Hearing Examiner took these objections under advisement, and gave the parties the opportunity to submit further commentary on the exhibits by January 23, 2006, with the record scheduled to close on January 27, 2006. Various parties made timely post-hearing submissions.

On January 27, 2006, just prior to the closing of the record, the Hearing Examiner ruled (Exhibit 57) that the traffic study (Exhibits 36(b) and 37(a)) was not admissible. The Hearing Examiner allowed Exhibits 36(a), (c) and (d) to be admitted, as well as the post-hearing submissions of the parties, Exhibits 51, 52, 53, and 54. The basis for these rulings will be discussed below in Part II.C. of this report.

The appropriate scope of the hearing on a petition for modification of a special exception is spelled out in Zoning Code § 59-G-1.3(c)(4). That subsection provides:

> *The public hearing must be limited to consideration of the proposed modifications noted in the Board's notice of public hearing and to (1) discussion of those aspects of the special exception use that*

[2] This Technical Staff report is frequently quoted and paraphrased herein.

> *are directly related to those proposals, and (2) as limited by paragraph (a) below, the underlying special exception, if the modification proposes an expansion of the total floor area of all structures or buildings by more than 25%, or 7,500 square feet, whichever is less.*
>
> * * *

The public notice in this case (Exhibit 29) specified all the modifications proposed by Petitioner, as set forth in Part II.C, below. Petitioner's plans do not include expansion of the total floor area of all structures by more than 25%, or 7,500 square feet. The only floor space expansion requested is the expansion of the food mart from the original 171 square feet to 396 square feet, an increase of 225 square feet. Jan. 13, 2006 Tr. 104-106.

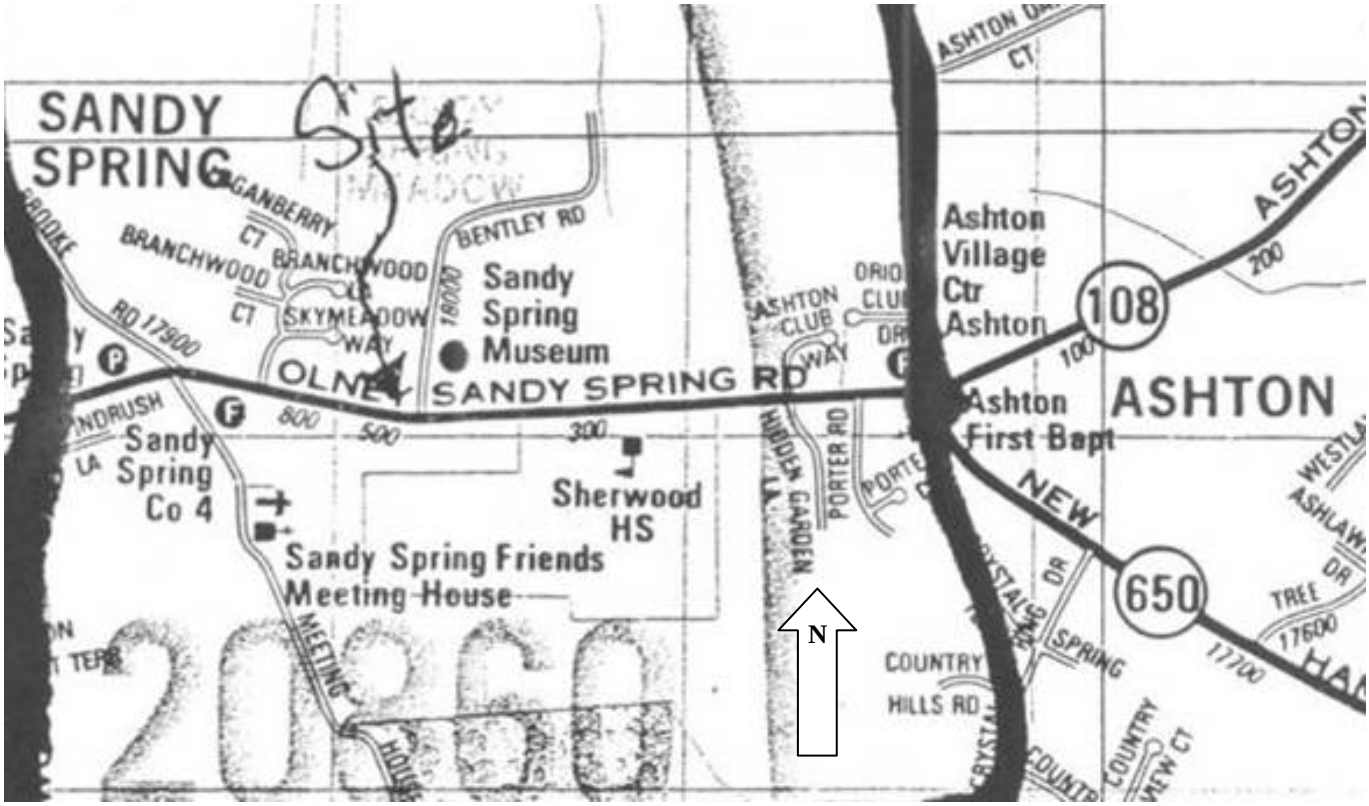
Because the proposed expansion does not exceed the statutory threshold of 7,500 square feet or 25%, the scope of the hearing includes just the matters related directly to the proposed changes, and their impact upon the surrounding neighborhood. However, the scope of this hearing is also circumscribed by the limits placed on lawful conforming uses in the Sandy Spring Overlay Zone, and the extent to which this automobile filling station was a "lawful use" at the time the Overlay Zone was first applied. This issue will be discussed in Part II.C. of this report, and it impacts on Petitioner's request for expanded hours of operation and on Petitioner's proposed expansion of the "food mart."

As will be seen below, the Hearing Examiner concludes that the lawful automobile filling station use may continue in operation, but may not be expanded. Therefore, neither the hours of operation nor the floor space used in the operation may be enlarged. Most of the other proposed changes to the subject site, if properly conditioned, will not have any non-inherent adverse effects on the neighboring area, and should be permitted.

II. FACTUAL BACKGROUND AND SIGNIFICANT ISSUES

A. The Subject Property

The subject property is known as Parcel B, Sandy Spring Meadow Subdivision, located at 501 Olney-Sandy Spring Road, Sandy Spring. The 0.7-acre parcel is a corner lot situated to the northwest of the intersection of Olney-Sandy Spring Road (MD Route 108) and Bentley Road. Its general location is shown below from a vicinity map attached to the Technical Staff report:



The parcel contains approximately 200 feet of frontage along both roads. As a result of the Sandy Spring/Ashton Special Study Plan, the property was classified for C-2 zoning in 1981. In 1987, the former owner, Rubem Garcia, proposed to replace the existing one-story automobile filling station with a two-story building, including bays for light auto repairs on the first floor of the northern (rear) side, an auto filling station on the first floor of the southern (front) side and office space above.

Special exception S-1471 was approved in December of 1987 to allow the two-story building, associated parking and operation of the automobile filling station. The Board did not consider any issues relating to the office space in the building because general offices are a permitted use in the C-2 Zone. *See* Zoning Ordinance §59-C-4.2(e) and Nov. 6, 1987 Tr. 14-15 and 19.

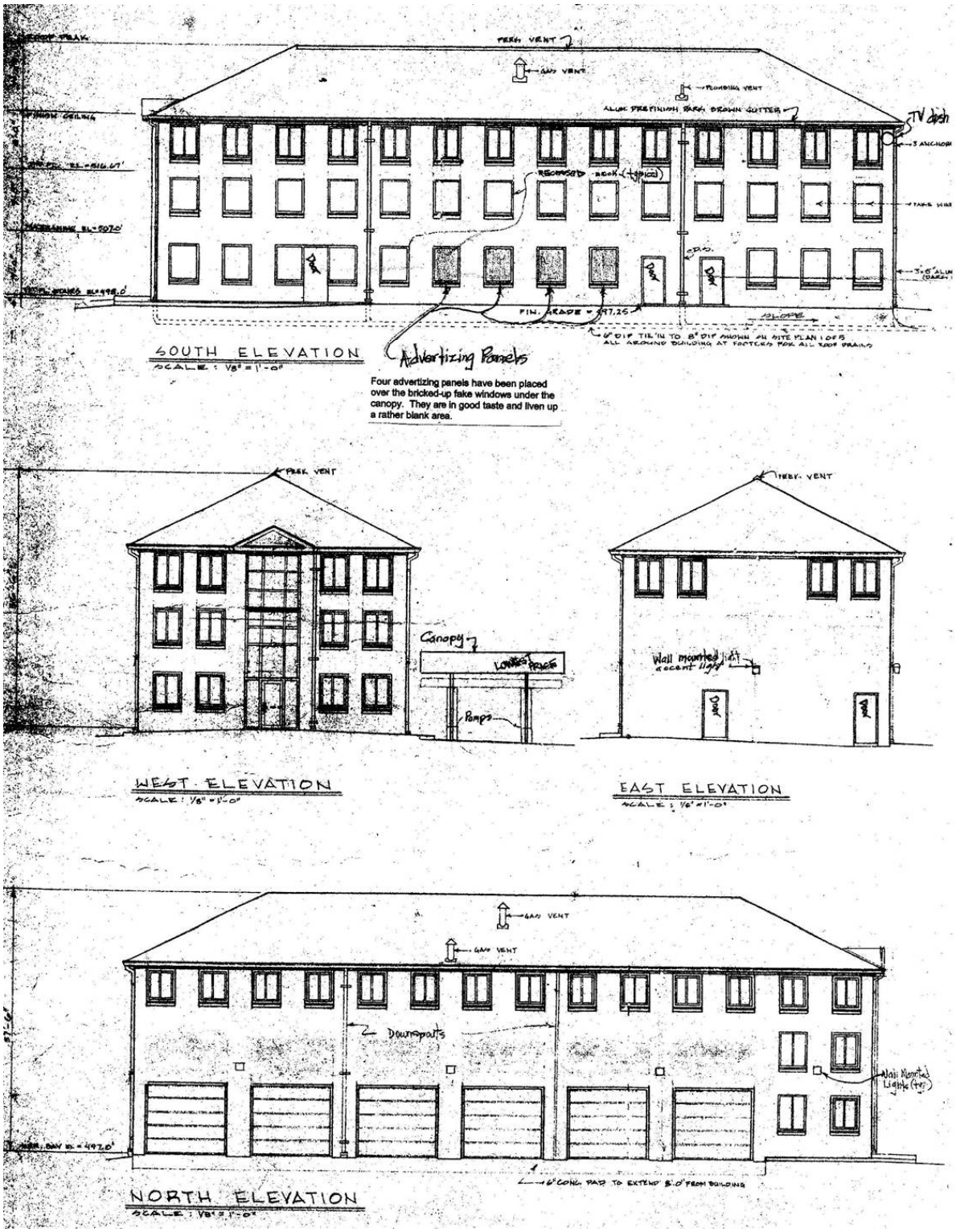
The site was thereafter developed with a structure described by Technical Staff as "a two-story brick building." Exhibit 38, p. 2. Although the building is the height of a three-story building (about 36.5 to 37.5 feet), it apparently qualifies as "a two-story" building because the middle floor is a mezzanine.[3] Nevertheless, in the Revised Site Plan (Exhibit 36(c)), Petitioner labels it as a "3 Story Brick" building, and the footprint of the building is listed on the Revised Site Plan as 3,856 square feet. The subject site is depicted below from the southeast (across Bentley Road) in Exhibit 9 (b).

There are five gasoline pump islands located in front of the building, covered by a single canopy, as shown above. The Plans approved by the Board of Appeals in 1987 called for a double canopy.[4]

[3] Under the definition of "Story" in Zoning Ordinance §59-A-2.1, a mezzanine is not counted as a story when it does not cover more than one-third of the area of the floor next below it, and the vertical distance between the floor next below it and the floor next above it is less than 20 feet. That is the case here.

[4] Site Plan "A," dated June 15, 1987 (Exhibit 29 in the original S-1471 file). The revised site plan approved by Technical Staff and filed with the Board in March of 1993 (Exhibit 31(b) in S-1471) also called for a double canopy.

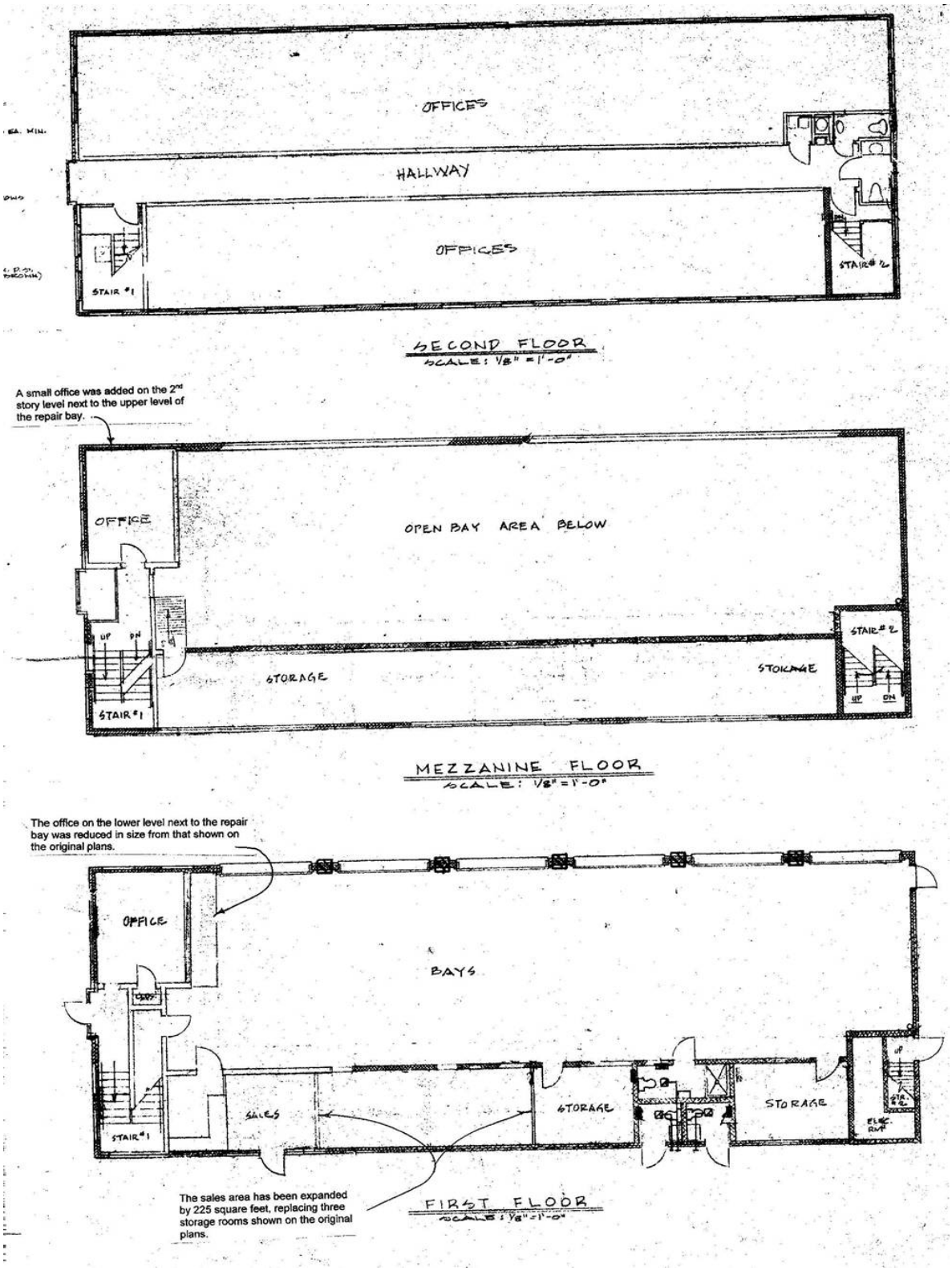
The ground level of the building contains the sales area in front and six automobile service bays located in the rear, which can be seen on the revised Elevations from Exhibit 36(d)), shown below.



