

**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 HENDERSON CORNER *
& 355, LLC *
 Petitioner *
 Richard E. Hurney *
 Phillip Perrine *
 Michael Lenhart *
 Joseph M. Cronyn *
 Bob Fitzgerald *
 For the Petition * Board of Appeals Case No. S-2743
Stanley D. Abrams, Esquire * (OZAH Referral No. 09-12)
 Attorney for the Petitioner *
 *

Martin Klauber, Esquire, People’s Counsel *
 In Support of 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-2743, filed on October 13, 2008, seeks a Special Exception, pursuant to §59-G-2.06 of the Zoning Ordinance, to allow Petitioner to construct and operate an Automobile Filling Station which would include 12 pumps and a convenience store. The subject site is located at 21040 Henderson Corner Road,¹ just south of its intersection with Ridge Road/MD 27, in Germantown, Maryland, and is zoned C-3 (Highway Commercial). Petitioner Henderson Corner & 355 LLC owns the property, which is designated Parcel “E,” Henderson Corner, and consists of 1.27 acres of land (Tax Account Number 02-03629433).

Notice of the hearing, scheduled for February 27, 2009, was issued by the Board of Appeals on November 3, 2008 (Exhibit 15(b)).² Technical Staff of the Maryland-National Capital Park and Planning Commission recommended approval of the special exception, with conditions, in a memorandum dated February 2, 2009.³ Exhibit 18. On February 12, 2009, the Montgomery County Planning Board voted 4-1 to recommend approval, based on the Technical Staff’s report. Exhibit 19. Staff’s report was supplemented, at the Hearing Examiner’s request, on February 26, 2009. Exhibit 20.

A public hearing was convened as scheduled on February 27, 2009. There was no opposition, and all the witnesses were called by Petitioner. Martin Klauber, Esquire, the People’s Counsel, was unable to attend, but indicated his support for the petition and suggested a condition to the Hearing Examiner, which was agreed to by Petitioner at the hearing. Tr. 6. The record was held open until March 13, 2009, to obtain a clarification from Technical Staff as to whether the adequacy

¹ Henderson Corner Road is occasionally referred to, erroneously, as “Henderson Corner Drive” in some of Petitioner’s reports and plans and in the testimony of some of its witnesses. The actual name is Henderson Corner Road.

² The notice contained the correct street address, but it incorrectly identified the town as “Derwood,” instead of the correct location, Germantown. This error likely resulted from the fact that the owner’s mailing address is in Derwood. The Hearing Examiner raised this issue at the hearing, and announced that he felt the error did not result in a failure of notice because the street address was correct, and those in the area receiving the mailed notice would realize that the location was a street address in their neighborhood. The omission was therefore inconsequential. Petitioner’s counsel agreed and did not request that further notice be mailed out. Tr. 4-6. Moreover, the subject site was posted with notice, as demonstrated by the Affidavit of Posting (Exhibit 21).

³ The Technical Staff Report is frequently quoted and paraphrased herein.

of public facilities would be addressed at the limited subdivision amendment anticipated in this case.⁴ The Hearing Examiner inquired by e-mail on February 27, 2009, and Technical Staff responded on March 4, 2009, that the adequacy of public facilities would be addressed at the limited amendment to the preliminary plan. Exhibit 34. The record closed, as planned, on March 13, 2009.

Based on the record in this case, as discussed below, the Hearing Examiner finds that Petitioner has met the standards for the grant of a special exception under §59-G-2.06 of the Zoning Ordinance.

II. FACTUAL BACKGROUND AND ANALYSIS

A. The Subject Property and the General Neighborhood

The subject site is located at 21040 Henderson Corner Road, just south of its intersection with Ridge Road/MD 27, in Germantown, Maryland, and is zoned C-3 (Highway Commercial). The property is designated Parcel "E," and is bounded on the north by Ridge Road, MD 27 (446 feet of frontage), and on the southeast by Henderson Corner Road (about 350 feet of frontage). The southwest boundary is adjacent to Parcel "D" and Parcel "B," Henderson Corner, which are also classified in the C-3 zone. Access to the adjacent C-3 parcels is precluded by topography and pre-existing development on those parcels. Land Planning Report, Exhibit 10, p. 1.

According to Technical Staff (Exhibit 18, p. 3), the site is approximately 1.27 acres in size and is primarily a wooded lot, as can be seen in pictures on the next page. The lot is triangular in shape and is bounded on two sides by roadways. Midway along the Henderson Corner side, the property rises several feet to form a plateau, while the side of the property adjacent to Ridge Road/MD-27 slopes steeply downward to the roadway. Currently, there is no access to the site. The site can be seen in the aerial and surface photographs from Attachment 3 to the Staff Report, shown on the following page.

⁴ Subdivision will be limited because a preliminary plan was already approved for this property when it was intended to be the site of a bank in 2006 (Preliminary Plan No. 120061210), and the anticipated traffic from the newly proposed use (a filling station) will be less than that which was anticipated for the bank.

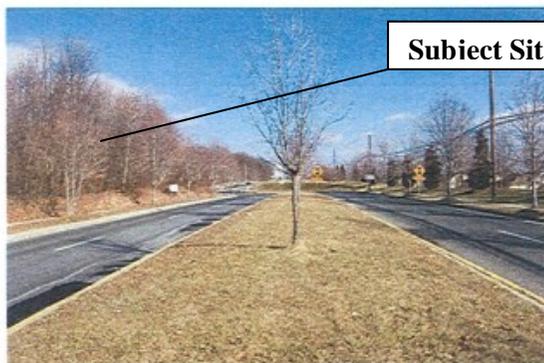
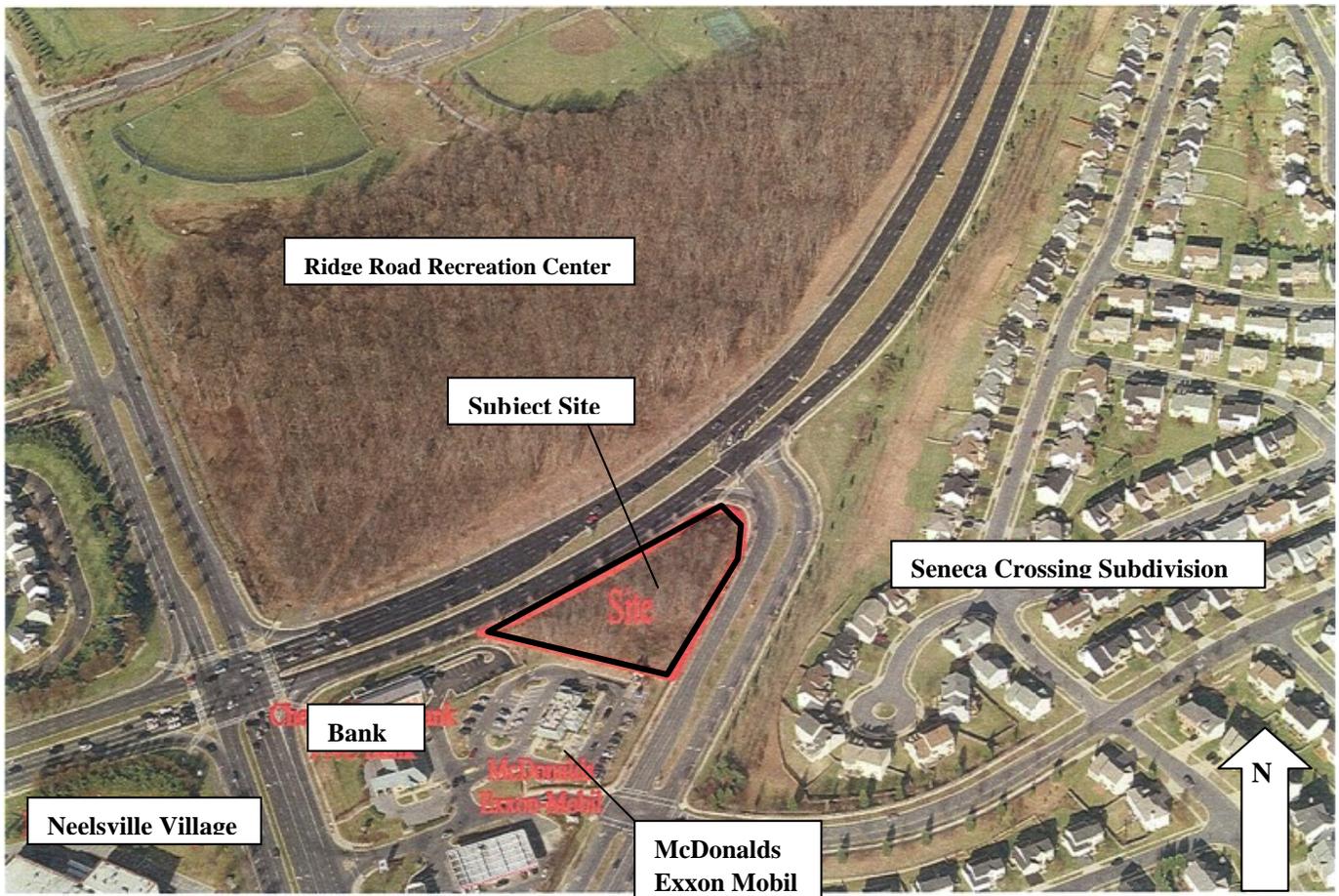


Figure 2: Henderson Corner, site is on left



Figure 4: Looking @ site from Henderson Corner

Technical Staff characterized the site’s location as being “on an ‘island’” of properties within the Neelsville Village area of Germantown. The “island,” which includes the other commercial properties south of the site, is bounded by Ridge Road/MD-27 to the north, Henderson Corner Road to the southeast and Frederick Road/MD-355 to the west. This “island” is shown in the Staff Report on Attachment 1, a Generalized Location Map, and Attachment 4, the Surrounding Area Map, both of which are reproduced on the following pages:

Generalized Location Map



LEGEND

- Subject Site
- Parcel
- Building
- Paved Area
- Lake and Pond
- Stream and River

1 inch = 400 feet
Address: Ridge Rd (MD27) and Henderson Corner Rd

Key Map
NTS



Surrounding Area Map



LEGEND

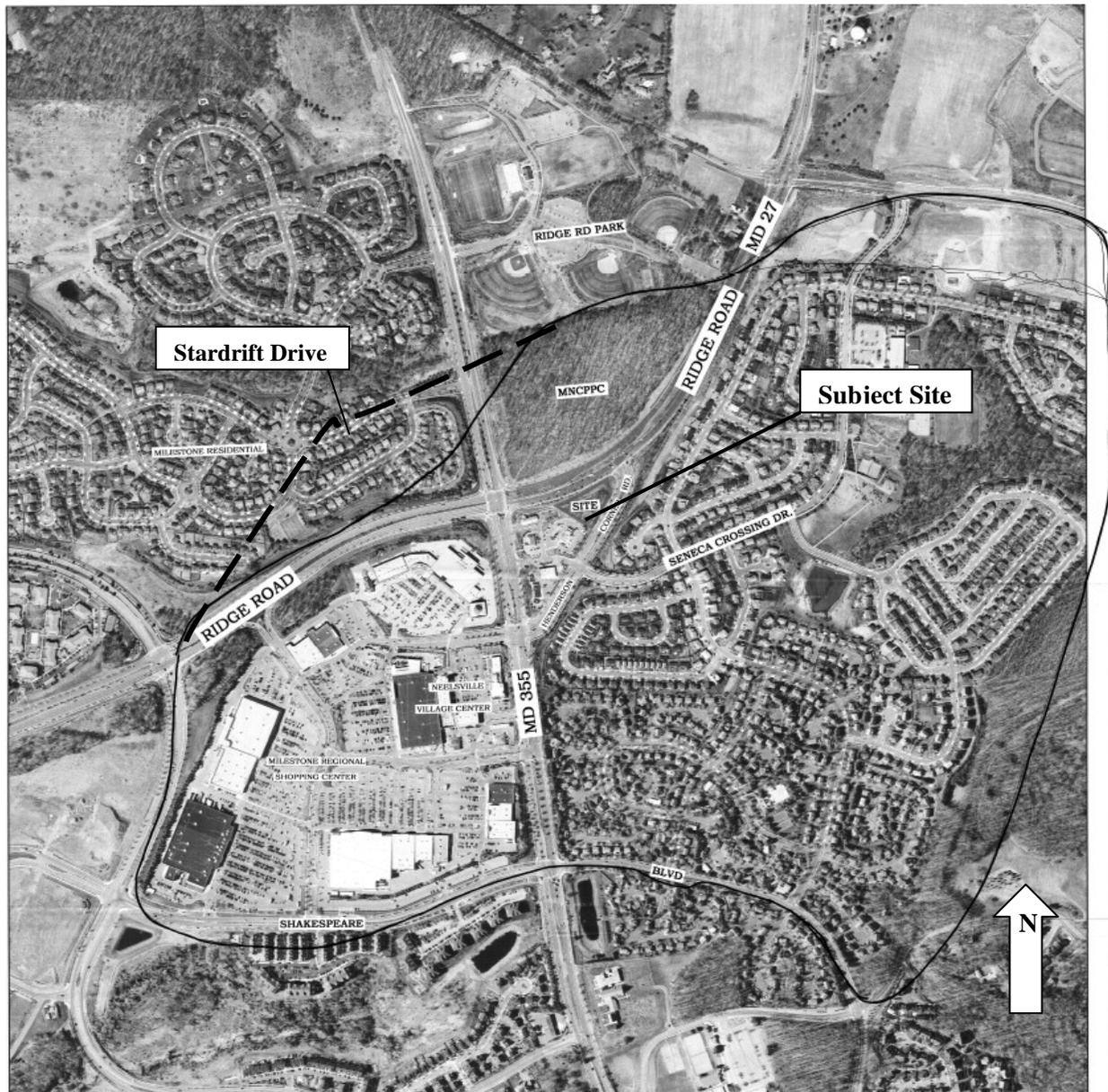
-  Subject Site
-  Parcel

1 inch = 400 feet
Address: Ridge Rd (MD27) and Henderson Corner Rd



To assess compatibility, Technical Staff defined the general neighborhood to include the Neelsville Village Shopping Center, Seneca Crossing Subdivision and Ridge Road Recreational Facility. Petitioner’s land planner, Phil Perrine, agreed with this definition, but stated its borders with greater particularity: “The boundaries of the surrounding area are Stadrift Drive and the south

edge of the Ridge Road Park to the north, Brink Road to the north, single-family homes in the Seneca Crossing subdivision adjacent to Henderson Corner Road and MD 27 to the east, and Neelsville Village Shopping Center and Milestone Shopping Center to the south.” Exhibit 10, p. 2. Mr. Perrine outlined the neighborhood on an aerial photo (Exhibit 30), which is reproduced below.⁵

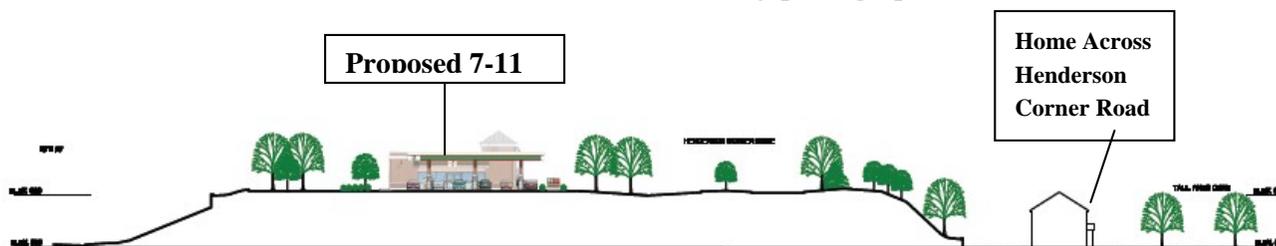


⁵ The Surrounding Area map submitted by Technical Staff and reproduced on the previous page did not actually show the entire general neighborhood, as defined. In the above aerial photo, the solid black outline by Mr. Perrine was a little inexact because, based on his land planning report, he meant to include the portion of the Milestone Residential area south of Stardrift Drive. The Milestone Subdivision is located in the northwest quadrant of the intersection of Ridge Road and MD 355, and is diagonally across from the commercial “island” on which the subject site is located. The Hearing Examiner has added that portion into the neighborhood outline with a dashed line.

