

**BOARD OF APPEALS
For
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

Case No. S-354-C

PETITION OF McDONALD'S CORPORATION
(Hearing held February 20, 2002)

OPINION OF THE BOARD

Effective Date of Opinion April 15, 2002

This proceeding is a petition pursuant to Section 59-G-2.16 of the Montgomery County Zoning Ordinance (Chapter 59, Mont. Co. Code 1994, as amended) (Drive-In Restaurants). The Petitioner proposes the modification of an existing drive-in restaurant to construct a second drive-in window and a freezer-cooler addition to the building. Pursuant to Section 59-G-1.3(c)(4), the Boards consideration of the special exception is limited solely to the proposed modification and its effects.

Patricia A. Harris, Esquire represented McDonald's Corporation. Testifying in support of the special exception site plan were Bharat Parikh of McDonald's Corporation and Stephen Mordfin of Ben Dyer Associates, planner.

The subject property is part of Parcel D (N272) in the Quince Orchard Shopping Center, located at 12130 Darnestown Road in the C-1 Zone.

Decision of the Board: Special Exception **Granted**, subject to the conditions enumerated below.

EVIDENCE PRESENTED

1. Special Exception S-354 was approved in 1974 for a drive-in restaurant and was subsequently modified in 1983 to permit the addition of a drive-in window. The Applicant requests permission to construct a 460 square foot addition to accommodate a freezer cooler and a second drive-in window. The proposed addition will result in a shift of approximately eight (8) feet in the location of the loading area and menu board located to the south of the building.
2. A traffic study is not required to satisfy Local Area Transportation Review to determine the adequacy of public facilities because the proposed modifications

will not alter the number of peak hour trips currently being generated by the restaurant. See M-NCPPC Staff Recommendation, Exhibit 16.

3. Mr. Stephen Mordfin testified, in his capacity as an expert in planning, that the proposed modification conforms to all zoning regulations. Mr. Mordfin also testified that the special exception site plan meets all the requirements for the Special Exception as enumerated in Sections 59-G-1.21 and 59-G-2.16 of the Montgomery County Zoning Ordinance. Mr. Mordfin testified that there are no non-inherent adverse effects associated with the requested modification.

4. Mr. Bharat Parikh of McDonald's testified that the addition of the freezer cooler will allow McDonald's to renovate its existing dated kitchen and work area and to increase the area of the McDonald's restaurant devoted to kitchen preparations. This change will allow McDonald's to more effectively and efficiently serve its customers. The addition of a second drive in window will allow the restaurant to conform in design and operation to the majority of the McDonald's restaurants. The first window will allow the customer to pay for the food and the second window will provide the pick-up. The addition of the second window will increase the efficiencies of the restaurant. Mr. Parikh testified that the existing patron area will not change as a result of the addition. Finally, Mr. Parikh testified that the need for the McDonald's restaurant is evidenced by the fact that the existing restaurant is viable and is patronized by the residents and employees in the area at a sufficient level to sustain its operations. The increase in the number of residents and employees within the market areas since the determination of need was first made in 1974 only further supports the finding of need.

5. The representative of the Applicant testified as to the Applicant's reliance upon the Staff Recommendation, Exhibit 16, prepared by the technical staff of the Planning Board, as evidence of the subject modification's satisfaction of the specific criteria of Zoning Ordinance Sections 59-G-1.21 and 59-G-2.16.

6. Given the minor nature of the requested modification, the Planning Board did not make a recommendation on the petition. The Technical Staff of the Planning Board recommended approval of the proposed modification, S-354-C, with conditions. See, Exhibit 16.

FINDINGS OF THE BOARD

Based on the binding testimony and the exhibits of record, the Board finds that the proposed Special Exception can be granted.

Sec. 59-G-1.2. Conditions for granting.

59-G-1.2.1. Standard for evaluation. *A special exception must not be granted absent the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner, or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. 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. Non-inherent adverse effects, alone or in conjunction with the inherent effects, are a sufficient basis to deny a special exception.*

This use has operated at the existing site for approximately 25 years and the proposed modification will result in a drive-in restaurant that is similar in scale and operation to the existing use. The proposed modification will have no non-inherent adverse effects.

59-G-1.21. General conditions.

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

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

The Board finds that the proposed special exception modification for a drive-through restaurant is permissible in the C-1 zone.

(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.*

The Board finds that the proposed modification complies with the standards and requirements for a drive-in restaurant found in Section 59-G-2.16.

(3) *Will be consistent with the general plan for the physical development of the District, including any master plan*

thereof adopted by the Commission. Any decision to grant or deny special exception must be consistent with an recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that the granting of 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.

The Board finds that the proposed modification is consistent with the Potomac Master Plan.

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

The Board finds that the design and scale of the proposed modification will be in harmony with the general neighborhood.

- (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.*

The Board finds that the proposed modification will not have a detrimental effect for any of these reasons on the use, peaceful enjoyment, economic value or development or surrounding properties or the general neighborhood.