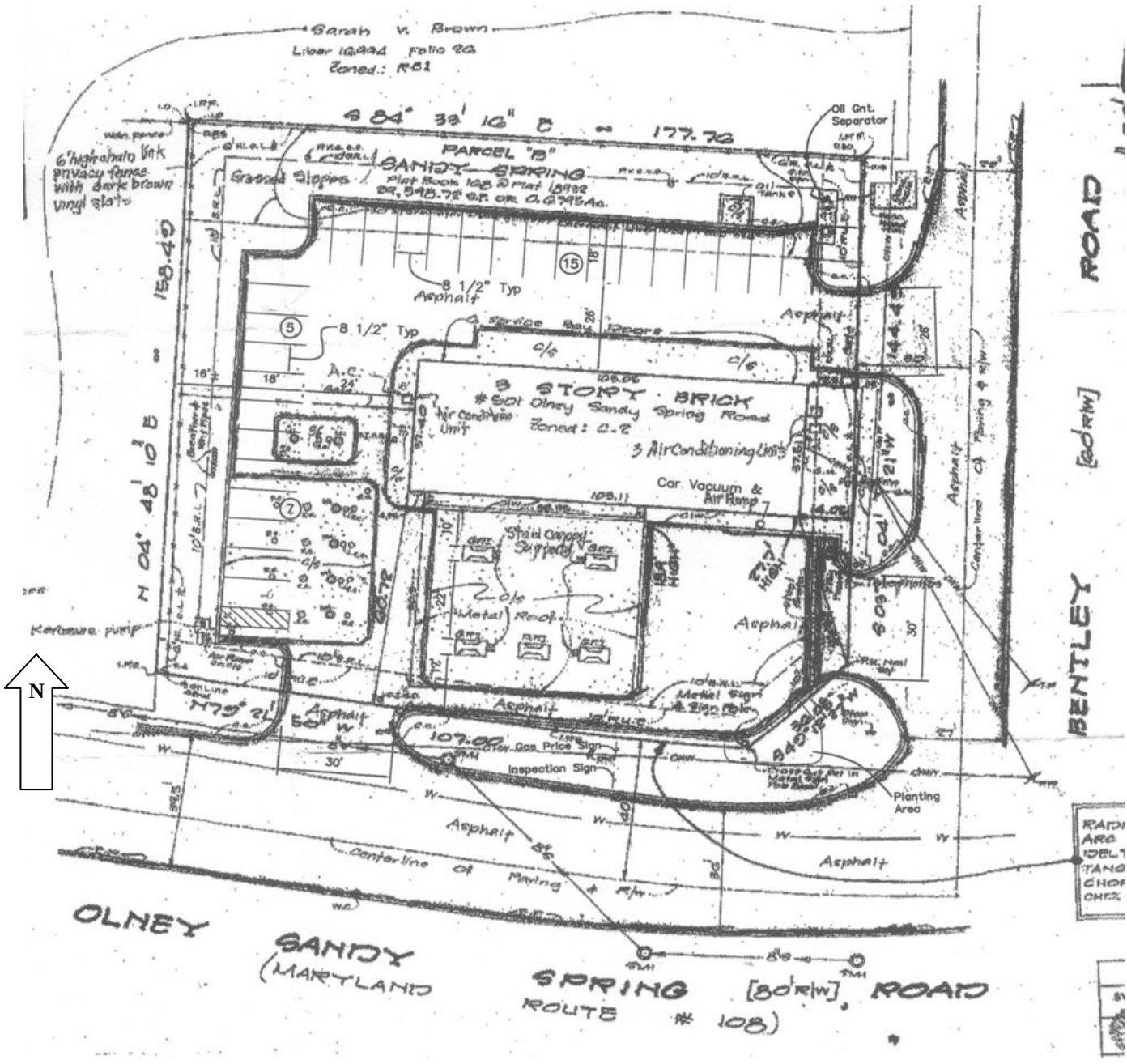
Some of the service bays can also be seen on the following top photo from Exhibit 9(e), which views the building from the northwest.

Additionally, the ground floor contains a food mart, which provides snacks and beverages to customers. The current owner has expanded the food mart (called a "small convenience store" in the NOV) from 171 square feet, as originally built by Mr. Garcia, to 396 square feet. It is located next to the Cashier, as viewed from the southwest in the following photo from Exhibit 9(c).

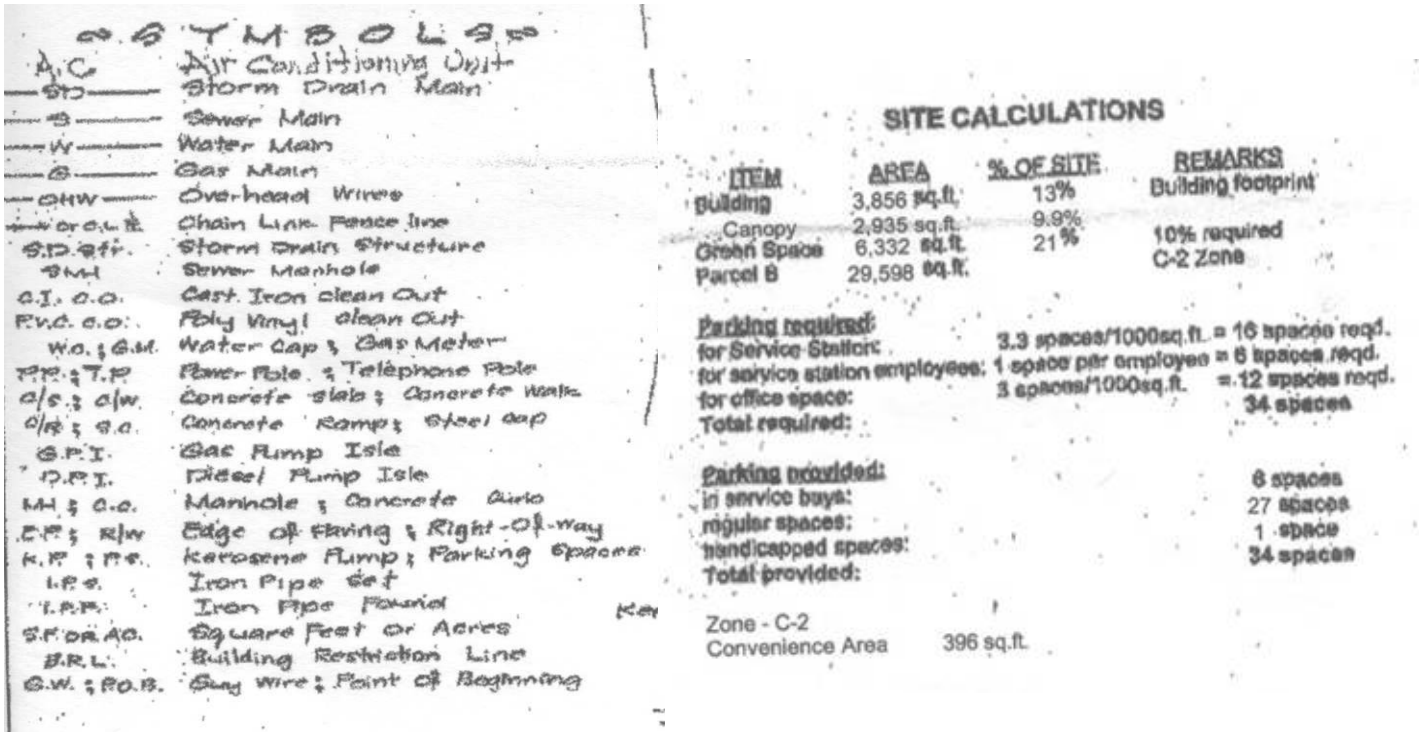
Both the second floor office space and the expanded sales area for the food mart can be seen on the revised Floor Plans from Exhibit 36(d), shown below:



Petitioner indicates in the "Site Calculations" on the Site Plan that there are 28 on-site, outdoor parking spaces (including one handicapped accessible space) and six service-bay parking spaces located within the building, resulting in a total of 34 spaces, as required.[5] The revised Site Plan, from Exhibit 36(c) is shown below (The Site Calculations and Symbol Key are on the following page):



[5] Only 27 outdoor spaces are clearly marked on the Site Plan, and the Landscape portion of the plan has two spaces marked "HC," so it is unclear whether Petitioner has designated one or two handicapped spaces.



SYMBOLS

A.C.	Air Conditioning Unit
STD	Storm Drain Main
S	Sewer Main
W	Water Main
G	Gas Main
OHW	Overhead Wires
C.L.F.	Chain Link Fence line
S.D.Str.	Storm Drain Structure
SMH	Sewer Manhole
C.I. C.O.	Cast Iron clean Out
P.V.C. C.O.	Poly Vinyl clean Out
W.C. & G.M.	Water Cap & Gas Meter
P.P. & T.P.	Power Pole & Telephone Pole
C/S & C/W	Concrete Slab & Concrete Walk
C/R & S.C.	Concrete Ramp & Steel cap
G.P.I.	Gas Pump Isle
D.P.I.	Diesel Pump Isle
MH & C.O.	Manhole & Concrete Curb
E.P. & R/W	Edge of Paving & Right-Of-Way
K.P. & P.P.	Kerosene Pump & Parking Spaces
I.P.S.	Iron Pipe Set
I.P.F.	Iron Pipe Found
S.F. OR AC.	Square Feet or Acres
B.R.L.	Building Restriction Line
G.W. & P.O.B.	Guy wire & Point of Beginning

SITE CALCULATIONS

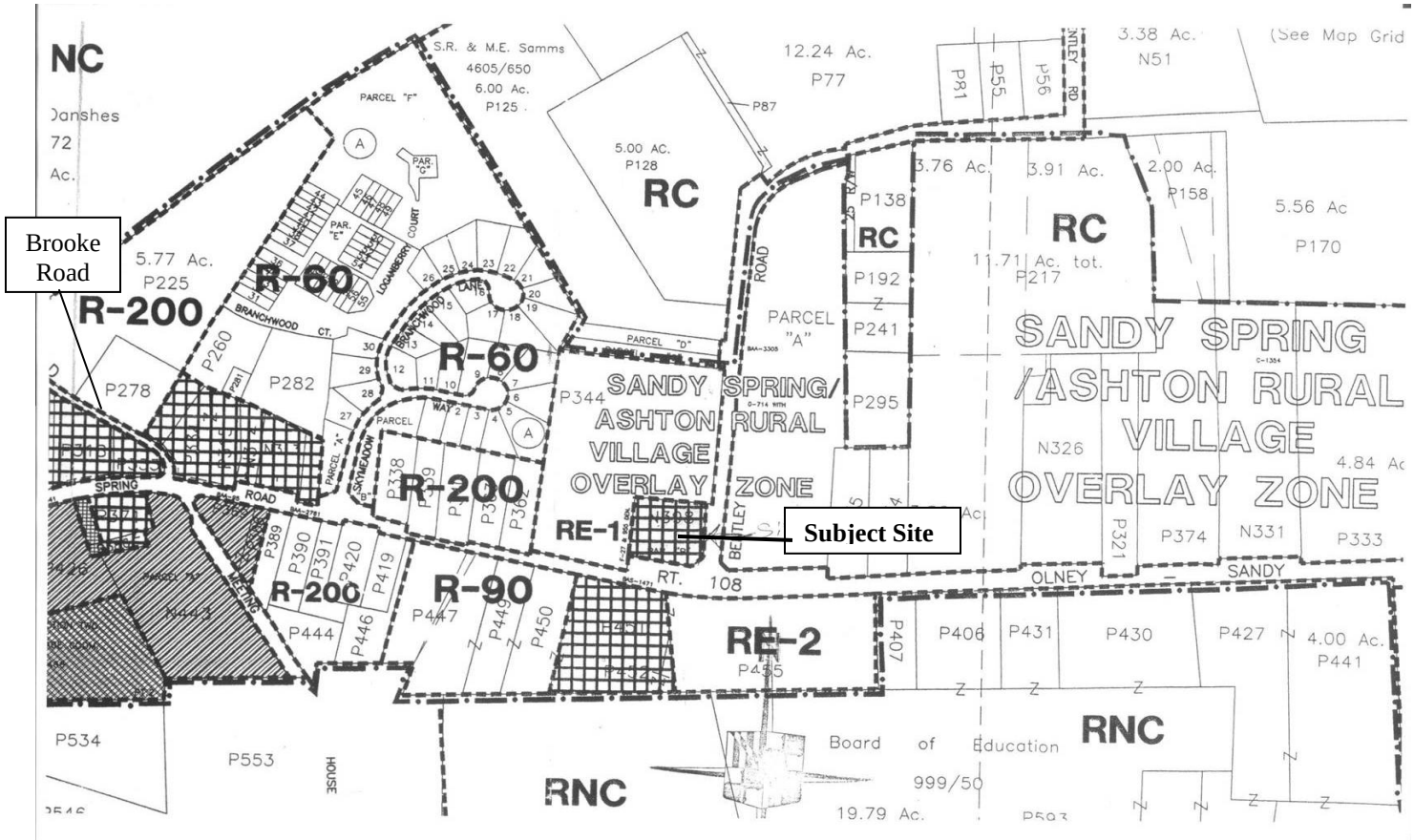
ITEM	AREA	% OF SITE	REMARKS
Building	3,856 sq.ft.	13%	Building footprint
Canopy	2,935 sq.ft.	9.9%	
Green Space	6,332 sq.ft.	21%	10% required C-2 Zone
Parcel B	29,598 sq.ft.		

Parking required:		
for Service Station:	3.3 spaces/1000sq.ft.	= 16 spaces reqd.
for service station employees:	1 space per employee	= 6 spaces reqd.
for office space:	3 spaces/1000sq.ft.	= 12 spaces reqd.
Total required:		34 spaces
Parking provided:		
in service bays:		6 spaces
regular spaces:		27 spaces
handicapped spaces:		1 space
Total provided:		34 spaces

Zone - C-2
Convenience Area 396 sq.ft.

B. The Neighborhood and its Character

The existing use is located in the C-2 and Sandy Spring Overlay Zones, as can be seen on the following Zoning map (Exhibit 24):



The property abuts residential zoning to the west, immediately to the north and diagonally across Maryland Route 108 to the southeast and southwest. To the northeast and east is the Rural Cluster Zone. Technical Staff describes the surrounding uses as a mixture of low-density residential homes, several retail stores and a Fire Station. The Hearing Examiner would define the general neighborhood as almost co-extensive with the Sandy Spring Overlay Zone, running from Brooke Road to the west, the border of the Overlay Zone to the north and east, and including the confronting properties across Olney Sandy Spring Road (MD Rt. 108) to the south. Technical Staff did not mention the confronting properties to the south, but they are clearly affected by traffic tie-ups and activities occurring at the subject site, as evidenced by the testimony of Patricia Lansdale, who is one of those neighbors. Jan. 13, 2006 Tr. 49-57.