The Hearing Examiner accepts this definition of the general neighborhood, as it covers the area containing those who will be most directly affected by the proposed service station.⁶ The site is surrounded by a mix of uses, including residential, professional, business, retail, drive-thru restaurants and a recreational park. Exhibit 18, p. 3. The adjacent, C-3 parcels are developed with a filling station, a bank, and a fast food restaurant. As to the adjacent roads, MD 27 is a major highway and Henderson Corner Road is an arterial road. Petitioner describes the surrounding area in its land Planning Report (Exhibit 10, p. 2):

Across Henderson Corner Drive is Seneca Crossing, an R-200/TDR classified, residential community, located approximately 20 to 35 feet below the elevation of Henderson Corner Drive. The rear of the houses along Henderson Corner Drive are separated from the road by a berm and natural vegetation, and only the roof-tops are visible from the road. The residential neighborhood is served by Seneca Crossing Drive, which intersects Henderson Corner Drive across from the entrance to the existing C-3 commercial area. The site is generally located across MD 355 from the Neelsville Village Shopping Center and the Milestone Regional Shopping Center. Future residential development is proposed north of MD 27 on the east side of MD 355. The Milestone subdivision is located in the northwest quadrant of this intersection.⁷

Technical Staff and Petitioner emphasize that the subject site has unusual grades that make the site higher than the surrounding properties and roadways. Thus, the residential properties across Henderson Corner Road are significantly lower in elevation than the subject site and would not have a direct view of the proposed automobile service station. This point is well illustrated by Petitioner's Cross-Section/Elevations (Exhibit 17(a)) and by photographs in Exhibits 17 and 26:



⁶ It should be noted that the general neighborhood for land use purposes, which is used to evaluate adverse impacts from the proposed use, is not the same as the defined market area for “need analysis,” which will be discussed in Part II. F. of this Report. Tr. 72. In evaluating the need for this business, Petitioner’s market analyst included potential users in an area surrounding the subject site, about three miles to the north, about two miles to the south, and about a mile on each side, east and west. Tr. 112.

⁷ As previously mentioned, Henderson Corner Road is occasionally referred to as “Henderson Corner Drive” in some of Petitioner’s reports and plans and in the testimony of some of its witnesses. The actual name is Henderson Corner Road.

Exhibit 26(b), taken from the subject site, looking towards the Seneca Crossing Subdivision. Only the upper parts of homes are visible.



Exhibit 17(g) shows the lower grade of the Seneca Crossing Subdivision



Exhibit 26(d) is taken from the Seneca Crossing Subdivision, looking towards the Subject site



Exhibit 26(c) is taken from the Seneca Crossing Subdivision, looking towards the Subject site

B. The Proposed Use

The subject application seeks a special exception pursuant to Section 59-G-2.06 of the Zoning Ordinance to permit the construction and operation of an automobile filling station with an ancillary convenience store. Petitioner proposes the following use:

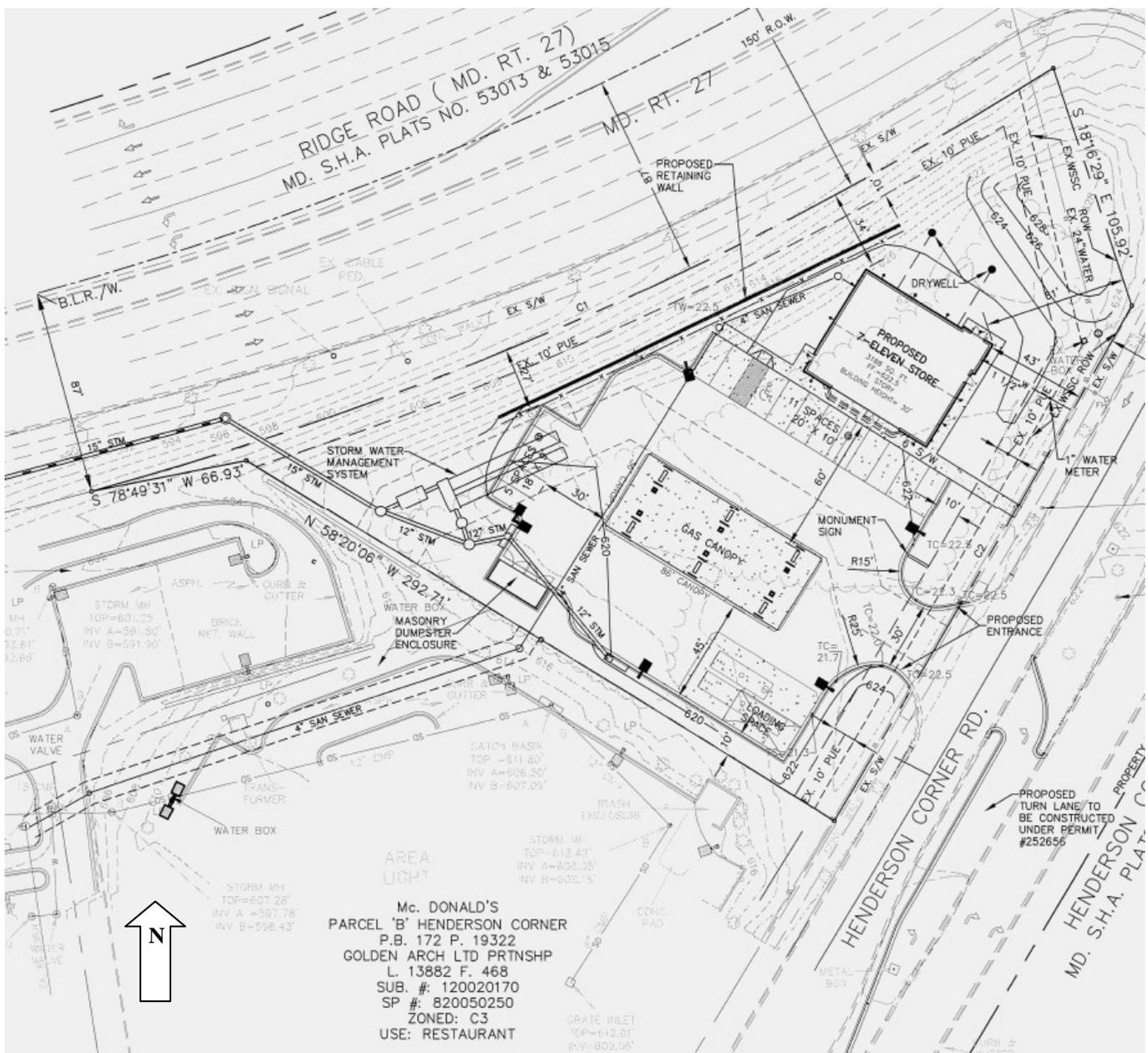
- 1) A self-service, automobile filling station will be centrally located on the site. It will contain six multi-product dispensers, two on each of three pump islands. The dispensers will provide a total of 12 pumping stations.
- 2) The pump islands will be covered by a canopy approximately 86 feet in length, 36 feet in width, and 18½ feet in height, with a clearance of 14½ feet.
- 3) A single-story, 3,188 square-foot building will be located at the north end of the site near the intersection of Ridge Road and Henderson Corner Road. It will house a 1,674 square-foot, “7-Eleven” convenience food and beverage store, with a customer area, a food preparation area, storage areas, an office, restrooms, cooler space, and an ATM machine.
- 4) The sole vehicular access to the site will be directly from Henderson Corner Road.
- 5) Sixteen parking spaces, including one handicapped space, will be provided on site.
- 6) Two underground storage tanks will be located on the southeast side of the site.
- 7) A dumpster enclosure will be located on the western side of the site, just south of a stormwater management system.
- 8) One free-standing monument sign will be located facing Henderson Corner Road, with additional signage on the building and canopy.
- 9) Hours of operation for both gas sales and the convenience food and beverage store will be 24 hours/day, 7 days/week. Staff will work in three 8-hour shifts.
- 10) No more than seven employees will be on site at any one time.
- 11) No repair services or car wash will be offered on site.

Petitioner’s vision for the filling station and convenience is illustrated in its elevations exhibit, shown below (Exhibit 17(d)):



BUILDING EXTERIOR MATERIALS		
NO.	MATERIAL	MANUF. - COLOR
B-1	FACE BRICK 3 5/8" x 2 1/4" x 7 5/8"	LAWRENCEVILLE - OLD RICHMOND 3-115 & HOLCIM SEASHELL - RED
B-2	FACE BRICK 3 5/8" x 2 1/4" x 7 5/8"	LAWRENCEVILLE - OXFORD ROSE 328 & HOLCIM SEASHELL - PINK
B-3	FACE BRICK 3 5/8" x 2 1/4" x 7 5/8"	LAWRENCEVILLE - BURGUNDY 4-015 & DESIGNER TAN - BROWN
S-1	SIDING, FREEZE, & SOFFIT	WHITE
F-1	GUTTERS	WHITE
F-2	LEADER BOX/DOWNSPOUTS/STRAPS	GREY
R-1	ROOFING	GREY

Petitioner's Site Plan (Exhibit 4(a)), is reproduced below and on the following page:



LEGEND

-  EX. MISC POLE
-  EX. CABLE TV
-  EX. ELECTRIC BOX
-  EX. FIRE HYDRANT
-  EX. GAS SERVICE/METER
-  EX. GAS VALVE
-  EX. LIGHT/LAMP POLE
-  EX. COMMUNICATIONS MANHOLE
-  EX. STORM DRAIN MANHOLE
-  EX. SIGN
-  EX. SANITARY SEWER MANHOLE
-  EX. TELEPHONE PEDESTAL/BOX
-  EX. WATERLINE VALVE
-  EX. IRON PIPE FOUND
-  EX. HANDICAPPED PARKING
-  EX. GUY WIRE
-  EX. STORM STRUC.
-  EX. FENCE(S)
-  EX. POWER POLE
-  EX. TREE
-  EX. OVERHEAD WIRES
-  EX. PARKING METER
-  EX. TELEPHONE PEDESTAL/BOX
-  EX. POWER MANHOLE
-  PROP. LIGHT POLE

SITE TABULATION		
PROPERTY AREA (TOTAL)	55,476 sf (1.27 Ac.)	
SPECIAL EXCEPTION AREA	55,476 sf (1.27 Ac.)	
PLAT	PARCEL E, PLAT NO. 23825	
ZONING	C-3, HIGHWAY COMMERCIAL	
USE	AUTO FILLING STATION/CONVENIENCE STORE	
ADJACENT ZONE	C-3, HIGHWAY COMMERCIAL	
ZONING REGULATIONS (C-3 Zone):	REQUIRED/ALLOWED	PROVIDED
1. Setbacks:		
a. From Right-of-Way	10'	34' (ROUTE 27) 43' (HENDERSON)
b. Side	None	N/A
c. Rear	None	N/A
2. Green Space	10% (5,548 sf)	52% (28,800 sf)
3. Floor Area Ratio:	0.08	0.06
4. Building Floor Area:		
a. Gross	N/A	3188 s.f.
b. Net	N/A	2890 s.f.
c. Patron Area	N/A	1674 s.f.
5. Building Height:		
Store	42' max.	30'
Canopy	42' max.	26'
6. Parking:	16 (5/1000 LFA)	16
a. Total		
b. HCP	1	1
c. Loading	1	1
d. Parking Lot Setbacks:		
from any r.o.w.	10'	27'
from other prop. lines	4'	10'
7. Buffer Yards:	N/A	N/A

GENERAL NOTES:

- 1) BOUNDARY AND TOPOGRAPHIC BASED ON FIELD SURVEY PREPARED BY DESIGN TECH ASSOCIATES, INC., DATED 1-16-2008.
- 2) THE SUBJECT SITE SOILS HAVE BEEN MAPPED BY THE MONTGOMERY COUNTY SOIL SURVEY AND ARE DETERMINED TO BE BRINKLOW-BLOCKTOWN CHANNERY SILT LOAM, 3%-8% SLOPES, 16B.
- 3) THERE ARE NO AREAS OF TREE PROTECTION ON THE SITE. ENTIRE SITE TO BE CLEARED AND FOREST CONSERVATION FEE IN LIEU HAS BEEN PAID.
- 4) THE SITE IS NOT WITHIN A SPECIAL PROTECTION AREA.
- 5) STORMWATER MANAGEMENT CONCEPT - _____(204787)
 QUANTITY - 1 YEAR PEAK FLOW IS LESS THEN
 2 cfs SO CPv NOT REQUIRED.
 QUALITY - ONSITE CONTROL VIA STORMFILTER.
- 6) THERE ARE NO ROCK OUTCROPPINGS OR SCENIC VISTAS AT THE SITE.
- 7) THE SUBJECT PROPERTY IS NOT AN HISTORIC SITE AS LISTED ON THE MASTER PLAN FOR HISTORIC RESOURCES.
- 8) NO BODIES OF WATER, WATER COURSES OR 100-YEAR FLOODPLAINS ARE PRESENT WITHIN THE SITE OR WILL BE IMPACTED BY CONSTRUCTION OF THE SITE.
- 9) UNDERGROUND UTILITY INFORMATION SHOWN IS BASED ON AVAILABLE RECORD OBTAINED FROM UTILITY COMPANIES. THE CONTRACTOR SHALL TEST PIT AS NECESSARY TO FIELD LOCATE THE UTILITIES PRIOR TO CONSTRUCTION. SITE SERVED BY PUBLIC WATER AND SEWER, S-1, W-1.
- 10) WSSC 200' SHEET #229NW12
- 11) GERMANTOWN PLANNING AREA #19
- 12) WATERSHED - GREAT SENECA CREEK (C-13), CLASS 1
- 13) NO CONSTRUCTION SHALL OCCUR UNTIL THE PROPER PERMITS HAVE BEEN OBTAINED.
- 14) NOTIFY MISS UTILITY AT 1-800-257-7777 FOR UTILITY LOCATION AT LEAST 48 HOURS PRIOR TO ANY CONSTRUCTION ACTIVITY.
- 15) THE SITE IS IN WATER CATEGORY W-1 AND SEWER CATEGORY S-1.

As mentioned in footnote 4 on page 3 of this report, Petitioner initially had planned to use this site for a drive-through Sovereign Bank. It went through preliminary plan, which was approved in November of 2006. All required road dedications for this site were made at that time. The site plan was approved in February of 2008, and a record plat was recorded for the property, as Parcel E, in February of 2008 (Exhibit 23). Shortly after that, Sovereign Bank decided not to proceed on the development of the property, and the owner then arranged for the 7-Eleven to go on the site.

