

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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[www.montgomerycountymd.gov/content/council/boa/board.asp](http://www.montgomerycountymd.gov/content/council/boa/board.asp)

**CASE NO. S-2596**

**PETITION OF WASHINGTON GAS**

OPINION OF THE BOARD

(Effective Date of Opinion: June 25, 2004)

Case No. S-2596 is application for a special exception pursuant to Section 59-G-1.21(a) and (59-G-2.43) (Public Utility Buildings and Structures) of the Zoning Ordinance to construct and operate an un-manned natural gas gate station. Pursuant to the provisions of Section 59-A-4.125 of the Zoning Ordinance, the Board of Appeals referred the case to the Hearing Examiner for Montgomery County to conduct a public hearing and submit a written report and recommendation to the Board for final action. The Hearing Examiner convened a hearing on April 27, 2004, and on May 14, 2004, issued a report and recommendation for approval of the special exception.

Decision of the Board: Special exception granted subject to conditions enumerated below.

The Board of Appeals considered the Hearing Examiner's report and recommendation at its Worksession on June 9, 2004. After careful consideration and review of the record, the Board adopts the report and recommendation and **grants** the special exception subject to 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. Petitioner shall coordinate with Technical Staff regarding the sight distance adequacy at the proposed gate station access road intersection with Beach Drive.
3. Petitioner shall submit a final Forest Conservation Plan (FCP) to the M-NCPPC Environmental Planning staff prior to issuance of sediment and erosion control permits.
4. If the access road's alternative alignment is constructed, the Petitioner must submit a revised FCP and detailed Tree Save Plan, prepared by an ISA certified arborist. This alternative alignment shall be constructed so as to preserve two-thirds or more of the critical root zone of the 57 inch Tulip Poplar tree referenced

in the Technical Staff report (Exhibit 17).

5. An acceptable land lease, easement or purchase agreement between Washington Gas and the M-NCPPC, for all property affected by the project, must be finalized before construction of the gate station begins.
6. The access road for ingress and egress to the gate station site from Beach Drive will be located as shown on the submitted plan. The "alternate access alignment" as shown on the submitted plan will be used only if the Petitioner demonstrates to the M-NCPPC's satisfaction that the preferred alignment is not workable from a construction and engineering perspective, recognizing that specialized construction measures are likely to be required within the preferred alignment that passes through an area previously used as a landfill.
7. When the final location of the access road is determined, Petitioner will notify the Board of Appeals and seek administrative modification of the special exception to substitute a Site Plan showing the location of the access road, as finally determined, and eliminating the alternate access road from the Site Plan.
8. The Petitioner agrees to relocate, at its cost and expense and in a timely manner, any or all portions of the established access road to the gate station, as may be required in the future, to accommodate approved facility plans for the future redevelopment of Rock Creek Regional Park Maintenance Yard.
9. Prior to commencement of construction, the Petitioner must submit the site plan approved by the Board of Appeals for the project, as well as detailed design plans, and obtain approval by the Park Development Division through the Park Permit Technical Review and Construction Permit process. Following approval of the detailed design plans, the Park Development Division will issue a Permit for Construction on Park Property which will itemize and detail conditions and requirements that must be met by the Petitioner.
10. Petitioner's construction and maintenance of the subject gate station must comply with all applicable federal, state and local statutes and regulations.
11. In the event that Petitioner is unable to obtain a contractual interest in the needed land, it must, within a reasonable time, formally notify the Board of Appeals that it is abandoning its special exception and consent to its revocation.

On a motion by Donna L. Barron, seconded by Angelo M. Caputo, with Allison Ishihara Fultz and Donald H. Spence, Jr., Chairman in agreement and Louise L. Mayer necessarily absent, 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.

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

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 25<sup>th</sup> day of June, 2004.

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Katherine Freeman  
Executive Secretary to the Board

**NOTE:**

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in 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 months' period within which the special exception granted by the Board must be exercised.

See Section 59-A-3.2 of the Zoning Ordinance regarding Use and Occupancy Permit for a Special Exception.