C. Proposed Modifications and Related Legal Issues

The specific modifications Petitioner seeks in its Modification Petition were spelled out in its Revised Statement (Exhibit 36(a)) and are set forth below with minor amplifications:

1) Extending hours of operation to between 5 a.m. and 12 midnight, seven days a week;
2) Window and façade changes;
3) Exterior changes of the window treatment and the garage side appearance;
4) Changes in the canopy, pump islands and lighting over the gas pumps;
5) Changes to the Floor Space Arrangement Inside the Building;
6) Installation of chain link fence with plastic inserts colored to look like natural wood;
7) A six-foot high fence topped by barbed wire and gated, on the west side of the building;
8) Changes in Landscaping;
9) Installation outside the building of a car vacuum, air pumps, two pay telephones, a Coke machine, a kerosene pump, air conditioning units and a clothing collection box;
10) Transfer of the Special Exception from Garcia Service Station/Ruben Garcia to Power Fuel, and Transport, Real Estate Holding Company (MD), LLC; and
11) An expanded convenience store or “food mart” in the building.

Each of these proposed modifications is discussed separately below, but before discussing them, we must first deal with objections to some of the evidence upon which parts of this petition rely, and with the legal issues resulting from application of the Sandy Spring Overlay Zone to the existing use.

Objectionable Evidence:

As mentioned in the Statement of the Case in Part I of this report, the People's Counsel, Martin Klauber, joined by Francine Hayward on behalf of the Bentley Road Civic Association, strenuously objected to admission of the exhibits filed on the day before the hearing because neither he nor the other parties had been given the statutorily required 10 days notice of a petition amendment and time to prepare to meet this evidence. Jan. 13, 2006 Tr. 10-12 and 18. Mr. Klauber fleshed out his objection in a post-hearing submission (Exhibit 52), noting that the traffic study does not address the issue of the traffic impact of proposed Saturday hours of operation. Mr. Klauber asked that the record be closed as of January 11, 2006 (*i.e.*, prior to the Petitioner's January 12 submissions). Ms. Hayward's post-hearing submission (Exhibit 54) echoed Mr. Klauber's objections, including the disadvantage suffered by the other parties as a result of the late filings, thereby denying them due process.

Shane Kamkari, Esquire, a lawyer for Petitioner, responded (Exhibit 53) that Technical Staff had not ordered any traffic study regarding Saturday impacts. He noted that all parties were on notice for a long time that Petitioner was requesting Saturday hours, and if they thought a study was necessary in that regard, they should have timely sought it. Moreover, Mr. Kamkari argued, if the record were closed as of January 11, 2006, as suggested by Mr. Klauber, it would unfairly require denial of all requests for modification regardless of whether they were related to the traffic study.

As to the Traffic Study (Exhibits 36(b) and 37(a)), the Hearing Examiner is convinced that fairness and due process considerations require its exclusion from the evidence. While Mr. Kamkari is correct that the parties had notice of Petitioner's request for Saturday hours, that issue is a bit of a "red herring," since the Traffic Study does not deal with Saturday hours. The real question is whether it is fair to make the other parties face the half-inch thick Traffic Study and the expert testimony based on

it without having had the opportunity to study the document and discuss it with their own experts.

The clear answer is that to do so would be unfair and would deny the other parties the opportunity to meet the Petitioner's evidence. That is undoubtedly why Zoning Ordinance §59-A-4.24 requires 10 days notice to all parties before a petition may be amended. Though that same section gives the Board the option of postponing the hearing, considering the history of this special exception set forth in Part I of this report, a further continuance would not have been in the public interest. Violations of the original special exception have been ongoing for many years, and while the Board ordered the halting of some of these violations as a result of its show-cause hearing, others were left to be reviewed during the subject modification proceedings. The hearing in this case was postponed twice at Petitioner's request expressly to allow Petitioner more time to complete its traffic study. It was supposed to be finished in time for other parties and Technical Staff to review it before the hearing. Petitioner failed to do so, despite the two continuances and an express reminder and warning from the Hearing Examiner. Thus, Petitioner's conduct does not justify further postponement, especially in light of the public interest in timely eliminating the ongoing violations of the special exception.

The Hearing examiner wishes to emphasize that his ruling is not intended as a sanction against Petitioner, though one would clearly have been justified by the repeated failure to meet deadlines in this case. Rather, this ruling is necessitated by the Hearing Examiner's obligation to protect the rights of all parties and to conduct a fair hearing.

The Hearing Examiner allowed the Revised Statement of the Petitioner, the Revised Site and Landscape Plan and the Revised Elevations and Floor Plans (Exhibits 36(a), (c) and (d), respectively) to be admitted, because although formally filed on January 12, 2006, the revised plans had all been seen by all interested parties, in very similar form, as early as the October 28, 2005 hearing. The

revised site and landscape plan (Exhibit 32), was produced at that hearing and was merely "cleaned up" to make it marginally passable[6] for the January 13, 2006 hearing. Oct. 28, 2005 Tr. 46. The revised elevations and floor plans (Exhibit 32(a)) were also referred to by Petitioner at the October 28 proceeding. Oct. 28, 2005 Tr. 10, 77. The Hearing Examiner finds that the parties would suffer no prejudice by allowing all the late-filed, but minimally revised, plans to be admitted into evidence in this case. The same can be said about the Revised Statement of the Petitioner (Exhibit 36(a)). That Revised Statement raised no issues that were not already discussed at the October 28, 2005 hearing or in previously filed documents. Therefore, the Hearing Examiner finds no prejudice to the other parties in permitting its admission.

It is worth noting that the exclusion of the Traffic Study may have no impact on this case because of the limits placed on lawful conforming uses in the Sandy Spring Overlay Zone.

Impact of the Sandy Spring Overlay Zone:

This case is complicated by the fact that the subject site lies not only within the C-2 Zone, but also within the Sandy Spring Overlay Zone. The resulting legal issue, raised by Mrs. Hayward of the Bentley Road Civic Association (Oct. 28, 2005 Tr. 19-20; Jan. 13, 2006 Tr. 36-38), is not easily resolved. The issue arises because the special exceptional was operational before the Sandy Spring Overlay Zone was superimposed over the subject site on July 27, 1998 (Ord. No. 13-95; ZTA 98-002).[7] That overlay zone does not permit automobile filling stations; however, in a footnote, it pronounces that

> [a]ny **lawful use** in existence as of the date of application of the overlay zone is a conforming use, and may be altered, repaired, or replaced in accordance with the provisions of the zone in effect at the time the use was established. [Emphasis added.]

[6] The Hearing Examiner characterizes the site plan as "marginally passable" because it is blurry and difficult to read, although it appears to contain sufficient detail for enforcement purposes.

[7] Mr. Garcia purchased the subject property in September of 1997, received the special exception in December of 1987, completed the renovations of the filling station in September of 1995 and sold the property to Petitioner in September of 2002. Oct. 28, 2005 Tr. 37.

Ms. Hayward contends that the subject use was not a "lawful use" at the time the overlay zone was applied because it was not in full compliance with all of the special exception conditions at the time.[8] For example, it is undisputed in the record that a single canopy was erected over the pumps even though the approved plans called for a double canopy, that the canopy lighting is different from that which was originally approved and that certain required plantings were not made by the special exception holder.[9]

If Ms. Hayward's legal interpretation is correct, the filling station was not a "lawful use" and does not get grandfathered as a conforming use under the overlay zone. What Ms. Hayward may not have realized is that if she is correct, the subject use also cannot become a lawful non-conforming use, which is defined Zoning Ordinance §59-A-2.1 as follows:

> *Nonconforming use: A use that* ***was lawful when established and continues to be lawful****, even though it no longer conforms to the requirements of the zone in which it is located because of the adoption or amendment of the zoning ordinance or the zoning map*. [Emphasis added.]

If the use is neither lawfully conforming nor lawfully nonconforming, that may render it an impermissible use which is prohibited on the property. That seems to the Hearing Examiner to be a rather Draconian (and possibly unconstitutional) result,[10] considering that the underlying use as a

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[8] Ms. Haywood relies on a September 29, 2004, memorandum from former Associate County Counsel, Thomas Carbo, a copy of which is attached to her post-hearing submission (Exhibit 54). Although the Hearing Examiner agrees with some of Ms. Hayward's argument, her reliance on the Carbo memo is misplaced since Mr. Carbo was discussing a related but different issue (the effect on a special exception modification petition when the statutory terms governing the special exception have been substantially changed prior to the petition and there is no statutory "grandfathering clause"). Fortunately, the issue we must resolve was addressed by a follow-up analysis for the Board of Appeals by the County Attorney's Office in a September 1, 2005 memorandum from Associate County Attorney Barbara L. Jay, which is discussed in the main text. By virtue of Montgomery County Code § 2-116, "the county attorney shall serve as counsel to the board." The Hearing Examiner will therefore take official notice of the Jay memorandum, and a copy of it is attached to this report.

[9] See the December 18, 2002 NOV (Exhibit 39) for a complete description of the items out of compliance. The Hearing Examiner mentions the canopy, the lighting and the plantings because there is testimony from Mr. Garcia that these items were never in compliance with the terms of the special exception. Oct. 28, 2005 Tr. 38-39 and 43-44.

[10] The possible constitutional issues in this case need not be reached because the Hearing Examiner concludes below that the previously approved use may continue despite the application of the Overlay Zone.

filling station was a lawful use permitted by special exception up until the time the overlay zone was imposed.

A much more sensible resolution was suggested in the memorandum from Associate County Attorney Barbara L. Jay, which is mentioned in footnote 8, above. Ms. Jay's memorandum mainly addressed the effect on a special exception when the substantial terms of a special exception are changed by statutory amendment. She concluded that if the use was lawful at the time of the amendment, it becomes a lawful non-conforming use, which cannot be modified by the Board of Appeals, but rather is subject to the jurisdiction of DPS. This conclusion cannot be applied directly here because the statutory amendment in this case (imposition of the overlay zone), unlike those discussed by Ms. Jay, had a grandfathering clause which allowed a lawful use to remain a lawful conforming use; however, Ms. Jay's memorandum did specifically address the issue of whether a failure to comply with **some** terms of the special exception at the time the new legislation becomes effective, completely deprives the use of its "lawful" status, without which it can become neither lawfully conforming nor lawfully non-conforming.

Ms. Jay's conclusion, with which the Hearing Examiner agrees, is that "[t]he use becomes unlawful to the extent that (1) it violates those terms and conditions of the special exception grant that were in place when the Zoning Ordinance was amended to render the use nonconforming, or (2) it has been impermissibly "extended" beyond the scope of the nonconforming use." Jay Memorandum, p. 5. The only difference between our case and the situation Ms. Jay was discussing is that our case involves a conforming use, if lawful, while Ms. Jay's involved a non-conforming use, if lawful. It is the "lawful v. non-lawful" analysis that is applicable to both.

The case law cited by Ms. Jay bears out her conclusions. For example, in *Jahnigen v. Staley*, 245 Md. 130, 225 A.2d 277 (1967), the Court of Appeals held that some of the changes to a

dock and rowboat rental facility constituted an unlawful extension of the nonconforming use (the additional docks), but the court nevertheless permitted the use to continue with that portion which was lawful. Thus, the task is to determine which parts of the proposed use (including the proposed modifications) are lawful and may continue, and which, if any, are unlawful and must cease. To do this, we must first examine the language of the grandfathering provision in the statutory amendment which created the Sandy Spring Overlay Zone.

The language, which is quoted at the beginning of this section of the report, specifies that the lawful conforming use "may be **altered, repaired, or replaced** in accordance with the provisions of the zone in effect at the time the use was established" [Emphasis added.] As pointed out by Ms. Hayward, the statute does not say that the use, though lawful and conforming, may be expanded or extended. The Council could have used such language, had it elected to do so, as is evidenced by the fact that it has allowed some enlargement in other parts of Zoning Ordinance with regard to a number of conforming uses. For example, Zoning Ordinance §59-C-1.31, footnote 16 provides:

> *Any horticultural nursery and related use established by special exception in the R-150, R-90, R-60, R-40, R-4plex or RMH-200 zones before May 6, 2002 is a conforming use, and may be modified, repaired or reconstructed,* ***or enlarged*** *a maximum of 5% of the total floor area in accordance with the special exception standards in effect before May 6, 2002.* [Emphasis added.]

Similar language is used by the Council in footnotes 41, 42, 43, 45 and 46 with regard to a variety of conforming uses. Yet, the Council elected not to allow enlargement in footnote 40 when discussing still another type of conforming use. In that instance, the Council allowed the use only to be "modified, repaired or reconstructed," language similar to the language in the Sandy Spring Overlay Zone footnote. In another section, the Ordinance limited enlargement to what was allowed in the original building permit. Zoning Ordinance §59-*59-C-4.324(b).*

As a matter of statutory construction, when a legislative body specifies that particular items are permitted, it is presumed that the legislature did not intend to include unlisted items. *Cox. v. Prince George's County*, 86 Md. App. 179, 194; 586 A.2d 43, 50 (1991). This doctrine, known as the *expressio unius est exclusio alterius* principal of construction, is especially applicable where, as here, the legislative body has included those missing items in other listings in the same Ordinance.

Thus, the Hearing Examiner must conclude that footnote 1 in the Sandy Spring Overlay Zone, which grandfathered lawful existing uses as "conforming," did not permit enlargement or extension of those lawful uses. Applying that conclusion to the subject case, it is evident that the fundamental use as an automobile filling station may continue, but may not be enlarged or extended. However, that does not mean that no change is permitted, for the courts have ruled that "intensification" of a use is not an unlawful enlargement or extension. *See, e.g., McKemy v. Baltimore County,* 39 Md. App. 257, 269-70, 385 A.2d 96 (1978); *Lone v. Montgomery County*,85 Md. App. 477, 496-97, 584 A.2d 142 (1991). Although these cases, and the others relied on with regard to this issue, are analyzing non-conforming uses, as distinguished from conforming uses, the Hearing Examiner finds that their rationale is applicable to determining the limits which the grandfathering provision imposed upon the subject conforming use. As demonstrated above, that provision did not permit enlargement or expansion of the use, so it is logical to apply case law standards which evaluate what is an expansion of a use and what is merely an intensification. Those cases apply four criteria to evaluating the Petitioner's activities:

(1) to what extent does the current use of these lots reflect the nature and purpose of the original use;

(2) is the current use merely a different manner of utilizing the original use or does it constitute a use different in character, nature, and kind;

(3) does the current use have a substantially different effect upon the neighborhood; and

(4) is the current use a "drastic enlargement or extension" of the original non-conforming use.

The Hearing Examiner will consider Petitioner's use and proposed modifications in light of these criteria and other case law which specifically addresses some of Petitioner's proposed changes. Ms. Jay observes in her memorandum that "the scope of a lawful, nonconforming use may or may not be coextensive with the scope of the operations contemplated in the original special exception grant since 'intensification' of the nonconforming use is permitted, provided it is not in conflict with the terms and conditions set forth in the underlying special exception grant." This summary of the applicable law is useful to keep in mind because there have been numerous changes to the subject site and operations, but that does not mean that every change must be undone. Not every change is forbidden, and the language of the grandfathering clause itself permits a lawful use to be "altered."

Bearing all this in mind, we now turn to the specific modification proposals.