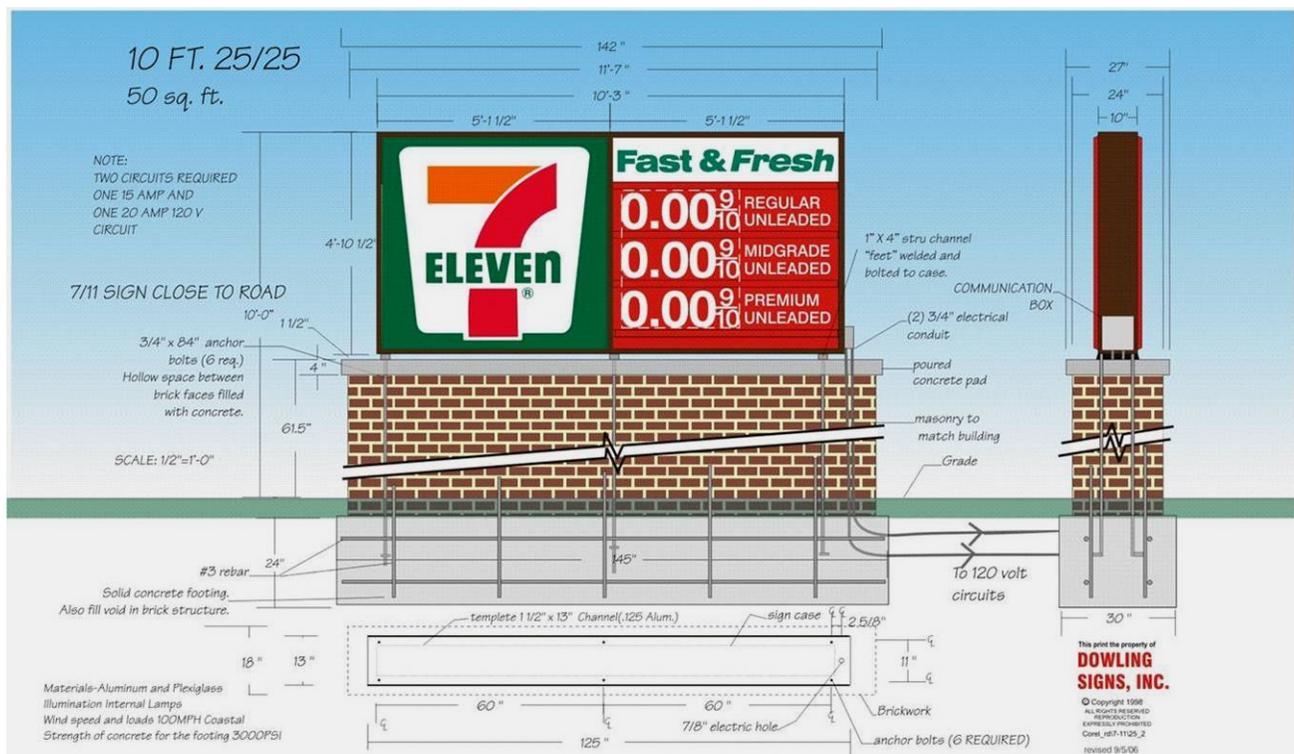
The subject property will have vehicular access solely from Henderson Corner Road, since there is too much of a grade difference to permit access from either MD Route 27 or from the properties to the south. The driveway entrance will be 30 feet wide, and that conforms to the zoning ordinance requirements for this use.

As can be seen from the site plan on page 11 of this report, entry will be by left or right turn in, but exiting is right turn only. The turn lane allowing left turns into the site was previously designed and permitted through the department of permitting services (DPS) and the Department of Transportation (DOT) for the original Sovereign Bank site plan. Petitioner has utilized the same turn lane for the proposed use, so the same permit application will suffice. Also, the entrance that was approved for unbuilt Sovereign Bank has the same position, location and dimensions as the current proposal, and an entrance permit has been obtained.

The 7-Eleven store will be in a 3,188 square foot building, located in the northeast quadrant of the property. There will be 11 parking spaces in front of the site, and an additional 5 spaces on the northwest side of the parking lot. As will be discussed later in this report, this meets the requirement for 16 parking spaces. It also complies with the C-3 Zone requirement that all parking be located to the side and rear of the site. There will be a canopy which will have six, two-sided gas pumps, with 12 fueling positions, located in the center of the property. The canopy will be 18 and a half feet tall, and will have a clearance height of 14 and a half feet, which meets the requirements of

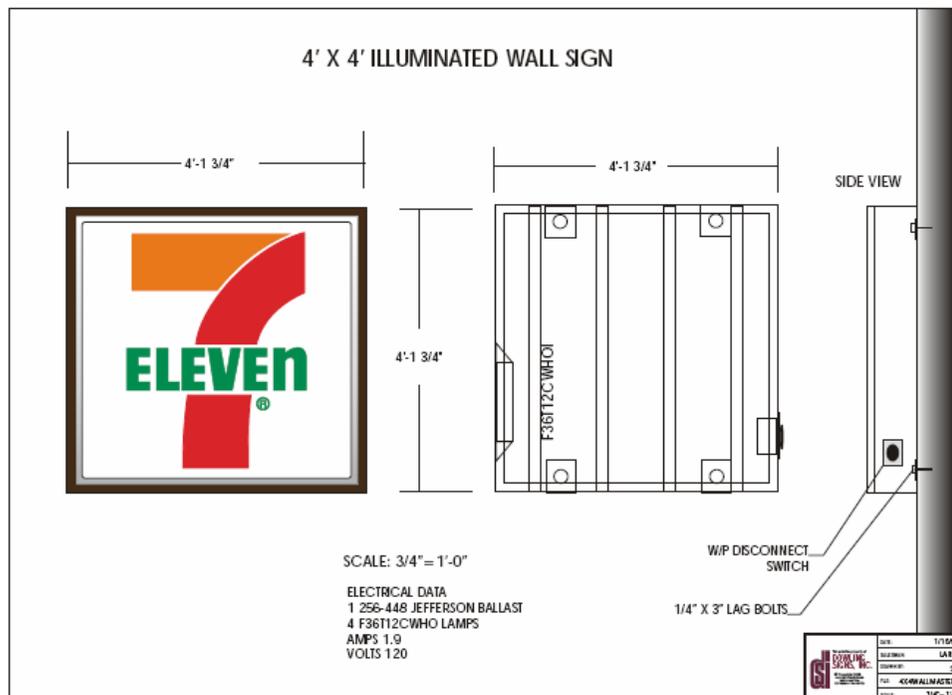
the American Association of State Highway and Transportation Officials (ASHTO). The underground storage tanks will be located in the southeast portion of the property, while the stormwater management system will be located on the southwest section of the property.

The building will be all brick, as can be seen in the elevations reproduced on page 10 of this report. It will also include a tower element on the front of the building, which faces the Ridge Road/Henderson Corner intersection (*i.e.*, the north side of the site), to comply with the Master Plan’s call for gateway features. The front elevation, as seen by drivers coming west on Ridge Road towards Route 355, will have a door and windows, in addition to the tower. However, the actual service side, which will have an entrance to the 7-Eleven, the gas pumps, and the parking spaces, will be hidden behind that building. The rear elevation of the building will face towards the canopy covering the gas pumps. All of the elements of the brick work, the trim and the cornice features from the building will be duplicated in the canopy, which will also have brick columns. The monument sign will be on a brick pedestal that has the same architectural brick elements as the store and the canopy. The proposed monument sign is depicted below (Exhibit 17(c)):



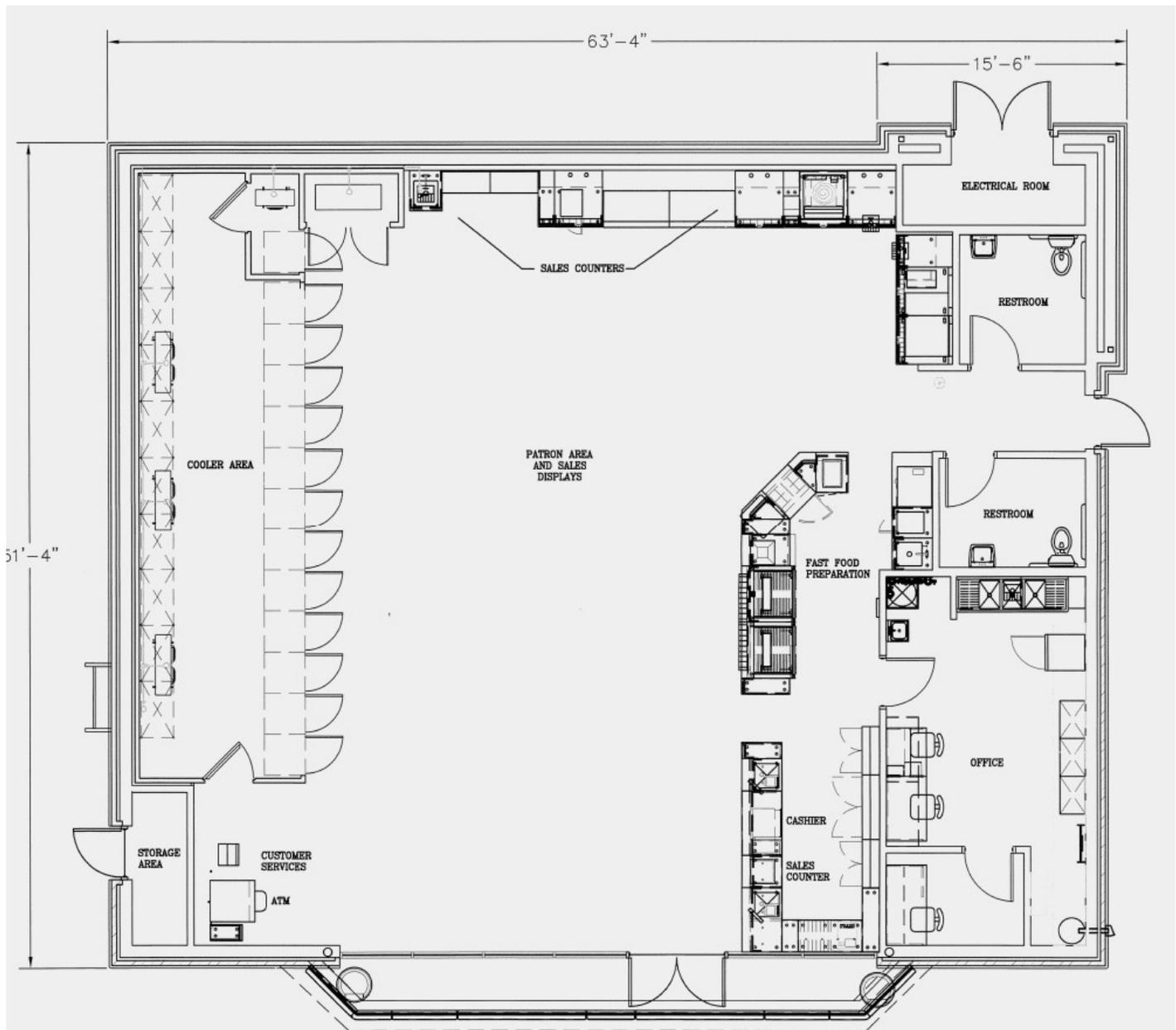
The brick base of the monument sign will be five feet tall, making the sign 10 feet in height, from the ground level. That monument sign will be located adjacent to the entrance along Henderson Corner Road, set back off of the right-of-way in the area north of the entrance, so that it will be visible from Henderson Corner Road.

There will also be 7-Eleven signs on the building and on the canopy, as depicted below in Exhibit 17(b):



The locations of the wall signs are shown in Exhibit 17(d), reproduced on page 10 of this report. There will be three of these four-foot by four-foot, 7-Eleven signs on the building. Two of them will be on the tower element of the building, one at the front elevation, and one on the left side elevation, facing Henderson Corner Drive. The third 7-Eleven sign on the building will be part of the fascia, above the entrance to the store. Similar 7-Eleven signs, measuring three-by-three feet, will be placed on the left side of each of the four corners of the canopy. All signs will meet the sign ordinance requirements for the specific use at this specific location, and permits will be obtained from DPS. Tr. 126-128.

The Floor Plan for the 3,188 square-foot building (Exhibit 4(f)) is reproduced below:

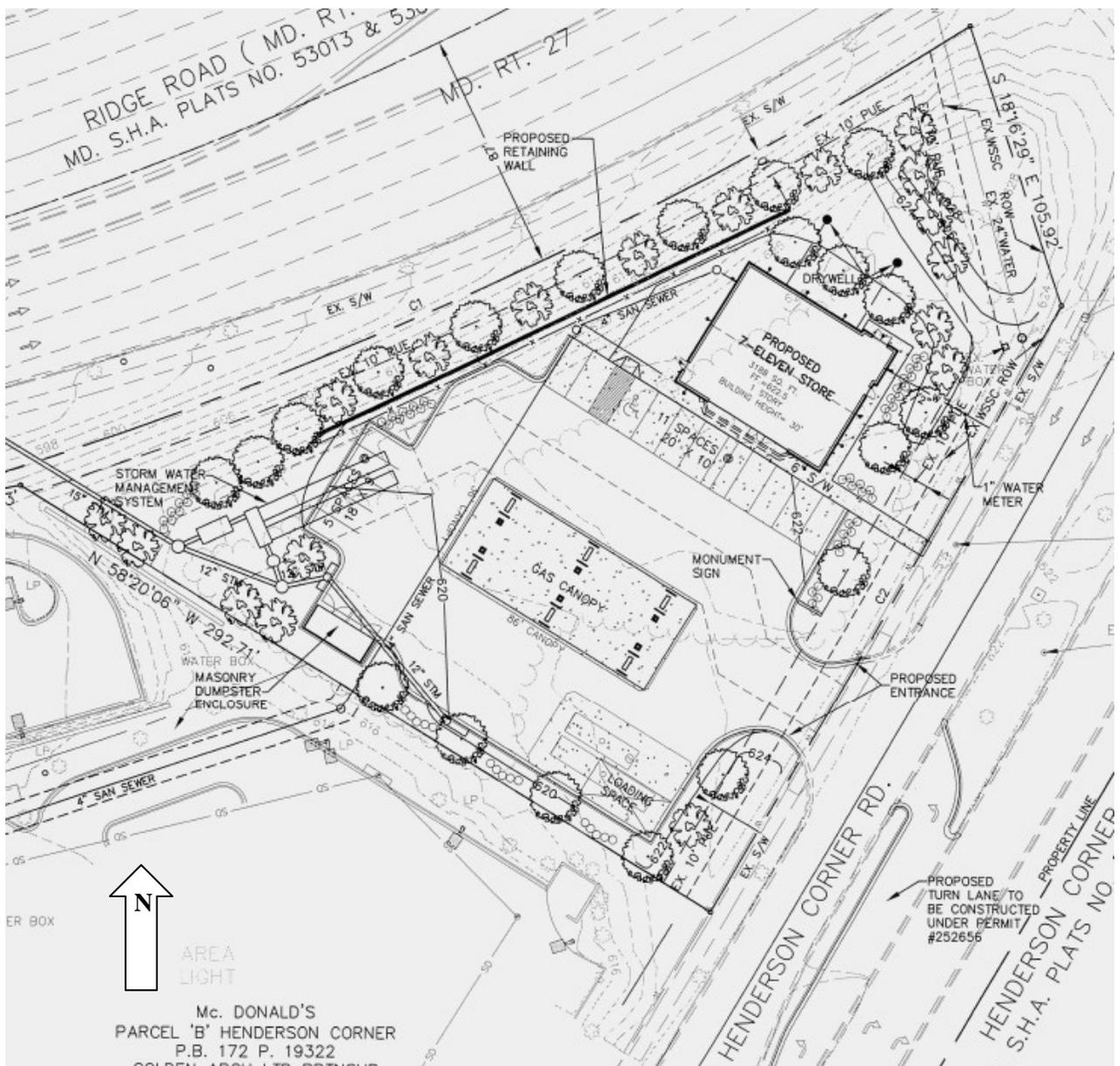


The 1,674 square-foot customer service area, as well as the remainder of the floor usage, can be seen above. There will be a sales counter adjacent to the front door; an office behind the sales counter for the exclusive use of the employees; two ADA accessible rest rooms available to the public; a sales counter area, which has sodas and coffee and similar merchandise items; a copier; an ATM machine; and a cooler vault area which sells milk, juices, and soda pop. There will be no

customer access behind the coolers, but customers can open the doors and get the food out. There will be no food prepared on site; it will just be heated and distributed. No auto repairs will be made on site; nor will there be a car wash.