- (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.*

The Board finds that the proposed modification will cause no objectionable noise, vibrations, fumes, odors, dust, glare or physical activity in accordance with Section 59-G-1.21(a)(6) of the Zoning Ordinance.

- (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.*

The Board finds that the proposed modification will not, when evaluated in conjunction with existing and approved special exceptions in the neighboring one-family residential area, increase the number, intensity or scope of special exception uses sufficiently to affect the area adversely or alter its predominantly residential nature, in accordance with Section 59-G-1.2 1 (a)(7) of the Zoning Ordinance.

- (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.*

The Board finds that the proposed modification will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area, in accordance with Section 59-G-1.27(a)(8) of the Zoning Ordinance.

- (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.*

The Board finds that the proposed modification 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, in accordance with Section 59-G- 1.21(a)(9) of the Zoning Ordinance.

- (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception.*

The Board finds that approval of a preliminary plan of subdivision is not required in this case.

- (ii) *With regard to findings related to public roads, the Board . . . must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

The Board finds that the proposal will not have a detrimental effect on the safety of vehicular or pedestrian traffic and that the public roads are adequate to accommodate the proposed modification.

Section 59-G-2.16. Drive-in restaurants.

A drive-in restaurant may be allowed, upon a finding, in addition to findings required in division 59-G-1, that:

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

The Board finds that the Special Exception modification will not constitute a nuisance because of noise, illumination, fumes, odors or physical activity in the location proposed.

- (b) *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 and intersections, or its location in relation to other buildings or proposed buildings on or near the site and the traffic patterns from such buildings or cause frequent turning movements across sidewalks and pedestrian ways, thereby disrupting pedestrian circulation within a concentration of retail activity.*

The Board finds that the proposed modification will not create a traffic hazard and will not affect the existing circulation pattern within the site and access to and from the site.

- (c) *The use of the proposed location will not pre-empt frontage on any highway or public road in such manner so as to substantially reduce the visibility and accessibility of an interior commercial area zoned or proposed for commercial use which is oriented to the*

same highway or public road.

The Board finds that the use will not preempt frontage on a public road. There is an existing access point south of the site and along Darnestown Road that provides access and visibility into the existing commercially zoned shopping center.

- (d) *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 three-foot wide planting strip on the outside of such wall or fence, planted in shrubs and evergreens 3 feet high, at the time of original planting and which shall be maintained in good condition. Location, maintenance, vehicle sight distance provisions, advertising and parking areas pertaining to screening shall be as provided for in the requirements contained in article 59-E.*

The Board finds that this provision is not applicable, as the nearby residentially zoned land is developed with an institutional use, a public high school.

- (e) *Product displays, parked vehicles and other obstructions which adversely affect visibility at intersections or at entrances and exits to and from, such use are prohibited.*

The Board finds that there will be no displays, parked vehicles or other obstructions that adversely affect visibility at the intersections or entrances to the Property.

- (f) *Lighting is not to reflect or cause glare into any residential zone.*

The Board finds that this provision is not applicable, as no new lighting is proposed and the nearby residential area is developed with a school.

- (g) *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 25 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 60 feet from the centerline of any abutting street or highway.*

The Board finds that the location of the existing facility is not a corner lot; therefore, the above criteria will not apply.

Section 59-G-1.25. County Need

In addition to the findings required in Section 59: G-1.21 and Division 59-G-2, 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, for the public convenience and service, a need exists for the proposed use due to an insufficient number of similar uses presently available to serve existing population concentrations in the County, and that the uses at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood of the proposed use:

(1) *Drive-in restaurant.*

The Board finds that the existing use has been operational since 1974. Its patronage base has expanded in order to sustain its operations over the years. The continued existence of the restaurant, its ability to maintain operations and the need for the requested modification to add a second drive-in window and larger freezer demonstrate that there is a county need for this existing use.

* * * * *

Accordingly, the Board grants the requested modification subject to the following conditions:

1. The petitioner shall be bound by all of its testimony and exhibits of record, the testimony of its witnesses and representations of its attorneys, to the extent that such evidence and representations are identified in the board's opinion granting the special exception modification.
2. All terms of the existing Special Exception shall remain in effect, except as modified herein.

On a motion by Louise L. Mayer, seconded by Angelo M. Caputo, with Donna L. Barron, Allison Ishihara Fultz and Donad H. Spence, Jr., Chairman in agreement, the Board adopted the following resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the Opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

I do hereby certify that the foregoing Opinion was officially entered into the Opinion Book of the County Board of Appeals this 15th day of April, 2002

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date of the Opinion is mailed and entered into the Opinion Book (see Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four-month period within which the special exception site plan granted by the Board must be exercised.

See Section 59-A-3.22 of the Montgomery County Zoning Ordinance regarding Use and Occupancy Permits for a special exception site plan.