Specific Modification Proposals:

1. Extending hours of operation to between 5 a.m. and 12 midnight, seven days a week

The current hours of operation for the filling station are 6 a.m. to 11 p.m., Sunday through Friday, by virtue of the Board's Resolution of June 2, 2005, following the show cause hearing in S-1471. These hours were not specifically spelled out in the Board's original December 14, 1987 resolution granting the special exception. Rather, they were intended to be based on the hours the former owner, Rubem Garcia, sought in the 1987 hearing for the special exception (Nov. 6, 1987, Tr. 18-19). While Mr. Garcia testified to much earlier closing times for the "mechanical" (*i.e.*, auto repair) side of his business, he added that the gas pump times might extend to 11:00 p.m. in the future. The Petitioner is bound by Mr. Garcia's testimony through Condition 2, recommended by the hearing examiner (Exhibit 23) and adopted by the Board in its December 14, 1987 resolution granting the special exception (Exhibit 22). That condition specified that "The special exception shall be

implemented and operated in strict accordance with all the testimony and evidence of record . . .." The problem with the current hours approved by the Board in its June 2, 2005 resolution is that it misreads Mr. Garcia's testimony regarding Sunday hours. The earliest time suggested by Mr. Garcia for a Sunday opening was 8:00 a.m., not 6:00 a.m. Nov. 6, 1987, Tr. 18-19. This 8:00 a.m. Sunday start time was also specified in the Statement accompanying the petition in S-1471 (Exhibit 3 in S-1471).[11] The originally approved hours for the gas pumps, thus, were 6:00 a.m. to 11:00 p.m. Monday through Friday; closed on Saturday; and 8:00 a.m. to 11:00 p.m. on Sunday. Under the case law cited above, these hours cannot be lengthened, if to do so would be considered an expansion of the use, as distinguished from a mere intensification.

The proposed change in hours to 5 a.m. and 12 midnight, seven days a week, would seem to be permissible under the first two criteria listed above on pp. 21-22 because it would still "reflect the nature and purpose of the original use" and would not "constitute a use different in character, nature, and kind." However, the proposed change appears not to satisfy the third and fourth criteria because, based on testimony from the community (Jan. 13, 2006, Tr. 42-45 and 50-51), it would "have a substantially different effect upon the neighborhood" and it would seem to be a "drastic enlargement or extension" of the original use. Our analysis is also aided by an opinion of the Maryland Court of Special Appeals, which spoke directly to the issue of "temporal expansion."

In *Trip Assocs. v. Mayor and City Council,* 151 Md. App. 167, 179-180, 824 A. 2d 977, *cert granted*, 377 Md 112, 832 A. 2d 204 (2003), the court faced the issue of whether an increase in the number of nights that adult entertainment constituted an "expansion"" of a nonconforming use, or merely an intensification of that use. The court held that the extension of hours constituted a prohibited "temporal expansion" of the use. Based on all these factors, the Hearing Examiner

[11] This Statement also prescribed earlier closing times, but that was modified by Mr. Garcia's testimony in 1987, as noted above.

concludes that the proposed extension of hours for the subject automobile filling station would be an enlargement of the use, not a mere intensification, and therefore is prohibited under the terms of the Sandy Spring Overlay Zone. Petitioner must return to the original hours, and a condition to that effect has been proposed in Part V of this report. That condition would be as follows:

> The gas pumps may be operated from 6:00 a.m. to 11:00 p.m., Monday through Friday and 8:00 a.m. to 11:00 p.m. on Sunday. They must be closed on Saturday. The light automobile repair shop may be operated from 6:00 a.m. to 7:00 p.m., Monday through Thursday; 6:00 a.m. to 5:00 p.m. on Friday; and 8:00 a.m. to 1:00 p.m. on Sunday. It must be closed on Saturday.

The hours specified for the light automobile repair shop were those requested by Mr. Garcia both in the Statement accompanying his original petition (Exhibit 3 in S-1471) and in his testimony at the hearing on the original petition in S-1471. Nov. 6, 1987, Tr. 18-19. The current Petitioner in S-1471-A has not requested an expansion of the auto repair shop hours.

Two other items should be mentioned in connection with hours of operation. The first is that the Hearing Examiner would not consider it an expansion of hours if Petitioner wanted to be open on Saturday, rather than Sunday, without any increase in hours of operation. The original choice to be closed on Saturday and open on Sunday was based on Mr. Garcia's religious beliefs, as he made clear at the hearing. Oct. 28, 2005 Tr. 81- 83. Since Mr. Garcia is no longer involved with operation of the station, the current operator might wish to flip operations on the two days; however, because Petitioner did not request such a change, the Hearing Examiner has no way to ascertain its desires from the record. The administrative modification procedure may be available for such a switch should Petitioner so desire.

Finally, other suggestions regarding hours of operation have been made by community members, such as cutting back hours to 10:00 pm., while allowing the facility to be open seven days a week (Testimony of Ms. Lansdale, Jan. 13, 2006 Tr. 50-51) or allowing the gas pumps to operate

from 6:00 a.m. to 11:00 p.m., seven days a week, but limiting the expanded food mart to 6:00 a.m. to 8:00 p.m. (Testimony of Ms. Hayward, Jan. 13, 2006 Tr. 42-45). While these suggestions may have merit, the Hearing Examiner cannot recommend them because, in his opinion, the changes mandated by the legal issues discussed above, and in those discussed in the following pages, will limit Petitioner's current operation sufficiently to avoid the adverse impacts on the community created by Petitioner's unapproved expansions of the use.

2. Window and façade changes; **and**

3. Exterior changes of the window treatment and the garage side appearance

None of the minor changes which have been made to the windows, the façade and the outside of the building, as shown on the revised Site Plan (Exhibit 36(c)) and the revised elevations (Exhibit 36(d)) will have any adverse impact on the community, and they do not represent an expansion of the use. They should all be permitted; however, Petitioner must obtain permits from DPS for any signs that are posted, and the advertising along the building façade should be removed. It is one thing to make minor changes to a building's façade, and another to turn it into an advertising poster. Copies of permits should be filed with the Board of Appeals.

4. Changes in the canopy, pump islands and lighting over the gas pumps

It is undisputed that the double canopy (with four pump islands) originally approved by the Board of Appeals in 1987[12] was never built. Oct. 28, 2005 Tr. 42-44. Instead, a single canopy was installed over five gasoline pump islands in front of the building.[13] Mr. Garcia explained in his testimony that the original plan for two canopies could not be carried out because of space considerations and the need to have effective circulation around the pump islands. Once the plans

[12] Site Plan "A," dated June 15, 1987 (Exhibit 29 in the original S-1471 file).

[13] For some reason, DPS did not cite Petitioner for having five pump islands instead of the four that appear on the approved site plan. Perhaps that is because the site plan approved by the Technical Staff and filed with the Board in March of 1993 shows eight gas pumps on the four islands (Exhibit 30(b) in the S-1471 File), which is more than the five pumps actually constructed on five islands under a single canopy, as can be seen in the photo on page 10 of this report. The revised site plan filed in this case (Exhibit 36(c)) correctly shows the five pump islands.

for two canopies were rearranged to meet these constraints, the canopies would have been so close together, that the builder felt that a single canopy should be used. Similarly, changes in the canopy lighting from what had been approved were dictated by industry standards. Oct. 28, 2005 Tr. 42-44.

The Hearing Examiner finds that the current arrangement of five pump islands under a single canopy with new lighting is the functional equivalent of the original double-canopy plan, and therefore this change does not represent an impermissible expansion in the use; however, the manner in which the lights are used does impact on the neighborhood, and Petitioner has failed to establish that its present use of lights does not violate Zoning Ordinance §59-2.06(b)(3), which requires that "Lighting is not to reflect or cause glare into any residential zone." Petitioner's photometric study (Exhibits 5 and 49) shows very high light levels at the property lines near the canopy, but the full extent of light spillage from the gas station into nearby residential zones is not clear. In addition to the photometric study, the evidence we have on the light-spillage question comes from the testimony of Petitioner's engineering expert, James Glascock, and from the letters and testimony of the opposition, including an October 17, 2005 letter written by the adjacent landowners, Virginia Brown and John and Staci Kernan (Exhibit 41) and the testimony of Fran Hayward and her letter of October 20, 2005 (Exhibit 31) on behalf of the Bentley Road Civic Association.

The Brown-Kernan letter states, in paragraph 3, "The over-head lights to the gas pumps are extremely bright. This reflects on our property and home and is very disturbing." Ms. Hayward's letter indicates reports from the neighbors that "at night the service station's bright lights are very disturbing." She also reports that Petitioner dimmed the lights after the May 2005 show cause hearing, and the difference was noticeable. In her testimony, Ms. Hayward stated that the canopy lighting has been variable, and that Petitioner needs to abide by the special exception terms. Jan. 13, 2006 Tr. 46-47.

Mr. Glascock testified that there is light spillage ranging from .2 to .8 foot-candles in the middle and rear of the subject site. The photometric study (Exhibit 49) shows readings of up to 1.7 foot-candles on the western side property line (adjacent to the Brown-Kernan property) and up to 42 foot-candles near the front of the canopy. These very high readings near the front of the canopy may not be as significant because the front of the filling station abuts a highway (Route 108) and the property directly across the highway from the subject site is not a residential zone. However, diagonally across the highway from the subject site, both to the southwest and to the southeast are residential zones (*see* zoning map on page 13 of this report), and Ms. Lansdale lives in one of those residential zones (RE-2) diagonally across from subject site. Mr. Glascock reported that Mr. Bera, the engineer who did the photometric study, suggested either lowering the fixture units in the rear or perhaps shielding them to break the light spillover. He suggested a similar solution on the western property line of either recessing the lights or shielding them to prevent spillover. In Mr. Glascock's opinion, "if you did it with proper screening or reducing wattage or whichever, it would satisfy the county criteria." Jan. 13, 2006 Tr. 123-126. Although the subject site itself is in a commercial zone, it is adjacent to one residential zone and near others. The Zoning Ordinance prohibits reflection of light or glare "into any residential zone." Thus, Petitioner must address the light spillage issue into all residential zones (not just the adjacent one) when it takes remedial action and does the follow-up photometric study suggested in Mr. Glascock's testimony (Jan. 13, 2006 Tr. 124-125) and promised by Petitioner's counsel. Jan. 13, 2006 Tr. 22-23.

Nevertheless, it must be borne in mind that this is a modification petition, not an original request to establish a filling station on the subject site. Thus, it is the increase of the current lighting over that which was originally approved that is the subject of this review. Unfortunately, because the originally approved lighting was never installed, it is very difficult to determine what if any increase

has occurred. We can say, however, that it appears from this record that the community expressed no complaints about the lighting when the station was run by Mr. Garcia, and he receives high praise from his neighbors. Jan. 13, 2006 Tr. 50 and 187. The best solution, it seems to the Hearing Examiner, is to require that the new operator follow the same lighting practices that were followed by Mr. Garcia, at least until shielding can be installed and a new photometric study submitted.

Mr. Garcia testified that the new owners have the same lighting he had, but he "never turn[ed] all the lights on." He would turn "two thirds of the lights on, and . . . never had any problem." Jan. 13, 2006 Tr. 195. When the station was closed, he would turn off the lights on the back of the building and keep on only one row of canopy lights, the middle row, for security purposes. Jan. 13, 2006 Tr. 196. The Hearing Examiner recommends a condition in Part V of this report that would limit the new owner to the same lighting practices employed by Mr. Garcia. The condition also requires a follow-up photometric study, as promised by Petitioner's counsel (Jan. 13, 2006 Tr. 22-23), to make sure that the station is not inappropriately spilling light into neighboring residential zones and that any necessary shielding is installed on the lights.

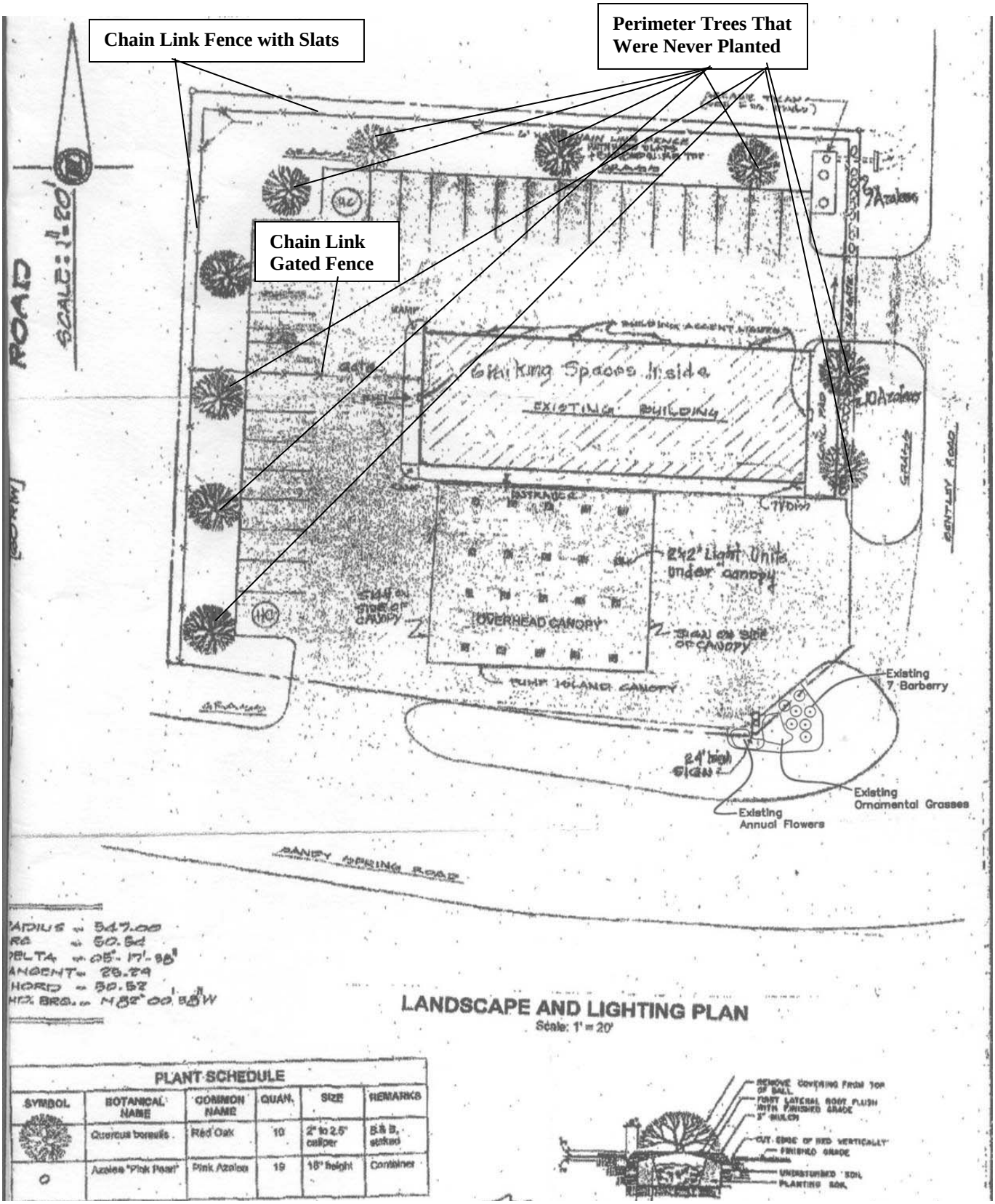
5. Changes to the Floor Space Arrangement Inside the Building

Petitioner made some changes to the floor space inside the building, as shown on the revised floor plans (Exhibit 36(d)). Except for the expanded food mart area, which is discussed in Item No. 11, below, these changes do not represent an expansion of the automobile filling station use; nor will they have any adverse impact on the community. Therefore, except for the expanded food mart, they should all be permitted. A condition to this effect has been recommended in Part V of this report.

6. A chain link fence with plastic inserts colored to look like natural wood;
7. A six-foot high fence topped by barbed wire and gated, on the west side of the building; and
8. Changes in Landscaping

Petitioner has requested permission for a number of changes to the subject site and its

landscaping. These changes can be seen on the revised Landscape and Lighting Plan contained in Exhibit 36(c), and reproduced below:



The original landscape plan required Petitioner to install a solid wood fence on its northern and western perimeters, and made no mention of barbed wire or a gated fence on the western side of the property. It also required ten oak trees to be planted at various locations around the perimeter of the station.