The station and store will operate 24 hours/day, 7 days/week, in 3 shifts, and no more than 7 employees will be on site at any one time. Normally, there would only be two to four employees on site, but when someone is being trained or inventory is taken, there might be up to seven.

The landscape plan (Exhibit 5(a)) and its rendered version (Exhibit 17(e)) are shown below:



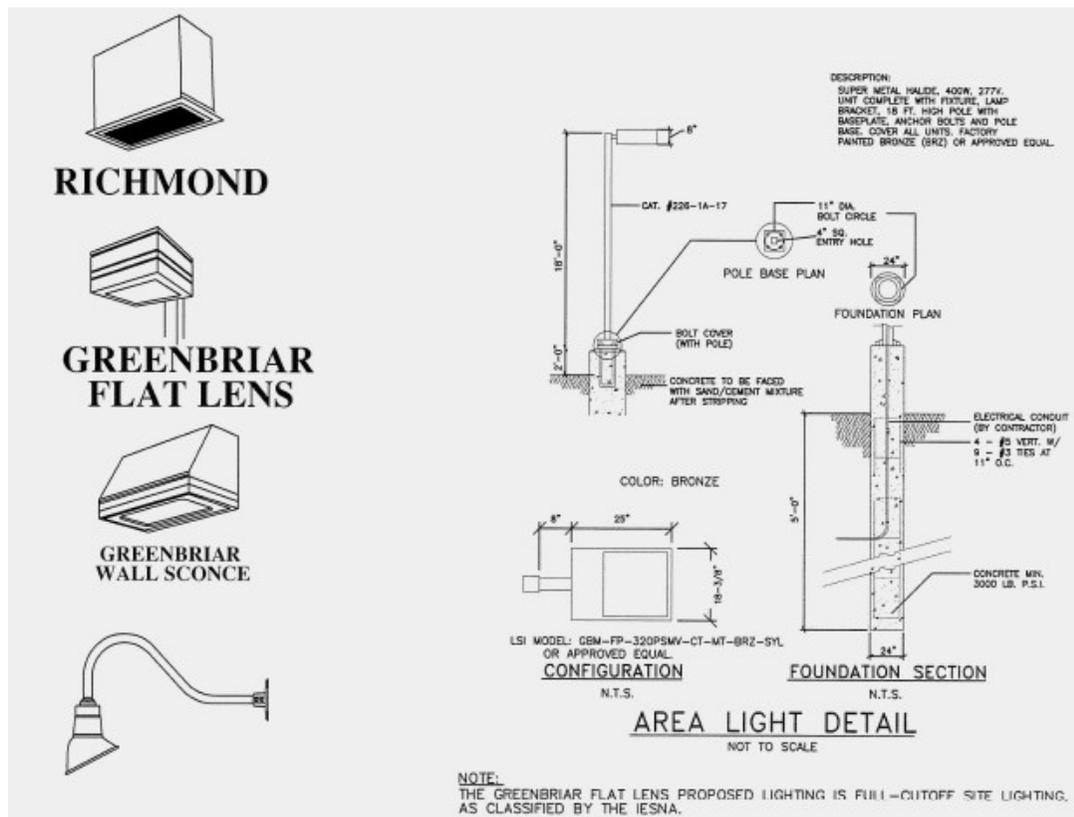
SYMBOL/PLANT LIST						
	COMMON NAME		BOTANICAL NAME	SIZE	QUANTITY	NOTES
TREES	SUGAR MAPLE		Acer saccharum 'Green Mountain'	2 1/2"-3" CAL.	20	40' O.C., SET AS SHOWN
	ALLEGHENY SERVICEBERRY		Amelancier laevis	1"-1 1/2" CAL.	18	15' O.C., SET AS SHOWN
SHRUBS	BARBERRY		Barberis thunbergi 'Crimson Pygmy'	18"-24" HGT.	67	3' O.C., STAGGERED
LIGHTS	AREA LIGHTS		---	---	5	---

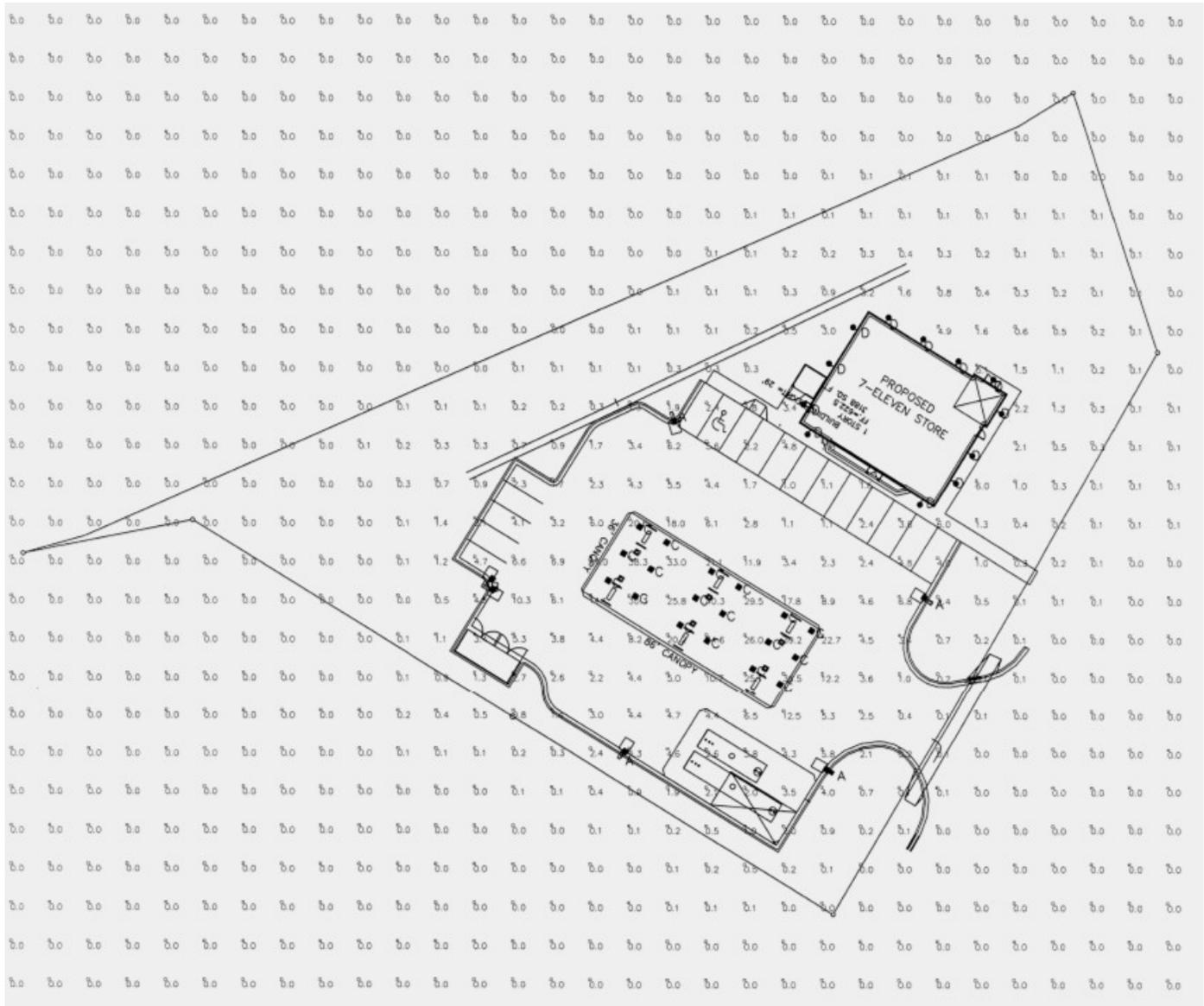
LANDSCAPE TABULATION		
	REQUIRED	PROVIDED
LANDSCAPE STRIP RIGHT-OF-WAY PROPERTY LINE	10' 4'	10' 10'
LANDSCAPING RIGHT-OF-WAY PROPERTY LINE	1 tree/40'; 3' hedge wall 1 tree/40'	29 trees; 52 shrubs 9 trees; 15 shrubs
INTERIOR LANDSCAPING	5% of parking lot Parking Lot Area: 13,000 SF; 5%=650 SF	675 SF (5.2%)



The site will have 52 percent green area, although only 10% is required by the Zoning Ordinance. According to Petitioner’s civil engineer, Richard Hurney, there is significant vegetation along Ridge Road, which will be retained. Petitioner will put a small “keystone retaining wall” right along the edge of the property, so as not to disturb the adjacent slope. There are street trees presently planted along Henderson Corner Road and Ridge Road. Those will remain in place. Petitioner will supplement some of the existing vegetation on Ridge Road by planting deciduous trees and shrubs in front of the keystone retaining wall to further supplement the vegetation, as can be seen on the landscape plan, above. Petitioner will also be planting more trees on its property along Henderson Corner Road and some trees in the buffer area between the subject site and the McDonalds and the Chevy Chase Bank site. Everything shown on the above landscape plan will be new plantings.

The lighting plan and photometric study is shown in Exhibit 5(d), which is reproduced below:





Statistical Area Summary					
Label	Avg	Max	Min	Avg/Min	Max/Min
SUMMARY INSIDE CURB	4.77	18.0	0.1	47.70	180.00
CANOPY SUMMARY	28.81	40.3	17.8	1.62	2.26

Luminaire Schedule							
Symbol	Qty	Label	Arrangement	Lumens	LLF	Description	Total Watts
☐	4	A	SINGLE	32000	0.720	GFM FP 320 PSMV F-S-18' POLE	368
⋈	1	B	2 @ 90 DEGREES	32000	0.720	GFM FP 320 PSMV F-D90-18' POLE	736
☐	18	C	SINGLE	20000	0.720	RIC-S-250-MH-73	295
⊙	12	D	SINGLE	8500	0.720	AD200-100-MH-WHT-PC3	129

There will be five pole lights on concrete bases, two near the entrance at Henderson Corner Road, one in the northwest corner of the parking lot, one in the southwest corner of the parking lot, and one in the middle of the parking lot between the McDonalds and the canopy. The pole lights will be mounted on 18-foot poles. With two feet added for the light, the five pole lights will be 20 feet in height, but all the lights will have shoe box lenses that are focused downward so as not to produce glare into the surrounding properties. There will also be recessed lighting underneath of the canopy for the patrons using the gas pumps. The average light level under the canopy will be about 28.8 footcandles, and the average in the parking lot inside the curb area will be about 4.77 footcandles, which is typical for a commercial center parking lot. The photometric plan indicates that there will be low readings around the edge of the property line.

The only lights on the building itself are architectural features. They will be small lamps to provide some minor lighting along the sides of the building, but they are not meant for major light distribution. Mr. Hurney testified that the amount of lighting will be adequate for safety and for other security concerns.

The question of the applicability of Zoning Ordinance §59-G-1.23(h) to this case was discussed at the hearing. Tr. 56-59. That section is entitled, "Lighting in residential zone," and the subject site is not in a residential zone. However, the text of the section provides that all outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. Although the residential area is not abutting or adjoining, it is adjacent under the definition of that term, as it is nearby. Mr. Hurney opined that no direct light will intrude into an adjacent residential property. Technical Staff agreed (Exhibit 20) because of the low level of light spillage, the distance to the nearest residences (about 200 feet away) and differences in elevation. The photometric study supports this conclusion because it shows 0.0 footcandle readings at all locations near the area of residential properties. Because the site is not actually in a residential

zone, Petitioner does not have to meet the requirements of 0.1 footcandles at the side and rear property lines.

The pumps and the tanks will have safety features to avoid spills or fires. All the tanks and piping will be double-walled, with interstitial monitoring for leakage. They will meet all the current federal and state codes. There is an automatic shutoff, an emergency shut off at the pump island, so that if anything does happen, the pumps will immediately shut down. Tr. 59-60.

A turning template for the site (Exhibit 28) demonstrates that a WB-50 tanker truck, which is the size of a truck that would be delivering fuel to the 7-Eleven store, can safely negotiate the site. All the turning movements can be made so that they do not interfere with any parked vehicles, and the truck does not have to make any backup, three-point type turning movements. Mr. Hurney testified that access to the site for oil deliveries, by tanker truck, will be safe and efficient. Tr. 60-61.

C. The Master Plan

The subject site is subject to the Germantown Master Plan (the “Master Plan”), which was approved and adopted in July 1989. The Master Plan directly addresses the subject site on page 84, in connection with the Neelsville Village Analysis Area NE-8:

. . . The triangular property between MD 355, existing MD-27 and proposed M 27 [*i.e.*, Henderson Corner Road] is recommended for limited retail use under the C-3 Zone. The uses appropriate at this location are limited to a convenience food and beverage store, a gas station, a car wash, and a bank. The development of this property should recognize its gateway location through the placement of the buildings, landscaping and berming, and building design. The building materials, roof line, and landscaping should be consistent with those of the convenience retail center (Neelsville Village Center) across MD 355. Further, the development of this property should be compatible with the proposed residential development across MD 27 and particular care should be taken in the design, height, and location of exterior lighting fixtures.

Community Based Planning Staff (*i.e.*, the “Vision Division” concluded that “The use of this property as an automobile filling station with accessory convenience store conforms to the land use recommendations of the 1989 Germantown Master Plan.” Exhibit 18, Attachment 6.

As noted on page 14 of this report, the proposed use has recognized the site's gateway location by placing the front of the building facing Ridge Road, including a tower in front, and designing its architecture with brick. Compatibility is achieved by using landscaping for screening and by the large differences in elevation between the site and nearby residential communities.

Based on this record, the Hearing Examiner finds, as did Technical Staff, that the proposed use is in conformance with the Germantown Master Plan.

D. Adequacy of Public Facilities

At the hearing, the Hearing Examiner raised the question of whether the Planning Board or the Board of Appeals would be assessing the adequacy of public facilities in this case. Petitioner's attorney, Stanley D. Abrams, Esquire, explained that Subdivision will be limited in this case because a preliminary plan (Preliminary Plan No. 120061210) was already approved for this property when it was intended to be the site of a drive-through bank in 2006, and the anticipated traffic from the newly proposed use (a filling station) will be less than that which was anticipated for the bank. Thus, only an amendment to the approved preliminary plan will be required. Tr. 7-10.

The record was held open to obtain a clarification from Technical Staff as to whether the adequacy of public facilities would be addressed at the limited subdivision amendment anticipated in this case. The Hearing Examiner inquired by e-mail on February 27, 2009, and Technical Staff responded on March 4, 2009, that the adequacy of public facilities would be addressed at the limited amendment to the preliminary plan. Exhibit 34. Since the proposed use will require an amended preliminary plan of subdivision, in accordance with Zoning Ordinance §59-G-1.21(a)(9), approval of this special exception must be conditioned upon approval of the amended preliminary plan of subdivision by the Planning Board. A condition to that effect is recommended in Part V of this report. Although the Planning Board, and not the Board of Appeals, will determine the adequacy of

public facilities in this case, a brief description regarding public facilities follows.⁸

1. Transportation:

All road dedications required for this site were made in connection with the previously approved preliminary plan.

Michael Lenhart testified as Petitioner's expert in traffic planning and engineering. Tr. 87-105. He prepared a traffic impact analysis for the proposed use (Exhibit 9), in conformance with the Planning Commission's guidelines for local area transportation review (LATR). His LATR analysis required that he study of the intersections of Maryland 27 at Brink Road, MD 27 and at Henderson Corner Road, Henderson Corner Road at the site, and MD 355 at Henderson Corner Road. All of those intersections are currently operating within the threshold level of service, 1425 critical lane volume (CLV), prescribed for the Germantown-East policy area. They are projected to remain within that threshold with background development (*i.e.*, development in the pipeline already) and with the development of this site, labeled "Total," on the following table from the Technical Staff report (Exhibit 18, p. 4):

Table 1: Intersection Capacity Analysis (Peak Hour Traffic Demands)

Intersection	Existing		Background		Total	
	A.M.	P.M.	A.M.	P.M.	A.M.	P.M.
MD 27/ Brink Rd.	1,019	1,085	1,357	1,422	1,360	1,424
MD 27/ Henderson Corner Rd.	264	755	330	1,014	334	1,011
MD 355/Henderson Corner Rd.	988	981	1,046	1,022	1,050	1,027

With respect to policy area mobility review (PAMR), Mr. Lenhart noted that the original preliminary plan for a Sovereign Bank on the site was approved under the old Growth Policy guidelines, which did not have PAMR requirements. Because the site had an approved Preliminary Plan, and primary trips which will be generated by the 7-Eleven are the same or fewer than the

⁸ School capacity is not an issue in this case because gas stations do not generate new students (though they may attract them). The Hyatttown Fire Station #29 and the Germantown Police Station are located along Aircraft Drive, north of MD 118, slightly over two miles from the Property. Exhibit 10, p. 2.

primary trips that would have been generated by a drive-through bank, Technical Staff made a finding that the site satisfies the PAMR requirements (Exhibit 18, p. 4 and Attachment 7, p. 3).⁹ If the new project had generated more traffic, then Petitioner would have had to mitigate the net increase in traffic to satisfy a PAMR requirement.

Mr. Lenhart further testified that from a traffic engineering or transportation planning standpoint, the proposed special exception at this location will not cause any adverse effects upon adjacent or adjoining roadways that is different, either in kind or degree, from those effects which would be inherently associated with this use elsewhere on C-3 zoned land.

The signalized intersections, as well as the four-way stop sign on the road to the south, aid traffic movement into and out of the site by providing gaps in traffic along Henderson Corner Road, which make it easier for motorists to enter and exit the site. The four-way stop at Seneca Crossing Drive also provides a form of traffic speed control along the roadway. There are also adequate sight distances, and a very good network of sidewalks along both sides of Henderson Corner Road, between Ridge Road and along Ridge Road, and along MD 355. Mr. Lenhart therefore concluded that both vehicles and pedestrians can safely access the site, and the use will not reduce vehicular or pedestrian safety. Technical Staff agreed with these conclusions, both with regard to vehicular access and circulation (Exhibit 18, Attachment 7, p. 1) and with regard to pedestrian safety (Exhibit 18, Attachment 7, p. 2).

⁹ The Hearing Examiner raised the question at the hearing of whether Staff's interpretation would satisfy the special exception requirements since the gas station special exception petition was filed after the effective date of the new Growth Policy, which does have PAMR requirements. Petitioner filed a memorandum of law arguing that either PAMR does not apply, or it has been satisfied if it does apply, because the original Preliminary Plan is vested and no additional trips will be generated (Exhibit 36(a)). Petitioner's (and Staff's) interpretation of the Growth Policy appears reasonable, but the Hearing Examiner need not reach the issue because Technical Staff has made it clear (Exhibit 34) that the Planning Board will review the public facilities issue at Subdivision, and thus it will make the determination regarding PAMR, not the Board of Appeals. Mr. Lenhart stated that if there had not been a prior preliminary plan approval, the site would be required to mitigate its primary trip impact to satisfy the PAMR requirements. The primary trips are 16 in the morning and 30 in the evening, and the Germantown East Policy Area requires 100 percent mitigation.

2. Parking:

The parking requirements for the special exception are based on a combination of an automobile filling station and a “retail, general” use. Zoning Ordinance §59-E-3.7 specifies the following parking spaces for these uses:

***Automobile filling station.** Two parking spaces for each car wash bay, grease bay or similar service area, and one parking space for each employee.*

***Retail, general.** Commercial establishments devoted to retail sales, merchandising or other similar use, except furniture stores, 5 parking spaces for each 1,000 gross leasable square feet. In accordance with the exception provision of Section 59-E-5.8 all storage space that exceeds 35 percent of the total gross leasable area shall be excluded in calculating the number of required parking spaces.*

Technical Staff states (Exhibit 18, pp. 8-9):

An automobile filling station must provide two parking spaces for each car wash bay or similar service and one parking space per each employee. In addition, a general retail operation must provide five parking spaces for each 1,000 gross leasable square feet. In this case, only seven employees will be on-site at any one time and 1,674 square feet of the service building will be devoted to the convenience store. No carwash or service bays are proposed. Based on the applicant’s proposal, it is estimated that sixteen spaces would be required: five will be adjacent to Ridge Road and the remaining 11 near the convenience store entrance. [Emphasis added.]

Since there will be a maximum of 7 employees on site at any one time, and no car wash or repair bays, the filling station part of the operation requires 7 spaces. There will also be 1,674 square feet of leasable floor area in the convenience store building, which would require 9 spaces ($1.674 \times 5 = 8.37$). As previously noted and as shown on the Site Plan (Exhibit 4(a)), Petitioner will provide the required 16 spaces. Technical Staff observes that Petitioner will also comply with the landscaping requirements for parking facilities prescribed Zoning Ordinance §59-E. Exhibit 16,p. 9.

3. Water and Sewer:

Mr. Hurney testified that water and sewer services will be provided by tapping into existing

Washington Suburban Sanitary Commission (WSSC) facilities. The water connection will come from the WSSC public main along Henderson Corner Road. There is the existing WSSC sanitary sewer system on the adjacent McDonalds property, and Petitioner will extend the sewer line and tie into that system. In Mr. Hurney's opinion, the sanitary sewer and water facilities are adequate to handle the proposed use.

E. Environmental Impacts

The subject property is not within a Special Protection Area. Exhibit 4(a)). A Natural Resource Inventory/Forest Stand Delineation (NRI/FSD) was reviewed and approved for the original bank proposal for this site (Exhibit 6(e)). Technical Staff indicated in an October 10, 2008, letter from Mark Pfefferle, Forest Conservation Project Manager, that a new NRI/FSD was not required for the 7-Eleven project because a forest conservation plan has been approved by the Planning Board (Exhibit 6(f)).

Mr. Hurney testified that the site plan and the landscape plan conform to County forestation requirements. A final forest conservation plan had been approved for the site when it was going to be used as a Sovereign Bank. Exhibits 6(c) and (d). It was determined then that a fee would be paid based on the level of disturbance. That fee for the forest conservation plan for Sovereign Bank has been paid, and the site has been approved for removal of the trees. Petitioner has prepared an amended forest conservation plan for the new use of this site (Exhibits 6(a) and (b)), which will be presented for approval as a site plan amendment.

The storm water management plan was approved for Sovereign Bank, and the impervious area for the proposed use will be less than for the Sovereign Bank. The new storm water management plan for the 7-Eleven is contained in Exhibits 13(a), (b) and (c). There will be curbing around the whole property, and the stormwater will discharge through the southwest part of the site, and go down to the public storm drain system at the intersection of Route 27 and Route 355. It

drains westerly towards I-70, and away from the residential subdivision. Thus, according to Mr. Hurney, the storm water management facilities will be adequate, and there won't be any runoff to the Seneca Crossing Subdivision from the subject property. DPS approved the stormwater management concept plan for the proposed 7-Eleven on June 26, 2008 (Exhibit 27).

As previously mentioned, the environment will be protected against fuel spills and fumes by automatic shut-off valves, double-walled tanks and pipes, vapor recovery systems and monitoring for leakage. There is no evidence in this case that the proposed use will harm the environment.

F. Neighborhood Need

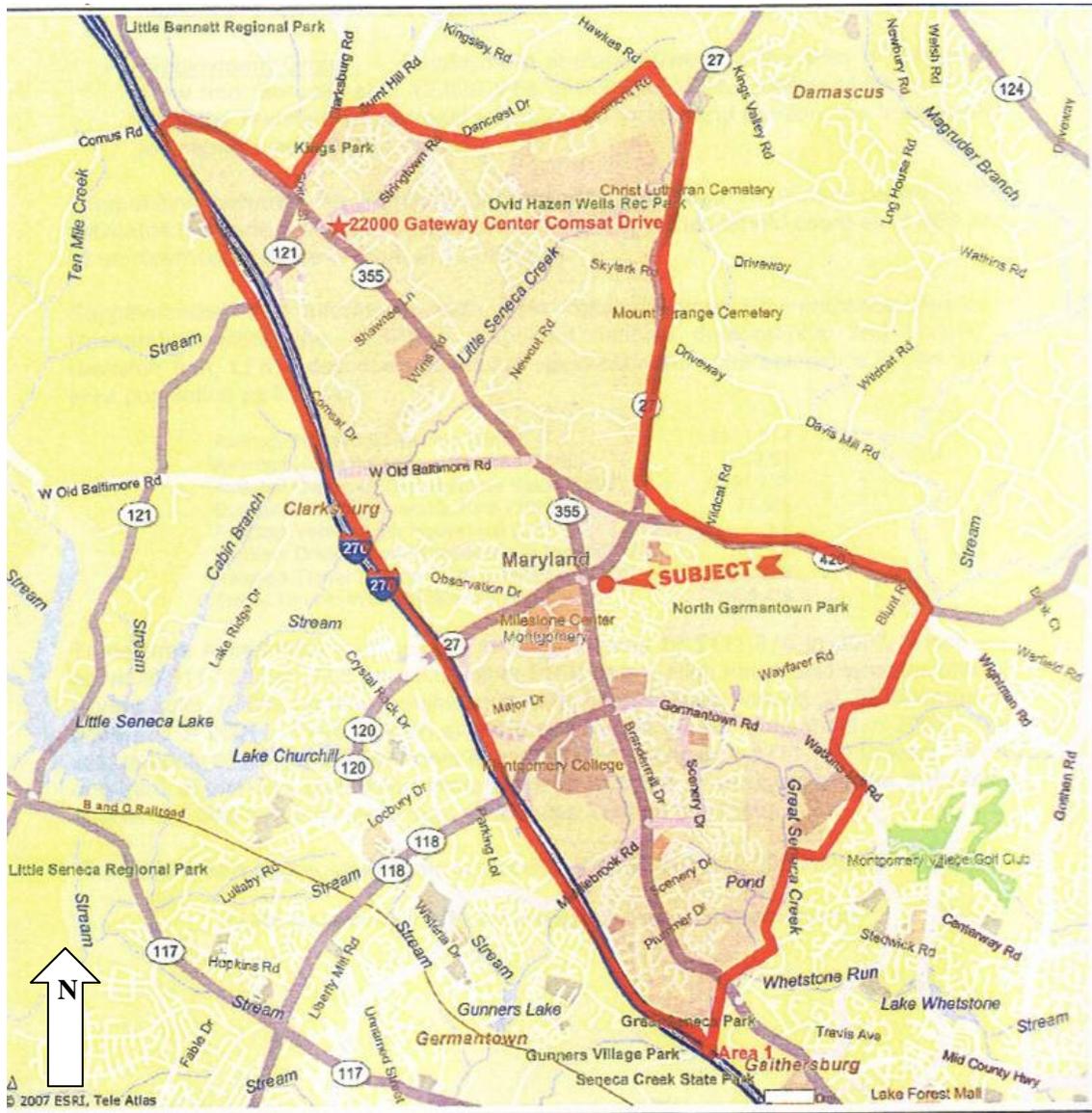
An Automobile filling Station is one of the special exceptions listed in Zoning Code §59-G-1.24 that requires a determination of neighborhood need. Specifically, the section requires, as a prerequisite to granting the special exception, that the Hearing Examiner find, “from a preponderance of the evidence 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.”

To meet this standard, Petitioner submitted a “Need Analysis” (Exhibit 12), completed by an expert in market and need analysis, Joseph Cronyn of Lipman, Frizzell and Mitchell, LLC. Mr. Cronyn also testified at the hearing, explaining his study (Tr. 105-117).

Mr. Cronyn testified that he first ascertained the average daily traffic along the roads adjacent to the site from a State Highway Administration 2006 Traffic Volume Map. These figures are listed on page seven of his report. On Ridge Road, just north of Frederick Road, which Mr. Cronyn felt would be the most reasonable location for taking a snapshot of traffic, there were about 25,000 daily trips going past that location in 2006. As of spring, 2007, that number is actually up to almost 32,000.

Mr. Cronyn defined the market area as more or less the same as the Germantown East policy area. This market or “trade” area is defined in narrative form on page 10 of Mr. Cronyn’s report, and

then depicted in a map on the following unnumbered page. That map is reproduced below:



The trade area is defined as the Germantown East Policy Area and the portion of the Clarksburg Planning Area located east of I-270. The trade area has the following boundaries: I-270 on the west, Great Seneca Creek on the south and east and Piedmont Road on the north.

Mr. Cronyn explained that a market area for a trade analysis is determined by geographic boundaries, traffic patterns, concentrations of uses and competing areas. In this case, he looked to retail uses that will shape where people are drawn from and which areas of residences consumers will

be coming from. Where there is another center of gravity for retail uses, that will also shape the way that this market area is drawn. The trade area is the area where, normally speaking, people would be coming from to patronize commercial uses and commuting through this area on a daily basis from their residences in the market area. The site is located fairly central to the trade area. It is about three miles to the northern edge, about two miles to the southern edge, and about a mile on each side, east and west.

The next step in determining need is to look at the residential population in the area, and also commuter traffic through the area, including people who do not live in the market area but who might be coming through for the retail uses at the big shopping centers that are nearby. For the residential population, the number of households is determined; how much they earn; and what they will be spending for gasoline. The process is very similar to the retail analysis for any other retail goods. The statistical ratios are very well determined over the long haul through the Census Bureau, Bureau of Labor Statistics Consumer Expenditure Survey, which is used as part of this analysis. Based on the consumer expenditure survey ratios, one can determine how much money consumers are likely to spend for gasoline purchases. That figure is then translated into gallons.

In this case, Mr. Cronyn found was that, on average, a household in the market area is likely to purchase about 1,400 gallons of gasoline per year, resulting in aggregate purchases of 16.45 million gallons per year for all households residing in the area. The area itself is never going to capture 100 percent of those purchases. Applying a reasonable estimate, used in Prince George's County and other places in the Washington area, about 60 percent of those household purchases are actually going to happen within the market area. Mr. Cronyn therefore concluded that 9.87 million gallons of gasoline a year are going to be demanded and captured, or will be available for capture, within the market area from resident households.

In this case, there is a commercial center with a regional shopping center and other major

shopping areas near the subject site. It is also a major commuter thoroughfare with many people coming through the area, and those people are going to be purchasing gasoline as they commute to work, or as they go to the shopping center.

Mr. Cronyn's calculation was that approximately a third of the total traffic on the market area roads is either through commuters or shoppers in the area, people not living right in the area. The amount of gasoline that those non-resident commuters and shoppers would be purchasing, based on their proportion of the traffic count, is a little less than 5 million gallons a year.

Adding the local and commuter transient sources to the residential demand, about 14.8 million gallons of gasoline are available for capture in the market area in 2008. According to Mr. Cronyn, that demand exceeds the supply. The difference is approximately 1.8 million gallons a year, taking into account the nine gas stations that are within the market area. Those stations are enumerated on page 16 of his report. On average, a gas station in this area will pump about 1.44 million gallons a year. Multiplying that by nine comes to 12.96 million gallons per year in supply. Thus, the existing stations in the area are not meeting all of the demand that they could capture within the market area.

In Mr. Cronyn's opinion, this unserved need can be met by the proposed station without causing any of the other filling stations to be seriously compromised or go out of business. The addition of the station would be reasonably convenient and useful to the general public. The 7-Eleven also offers other features that are useful to the public. He indicated that the public need standard in the County Zoning Ordinance does not require a showing of absolutely necessity, but rather that the proposed use would be reasonably convenient and useful to the public; that it offers services that the public might desire. *Lucky Stores, Inc. v. Board of Appeals of Montgomery County*, 270 Md. 513, 312 A.2d 758 (1973). That is the standard he applied in concluding there is an unmet need for the proposed gas station.