Mr. Garcia testified that he had removed the barbed wire from the perimeter fence before he left the filling station, and the remaining chain link fence "with slats" is six feet tall. He did not install the wooden fence called for in the plans because his understanding was that a "privacy fence" was called for, and the people from Long Fence, who installed the present fence, told him that a chain link fence with slats was a privacy fence. Moreover, Mr. Garcia feared that the sap from nearby trees would discolor any wooden fence, but not the fence he installed. The slats are plastic, but are made to look like wood. Oct. 28, 2005 Tr. 44-45.

According to Mr. Garcia, there is another fence that has been added, though it was not on the original plans. The new fence is also a six-foot tall, chain link with plastic slats, and it was installed to hide the air conditioning unit, which is located on the west side of the building[14] and to keep children away from it. Oct. 28, 2005 Tr. 49-50. All the barbed wire has been removed. These items were also confirmed in the testimony of civil engineer, James Glascock. Jan. 13, 2006 Tr. 116-118. The Hearing Examiner sees no reason to require the fences to be changed at this point. They are, by all accounts, serviceable and sufficiently solid in appearance to serve as a screen for the adjacent property. Moreover, the adjacent landowner testified in support of keeping the fence, as is. May 25, 2005 Tr. 44.

The landscaping changes raise some more serious concerns because the record does not sufficiently address the issue. Mr. Garcia testified that he did not plant the ten oak trees required

[14] The transcript indicates the fence is on the "east side of the building," but that is either a typo or Mr. Garcia misspoke, because both the air conditioning unit and the fence in question are on the west side of the building.

around the perimeter of the lot because he was led to believe that planting the trees would kill the grass along the perimeter and cause erosion due to the slope along the perimeter. According to Mr. Garcia, Virginia Brown, the adjacent property owner agreed with him that he should not plant the trees. Oct. 28, 2005 Tr. 38; Jan. 13, 2006 Tr. 139. Ms. Brown testified at the Show Cause Hearing against planting the ten oak trees required by the original special exception. "Goodness no, it's already washed; if you disturb what sod is there, we'll have nothing but mud. Keep the six foot fence, the grass is pretty, its nice and green, they keep it cut, why disturb it?" May 25, 2005 Tr. 44.

Petitioner also produced testimony from a civil engineer, James Glascock, regarding the feasibility of planting the oak trees around the perimeter and of planting azaleas along the east side of the building. Jan. 13, 2006 Tr. 112-115. Although Mr. Glascock testified that the trees could be successfully planted, the Hearing Examiner is not satisfied that a civil engineer is *per* se qualified to opine in this area. Unfortunately, Petitioner failed to call a plant expert or landscape architect to advise as to the proper course of action regarding the required trees, and the Hearing Examiner therefore has inadequate information to decide whether the trees should be required for the intended screening, or prohibited because they will cause erosion and because they are unwanted by the two property owners between whose lots they will lie (*i.e.*, Petitioner's lot and Ms. Brown's lot). A third possibility is to require a different kind of vegetative screening.

To obtain the information necessary to make an intelligent decision on this point, the Hearing Examiner will propose a condition requiring Petitioner, within 30 days after the Board's resolution becomes effective, to file with the Technical Staff of M-NCPPC and with this Board an opinion statement by a qualified landscape architect stating whether planting trees as prescribed in the revised landscape plan, on the perimeter of the subject site, would result in successful growth of the trees and/or would be destructive of the currently existing sod. If the planting of those trees is

inadvisable, in the expert's opinion, the expert's statement should include a recommendation of alternative plantings to provide screening from the neighborhood. The expert should also consider whether and where to plant 19 azaleas that were called for in the original plans. In making these recommendations, the expert should take into account the necessary sight lines for vehicles accessing and leaving the filling station.

9. Installation outside the building of a car vacuum, air pumps, pay telephones, a Coke machine, a kerosene pump, air conditioning units and a clothing collection box

According to Mr. Garcia, a power vacuum that had been located on the southeast corner of the building has been removed. Oct. 28, 2005 Tr. 53-54. Mr. Glascock testified that a second power vacuum remains on the site, at the eastern front of the building, next to the air pump. Jan. 13, 2006 Tr. 120-121.

Mr. Garcia testified that, in the original drawings, the builder had located a kerosene pump in the center island with the gas pump, but he was told by either a county inspector or a state inspector that the pump could not be placed there, and they suggested two other locations to put the kerosene pump. It has to be located so that diesel cars or trucks can't put kerosene in their tanks. Mr. Garcia decided on the present location, in the southwest corner of the of the lot, because the cashier could see people pumping kerosene. Oct. 28, 2005 Tr. 53-54. Mr. Garcia testified that access to the kerosene pump would not be inhibited by the location of the handicapped space which has been added to the southwest corner of the subject site; that people cannot drive up to the kerosene pump, and that it is about 12 feet from the Brown property. Jan. 13, 2006 Tr. 146-147.

Mr. Garcia allowed a "Planet Aid" collection box and a public telephone to be placed on his property because he thought he was doing a public service. Oct. 28, 2005 Tr. 55-57. Mr. Glascock testified that the soda machine, the Planet Aid box and the public telephone, all of which were cited in DPS's NOV, are no longer on the site. Jan. 13, 2006 Tr. 120-122.

Mr. Garcia had kept his old "Garcia Service Center" sign and mounted it on a plastic stand on the grass. The new owner put up some additional signs. Mr. Garcia testified that Mr. Garber of DPS was incorrect in citing him for not having an "oil grit separator," since Mr. Garcia had paid over $100,000 to install it. The oil grit separator is located in the northeast corner of the lot. Oct. 28, 2005 Tr. 58-60. Mr. Glascock confirmed the existence of the oil grit separator. Jan. 13, 2006 Tr. 121-122.

The Hearing Examiner finds that the air-pump and handicapped parking space are appropriate additions to the auto filling station, and Petitioner should be allowed to keep them as located on the revised site plan (Exhibit 36(c)). The Planet Aid Box, public telephones, soda machine and one of the power vacuums have all been removed from the site and do not appear on the revised site plan. Petitioner has therefore removed the basis for these citations, and these items may not be reinstalled unless the Board grants a further modification request.

The kerosene pump and the second car vacuum raise an additional problem. Technical Staff opined that "the outside installation of the kerosene pump and the car vacuum will constitute a nuisance in an area that includes low-density residential homes adjacent to the subject property." Exhibit 38, pp. 13 & 9. Although Technical Staff does not explain further, there is also nothing in the record from Petitioner (or anyone else) to refute Technical Staff's assertion. There is testimony about excessive noise from the filling station (Jan. 13, 2006 Tr. 45, 50 and 191), and car vacuums do make noise, but nobody specifically linked the noise complaints to either the car vacuum or the kerosene pump. Nevertheless, in the absence of any evidence rebutting Technical Staff's conclusion, the Hearing Examiner feels constrained to recommend removal of both the remaining car vacuum and the kerosene pump.

It must also be noted that the kerosene pump does not meet the side yard setback requirement for an accessory structure in the C-2 Zone. Zoning Ordinance §59-C-4.353(b) provides that side-yard

setbacks may not be less than called for in an adjacent residential zone. The adjacent zone is the RE-1 Residential Zone, and Zoning Ordinance §59-C-1.326(a)(2)(C) calls for a 15 foot setback for accessory structures in that zone. As noted above, Mr. Garcia testified that the kerosene pump is set back approximately 12 feet from the property line, and examination of the site plan shows it to be set back from 10 to 12 feet. Thus, it appears to be in violation of the 15 foot setback, and should be removed.

Neither the air-conditioning unit nor the oil grit separator were mentioned in the December 18, 2002 NOV, which rescinded the November 21, 2002 NOV. Nevertheless, the Hearing Examiner finds that they are appropriately present, and their locations are shown on the revised site plan. As noted above, the various signs posted in the station are permitted only if Petitioner is successful in obtaining permits for them from DPS, and they may be displayed only in locations shown on the revised site plan.

10. Transfer of the Special Exception

Petitioner seeks to transfer the special exception from the former owner, Rubem Garcia, to Power Fuel, and Transport, Real Estate Holding Company (MD), LLC, the current owner and operator. Mr. Garcia agrees to this transfer, and so testified at the hearing. Oct. 28, 2005 Tr. 85; Jan. 13, 2006 Tr. 138. The Hearing Examiner deems that transcribed testimony, under oath, to be sufficient to satisfy Board of Appeals Rule 12.2. Transfer of the special exception to the new owner and operator of the site is clearly sensible, and the Hearing Examiner so recommends.

11. An expanded convenience store or "food mart" in the building

One of the more contentious issues in this case arose from the expansion of the small "snack shop"[15] originally set up by Mr. Garcia adjacent to the cashier in the filling station's building. Mr.

[15] Mr. Garcia called this sales area a "snack shop." DPS referred to it in the NOV as "convenience store." It has also been variously referred to in this case as a "food mart" or "a food and beverage store." These may appear to be distinctions without a difference, but strangely, the Zoning Ordinance makes a distinction between a "convenience food and beverage store" which is a permitted use in the C-3 Zone but not permitted even by special exception in the C-2 Zone, and a "food and beverage store" which is a permitted use in the C-1 and C-2 Zones but not permitted, even by special exception in the C-3 Zone. *Zoning Ordinance §59-C-4.2(d).* To complicate the matter further, Zoning Ordinance §59-A-2.1 defines "convenience food and beverage store," but not "food and beverage store."

Garcia testified that he had a little snack shop in the old service station (*i.e.*, prior to the renovation for which he sought a special exception), and he added that, "in the hearings I did say I want to have a little snack shop, continue to have -- to sell cookies and sodas and things like that. And although it doesn't show on the last thing there, but, I did ask for permission to open, you know, the snack shop." Oct. 28, 2005 Tr. 77. The snack shop had machines with two coolers which sold sodas and juices, and there were two racks that sold cookies, chips and coffee. "That was the extent of my thing. I didn't sell cigarettes or nothing else because of my religion." Oct. 28, 2005 Tr. 78.

Mr. Garcia estimated that area occupied by the snack shop when he owned it was about 200 square feet. Petitioner's counsel and its engineering expert, James Glascock, identified the original snack shop area as being 171 square feet, and the present expanded sales area to be about 396 square feet (including the cashier's area), an expansion of 225 square feet of sales area. Jan. 13, 2006 Tr. 119-120. This expanded sales area is shown in Petitioner's revised Floor Plans (Exhibit 36(d)).

Mr. Garcia testified that, when the new owners took over, they broke though the wall and expanded the sales area into the storage area. They added cigarettes, food items and "knick knacks" like gloves and sunglasses. Oct. 28, 2005 Tr. 80.

Petitioner suggests that because a "food and beverage store" is a permitted use in the C-2 Zone, it need not be considered as part of the special exception under scrutiny. Exhibit 53, first ¶. If the store in question were a stand-alone operation and fully qualified as a "food and beverage store," the Hearing Examiner would agree. However, this food mart is integrally connected with the gas station operations, and the Board has broad authority under Zoning Ordinance §59-G-122(a) to set any conditions for a special exception "necessary to protect nearby properties and the general neighborhood." The Hearing Examiner distinguishes between the general office space in the building and the food mart because there is no evidence that the office space, which is also a permitted use,

relates in any way to the filling station's operations. The office space occupies floors above the filling station, while the food mart operates directly out of the filling station's space on the first floor of the building and is completely controlled by the operator of the filling station on a day-to-day basis, sharing the same cashier area. Since it is linked inextricably with a special exception use, the Board must have authority to condition its use in order to properly govern the special exception and protect the community.

Petitioner also argued during the hearing that the food mart was "an ancillary use," and therefore should be permitted; however, Petitioner's counsel were unable to cite any authority for that proposition. Jan. 13, 2006 Tr. 105-107, 170 and 174-175. Although the term "ancillary use" may not be precisely correct, the Hearing Examiner finds, based on his own research, that the food mart is an "accessory use," which is defined in Zoning Ordinance §59-A-2.1, as *"[a] use which is (1) customarily incidental and subordinate to the principal use of a lot or the main building thereon, and (2) located on the same lot as the principal use or building."*

The Maryland Court of Special Appeals addressed the question of accessory uses in *County Commissioners of Carroll County v. Zent*, 86 Md. App. 745, 769, 587 A. 2d 1205, 1217 (1991), holding that "a use [which] does not change the basic nature of the primary permitted nonconforming use and is truly incidental to, and supports the nonconforming use, . . . is an accessory use and, unless expressly prohibited by statute, is permitted." The same court expressly applied the "accessory use" label to a convenience store appended to an automobile filling station in *Eastern Service Centers, Inc. v.. Cloverland Farms Dairy, Inc.*, 130 Md. App. 1, 9-13; 744 A.2d 63, 67-69 (2000). It is therefore quite clear that the food mart in question need not be expressly permitted in the C-2 Zone, since it qualifies as an accessory use to the special exception use. However, our inquiry cannot end there because the central issue in our case is not whether the special exception or its accessory use may

continue to exist, but whether floor space for sales may be added under the terms of the Sandy Spring Overlay Zone's grandfathering clause.

Thus, the question is whether the 225 square feet of expanded sales area constitutes a mere intensification of the use or an impermissible enlargement under the case law discussed in Part II.C. of this report. Although a mere increase in volume of sales has been held to be only an intensification of a use, "[a]n increase in floor space . . . an increase in the area of a lot used for non-conforming uses; or a change in business methods or the provision of new accessory facilities with the resulting extension of the use involved have all been held to be proposals for the enlargement of a non-conforming use." *County Commissioners of Carroll County v. Zent, supra*, 86 Md. App. at 754 n.5, 587 A. 2d at 1209 n.5 (1991) [Citations omitted from quote.].

The Hearing Examiner must therefore find that the expanded food mart area constitutes an impermissible expansion of the use. If the volume of business had increased but the floor space dedicated to the use had remained unchanged, the opposite conclusion would be reached. But in this case, it is undisputed that the floor space dedicated to the food mart use has been more than doubled, and that must be considered an expansion. For the reasons discussed at length in Part II. C of this report, a conforming use may not be expanded following the imposition of the Sandy Spring Overlay Zone because the grandfathering provision in that Zone does not permit expansion. Thus, the 225 square feet of expanded food mart ("sales") area, as shown on the first floor of the revised floor plans (Exhibit 36(d)) must not be used for sales of food or anything else in connection with the automobile filling station use, and must be returned to its use prior to the expansion of the food mart sales area. The original 171 square feet of "sales" area next to the cashier on the first floor of the building may be retained. A condition to that effect is recommended in Part V of this report.

D. Community Response

The opposition in this case comes chiefly from the Bentley Road Civic Association, through its President, Fran Hayward, and from Petitioner's neighbors, Ms. Lansdale, who lives across Route 108 from the subject site and the Kernans and Virginia Brown, who live adjacent to the subject site.[16] The neighbors complaints center on noise, commotion, light spillage and traffic concerns. Ms. Lansdale does not oppose seven day a week gas-pumping operations until 10 p.m. ((Jan. 13, 2006 Tr. 50-51), and the Kernan-Brown letter (Exhibit 41) appears to approve such operations until 11:00 p.m. daily.

Ms. Hayward's October 20, 2005 letter on behalf of the Bentley Road Civic Association (Exhibit 31) raised numerous issues, which the Hearing Examiner summarizes, as follows:

1. Incompatibility of gas station expansion with community's vision of itself;
2. Traffic stopping eastbound on Maryland Rt 108 to turn left into the station;
3. Customer overflow blocking Bentley Road at peak times;
4. Reckless turns onto Bentley Road;
5. Exiting customers delaying residential traffic attempting to leave Bentley Road;
6. Bright lights ["Brighter is not better"] and gaudy advertising signage;
7. No need a second car vacuum; and
8. Pay phones and soda machines outside the building invite loitering and littering.