Technical Staff in the Development Review Division agreed with Mr. Cronyn's need analysis,

stating (Exhibit 18, p. 11), “The analysis provided by the consultant’s report demonstrates sufficient proof of a need in this neighborhood for the proposed automobile filling station.” However, Technical Staff’s Research and Technology Division (Exhibit 18, Attachment 10) challenged Mr. Cronyn’s analysis of available supply, asserting that numerous sources suggest that gas stations can pump between 2.19 and 2.88 million gallons per year, figures much higher than Mr. Cronyn’s estimate of 1.44 million gallons a year. If one employs these estimates from Technical Staff and multiplies 2.19 and 2.88 million gallons times the nine existing stations, it appears that the existing nine stations could supply between 19.8 million and 25.9 million gallons per year, and there would be no undersupply or market gap.

Research and Technology Technical Staff therefore concludes that Petitioner has not proven “that it is necessary to have another gas station in the trade area.” Nevertheless, Research and Technology Technical Staff recognized that necessity is not the criterion applied to need analysis in the County. They correctly state the case law definition of “need” as that which is “expedient, reasonably convenient and useful to the public.” *Lucky Stores, supra*, 270 Md. 513 at 527-28. Thus, their “bottom line” is to recommend approval and leave it to the market “[to] determine if another gas station in the trade area is useful or not.”

It could well be argued that the case law definition of need eliminates, or at least reduces, the utility of supply/demand market analysis, of the kind employed in this and other similar cases. We need not decide that issue now, and leave it to the Council to determine whether the standard should be modified or repealed. Suffice it to say, for this case, that all of the experts evaluating need found that the proposed use satisfies the applicable criteria. Given the evidence that was presented that the subject site would be a convenient and useful location for a gas station, the Hearing Examiner finds that need for the special exception has been established under the recognized standard.

G. Community Response

There has been no opposition or any other community response to the subject proposal.

III. SUMMARY OF THE HEARING

Petitioner called five witnesses at the hearing, Richard Hurney, a civil engineer; Phil Perrine, a land planner; Michael Lenhart, a transportation planner; Joseph Cronyn, an expert in market and needs analysis; and Bob Fitzgerald, a real estate development consultant. There was no opposition and there were no other witnesses.

At the outset of the hearing, the Hearing Examiner raised the fact that the mailed notice contained the subject site's correct street address, but it incorrectly identified the town as "Derwood," instead of the correct location, Germantown. This error likely resulted from the fact that the owner's mailing address is in Derwood. After hearing from Petitioner's counsel, the Hearing Examiner announced that he felt the error did not result in a failure of notice because the street address was correct, and those in the area receiving the mailed notice would realize that the location was a street address in their neighborhood. The omission was therefore inconsequential. Petitioner's counsel agreed and did not request that further notice be mailed out. Tr. 4-6.

Martin Klauber, Esquire, the People's Counsel, was unable to attend the hearing, but suggested to the Hearing Examiner that Petitioner be required to keep an employee attendance log available for inspection by DPS. At the hearing, Petitioner agreed to do so, at least in the form of time and attendance reports. Tr. 6.

In response to a question from the Hearing Examiner, Petitioner's attorney, Stanley D. Abrams, Esquire, explained that Subdivision will be limited in this case because a preliminary plan was already approved for this property when it was intended to be the site of a bank in 2006. Thus, only an amendment to the approved preliminary plan will be required. Tr. 7-10. At the end of the hearing, the record was held open until March 13, 2009, to obtain a clarification from Technical Staff

as to whether the adequacy of public facilities would be addressed at the limited subdivision amendment anticipated in this case.

Petitioner's Case

1. Richard Hurney (Tr. 13-65; 126-128):

Richard Hurney testified that he is the president of Huron Consulting, and is a professional engineer licensed in Maryland. He testified as an expert in civil engineering. Mr. Hurney first performed some civil engineering on the site about three-four years ago, doing a preliminary plan for a Sovereign Bank at this property. It went through preliminary plan, which was approved in November of 2006. The site plan was approved in February of 2008, and a record plat was recorded for the property, as Parcel E, in February of 2008 (Exhibit 23). Shortly after that, Sovereign Bank decided not to proceed on the development of the property, and at that point in time, the owner arranged for the 7-Eleven to go on the site.

Mr. Hurney prepared a site plan for the 7-Eleven, and used a rendered version (Exhibit 24) to discuss it. He then discussed the property and its immediate environs. The total size of the property is 55,476 square feet, which is 1.27 acres. It is located between Henderson Corner and Ridge Road (Route 27). The frontage on Route 27 is 446 feet, and the frontage on Henderson Corner is approximately 350 feet. It forms a triangular piece of an area that's basically an island, shaped out by Ridge Road to the north, Henderson Corner Drive to the east, and Route 355 to the west. The zoning is C-3 for the entire property, and for the property adjacent to the south of the site.

Immediately to the south of the site is a Chevy Chase Bank and a McDonald's fast food restaurant. The property itself sits upon a fairly high knoll. There's a significant slope and drop off to Ridge Road, Route 27. It's around a 3 to 1 slope, and the height varies anywhere from 16 to 22 feet, so it's significantly higher than Ridge Road, which makes any kind of access to Ridge Road unattainable. Across Henderson Corner, which is also a divided highway, a 100-foot right-of-way

with two lanes in each direction, there is the residential subdivision of Seneca Crossing. That subdivision, when it was built, was significantly lower than the Henderson Corner Road elevation. The roofs of the houses of Seneca Crossing, which are immediately across the street from the proposed 7-Eleven, basically are at the same elevation as Henderson Corner Road. So there is about a 15 to 20-foot grade drop off from the road down to the back of the houses. Exhibit 17(a) shows cross-sections of the property one going east to west, and the other one from north to south. It demonstrates the different elevations.

Mr. Hurney then used photos of the adjacent areas, marked as Exhibits 26(a)- (i), to show the different elevations and the views from and of the subject site. According to Mr. Hurney, they show that the site of the 7-eleven gas station will be largely not visible from the residential community because of the difference in elevations. It will, therefore, not have an impact on the visuals from the surrounding community. Tr. 22-28.

There cannot be any vehicular access from this property to Maryland Route 27, because of the steep slope that separates them. Referring back to Exhibit 24, the subject property will have access solely from Henderson Corner Road. Entry will be by left or right turn in, but exiting is right turn only. The turn lane allowing left turns into the site was previously designed and permitted through DPS and DOT for the Sovereign Bank site. Petitioner has utilized the same turn lane for the proposed, so that the same permit application will suffice. Also, the entrance that was approved for Sovereign Bank has the same position, location and dimensions as the current proposal, and an entrance permit has been obtained.

The site has the one access point. The store, which is in a 3,188 square foot building, will be located in the northeast quadrant of the property. There will be 11 parking spaces in front of the site. There are an additional five spaces on the northwest side of the parking lot. There will be a canopy which will have six, two-sided gas pumps, with 12 fueling positions, located in the center of the

property. The underground storage tanks will be located in the southeast portion of the property. The storm water management for the property will be located on the southwest section of the property.

The storm water management plan was approved for Sovereign Bank, and the impervious area for the proposed use will be less than the Sovereign Bank. DPS also approved a storm water concept for the proposed 7-Eleven on June 26, 2008 (Exhibit 27). There will be curbing around the whole property, and the storm water management will discharge through the southwest part of the site, and go down to the public storm drain system at the intersection of Route 27 and Route 355. It drains westerly towards I-70, and away from the residential subdivision. Thus, according to Mr. Hurney, there won't be any runoff to the Seneca Crossing Subdivision from the subject property.

There is a WSSC water main that comes across Ridge Road, crosses the northeast quadrant of the property in an existing easement, and then parallels Henderson Corner Road along the frontage of the 7-Eleven property. The water connection will come from WSSC off of the public main along Henderson Corner Road. There is the existing WSSC sanitary sewer system on the McDonalds property, and Petitioner will extend the sewer line and tie into that system. In Mr. Hurney's opinion, the storm water management facilities and sanitary sewer and water facilities are adequate to handle the proposed use.

There are 16 parking spaces required, and 16 will be provided. The canopy will have a clearance height of 14 and a half feet, which meets the requirements of the American Association of State Highway and Transportation Officials (ASHTO), as shown in Exhibit 4(e).

The building will be all brick. It will also include a tower element on the building at the front elevation which faces into the Ridge Road, Henderson Corner side of the site to comply with the Master Plan's call for gateway features. The front, as you will see coming down from Ridge Road, will have the doors and windows. The actual service side, with the fueling positions and the parking

spaces, will be hidden behind that view because people coming down in a westerly direction from Ridge Road heading towards 270 will see the northeast side of the building, labeled the “front elevation.” All of the elements of the brick work and the trim and cornice features from the building are duplicated onto the canopy. All the canopy columns will be brick. The monument sign out on Henderson Corner Road will be on a brick pedestal that has the same architectural brick and elements from the store, the canopy and the monuments. It's the rear elevation of the building that faces towards the canopy. So people enter from the rear. The C-3 zone requires that all parking be to the side and rear of the building.

The site plan reflects a 30-foot wide driveway entrance, and that conforms to the zoning ordinance requirements for this use. The Floor Plan (Exhibit 4(f)) shows a building of 3,188 square feet. The customer service area consists of a sales counter adjacent to the front door, which is open for access only by the sales employees, and the same thing with a pass through preparation area. There is no real food prepared on site. It's just heated and redistributed. There is an office behind the sales counter for the exclusive use of the employees. There are two rest rooms, both ADA accessible, that are open and available to the public, located to the right side of the building. Along the wall to the upper part of the page, is a sales counter area. This has sodas and coffee and similar merchandise items. Across from the sales counter area is a cooler vault area which sells milk, juices, and soda pops. There is no access to the cooler areas, except they can open the doors and get the food out. There is another customer service area that usually has a copier and ATM type machines.

Mr. Hurney also testified about the landscape plan (Exhibit 5(a)) and its rendered version (Exhibit 17(b)). There is some significant vegetation along Ridge Road, which will be retained. Petitioner will put a small “keystone retaining wall” right along the edge of the property, so as not to disturb the adjacent slope. There are street trees presently planted along Henderson Corner and Ridge Road. Those will remain in place. Petitioner will supplement some of the existing vegetation

on Ridge Road by planting deciduous trees and shrubs in front of the keystone retaining wall to further supplement the vegetation. Petitioner will also be planting more trees on its property along Henderson Corner and some trees in the buffer area between the subject site and the McDonalds and the Chevy Chase Bank site. Everything shown on the landscape plan will be new planting. The site will have 52 percent green area, although only 10% is required.

Mr. Hurney opined that the site plan and the landscape plan conform to County forestation requirements. A final forest conservation plan had been approved for the site when it was going to be used as a Sovereign Bank. It was determined that a fee would be paid based on the level of disturbance. That fee for the forest conservation plan for Sovereign Bank has been paid, and the site has been approved for removal of the trees. Petitioner has prepared an amended forest conservation plan for the new use of this site, which will be presented for approval as a site plan amendment.

The lighting plan and photometric study is shown in Exhibit 5(d). There are five lights, two near the entrance at Henderson Corner, one in the northwest corner of the parking lot, one in the southwest corner of the parking lot, and one in the middle of the parking lot between the McDonalds and the canopy. There will also be recessed lighting underneath of the canopy that will be lit up for the patrons under the canopy. All the lights are shoe box type lenses that are focused downward so not to have glare to the surrounding properties. The photometric plan indicates that there will be low readings around the edge of the property line. The average under the canopy is 28.8 footcandles, and the average in the parking lot inside the curb area comes out as 4.77 footcandles, which is typical for a commercial center type parking lot. The poles, again, are on a concrete base. They are 18 foot poles with two feet above, so they are 20 feet in height, but they are a shoe box type and they are directed downward onto the property.

The only lighting that's on the building itself are architectural features. They're small architectural lamps that will provide some minor lighting along the sides of the building, but not

meant for major light distribution. Mr. Hurney finds the amount of lighting to be adequate for safety and for other security concerns. The subject site is not in a residential zone. He opined that no direct light will intrude into an adjacent residential property. The photometric study shows 0.0 footcandle readings when you get to anywhere near the area of residential properties.

Mr. Hurney further testified that the pumps and the tanks have safety features to avoid spills or fires. All the tanks and the piping are double-walled tanks, and double-walled pipes with interstitial monitoring for leakage. They will meet all the current federal and state codes. There is an automatic shutoff, an emergency shut off at the pump island, so that if anything does happen, the pumps immediately shut down.

Mr. Hurney also stated that access to the site for oil deliveries, by tanker truck, will be safe and efficient. A turning template for the site (Exhibit 28) so demonstrates for a WB-50 tanker truck, which is the size of a truck that would be delivering fuel to the 7-Eleven store. All the turning movements can be made so that they do not interfere with any parked vehicles, and the truck does not have to make any backup, three-point type turning movements.

Mr. Hurney also measured the distance from the access point to the nearest intersections, both north and south of this property. From the entrance to the 7-Eleven, up to the center line of the Seneca Crossing Drive intersection is 325 feet. From the center line entrance of the 7-Eleven to the intersection of Route 27 and Henderson Corner is 340 feet. So the entrance is almost at the midpoint of the two intersections.

The distance between the pump islands and the existing right-of-way on Route 27 is approximately 63 feet, and it's 61 feet from Henderson Corner. The gas pumps located at least 10 feet behind the building line. From the end of the parking space to the front of the pump island is a 40 foot clearance. From the pump island to the convenience store entrance is 66 feet.

According to Mr. Hurney, the buildings and the structures which are proposed for this site

are set back from Maryland Route 27 and Henderson Corner Road, more than the distances which are required in the zoning ordinance for the C-3 Zone. All road dedications required for this site been made previously.

In Mr. Hurney's opinion, the subject special exception as reflected in the site plan will not be in any way be detrimental to the use and enjoyment of adjacent properties since this was planned to be a commercial area, shielded from residential areas, and Petitioner has also designed the site to maintain the integrity of the surrounding area and the slopes. Petitioner has tried to minimize the disturbance of the site, maximized the green space there, reduced the impervious area, and the footprint and size of the building, so it will have less of an impact on the surrounding area. In his opinion, this is a compatible form of development with what exists in the surrounding area, and what's planned for that area. The special exception, as proposed, meets all the special and general conditions and criteria for approval from an engineering standpoint.

Mr. Hurney discussed the signage planned for the site. 7-Eleven signs will be placed on the building and on the canopy, as shown in Exhibits 4(e) and 17(b). The sign is approximately four feet by four feet. There will be two of the signs, the 7-Eleven signs on the tower element of the building, one at the front elevation, and one on the left side elevation, which will be facing Henderson Corner Drive. There is also a 7-Eleven sign that is part of the fascia above the front store of the building. And then there is a three-by-three foot 7-Eleven sign, which is on the left side of the four corners of the canopy. There will also be a monument sign, which is shown in Exhibit 17(c). The monument sign is on a brick base, which is five feet tall, making the sign 10 feet in height, from the ground level. That monument sign will be located adjacent to the entrance along Henderson Corner, set back off of the right-of-way in the area north of the entrance, to be visible from Henderson Corner Drive. All signs will meet the sign ordinance requirements for the specific use at this specific location, and permits will be obtained from DPS. Tr. 126-128.

2. Phillip Perrine (Tr. 66-86):

Phillip Perrine testified as an expert in land planning. Using an aerial photo (Exhibit 30), Mr. Perrine defined and described the general neighborhood. Immediately to the north of the site, on the north side of Ridge Road, is a wooded property owned by the Maryland-National Capital Park and Planning Commission. North of that is the Ridge Road Park, which is developed with a number of ball fields and soccer fields. On the west side of 355, north of Ridge Road, is the Milestone residential area. South of Ridge Road is the Neelsville Village Center, which is a local commercial service area, and the Milestone Regional Shopping Center, which includes commercial places such as Wal-Mart and other large-scale commercial uses. To the south and east of Henderson Corner Road is the Seneca Crossing residential development. There is a tributary to the Great Seneca Creek to the southeast of that area. The surrounding area is bounded by property to the north of the Seneca Crossing residential area, and then extending across to the Planning Commission property, bounded by Ridge Road on the west side of 355, including the commercial areas that are west of 355, and bounded on the south by Shakespeare Boulevard, and over to the east by the tributary of Great Seneca Creek. The western boundary is Observation Drive.

This is not the same as the trade or market area, which is larger than the immediate surrounding area.

There's a mix of commercial, residential and recreational uses in the surrounding area. There's a large commercial component, a regional mall, a local shopping center and the convenience commercial uses within the Henderson Corner-Ridge Road-MD 355 triangle. There is also the single-family residential to the east and to the west across Maryland 355, and there is the open space of a Park and Planning Commission park and a recreation facility over in Seneca Crossing.

Mr. Perrine opined that the proposed use is in conformance with the Germantown Master Plan which was last adopted back in 1989. On page 84, the Master Plan specifically indicates that the

Henderson Corner, Ridge Road triangle area, is a gateway location and is an appropriate location for a convenience food and beverage store, gas station, car wash, or bank.

Mr. Perrine further testified that the proposed use is compatible with adjacent uses, given the location of the property, separated from the residential by distance and a different elevation, as well as an intervening four-lane divided road. He added that the application complies with all the filling station special exception conditions, and that it complies with the general conditions for a special exception. The use will not constitute a nuisance due to noise, fumes, odors, physical activity or glare of light. There will be no repairs or car wash on this property, and it is bounded on the east by Henderson Corner Road, a four-lane divided road, and to the west by Ridge Road, a major road, somewhat isolating it. There will be no fumes. There will be vapor recovery nozzles on the fueling stations. The lighting will be directed shoebox style lights with cut offs, so there will be no spill over, illumination, or glare into the residential area across Henderson Corner Road.

According to Mr. Perrine, the proposed use is a compatible and a logical use from a land planning standpoint with respect to the other land uses which define the surrounding neighborhood, as well as compatible with traffic on Henderson Corner Road and Maryland Route 355. It will also be available to serve not only immediately adjacent communities, but the commuters that travel up and down 355 and Ridge Road, as well as people that are customers of the regional shopping center that come back to 355. The proposed special exception will be in harmony with the neighborhood and its character, considering such elements as population, density, design and scale of buildings, and intensity, character of activity, parking, and number of similar uses. This is a relatively low density use in terms of workers on site. Normally, there would only be two to four employees on site, while on special occasions, when someone is trained or inventory is taken, there might be a few more. The building is of a scale that's comparable to the other buildings in this immediate area. It is of a character similar to these adjacent uses, auto oriented. The service area itself is an activity directed

away from the residential to the east, and it's separated topographically and by Henderson Corner Road.

Mr. Perrine further testified that the site will meet the parking requirement, and no repairs will be made on site. The Exxon Station, which is just to the south of the site is the only other filling station in the immediate area, unless you head up MD 27 toward Damascus. The use will not retard or adversely affect the logical development of the neighborhood, which is basically stabilized. The use will not be detrimental to the peaceful enjoyment, value, or development of surrounding properties. The adjacent residential to the east is screened by both topography and distance and the intervening road and plantings. Lighting would not spill over to the adjacent areas. It will provide a convenience to motorists and commuters traveling both 355 and Ridge Road, and commercial shoppers that are in this area. It has direct access to Henderson Corner Road, so there will be no impact on safety, health or welfare.

According to Mr. Perrine, the area is adequately served by police and fire protection facilities, with a fire and rescue and a police station in the Germantown area, west on 118, about two miles away. The property is not near any public or private school, active recreation facility, park, playground, hospital, or other place of public assembly. The closest public park is across Route 27, and it is an open space park. It's about 325 feet to the driveway from Seneca Crossing and about 340 feet to the north to Route 27. In Mr. Perrine's opinion, this application meets all of the special exception requirements at this location.

As to inherent effects, Mr. Perrine testified that a few things normally are associated with a filling station -- there are the fuel pumps, a building for employees and storage, traffic from customers, employees, and fuel delivery. There is the potential for tuning of vehicles; some noise related to the use, such as car doors opening and shutting; advertising signs for the gas products and the price; outdoor lighting; longer hours that you normally have associated with retail and sometimes

24 hour operation; there is the potential for environmental impact, fumes from cars, although there is the vapor recovery devices; underground fuel tanks; and there are often times and increasingly convenience stores of some sort associated with a filling station. This application has some of those things. There will be no adverse impacts at this site which are different, in kind, or to a greater degree than might be associated with an auto filling station elsewhere in the C-3 zone, in Germantown. Mr. Perrine opined that there are no non-inherent adverse effects associated with locating the proposed use at this site.

3. Michael Lenhart (Tr. 87-105):

Michael Lenhart testified as an expert in traffic planning and engineering, and prepared a traffic impact analysis for the proposed use (Exhibit 9), in conformance with the Planning Commission's guidelines for local area transportation review (LATR)

Mr. Lenhart noted that, due to elevation differences, it is not possible to access the subject site either from Maryland Route 27 directly, or from commercial areas to the south. The access is approximately 325 feet south of Ridge Road on Henderson Corner Road. And there will be a right in and right out to the site, along with a left turn into the site from Henderson Corner Road that will be constructed under an existing entrance permit, so the site would have access from all directions entering the site. Exiting the site would be forced to a right out, and if someone wanted to go north on Ridge Road, they would simply turn right out, go down and make a U-turn at Seneca Crossing Drive, and continue back to Ridge Road to the north. Otherwise, they would continue onto 355 either north or south.

The signalized intersections, as well as the four-way stop sign on the road to the south, aid traffic movement into and out of the site by providing gaps in traffic along Henderson Corner Road that aid motorists in entering and exiting the site. The four-way stop at Seneca Crossing Drive also provides some form of traffic speed control along the roadway. There are also adequate sight

distances. Both vehicles and pedestrians can safely access the site. There is a very good network of sidewalks along both sides of Henderson Corner Road, between Ridge Road and along Ridge Road, and along MD 355.

Mr. Lenhart further testified that LATR analysis requires that you go out to a certain number of study intersections, based on the number of trips the site generates. This site required study of the intersections of Maryland 27 at Brink Road, 27 and at Henderson Corner Road, Henderson Corner Road at the site, and MD 355 at Henderson Corner Road. All of those intersections are currently, and are projected with the development of this site, and the background development, to operate within the threshold level of service, 1425 critical lane volume (CLV). The site is in the Germantown-East policy area.

With respect to policy area mobility review (PAMR), Mr. Lenhart noted that the original preliminary plan for a Sovereign Bank on the site was approved under the old growth policy guidelines, which did not have PAMR requirements. Because the site was vested under the old Growth Policy and primary trips generated by the 7-Eleven are the same or less than the primary trips that would be generated by a bank, Technical Staff made a finding that the site satisfies the PAMR requirements. In response to the Hearing Examiner, Mr. Lenhart testified that regardless of whether there was a preliminary plan already, this project will generate less traffic than the previously proposed bank. If the new project had generated more traffic, then Petitioner would have had to mitigate the net increase in traffic to satisfy a PAMR requirement.

[Petitioner's attorney stated that, in meeting with Staff, it was their opinion, and the opinion of their legal department, that the site was vested under the old pre-PAMR requirements, by virtue of having an approved preliminary plan, and a record plat for that. If the use exceeded the impacts of the previously approve use, pre-PAMR, then Petitioner would have to comply or mitigate the additional trips. The Hearing Examiner raised the question of whether that interpretation would

satisfy the special exception requirements. Petitioner's counsel indicated that while there would not be a new preliminary plan, there will be a limited amendment to the existing preliminary plan. The Hearing Examiner gave Petitioner's Counsel an opportunity to file a legal memo after the hearing discussing the legal issue.]

Mr. Lenhart stated that if there had not been a prior approval, the site would be required then to mitigate its primary trip impact to satisfy PAMR requirements. The primary trips are 16 in the morning and 30 in the evening, and the Germantown East Policy Area requires 100 percent mitigation.

Mr. Lenhart further testified that from a traffic engineering or transportation planning standpoint, the proposed special exception at this location will not cause any adverse effects upon adjacent or adjoining roadways that is different, either in kind or degree, than those effects which might be inherently associated with this use elsewhere on C-3 zoned land. He also opined that it would not reduce vehicular or pedestrian safety.

4. Joseph Cronyn (Tr. 105-117):

Joseph Cronyn testified as an expert in market and need analysis. First, he ascertained the average daily traffic along the adjacent roads as part of his analysis, which is Exhibit 12. On page seven of the report, the average annual daily trips are outlined. On Ridge Road, just north of Frederick Road, which would be the most reasonable location for taking a snapshot of traffic, there were about 25,000 daily trips going past that location. As of spring 2007, that number is actually up to almost 32,000.

Mr. Cronyn stated that there are nine existing gas stations located within the market area that he defined, and those stations are enumerated on page 16 of his report. He indicated that the public needs standard in the County Zoning Ordinance, does not require a showing of absolutely necessity, but rather that the proposed use would be reasonably convenient and useful to the public; that it offers

services that the public might desire. That is the standard he applied, as stated in the *Lucky Stores* court case.

The trade area is defined in narrative form on page 10 of Mr. Cronyn's report, and then depicted on the map following. It is more or less the same as the Germantown East policy area. He explained that when you look at a market area for a trade analysis, you look at geographic boundaries, you look at traffic patterns, you look at concentrations of uses, for example in this case retail uses, that will shape where people are drawn from, which areas of residences consumers will be coming from, those kinds of things. You also look at competing areas. So where there is another center of gravity for retail uses, that will shape the way that this market area is drawn. The area that he defined is bounded on the west by 270, which creates a fairly strong east/west barrier. It's bound to the east by Great Seneca Creek. Again, you've got a geographic boundary. It's hard to get roads that go over that boundary. Great Seneca Creek also forms the southern boundary. The north is bounded by Comus Road over east to Ridge Road. That is the area where, normally speaking, people would be coming from who would be patronizing this area and commuting through this area on a daily basis from their residences in the market area.

The site is located fairly central to the area. It's about three miles to the northern edge, about two miles to the south, the southern edge, and about a mile on each side, east and west. The next step is to look at the residential population in the area, and also commuter traffic through the area and folks who don't live in the market area who might be coming through for the retail uses at the big shopping centers that are right nearby.

For the residential population you determine how many households there are; how much do they earn; and what will they be spending for gasoline. It's very similar to the retail analysis for any other retail goods. The statistical ratios are very well determined over the long haul through the Census Bureau, Bureau of Labor Statistics consumer expenditure survey, which is used as part of this

analysis. Based on the consumer expenditure survey ratios, you can determine how much money they are they likely to be spending for gasoline purchases. That is translated that into the gallons.

In this case, Mr. Cronyn found was that, on average, a household in the market area is likely to purchase about 1,400 gallons of gasoline per year resulting in aggregate purchases of 16.45 million gallons per year for households residing in the area. The area itself is never going to capture 100 percent of those purchases. Applying a reasonable estimate, used in Prince George's County and other areas in the Washington area, about 60 percent of those household purchases are actually going to happen within the market area. He therefore concluded that 9.87 million gallons of gasoline a year are going to be demanded and captured or available for capture within the market area from resident households.

In this case, there is a commercial center here with a regional shopping center, and other major shopping areas. It is also a major commuter thoroughfare with a lot of people coming through the area, and therefore those folks are going to be purchasing gasoline as they commute to work, or as they, on an opportunity basis, go to the shopping center.

Mr. Cronyn's calculation was that approximately a third of the total traffic on the road is either through commuters or shoppers in the area, people not living right in the area. And therefore the amount of gasoline that those folks would be purchasing, based on their proportion of the traffic count is about, a little less than 5 million gallons a year.

When you add the local and commuter transient sources to the residential demand, about 14.8 million gallons of gasoline are available for capture in the market area in 2008. According to Mr. Cronyn, the demand exceeds the supply. The difference is approximately 1.8 million gallons a year, taking into account the nine gas stations that are within the market area. On average, a gas station will pump in this area about 1.44 million gallons a year, some much less, some more. But on average, it's about 1.44 million gallons a year. Multiplying that by nine comes to 12.96 million

gallons per year in supply. Thus, the existing stations in the area are not meeting all of the demand that they could capture within the market area.

In Mr. Cronyn's opinion, this unserved need can be met by the proposed station without causing any of the other filling stations to be seriously compromised or go out of business. The addition of the station would be reasonably convenient and useful to the general public. The 7-Eleven also offers other features that are useful to the public.

5. Bob Fitzgerald (Tr. 119-126):

Bob Fitzgerald testified that he is a real estate site development consultant for 7-Eleven. He has developed over 100 other gas stations in the metropolitan area, including some in Montgomery County. They've all been operated pursuant as a 7-Eleven, as will this one. All of 7-Eleven is now 7-Eleven gas.

There will be no mechanical repairs on site and no car wash. Both the convenience store and gas would operate 24 hours a day, seven days a week. There will be three eight-hour shifts, and the maximum number of employees in any one shift will be limited to seven. Typically, there would be between two and four employees, except perhaps at shift change or during training, which might increase the number to seven.

According to Mr. Fitzgerald, it is easier to operate a 24-hour store than a limited hours store. A lot of people are doing something during the night, such as night shift workers and hospital workers, so there is a need. Safety or security is not any more of a problem than in an 18-hour store.

Gas pumps will have two vapor recovery systems, one at the pump where the customer is, and one for the tanker when he fills the underground tanks. Everything is double-wall containment, and electronics constantly monitor sales versus the inventory on hand. If there are any issues, bells and whistles go off.

Fuel is re-supplied two to three times a week.

The convenience store building will contain a gross area of 3,188 square feet. Of that square footage, approximately 1,674 square feet are devoted to the patron services. The remaining area is used for storage and other areas (such as behind the cooler) which are not accessible to patrons. A typical store has about 3,000 items, including hot and cold beverages, proprietary items such as coffee, big gulp, fountain drinks, slurpies, sodas, snacks, candy, bread, milk, grocery items, some patent medicine items, fresh foods, pastries, ice, lottery, prepaid phone cards and gift cards, and an ATM machine on the inside. There is also a sales counter on the inside.

There will be three pump islands, two pumps on each isle, which creates 12 fueling positions. These fuel dispensers will take credit cards. The lighting for this station will be similar to the lighting for other recent stations constructed for 7-Eleven. That lighting has not caused any problems or glare onto adjacent properties or roadways, and this should be the same.

Mr. Fitzgerald further testified that 7-Eleven was attracted to this location for many reasons, including the good density of housing in the area, the potential for growth of housing in the area, the fact that it's located on pretty busy commuter routes, the fact that it's adjacent to a regional shopping center and it's said that Wal-Mart, for example, draws for up to 25 miles. So it's just an area of lots of activity. In addition, the site is very user friendly for the customer, the way it's situated, and it just kind of blends in with the community in the way it's developed. He projected gasoline volumes of 1.4 to 1.5 million gallons per year.

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 petition is evaluated in a site-specific context because a given special exception might 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 applicable general and specific standards. Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Zoning Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Zoning Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. 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-1.2.1. 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 Automobile Filling Station use that are consistent with the “necessarily associated” characteristics of Automobile Filling Station uses will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with Automobile Filling Station uses, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed, in the context of the

subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff opined that the inherent adverse effects associated with automobile filling stations include (Exhibit 18, p. 11):

- (1) fuel pumps;
- (2) a structure providing storage space and shelter for employees;
- (3) traffic generated by customers, employees, and fuel delivery trucks;
- (4) potential for queuing vehicles on site;
- (5) noise associated with the use;
- (6) signage advertising gas products and prices;
- (7) outdoor lighting;
- (8) longer hours of operation than the average business establishment;
- (9) environmental impacts that may include fumes from idling vehicles and potential spillage of automobile fluids; and
- (10) underground fuel storage tanks.