Ms. Hayward also suggested a number of possible remedies:

1. Accepting credit cards at the pumps or having a cash-accepting attendant at the pumps;
2. Moving payphones and soda machines inside the building;
3. Reviewing proposed landscaping for sight-line safety;
4. Reducing the intensity of the lighting; and
5. Limiting business hours to 10:00 p.m.[17]

Issues relating to hours of operation, lighting, the food mart, pay phone, vacuums and soda machines were discussed in Part II. C., above. A few words should be said about the traffic situation. Although the Local Area Transportation Review (LATR) traffic study was excluded from

[16] The People's Counsel's opposition arises from his objection to Petitioner's repeated failure to meet filing deadlines, thereby prejudicing the other parties. This issue was discussed at some length in Part II. C., above.

[17] At the hearing, Ms. Hayward indicated that the Civic Association was agreeable to allowing the gas pumps to operate from 6:00 a.m. to 11:00 p.m., seven days a week, but wanted to limit the expanded food mart to 6:00 a.m. to 8:00 p.m. Jan. 13, 2006 Tr. 42-45.

the evidence, the Hearing Examiner may still review the question of whether steps can be taken by the operator of the station to reduce back-ups at the pumps which may cause unsafe conditions on the street and certainly generate noise and commotion in the neighborhood. These inquires address different issues. The LATR study looks at the critical lane volumes generated at key intersections by the subject use and determines whether those volumes exceed the permissible limits for the area, while the present inquiry looks to the way the Petitioner handles vehicles at his gas station to see if efficiencies can be effected which will reduce adverse impacts on the neighborhood.

The problem reported by Ms. Hayward and Ms. Lansdale of backups at the pumps causing unsafe queuing onto the public streets apparently began when the current operator took over from Mr. Garcia and stopped accepting credit cards, even though the pumps are designed to accept them. Jan. 13, 2006 Tr. 48, 164-166. Mr. Kamkari, one of Petitioner's attorneys, filed a post-hearing memorandum (Exhibit 53) asserting that accepting credit cards would not be consistent with Petitioner's "business model" of "Lowest Price" gasoline. He claims it would add costs that "would drive this service station out of business." However, Petitioner produced no evidence whatever at the hearing to substantiate this claim, even though the Hearing Examiner specifically alerted Petitioner's counsel to the suggestions in Ms. Hayward's letter (Exhibit 31) at the October 28, 2005 hearing and asked him to address this and the other points raised by Ms. Hayward. Oct. 28, 2005 Tr. 17.

Ms Hayward subsequently testified (Jan. 13, 2006 Tr. 48, 165-166):

> . . . when people cue [*sic*] up enough the way they have in the past and the way they probably will, especially if credit cards are not accepted, so people are cuing [*sic*] up on 108, they would be heading westbound on 108 and they would be waiting to make a right turn into Bentley Road and then a left turn onto the station, and we have those people back up and totally block ingress and egress.
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> * * *
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> I have personally observed that. I have personally got caught in the middle. I have personally had to tell people, excuse me, I live here do you mind pulling up, and every person who lives on Bentley Road has had that experience. We've all also had

> to wait for people who are heading eastbound, waiting to make a left turn onto Bentley Road even in situations where there's already a cue [*sic*] from people going, you know, waiting to make that right turn onto Bentley Road. So you know, where people are waiting to turn, where there's no room for them to go. And that's before construction started.

Based on this record, the problem created by backups at the pumps is apparently a serious one, and no evidence was offered to refute Ms. Hayward's testimony; nor was any evidence proffered by Petitioner of a better way to accelerate the process than Ms. Hayward's two suggestions. The Hearing Examiner will therefore recommend a condition that Petitioner either accept credit cards at the pump or have an attendant stationed at the pump to accept cash and make change. While this may be an unusual condition, the Board's powers to fashion conditions to protect the public interest are broad. *See* Zoning Ordinance §59-G-1.22(a).

It should also be mentioned that there were serious complaints at the May 25, 2005, show-cause hearing about automobiles connected with the filling station use being parked on the local streets or overhanging the public streets so as to create a safety hazard, and even blocking an ambulance on Bentley Road. May 25, 2005, Tr. 44. The Board ordered a stop to that practice in its June 2, 2005 resolution following the show cause hearing, and for ease of enforceability, the Hearing Examiner recommends a condition in Part V of this report incorporating that prohibition in the new resolution.

III. SUMMARY OF THE HEARING

The hearing was conducted over two days, October 28, 2005 and January 13, 2006. Petitioner called three witnesses at the hearing, former owner, Rubem Garcia, traffic expert, Craig Hedberg and engineer, James Glascock. There were two opposition witnesses, Patricia Lansdale, who testified as an neighbor affected by the use, and Fran Hayward, who testified on behalf of the Bentley Road

Civic Association. Martin Klauber, the People's Counsel, participated but did not call any witnesses. Petitioner's counsel also made a variety of representations at the hearing.

At the October 28 hearing, the Hearing Examiner specifically alerted Petitioner's counsel to the complaints and suggestions in Ms. Hayward's letter of October 20, 2005 (Exhibit 31) and asked him to address the points raised by Ms. Hayward. Oct. 28, 2005 Tr. 17. Ms. Hayward also contended that the subject use was not a "lawful use" at the time the overlay zone was applied because it was not in full compliance with all of the special exception conditions at the time. Oct. 28, 2005 Tr. 19-20. When asked about Petitioner's failure to file the promised traffic study prior to the October 28 hearing, Petitioner's counsel stated (Oct. 28, 2005 Tr. 7) he would be able to complete and file a traffic study in three weeks (*i.e.*, by November 18, 2005), and the hearing was adjourned until January 13, 2006, to give Petitioner the opportunity to do so and Technical Staff time to review the study. Oct. 28, 2005 Tr. 89. When Petitioner failed to produce the traffic study and other evidence until January 12, 2006, the day before the hearing was to resume, the People's Counsel (joined by Ms. Hayward) objected and asked that the record be closed as of January 11, 2006. Jan. 13, 2006 Tr. 10-12 and 18.[18]

At the January 13 hearing, Petitioner's counsel also promised a follow-up photometric study (Jan. 13, 2006 Tr. 22-23), to make sure that the station is not inappropriately spilling light into neighboring residential zones and that any necessary shielding is installed on the lights.

A. Petitioner's Case

1. Rubem Garcia (Oct. 28, 2005 Tr. 36-88; Jan. 13, 2006 Tr. 137-147):

Rubem Garcia testified that he purchased the subject property in September of 1997, received the relevant special exception in December of 1987, completed the renovations of the filling station in

[18] The Hearing Examiner took the objection under advisement and ruled out the traffic study, but allowed other evidence to be admitted, for the reasons set forth in Part II.C. of this report.

September of 1995 and sold the property to Petitioner in September of 2002. Oct. 28, 2005 Tr. 37. Planting of ten trees around the perimeter of the site was required in the original special exception, but they were not planted because Mr. Garcia was led to believe that planting the trees would kill the grass along the perimeter and cause erosion due to the slope along the perimeter. According to Mr. Garcia, Virginia Brown, the adjacent property owner agreed with him that he should not plant the trees.[19] Oct. 28, 2005 Tr. 38; Jan. 13, 2006 Tr. 139.

Mr. Garcia further testified that the double canopy approved by the Board of Appeals in 1987 was never built. Oct. 28, 2005 Tr. 42-44. Instead, a single canopy was installed over five gasoline pump islands in front of the building. Mr. Garcia explained in his testimony that the original plan for two canopies could not be carried out because of space considerations and the need to have effective circulation around the pump islands. Once the plans for two canopies were rearranged to meet these constraints, the canopies would have been so close together, that the builder felt that a single canopy should be used. Similarly, changes in the canopy lighting from what had been approved were dictated by industry standards. Oct. 28, 2005 Tr. 42-44.

Mr. Garcia said that he had removed the barbed wire from the perimeter fence before he left the filling station, and the remaining chain link fence "with slats" is six feet tall. He did not install the wooden fence called for in the plans because his understanding was that a "privacy fence" was called for, and the people from Long Fence, who installed the present fence told him that a chain link fence with slats was a privacy fence. Moreover, Mr. Garcia feared that the sap from nearby trees would discolor any wood fence, but not the fence he installed. The slats are plastic, but are made to look like wood. Oct. 28, 2005 Tr. 44-45; Jan. 13, 2006 Tr. 141-142.

According to Mr. Garcia, there is another fence that has been added, though it was not on the original plans. The new fence is also a six-foot tall, chain link with plastic slats, and it was

[19] Ms. Brown confirmed Mr. Garcia's testimony in her own testimony at the Show Cause Hearing. May 25, 2005 Tr. 44.

installed to hide the air conditioning unit, which is located on the west side of the building[20] and to keep children away from it. Oct. 28, 2005 Tr. 49-50.

Mr. Garcia also testified regarding the changes to the exterior design of the building and the lighting, which was part of the citation by DPS. The bottom windows on the two floors on the front of the building were supposed to be fake windows with glass on top of the cinder block. He tried that and "it looked horrible." The builder suggested that we line the windows with brick and omit the glass because of moisture being drawn behind the glass where mildew and mold would grow. The builder showed Mr. Garcia another commercial site he had built in Beltsville where mold was growing right behind the glass. Mr. Garcia therefore followed the builder's suggestion.

Lights that were supposed to be located on the front of the building were eliminated because of the change in the canopy design, but four lights were installed on the back of the building and one on each side of the building. Oct. 28, 2005 Tr. 50-51. The height, footprint and total square footage of the building have not been changed from the original plans, only the façade. The architect for the Sandy Spring museum complimented Mr. Garcia on the look and incorporated some of that concept in the Sandy Spring Museum building. Oct. 28, 2005 Tr. 52.

According to Mr. Garcia, a power vacuum that had been located on the southeast corner of the building has been removed. He explained that, in the original drawing, the builder had located the kerosene pump in the center island with the gas pump, but he was told by either a county inspector or a state inspector that the pump could not be placed there, and they suggested two other locations to put the kerosene pump. It has to be located so that diesel cars or trucks can't put kerosene in their tanks. Mr. Garcia decided on the present location, in the southwest corner of the of the lot because the cashier could see people pumping kerosene. Oct. 28, 2005 Tr. 53-54.

[20] The transcript indicates the fence is on the "east side of the building," but that is either a typo or Mr. Garcia misspoke, because both the air conditioning unit and the fence in question are on the west side of the building.

Mr. Garcia allowed a "Planet Aid" collection box and a public telephone to be placed on his property because he thought he was doing a public service. Oct. 28, 2005 Tr. 55-57. He had kept his old "Garcia Service Center" sing and mounted it on a plastic stand on the grass. The new owner put up some additional signs. Mr. Garcia testified that Mr. Garber of DPS was incorrect in citing him for not having an "oil grit separator," since Mr. Garcia had paid over $100,000 to install it. The oil grit separator is located in the northeast corner of the lot. Oct. 28, 2005 Tr. 58-60.

Mr. Garcia had office space built into his building to help him defray tax costs. [Petitioner's counsel noted that, in the original hearing on November 27, 1987, at page 19, the Hearing Examiner stated that he was not concerned about the office space because it was a permitted use in the C-2 Zone.] Oct. 28, 2005 Tr. 61-63.

Mr. Garcia testified that when he owned the station, cars related to the service station were not parked on Bentley Road. If a customer did park there, Mr. Garcia got the key and retrieved the car. Mr. Garcia continued to work at the station after he sold it, until June of 2003. Oct. 28, 2005 Tr. 64-65. Mr. Garcia identified the pictures in Exhibit 9, but he was not the person who took them. He also identified the area where the "snack shop" is located. According to Mr. Garcia, he had a little snack shop in the old service station (*i.e.*, prior to the renovation for which he sought a special exception), and he testified "in the hearings I did say I want to have a little snack shop, continue to have -- to sell cookies and sodas and things like that. And although it doesn't show on the last thing there, but, I did ask for permission to open, you know, the snack shop." Oct. 28, 2005 Tr. 77. The snack shop had machines with two coolers which sold sodas and juices and there were two racks that sold cookies, chips and coffee. "That was the extent of my thing. I didn't sell cigarettes or nothing else because of my religion." Oct. 28, 2005 Tr. 78. Mr. Garcia estimated that area

occupied by the snack shop when he owned it was about 200 square feet. When the new owners took over, they broke though the wall and expanded the sales area into the storage area. They added cigarettes, food items and "knick knacks" like gloves and sunglasses. Oct. 28, 2005 Tr. 80.

Mr. Garcia indicated the operating hours were specified in the original hearing. He would actually keep the pumps on after he station was closed because turning them on and off would burn up the electronic boards in them. The pumps could be operated by credit card. The original choice to be closed on Saturday and open on Sunday was based on Mr. Garcia's religious beliefs. Oct. 28, 2005 Tr. 81- 84.

Mr. Garcia testified that he is requesting also that this special exception use be transferred to Power Fuel and Transport Real Estate Holding Company, L.L.C. Oct. 28, 2005 Tr. 85; Jan. 13, 2006 Tr. 138. The repairs conducted in the building are light mechanical repairs. He also indicated that the total floor space in the building has not been expanded; rather, the new owner knocked down an internal wall to expand the snack shop. Oct. 28, 2005 Tr. 86. He further testified that the flow of cars past the gas pumps (*i.e.*, the traffic circulation pattern for the station) was based on the suggestion of the Maryland Department of Transportation. He did not observe traffic problems with cars entering or exiting the station while he was there, but he worked "in the bays" after he sold the station [implying he was not in a position to see traffic problems at that time]. Oct. 28, 2005 Tr. 87-88.

Mr. Garcia feels that the business was compatible with the neighborhood because he received no complaints. Oct. 28, 2005 Tr. 88.

Mr. Garcia testified that access to the kerosene pump would not be inhibited by the location of the handicapped space in the southwest corner of the subject site; that people cannot drive up to the kerosene pump, and that it is about 12 feet from the Brown property. Jan. 13, 2006 Tr. 146-147.

Mr. Garcia testified that the new owners have the same lighting he had, but he "never turn[ed] all the lights on." He would turn "two thirds of the lights on, and . . . never had any problem." Jan. 13, 2006 Tr. 195. When the station was closed, he would turn off the lights on the back of the building and keep on only one row of canopy lights, the middle row, for security purposes. Jan. 13, 2006 Tr. 196.

2. Craig Hedberg (Jan. 13, 2006 Tr. 67-107):

Craig Hedberg testified as an expert in transportation planning. [Because Petitioner did not timely file the LATR traffic study performed by Mr. Hedberg, the witness's testimony in that regard (Jan. 13, 2006 Tr. 67-77; 81-82) will not be admitted. This issue is discussed at length in Part II.C. of this report. However, Mr. Hedberg did provide other testimony not directly related to the LATR that is admissible and is summarized below. Mr. Hedberg also stated that he had given Petitioner's counsel an overly optimistic estimate of how soon he could produce the traffic study, and that the study has no bearing on either Saturday or Sunday traffic or how late the station stays open, since he studied only peak-hour weekday traffic. Jan. 13, 2006 Tr. 82-92.]

According to Mr. Hedberg, the southern side of Maryland 108 is being widened in conjunction with the development just to the west of the subject site, and the widened pavement near the subject site should leave adequate room for cars to get around those making left turns into the station. The construction should be complete within six months. In his opinion, the road widening will help to eliminate accidents in the area. Jan. 13, 2006 Tr. 77-78.

Mr. Hedberg also opined that it would be better to keep the site's circulation pattern the way it currently exists, with the left turns going to Bentley Road from Route 108, and then left into the station. Mr. Hedberg feels it provides more stacking distance for left turns, and would be a better operation than the alternative, especially given the widening of Route 108. Jan. 13, 2006 Tr. 79-81.

Striping a small portion of Bentley Road, near the intersection might also help. Jan. 13, 2006 Tr. 99-100.

Mr. Hedberg measured the floor space of the convenience retail store in the gas station and concluded that it occupies 396 square feet. [Petitioner's counsel added that the original floor space for the convenience retail was 171 square feet. Thus, the only floor space expansion requested is the expansion of the food mart from the original 171 square feet to 396 square feet, an increase of 225 square feet.] Jan. 13, 2006 Tr. 104-106.

3. James Glascock (Jan 13, 2006 Tr. 108-137):

James Glascock testified as an expert in civil engineering. He stated that, in his opinion, the ten oak trees that were supposed to be planted around the perimeter of the site could now be planted there "without a problem." Jan. 13, 2006 Tr. 114-115. He also opined that the 19 azaleas that were originally called for on the western side of the building could not be planted there now because the area is paved, but they could be planted on the east side of the building. Jan. 13, 2006 Tr. 112-116.

Mr. Glascock also testified that a handicapped space would be added to the southwest corner of the parking area, and that there are fences around the perimeter and on the western side of the building. Both fences are six feet tall, and neither had barbed wire on it. Both fences are chain link, with solid slats. Jan. 13, 2006 Tr. 116-118. Mr. Glascock also confirmed the dimensions of the food mart sales area as being 396 square feet, including the cashier's area. He noted the location of the kerosene pump, the oil grit separator, the air pump and the vacuum, one vacuum having been removed, but the other remaining. The soda machine, the Planet Aid box and the public telephone are no longer on the site. Jan. 13, 2006 Tr. 118-122.

Mr. Glascock testified that there is light spillage ranging from .2 to .8 foot-candles in the middle and rear of the subject site. He reported that Mr. Bera, the engineer who did the

photometric study in Exhibit 5, suggested either lowering the fixture units in the rear or perhaps shielding them to break the light spillover. He suggested a similar solution on the western property line of either recessing the lights or shielding them to prevent spillover. In Mr. Glascock's opinion, "if you did it with proper screening or reducing wattage or whichever, it would satisfy the county criteria." He suggested a follow-up photometric study. Jan. 13, 2006 Tr. 123-126.

Mr. Glascock further testified that the Elevations submitted in Exhibit 36(d) accurately reflect the existing building, although there is currently advertising in the four panels on the front of the building. Jan. 13, 2006 Tr. 129-130.

B. Opposition Case

1. Fran Hayward (Jan. 13, 2006 Tr. 27-49; 58-67; 164-166; 177; 187-204):

Francine Hayward testified on behalf of the Bentley Road Civic Association, which opposes parts of the modification petition. She joined Martin Klauber in his objection to admitting exhibits which were late filed on January 12, 2006, the day before the resumption of the hearing. Jan. 13, 2006 Tr. 18.

Ms. Hayward contends that the subject use was not a "lawful use" at the time the Sandy Spring Overlay Zone was applied because it was not in full compliance with all of the special exception conditions at the time. Therefore, they could not be grandfathered into the overlay zone, and even if they were grandfathered, they could not expand the use. The Civic Association is opposed to the expanded convenience store. Oct. 28, 2005 Tr. 19-20; Jan. 13, 2006 Tr. 36-43.

Ms. Hayward indicated that the Civic Association was agreeable to allowing the gas pumps to operate from 6:00 a.m. to 11:00 p.m., seven days a week, but wanted to limit the expanded food mart to 6:00 a.m. to 8:00 p.m. Jan. 13, 2006 Tr. 42-45 and 197. According to Ms. Hayward, when she and other members of the Bentley Road Civic Association signed the affidavit in Exhibit 44

agreeing to have the station remain open till 12:00 midnight, they thought it was temporary, for a three-month trial period, until the modification hearing which was set to be held in August or September of 2005. Jan. 13, 2006 Tr. 203-204.

In her testimony, Ms. Hayward indicated that the canopy lighting has been variable, and that Petitioner needs to abide by the special exception regulations. Jan. 13, 2006 Tr. 46-47. She stated that the community expressed no complaints about the lighting when the station was run by Mr. Garcia, and he receives high praise from his neighbors. Jan. 13, 2006 Tr. 50 and 187. Ms. Hayward testified that when the gas station is closed, the lighting should be "dimmed extensively or shut off, period." Jan. 13, 2006 Tr. 194.

Ms. Hayward testified that there are backups at the pumps causing unsafe queuing onto the public streets, and that this problem apparently began when the current operator took over from Mr. Garcia and stopped accepting credit cards, even though the pumps are designed to accept them. According to Ms. Hayward, Petitioner needs to speed up operations at the pump by either allowing the pumps to accept credit cards or by stationing an attendant at the pump to take cash. She also suggested that changing the traffic flow through the service station might help. Jan. 13, 2006 Tr. 48, 58-60 and 164-166. As stated by Ms Hayward (Jan. 13, 2006 165-166):

> . . . when people cue [*sic*] up enough the way they have in the past and the way they probably will, especially if credit cards are not accepted, so people are cuing [*sic*] up on 108, they would be heading westbound on 108 and they would be waiting to make a right turn into Bentley Road and then a left turn onto the station, and we have those people back up and totally block ingress and egress.
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> I have personally observed that. I have personally got caught in the middle. I have personally had to tell people, excuse me, I live here do you mind pulling up, and every person who lives on Bentley Road has had that experience. We've all also had to wait for people who are heading eastbound, waiting to make a left turn onto Bentley Road even in situations where there's already a cue [*sic*] from people going, you know, waiting to make that right turn onto Bentley Road. So you know, where people are waiting to turn, where there's no room for them to go. And that's before construction

[on Route 108] started.

2. Patricia Lansdale (Jan. 13, 2006 Tr. 49-57):

Patricia Lansdale testified that she lives across Olney sandy Spring Road from Petitioner's filling station, where she has lived for 55 years. Ms. Lansdale stated that, when the property was owned by Ruby Garcia, he was a good neighbor to everyone and a kind and thoughtful business owner. She found his hours of operation to be sensible and acceptable, and assumed that his main business was his car repair business, not the sale of gasoline.

According to Ms. Lansdale, the new ownership appears to have a "total disregard for the affect of the business on its neighbors. Although they have reduced their hours of operation of 24/7 when they first took ownership, to a 5 a.m. to 11 p.m. operation 7 days a week, the traffic and the noise that this generates is almost beyond belief." Jan. 13, 2006 Tr. 50.

Ms. Lansdale asserts that, because Petitioner is selling lower cost gasoline, the increase in sales is causing traffic snarls on this highly traveled two lane route, and there are almost weekly accidents and collisions as cars try to make turns and other try to bypass them. As a result, this section of Olney Sandy Spring Road has become a safety hazard, according to Ms. Lansdale, and living where she does has become extremely dangerous. Jan. 13, 2006 Tr. 50-51. Ms. Lansdale admitted that she does not have any studies or experts that would indicate that any of these near accidents were the result of the operation of the gas station (Jan. 13, 2006 Tr. 56); however she notes that "one of the major problems is that traffic eastbound, stopping to go into the gasoline station has traffic backing up behind it." Jan. 13, 2006 Tr. 54.

Ms. Lansdale suggested cutting back hours to 10:00 pm., while allowing the facility to be open seven days a week. Jan. 13, 2006 Tr. 50-51.

C. People's Counsel

Martin Klauber, the People's Counsel, did not present any witnesses at the hearing, but he did participate in the entire October 28, 2005 proceeding and in a portion of the January 13, 2006 proceeding which completed the hearing. Mr. Klauber strenuously objected to admission of Petitioner's exhibits filed on the day before the January 13 hearing because neither he nor the other parties had been given the statutorily required 10 days notice of a petition amendment and time to prepare to meet this evidence. Jan. 13, 2006 Tr. 10-12 and 18. Because of Petitioner's repeated failures to meet deadlines, Mr. Klauber asked that the record be closed as of January 11, 2006 (*i.e.*, prior to the Petitioner's January 12 submissions) and that the petition be denied.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan and that it is compatible with the existing neighborhood. Each special exception is evaluated in a site-specific context because a given special exception may be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all the applicable general and specific standards.

Petitions to modify the terms or conditions of a special exception are authorized by §59-G-1.3(c)(4) of the Zoning Ordinance. As mentioned in Part I of this report, because Petitioner is proposing to increase total floor area by less than 7,500 square feet, we must limit our inquiry "to consideration of the proposed modifications noted in the Board's notice of public hearing and to (1) discussion of those aspects of the special exception use that are directly related to those proposals." Section 59-G-1.3(c)(4). As demonstrated below, the record in this case establishes that some of the

proposed modifications, when properly conditioned, would neither change the nature or character of the special exception nor adversely affect the surrounding neighborhood. Other proposed modifications, extension of operational hours and expansion of the food mart, represent unlawful enlargements of the use in violation of the grandfathering provision in the Sandy Spring Overlay Zone. These should not be permitted.

A. Standard for Evaluation and its Application

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects of the proposed modifications, at the proposed location, on nearby properties and the general neighborhood. Inherent adverse effects are "the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations." Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are "physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site." *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with an automobile filling station use. Characteristics of the proposed modifications that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed modifications that are not consistent with the characteristics thus identified, or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent

and non-inherent effects thus identified must be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff describes the inherent characteristics of an automobile filling station as including "the environmental impacts of spillage of oils, and other automobile fluids, fumes from idling vehicles, queuing of vehicles, noise, signage, lighting and hours of operation." The Hearing Examiner would add to this, the inherent disturbance created by the flow of traffic to and from the pumps.

Non-inherent characteristics would include the traffic and lighting spillage problems created by operational changes under new ownership and by the site's location next to a country road (Bentley Road) and adjacent to residential zones. This is a modification petition, so it is only the effects of the permitted changes which may be addressed. To the extent Petitioner has modified the traffic flow by changes in its operations (*e.g.*, refusal to accept credit cards at the pump), a non-inherent characteristic has been established which adversely impacts upon the neighbors, as established by the testimony of Fran Hayward and Patricia Lansdale. Jan. 13, 2006 Tr. 48, 58-60 and 164-166; Jan. 13, 2006 Tr. 49-57. The same is true of the brighter lighting evident since the station changed ownership. *See* Petitioner's photometric study (Exhibit 49); the testimony of Petitioner's own engineering expert (Jan. 13, 2006 Tr. 123-126); the October 17, 2005 letter written by the adjacent landowners, Virginia Brown and John and Staci Kernan (Exhibit 41); and the testimony of Fran Hayward (Jan. 13, 2006 Tr. 46-47) and her letter of October 20, 2005 (Exhibit 31) on behalf of the Bentley Road Civic Association.

The Hearing Examiner has recommended conditions to address the operational changes which have created the traffic and lighting problems, and concludes that with these conditions, the non-inherent adverse effects do not warrant denial of the modification petition. Since neither longer operational hours nor an expanded food mart will be permitted, the potential effects of those

expansions need not be considered. The kerosene pump and the remaining car vacuum create a nuisance in this residential area, according to Technical Staff, and must be removed. The other requested modifications, as conditioned, should not create any adverse non-inherent effects warranting denial.

B. General Standards

The general standards for a special exception are found in Section 59-G-1.21(a). Based on the Technical Staff report and the other evidence in this case, the Hearing Examiner concludes that those proposed modifications recommended for approval, as conditioned, would comply with the general standards, as outlined below.

Sec. 59-G-1.21. General conditions:

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

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

Conclusion: An automobile filling station is a permitted special exception in the C-2 Zone, pursuant to Zoning Ordinance §59-C-4.2(e). It is not permitted in the Sandy Spring Overlay Zone, but this station, to the extent of its lawful use, was grandfathered in as a conforming use. See Part II.C. of this Report.

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

Conclusion: Those proposed modifications recommended for approval, as conditioned, would comply with the standards and requirements set forth for an automobile filling

station in Code §§59-G-2.06, as detailed in Part IV.C., below, to the extent that the requirements relate to the proposed modifications.

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

Conclusion: Since the petition is only for modification of an existing special exception, the relevant question is whether the proposed modifications render the use inconsistent with the applicable *Sandy Spring /Ashton Master Plan*, approved and adopted in July 1998. As correctly pointed out by Technical Staff, the Master Plan recommended that the Sandy Spring/Ashton Rural Village Overlay Zone be applied to all properties along MD 108 between the village centers of Sandy Spring and Ashton. *Zoning Ordinance §59-C-18.18.* The subject property lies within that Overlay Zone. Although the overlay zone prohibits automobile filling stations, in general, it contains a grandfathering clause which allows any lawful use in existence as of the date of application of the overlay zone to continue as a conforming use which may be altered, repaired or replaced. For the reasons stated in Part II.C. of this report, this provision does not permit expansion of the use; however, having limited the modification petition to changes which do not expand the use, the Hearing Examiner finds that the proposed modifications do not render the existing special exception inconsistent with the *Master Plan*.

(4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.

Conclusion: It should be noted, at the outset, that the Board of Appeals initially approved this special exception use in 1987 with the support of the community. Nov. 6, 1987 Tr. 28-30. It must be remembered that this is a modification petition, and thus the question is whether any of the requested changes would reduce harmony with the neighborhood. These issues have been discussed at length in Part II.C. of this report, and the Hearing Examiner finds that those changes he has recommended for approval, as set forth in Part II and summarized in Part V of this report, do not reduce harmony with the neighborhood as to any of the factors enumerated in this provision.

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

Conclusion: The evidence supports the conclusion that, with the operational limitations and proposed conditions, the requested modifications recommended for approval would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site.

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

Conclusion: Technical Staff asserts that "the outside installation of the kerosene pump and the car vacuum will constitute a nuisance in an area that includes low-density residential

homes adjacent to the subject property." Exhibit 38, p 13. Based on this unrebutted evidence and on set-back problems with the kerosene pump, the Hearing Examiner has recommended their removal, as discussed at length in Part II.C.9 of this report. For reasons set forth at length in Part II. C. of this report, the Hearing Examiner has also recommended denial of expanded hours and removal of the expanded sales area for the food mart. Changes in lighting have also resulted in light spillage into the community, and the Hearing Examiner has recommended conditions to remedy this problem, as discussed in Part II. C. 4 of this report. The other requested changes, as conditioned, will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site.

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

Conclusion: Technical Staff reports that there are no other special exceptions in the immediate area. Those proposed modifications which the Hearing Examiner has recommended for approval, as conditioned, do not increase the intensity or scope of the existing special exception. They therefore do not affect the area adversely.

> *(8) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed modifications recommended for approval would not adversely affect the health, safety, security,

morals or general welfare of residents, visitors or workers in the area at the subject site.

(9) Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.

(i) If the special exception use requires approval of a preliminary plan of subdivision the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review[LATR] and the Policy Area Transportation Review[PATR], as required in the applicable Annual Growth Policy.

(ii) With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will not reduce the safety of vehicular or pedestrian traffic.

Conclusion: Because the Hearing Examiner has recommended denial of all proposals to expand the special exception, the proposed modifications recommended for approval, as conditioned, will place no additional burden on public facilities, nor will they reduce the safety of pedestrian or vehicular traffic.

C. Specific Standards

The testimony and the exhibits of record, including the Technical Staff report, provide sufficient evidence that the proposed modifications recommended for approval, as conditioned, would comply with the specific standards required by Section 59-G-2.06, as described below.

Sec. 59-G-2.06. Automobile filling stations.

(a) An automobile filling station may be permitted, upon a finding, in addition to findings required in division 59-G-1, that:

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

Conclusion: For all the reasons set forth on pages 56-57 of this Report in response to General Condition §5-G-1.21(a)(6), the Hearing Examiner concludes, that those changes which the Hearing Examiner has recommended for approval, as conditioned, will not cause a nuisance because of noise, fumes, odors or physical activity at the subject site. The Hearing Examiner has recommended denial of requested changes that would constitute a nuisance, as discussed in Part II.C. of this report and summarized in Part V of this report.