The Hearing Examiner agrees that these characteristics are inherent in the use. Technical Staff indicated that the only non-inherent characteristic of the proposed use is the convenience store. Though they are increasingly common with modern filling stations, Staff felt that convenience stores are not an inherent characteristic of such uses, and the Hearing Examiner agrees. Technical Staff found that the non-inherent adverse effects of the convenience store, alone or in conjunction with the inherent effects, are not a sufficient basis to deny the subject special exception petition, given the station's design, the site topography and the planned screening.

The Hearing Examiner agrees with Technical Staff's conclusion. The difference in elevation between the subject site and the nearby residential areas, as well as shielded lights, landscaping and operational controls such as vapor recovery systems, make it unlikely that the proposed use will adversely affect the neighborhood to a greater extent than would normally be anticipated for this type of use. The Hearing Examiner therefore finds, based on the evidence, and considering size, scale, scope, light, noise, traffic and environment, that there are no non-inherent effects that require a denial of the petition.

B. General Conditions

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report, the exhibits and the testimony of the witnesses provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) -*A special exception may be granted when the Board or the Hearing Examiner 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 use is a permissible special exception in the C-3 Zone, pursuant to Code § 59-C-4.2(e).

(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: The proposed use complies with the specific standards set forth in § 59-G-2.06 for an Automobile Filling Station use as outlined in Part C, below.

(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 a 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: The subject site is located within the Germantown planning area, and within the Neelsville Village Analysis Area NE-8. The Germantown Master Plan (the "Master

Plan”), which was approved and adopted in July 1989, directly addresses the subject site (page 84), recommending “a convenience food and beverage store, a gas station, a car wash, and a bank.”

As discussed in Part II.C. of this report, Technical Staff concluded that the proposed use is consistent with the Germantown Master Plan. Exhibit 18, pp. 3-4. The Hearing Examiner agrees and so finds.

- (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. The Board or Hearing Examiner must consider whether the public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

Conclusion: The Hearing Examiner agrees with Technical Staff’s conclusion that the use will be in harmony with the general character of the neighborhood. As stated by Staff (Exhibit 18, p. 6):

The proposed special exception use will be in harmony with the general character of the neighborhood The site is one of several parcels located on a triangular piece of land that is surrounded on three sides by roadways. Two of these roads, Ridge Road and Frederick Road [MD 355], are major arterial roads with rights-of-way greater than 120-feet. The traffic associated with this proposal will be 27 less trips in the P.M. peak hour travel times than the previously approved bank. In addition, the proposed height of the building is significantly lower than the permitted height of the zone and the building materials are similar to the surrounding area.

As demonstrated in Part II. D. of this report, the public facilities are adequate to serve the proposed use.

- (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 Hearing Examiner concludes that the proposed use will not be detrimental to the peaceful enjoyment, economic value or development of surrounding properties at the site. As well stated by Technical Staff (Exhibit 18, p. 6):

This property is one of several properties surrounded on three sides by major roadways. The proposed building is similar in scale and use to the majority of uses in the area. Additionally, the natural vegetation, proposed landscaping, and topography will restrict the visibility of the physical activity from the residential properties, which lie approximately 200-feet southeast of the site. Because of the site's isolation from the nearest residential community, in addition to the restricted turning movements, the proposed use will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site. Lastly, the site is recommended for a limited commercial use, such as a automobile filling station per the Germantown Master Plan.

- (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 concluded that the use will not cause any objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site, and the Hearing Examiner agrees. Some degree of “noise, vibrations, fumes, odors, dust, illumination, glare [and] physical activity” are inherent in a filling station use. To the extent that any of the cited effects are noticeable, they are inherent to the use. The lighting fixtures which will be used, the environmental protections built into the use, the difference in elevation between the site and its surroundings, the landscape screening and the design of the station will reduce the listed adverse effects to within the inherent characteristics of this type of use. Thus, the special exception would be compliant with this provision.

- (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 is only one existing special exception (S-1785) within the defined neighborhood, and it is another gas station. Hence the proposed use will not increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely. Moreover, the filling station proposal is consistent with the Germantown Master Plan. Therefore, by definition, the use will not alter the nature of the area.

(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 use will not be a danger to public health or safety, as discussed in Part II. E. of this report. The nature of the use makes the morals issue inapplicable. Bob Fitzgerald, a real estate site development consultant for 7-Eleven, testified that the 24/7 operation does not create any additional security concerns. Tr. 121. Thus, the Hearing Examiner finds that the proposed use 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.

Conclusion: The evidence supports the conclusion that the proposed special exception would be adequately served by the specified public services and facilities, as discussed in Part II. D. of this report. The site has both public water and sewer access, and DPS has

approved a stormwater concept plan. By its nature, the use does not burden public schools. Police and fire protection are presumed adequate by the Growth Policy unless those agencies specify otherwise, which they have not.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception does not require approval of a preliminary plan of subdivision, by the Board of Appeals must determine the adequacy of public facilities when it considers the special exception application. The Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

Conclusion: The special exception sought in this case would require approval of an amended preliminary plan of subdivision. Technical Staff has indicated that “The adequacy of public facilities to serve the proposed use will be determined at preliminary plan.” Exhibit 18, p. 7. This site was previously approved for the development of a drive-through bank (Preliminary Plan #120061210), and the proposed use will not generate more trips than has been previously approved. Thus, only a limited amendment to the preliminary plan is needed. Nevertheless, Technical Staff stated that “APF will be evaluated at the time of the limited amendment to the preliminary plan.” Exhibit 34.

Even though the public facilities review will be done by the Planning Board at subdivision, and approval of the Preliminary Plan will be a condition of this special exception, the evidence in the record supports the conclusion that public facilities will be adequate. A traffic analysis was done by Petitioner’s transportation planner, and he

determined that all the intersections impacted by this proposal are currently operating at the CLV standard prescribed for this area and are anticipated to be at acceptable levels under both the background and total development conditions. Exhibit 18, Attachment 7. Technical Staff also indicates that Policy Area Mobility Review (PAMR) is satisfied in this case because no trips will be added beyond that which was previously approved for the site. The Hearing Examiner finds that Petitioner has made a sufficient showing that public facilities will be adequate at this stage.

(C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Petitioner's traffic engineer, Michael Lenhart, testified that the proposed development will not reduce the safety of vehicular or pedestrian traffic (Tr. 104-105), and Technical Staff agreed. Exhibit 18, Attachment 7. There is no evidence to the contrary, and the Hearing Examiner therefore concludes that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic.

C. Specific Standards

The testimony and the exhibits of record, including the Technical Staff reports, provide sufficient evidence that the specific standards required by Section 59-G-2.06 are satisfied in this case, 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 in Part IV. B. of this Report in response to General Condition §59-G-1.21(a)(6), the Hearing Examiner concludes, as did Technical Staff, that the use will not cause any objectionable noise, fumes, odors or physical activity at the subject site.

(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: For all the reasons set forth in Part II. D. of this report with regard to Transportation and Part IV. B. of this Report in response to General Condition §59-G-1.21(a)(9), the Hearing Examiner concludes, as did Technical Staff, that the use will not create a traffic hazard or a traffic nuisance for any of the stated reasons.

(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.

Conclusion: The proposed filling station will be consistent with the Germantown Master Plan recommendations for the site. For this reason and for the reasons set forth in Part IV. B. of this Report in response to General Conditions §59-G-1.21(a)(4)-(7), the proposed station will not adversely affect the logical development of the neighborhood or the commercial zone where it will be located.

(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.

Conclusion: The use does not abut a residential Zone, but is separated from them by roadways.

Technical Staff notes that, “This site is screened effectively by the natural topographic features (higher in elevation), as well as landscaping as indicated in the proposed landscaping plan. In addition, Henderson Corner Road, a 100 foot-wide roadway separates the nearest residential properties.” Exhibit 20. The evidence also supports the conclusion that the location, maintenance, vehicle sight distance provisions and screening will be consistent with Article 59-E.

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

Conclusion: Technical Staff found that there will be no product displays, parked vehicles or other obstructions to adversely affect site access. Exhibit 20. The Hearing Examiner agrees.

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

Conclusion: As discussed in Part II. B. and elsewhere in this report, the lighting is designed to shield light and glare and direct it to prevent spillover. There will also be a significant amount of landscaping to screen the site. The Hearing Examiner concludes, as did Technical Staff (Exhibit 20), that the use 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: As stated by Technical Staff (Exhibit 20),

The location of the driveway is approximately 340 feet south of the intersection of Henderson Corner Road and Ridge Road/MD27. The driveway width is 30 feet and therefore, the proposed special exception satisfies the requirement.

The Hearing Examiner so finds.

(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: As stated by Technical Staff (Exhibit 20),

As proposed, all gasoline pumps are located 10 feet behind the building line. The driveway entrance that is shown is perpendicular to the street line and the location of the opening was previously approved in Preliminary Plan #120061210. Therefore, the proposed special exception satisfies the requirement.

The Hearing Examiner so finds.

(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: The Petitioner is not proposing any repair work in the proposed use.

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

Conclusion: No parking areas are located in a way that would permit overhang of vehicles onto the public right-of-way.

(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: Petitioner does not seek to rent automobiles, trucks or trailers on this site; nor is a car wash proposed.

(9) In a Rural Village Overlay Zone . . .

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: The following chart from the Technical Staff Report (Exhibit 18, p. 8), demonstrates compliance with applicable development standards:

Table 2: Applicable Development Standards of the C-3 Zone.

C-3 Zone Development Standards	Standard	Proposed¹⁰
Building Height (§59-C-4.361)	42-ft (max)	Tower: 29' 6" Flat Roof: 18'-6" Canopy: 18'-6"
Setbacks (§59-G-4.362) (a) From any Street R/W (1) R/W est. on a Master Plan (2) No Master Plan showing R/W (b) From any other lot line (1) Lot adjoins a residential zone not -recommended on a Master Plan for commercial or industrial zoning or -used as a public parking lot, or -used for off-street parking in connection with multi-family, commercial or industrial Zone (2) In all other cases, no setback is required.	10-ft (min) 70-ft Not less than required in the adjoining zone.	±34-ft N/A N/A N/A
Green Area (§59-G-4.363) Green area shall constitute at least 10% of the area of the lot. The green area, including the required setback area shall be landscaped. Where yards are required adjoining a residential zone a solid wall or fence at least 5-ft high or a compact evergreen hedge at least 3-ft high at time of planting shall be provided, unless the site is already effectively screened, in the opinion of the planning board, by a permanent natural or artificial screen. Such wall, fence or hedge shall be located so as to provide the most effective screening for adjoining or facing premises.	10% of lot area	±55%
Roads and Internal Circulation (§59-C-4.364) (a) Access from the abutting major highway shall be by way of channelized service drives, providing for the separation of all vehicular movements,		<i>Public Facilities and Access will be reviewed at the</i>

¹⁰ The Hearing Examiner modified some of the items in the "Proposed" column of this chart to conform to the evidence.

C-3 Zone Development Standards	Standard	Proposed ¹⁰
acceleration, deceleration and left-turn storage, except where existing adjoining development makes it infeasible.		<i>limited subdivision to amend the existing Preliminary Plan</i>
Off-street Parking (§59-C-4.365) (a) All parking shall be located on land classified in the C-3 zone. (b) All parking shall be located to the side or rear of the main building, inside of the building or on the roof. (c) A driveway without parking areas may be located in front of the building.		<i>The required number of spaces will be provided at the required locations</i>

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

Conclusion: As discussed in Part II. D. of this report, Zoning Ordinance §59-E-3.7 provides that an automobile filling station must provide one parking space for each gas station employee. Since there will be, at most, only 7 employees on site, this part of the use will require 7 parking spaces. The same provision indicates that a general retail operation must provide 5 parking spaces for each 1,000 gross leasable square feet. In this case, only 1,674 square feet of the service building will be devoted to the convenience store, and thus the convenience store operation would require 9 parking spaces (5 X 1.674). The total number of required spaces for this site would be 16 spaces. Petitioner will provide a total of 16 parking spaces, thus meeting the statutory criteria. The landscaping provisions of Article 59-E will also be followed.

- (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 applicable frontage requirements in the C-3 Zone.

- (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: A final forest conservation plan had been approved by the Planning Board for the site when it was going to be used as a Sovereign Bank. Exhibits 6(c) and (d). Petitioner has prepared an amended forest conservation plan for the new use of this site (Exhibits 6(a) and (b)), which will be presented for approval as a site plan amendment.

- (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: The site is not within a Special Protection Area, so a water quality plan is not required.

DPS has approved a stormwater management concept plan for the site. Exhibit 27.

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

Conclusion: Proposed signage is discussed in Part II. B. of this report. Permits will have to be obtained for the proposed signs, and copies thereof will be filed with the Board of Appeals prior to posting the signs.

- (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 site is in a commercial 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: According to Technical Staff, no direct light will intrude into adjacent residential properties. The limits of 0.1 footcandles at the property line do not apply here because the property is not in a residential zone.

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: 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 need was demonstrated in a “need analysis” done by Petitioner’s expert. Exhibit 12. Technical

Staff argued that Petitioner understated the available supply of gasoline from the nine existing stations in the trade area, but supported a finding that “need” had been sufficiently established under applicable case law definitions. Exhibit 18, Attachment 10. As discussed in Part II. F. of this Report, the case law interpreting this provision does not define need as requiring a showing of necessity, but rather that the proposed use would be “expedient, reasonably convenient and useful to the public.” *Lucky Stores, supra*, 270 Md. 513 at 527-28. Based on this definition and the evidence of record, the Hearing Examiner finds 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.

Based on the testimony and evidence of record, I conclude that the Automobile Filling Station use proposed by Petitioner, as conditioned below, meets the specific and general requirements for the special exception, and that the Petition should be granted, 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-2743, seeking a special exception allow an Automobile Filling Station with an accessory convenience store at 21040 Henderson Corner Road, Germantown, Maryland, be GRANTED, with the following conditions:

1. The Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and representations of counsel identified in this report.
2. Development of the property must be limited to:
 - a. A self-service automobile filling station, containing six multi-product dispensers (with 12 pumping stations) located on three pump islands;
 - b. A 3,188 gross square foot building, including a 1,674 square foot convenience food, beverage and customer patron area;

- c. Two (2) underground storage tanks; and
 - d. A maximum canopy clearance height of 14'-6," and a total canopy height of 18'-6".
3. No more than seven (7) employees may be on site at any one time. Petitioner shall make a log or employee time and attendance sheets available for inspection upon request of the Department of Permitting Services.
 4. Petitioner must submit of a revised Final Forest Conservation Plan to the Planning Board, showing the proposed development's layout.
 5. Hours of operation of the automobile filling station and the convenience store are 24 hours/day, seven days a week.
 6. The Petitioner must comply with stormwater and sediment control regulations of the Montgomery County Department of Permitting Services (DPS).
 7. Fuel storage tank and fuel pump installation and use, must comply with the control guidelines and air quality permitting requirements of the Maryland Department of the Environment (MDE).
 8. Fuel storage tanks must meet required technical standards and must comply with all county, state and federal permitting requirements.
 9. Permits must be obtained for the proposed signs, and copies thereof must be filed with the Board of Appeals prior to posting the signs.
 10. Since the proposed use will require an amended preliminary plan of subdivision, in accordance with Zoning Ordinance §59-G-1.21(a)(9), approval of this special exception is conditioned upon approval of the amended preliminary plan of subdivision by the Planning Board. If changes to the site plan or other plans filed in this case are required at subdivision, Petitioner must file a copy of the revised site and related plans with the Board of Appeals.
 11. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all

times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: April 13, 2009

Respectfully submitted,

Martin L. Grossman
Hearing Examiner