(2) The use at the proposed location will not create a traffic hazard or traffic nuisance because of its location in relation to similar uses, necessity of turning movements in relation to its access to public roads or intersections, or its location in relation to other buildings or proposed buildings on or near the site and the traffic pattern from such buildings, or by reason of its location near a vehicular or pedestrian entrance or crossing to a public or private school, park, playground or hospital, or other public use or place of public assembly.

Conclusion: Because the Hearing Examiner has recommended denial of all proposals to expand the special exception, the proposed modifications recommended for approval, as conditioned, will create no additional traffic hazard or nuisance. One of the conditions recommended by the Hearing Examiner, requiring acceptance of credit cards at the pump or an attendant to accept cash at the pump, is intended to reduce vehicle queuing at the pumps which create potential traffic hazards.

(3) The use at the proposed location will not adversely affect nor retard the logical development of the general neighborhood or of the industrial or commercial zone in which the station is proposed,

considering service required, population, character, density and number of similar uses.

<u>*Conclusion*</u>: None of the changes proposed and recommended for approval will adversely affect logical development of the neighborhood or the zone.

(b) In addition, the following requirements must be complied with:

(1) When such use abuts a residential zone or institutional premises not recommended for reclassification to commercial or industrial zone on an adopted master plan and is not effectively screened by a natural terrain feature, the use shall be screened by a solid wall or a substantial, sightly, solid fence, not less than 5 feet in height, together with a 3-foot planting strip on the outside of such wall or fence, planted in shrubs and evergreens. Location, maintenance, vehicle sight distance provisions and advertising pertaining to screening shall be as provided for in article 59-E. Screening shall not be required on street frontage.

<u>*Conclusion*</u>: The subject site does abut a residential zone, and the Hearing Examiner finds, based on the evidence, and especially on the testimony of the adjacent neighbor (May 25, 2005 Tr. 44), that the existing chain link fence with solid plastic slats satisfies the fence requirement. The 3-foot planting strip also exists, but the required shrubs and evergreens have not been planted due to concerns about erosion and the wishes of the adjacent neighbor. That neighbor, Virginia Brown, testified at the Show Cause Hearing against planting the ten oak trees required by the original special exception. "Goodness no, it's already washed; if you disturb what sod is there, we'll have nothing but mud. Keep the six foot fence, the grass is pretty, its nice and green, they keep it cut, why disturb it?" May 25, 2005 Tr. 44. To obtain the information necessary to determine what, if any additional vegetation should be planted, the Hearing Examiner has proposed a condition requiring Petitioner, within 30 days after the Board's resolution becomes effective, to file with the Technical Staff of M-NCPPC and with this Board

an opinion statement by a qualified landscape architect stating whether planting trees as prescribed in the revised landscape plan, on the perimeter of the subject site, would result in successful growth of the trees and/or would be destructive of the currently existing sod. If the planting of those trees is inadvisable, in the expert's opinion, the expert's statement should include a recommendation of alternative plantings to provide screening from the neighborhood. The expert should also consider whether and where to plant 19 azaleas that were called for in the original plans. In making these recommendations, the expert should take into account the necessary sight lines for vehicles accessing and leaving the filling station.

(2) Product displays, parked vehicles and other obstructions which adversely affect visibility at intersections or to station driveways are prohibited.

Conclusion: Technical Staff did not observe any product displays, parked vehicles or other obstructions adversely affecting site access. There is no evidence to the contrary, and the Hearing Examiner has recommended a condition incorporating this requirement.

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

Conclusion: As discussed on pages 56-57 of this Report in response to General Condition §5-G-1.21(a)(6), changes in lighting have resulted in light spillage into the community, and the Hearing Examiner has recommended conditions to remedy this problem. This issue is addressed at length in Part II. C. 4 of this report. The Hearing Examiner concludes that, by limiting the lighting in the manner recommended in the proposed conditions, the changes in the lighting will not cause any light spillage or glare into any residential zone.

(4) When such use occupies a corner lot, the ingress or egress driveways shall be located at least 20 feet from the intersection of the front and side street lines of the lot as defined in section 59-A-2.1, and such driveways shall not exceed 30 feet in width; provided, that in areas where no master plan of highways has been adopted, the street line shall be considered to be at least 40 feet from the center line of any abutting street or highway.

Conclusion: The subject use does occupy a corner lot, but none of the proposed changes in the use relate to driveway size or location. This provision is therefore beyond the scope of this modification petition. Nevertheless, Technical Staff reports that the site "appears to be incompliance." Exhibit 38, p.10.

(5) Gasoline pumps or other service appliances shall be located on the lot at least 10 feet behind the building line; and all service storage or similar activities in connection with such use shall be conducted entirely within the building. There shall be at least 20 feet between driveways on each street, and all driveways shall be perpendicular to the curb or street line.

Conclusion: Technical Staff found that "[t]he nearest gas pump is located over 25 feet from the Olney-Sandy Spring right-of-way, well in excess of the required 10-foot setback from the building restriction line." Exhibit 38, p.10. Storage is provided inside the gas station building, and there is no indication that any storage was conducted outside of the building. As mentioned in answer to the previous provision, none of the proposed changes in the use relate to driveway size or location, and therefore those issues are beyond the scope of this modification petition. The Hearing Examiner finds that the subject site is in compliance with the applicable terms of this provision.

(6) Light automobile repair work may be done at an automobile filling station; provided, that no major repairs, spray paint operation or body or fender repair is permitted.

Conclusion: Mr. Garcia testified that only light repairs are performed at the station. Oct. 28, 2005 Tr. 86. Technical Staff observed that "no automobile body work or other heavy automobile repairs [appeared to be] performed on site." Exhibit 38, p.11. The Hearing Examiner so finds.

(7) Vehicles shall not be parked so as to overhang the public right-of-way.

Conclusion: Technical Staff states that "[p]arking is located well inside the property along the rear property line and the western property line." Exhibit 38, p.11. To the extent that this may have been a problem prior to the show-cause hearing on May 25, 2005, the Board's resolution which resulted appears to have rectified it. The Hearing Examiner has included this requirement as an express condition of the use.

(8) In a C-1 zone, an automobile, light truck and light trailer rental, as defined in section 59-G-2.07, and in a C-2 zone, an automobile, truck and trailer rental lot, as defined in section 59-G-2.09, may be permitted as a part of the special exception, subject to the provisions set forth for such uses in this section. In addition, a car wash with up to 2 bays may be allowed as an accessory use as part of the special exception.

Conclusion: Not applicable.

D. Additional Applicable Standards

59-G § 1.23. General development standards

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

Conclusion: Since most structures on the subject site are not being changed, it is unnecessary to review compliance with all the development standards. However, the Hearing Examiner did note compliance with standards for location of the gas pumps per Zoning Ordinance §59-G-2.06(b)(5), above, and non-compliance with side-yard set-back requirements of the C-2 Zone (Zoning Ordinance §59-C-4.353(b)) for the kerosene pump. *See* pages 33-34 of this report. As previously stated, the Hearing Examiner recommends removal of the kerosene pump, in part for that reason.

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

Conclusion: The only change proposed in the parking is conversion of one of the parking spaces into a handicapped-accessible space, as required by DPS's NOV.

(c) ***Minimum frontage****. In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*

(1) Rifle, pistol and skeet-shooting range, outdoor.
(2) Sand, gravel or clay pits, rock or stone quarries.
(3) Sawmill.
(4) Cemetery, animal.
(5) Automobile Filling Stations and Automobile Filling Stations, including radio and T.V. broadcasting stations and telecommunication facilities.
(6) Riding stables.
(7) Heliport and helistop.

Conclusion: There are no changes in frontage being proposed.

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

Conclusion: There are no changes being proposed that would affect forest conservation.

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

Conclusion: There are no changes being proposed that would affect water quality.

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

Conclusion: As mentioned in Part II. C. of this report, Petitioner must obtain permits from DPS for all signs displayed on the site, and file copies of the permits with the Board. A condition so requiring has been recommended in Part V, below.

(g) ***Building compatibility in residential zones****. Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: Not applicable. The subject site is in the C-2 Zone.

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

(1) Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.

(2) Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.

Conclusion: As discussed at length in Part II. C. 4 of this report, light spillage into nearby residential zones is an issue in this case. The Hearing Examiner has proposed a condition which should reduce light spillage to acceptable levels.

59-G-1.24. Neighborhood need.

In addition to the findings and requirements of Article 59-G, the following special exceptions may only be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that a need exists for the proposed use to serve the population in the general neighborhood, considering the present availability of identical or similar uses to that neighborhood:

(1) Automobile filling station.

(2) Automobile and light trailer rental lot, outdoor.

(3) Automobile, truck and trailer rental lot, outdoor.

(4) Automobile sales and service center.

(5) Swimming pool, community.

(6) Swimming pool, commercial.

Conclusion: Not applicable. An Automobile Filling Station is one of the special exceptions listed in Zoning Code §59-G-1.24 that requires a determination of neighborhood need. That provision does not apply in this case because this is a modification petition and the subject use already exists. The scope of this inquiry is limited by statute to "discussion of those aspects of the special exception use that are directly related to [the modification] proposals" and does not include a review of the "underlying special exception." In sum, Petitioner need not satisfy a needs analysis.

Based on the testimony and evidence of record, I conclude that some of the modifications to the automobile filling station use proposed by Petitioner, would be unlawful expansions of the use,

and are therefore not permitted, while other proposed modifications, as conditioned below, meet the specific and general requirements for the special exception. Therefore, the Petition should be granted in part and denied in part, subject to the conditions set forth in Part V of this report.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-1471-A, by Power Fuel and Transport Real Estate Holding Company, LLC, seeking to modify a special exception to bring an existing Automobile Filling Station located at 501 Olney-Sandy Spring Road, Sandy Spring, Maryland into compliance with the terms and conditions of its special exception, to change certain operational and site conditions, and to transfer the special exception, be GRANTED in part and DENIED, in part, as follows:

A. The transfer of the special exception from Rubem Garcia to Power Fuel, and Transport, Real Estate Holding Company (MD), LLC, is **granted**.

B. The proposed expansion of the "food and beverage" store, or "convenience store," as it was called by DPS is **denied.**

C. The proposed expansion of operating hours for pumping gas from 5:00 a.m. to 12:00 midnight, 7 days a week is **denied**, and the permitted hours are set forth in the conditions below.

D. The request to permit an exiting kerosene pump and the remaining power car vacuum are **denied**.

E. The other proposed modifications to the site plan and to certain operating conditions are **granted**, subject to the conditions set forth below:

1. The Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and representations of counsel identified in this report.

2. All terms and conditions of the approved special exception (S-1471) shall remain in full force and effect, except as modified by the Board as a result of this Modification Petition.

3. The hours of operation shall be that which was originally approved for the special exception, as follows: The gas pumps may be operated from 6:00 a.m. to 11:00 p.m., Monday through Friday and 8:00 a.m. to 11:00 p.m. on Sunday. They must be closed on Saturday. The light automobile repair shop may operate from 6:00 a.m. to 7:00 p.m., Monday through Thursday; 6:00 a.m. to 5:00 p.m. on Friday; and 8:00 a.m. to 1:00 p.m. on Sunday. It must be closed on Saturday.

4. Only light automobile repair work may be done at the subject site. Major auto repairs, spray paint operations, auto-body repairs and fender repairs are not permitted.

5. The special exception is limited to the existing five fuel pumps or their replacements. Fuel storage tanks and fuel pumps must comply with the control guidelines and air quality permitting requirements of the Maryland Department of the Environment (MDE), and must comply with all County, State and federal technical standards and permitting requirements. Petitioner shall ensure that all chemicals stored on site are stored in accordance with applicable Codes.

6. The current single canopy arrangement for the automobile fuel pumps is permitted, and the canopy area is limited to its current dimensions. In order to speed up operations and avoid queuing onto the public streets, Petitioner must either accept credit cards at the pumps or have an attendant stationed at the pumps to accept cash and make change.

7. Only two-thirds of the canopy lights may be on at any time during operating hours. After operating hours, only one row of canopy lights, the middle row, may be left on for security. Lights in the back of the building must be turned off when the station is closed.

Within 30 days after the Board's resolution becomes effective, Petitioner must submit a follow-up photometric study demonstrating that its lights do not impermissibly "reflect or cause glare" into any residential zone, as required by Zoning Ordinance §59-G-2.06(b)(3). If the photometric study indicates excessive light spillage (*i.e.*, more than 0.1 foot-candles at the residential property owner's property line, after subtracting out light spillage from sources other than Petitioner's filling station[21]), then Petitioner must take appropriate steps to shield the lights or reduce their intensity so that such excessive light spillage does not occur.

8. The minor changes which have been made to the windows, the façade and the outside of the building, as shown on the revised Site Plan (Exhibit 36(c)) and the revised elevations (Exhibit 36(d)), are permitted; however, Petitioner must obtain permits from DPS for any signs that are posted on the site, and the signs may be displayed only in locations shown on the revised site plan (Exhibit 36(c)), or its approved successor. Copies of the sign permits must be filed with the Board of Appeals. Petitioner must remove the advertising posters along the building façade.

9. The minor changes to the floor space inside the building, as shown on the revised floor plans (Exhibit 36(d)) are permitted, except for the expanded food mart area, which constitutes an impermissible expansion of the use. The 225 square feet of expanded food mart ("sales") area, as shown on the first floor of the revised floor plans (Exhibit 36(d)) must not be used for sales of food or anything else in connection with the automobile filling station use, and must be returned to its use prior to the expansion of the food mart

[21] The Hearing Examiner suggests "subtracting out light spillage from sources other than Petitioner's filling station" because the residential zones across Maryland Rout 108 from the subject site are located on a busy road with other light sources. It would be unfair to make Petitioner, which has no control over those other light sources, reduce the total light spillage onto the residential zones from all sources.

sales area. The original 171 square feet of "sales" area next to the cashier on the first floor of the building may be retained. A newly revised floor plan should be filed within 30 days showing the correct size of the cashier and food mart sales area.

10. The Planet Aid clothes collection box, the telephones, the soda machine, and one of the power vacuums, which have been removed form the site , must not be replaced; nor may any other new appliances, equipment or accoutrements be added to the site without express permission of the Board because they attract additional traffic to the site. The remaining power vacuum and the kerosene pump must be removed from the site, and a newly revised site plan should be submitted within 30 days showing the site without these items. The air-pump, air-conditioning unit and handicapped parking space are all appropriate additions to the auto filling station, and Petitioner may keep them as located on the revised site plan (Exhibit 36(c)).

11. All cars connected to the special exception use must be contained on the special exception site, with no cars parked off site or overhanging any public right-of-way. Product displays, parked vehicles and other obstructions which adversely affect visibility at intersections or to station driveways are prohibited.

12. Within 30 days after the Board's resolution becomes effective, Petitioner shall file with the Technical Staff of M-NCPPC and with this Board an opinion statement by a qualified landscape architect stating whether planting trees as prescribed in the revised landscape plan, on the perimeter of the subject site, would result in successful growth of the trees and/or would be destructive of the currently existing sod. If the planting of those trees is inadvisable, in the expert's opinion, the expert's statement should include a recommendation of alternative plantings to provide screening from the neighborhood.

The expert should also consider whether and where to plant 19 azaleas that were called for in the original plans. In making these recommendations, the expert should take into account the necessary sight lines for vehicles accessing and leaving the filling station.

13. Petitioners must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: February 23, 2006

Respectfully submitted,

_____

Martin L. Grossman
Hearing Examiner