**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 WASHINGTON GAS \***

Petitioner \*

\*

Matthew G. Esmacher \*

Kevin M. Murphy \*

John Sekerak, Jr. \*

Afsi T. Nikoo \*

For the Petition \*

Board of Appeals Case No. S-2596  
(OZAH Referral No. 04-26)

Stephen P. Elmendorf, Esquire \*

Mark M. Viani, Esquire \*

Attorneys for the Petitioner \*

\*

\*\*\*\*\*

Martin Klauber, Esquire, People’s Counsel \*

In Support of the Petition \*

\*\*\*\*\*

Brian and Dian Belanger \*

Neither for nor Against \*

\*\*\*\*\*

Before: Martin L. Grossman, Hearing Examiner

**HEARING EXAMINER’S REPORT AND RECOMMENDATION**

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## I. STATEMENT OF THE CASE

Petition No. S-2596, filed on November 17, 2003, seeks a special exception, pursuant to §59-G-2.43 of the Zoning Ordinance, to permit construction of a “Public Utility Building and Structure,” which in this case is a natural gas “gate station” on a 15.99 acre parcel of parkland owned by the Maryland National Capital Park and Planning Commission (M-NCPPC). A gate station is “the point where a local natural gas distribution company (Washington Gas) connects into the main transmission line of a natural gas pipeline supplier (Williams Transco).”<sup>1</sup> The property is zoned RE-2 (Residential, single-family, minimum of 2 acres) and is adjacent to Rock Creek Regional Park and the Rock Creek Maintenance Yard Facility, about a third of a mile south of the intersection of Needwood Road and Muncaster Mill Road, in the Upper Rock Creek planning area of the County.

Petitioner indicates that the gate station in question is needed so that Petitioner can ensure continuing gas service to the eastern portion of upper Montgomery County. On November 26, 2003, the Board of Appeals adopted a resolution (Exhibit 13), effective December 31, 2003, referring this case to the Hearing Examiner for Montgomery County to conduct a public hearing and issue a written report and recommendation to the Board of Appeals for final action. On January 7, 2004, the Board of Appeals issued a notice (Exhibit 14) that a hearing in this matter would be held by the Hearing Examiner for Montgomery County on March 12, 2004, at 9:30 a.m., in the Second Floor Hearing Room of the Stella B. Werner Council Office Building. At Petitioner’s request, the hearing was continued until April 23, 2004, at 1:00 p.m. (Exhibit 16).

Technical Staff at the M-NCPPC, in a memorandum dated April 9, 2004, recommended approval of the petition, with conditions (Exhibit 17).<sup>2</sup> On April 14, 2004, Petitioner filed a proposed amendment to the Petition (Exhibits 18 and 19) and the Hearing Examiner issued a

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<sup>1</sup> Petitioner’s Land Planning and Zoning Report (Exhibit 3).

<sup>2</sup> The Technical Staff Report is frequently quoted and paraphrased herein.

notice to that effect (Exhibit 20). On April 15, 2004, the Planning Board voted, 3 to 2, to recommend approval of the petition, with conditions (Exhibit 21). The two dissenting Planning Board members expressed concern that Petitioner had not, in their opinion, satisfied Zoning Code §§59-A-4.22(a)(6) and 59-G-2.43(i), which require a Petitioner to establish ownership or a contractual interest in the property (or at the very least, a *bone fide* effort to obtain such an interest and intent to continue negotiations). The majority of the Planning Board, in voting to recommend approval, modified the fifth condition proposed by the Technical Staff, to allow Petitioner to acquire the property interest in question by way of a lease, easement or purchase agreement, any of which would have to be approved by the M-NCPPC prior to construction. On April 20, 2004, the People's Counsel filed a letter noting that he would be unable to attend the hearing on April 23, 2004, and requesting that it be postponed until the following week.

A public hearing was convened as scheduled on April 23, 2004. Only petitioner appeared, and after the filing of the affidavit of posting, the hearing was adjourned, with Petitioner's consent, until April 27, 2004, at 9:30 a.m., to accommodate the request of the People's Counsel. The hearing was resumed on April 27, 2004, and the then pending motion to amend the Petition was granted as a preliminary matter. Testimony was presented by Petitioner's four witnesses, and by community participants, Brian and Dian Belanger. The Belangers live at 5730 Avery Park Drive in Rockville, which makes them the closest residential neighbors to the subject site. The People's Counsel participated in the hearing but did not call any witnesses, and the record closed on May 7, 2004, following receipt of the hearing transcript and a legal memo from Petitioner (Exhibit 33).

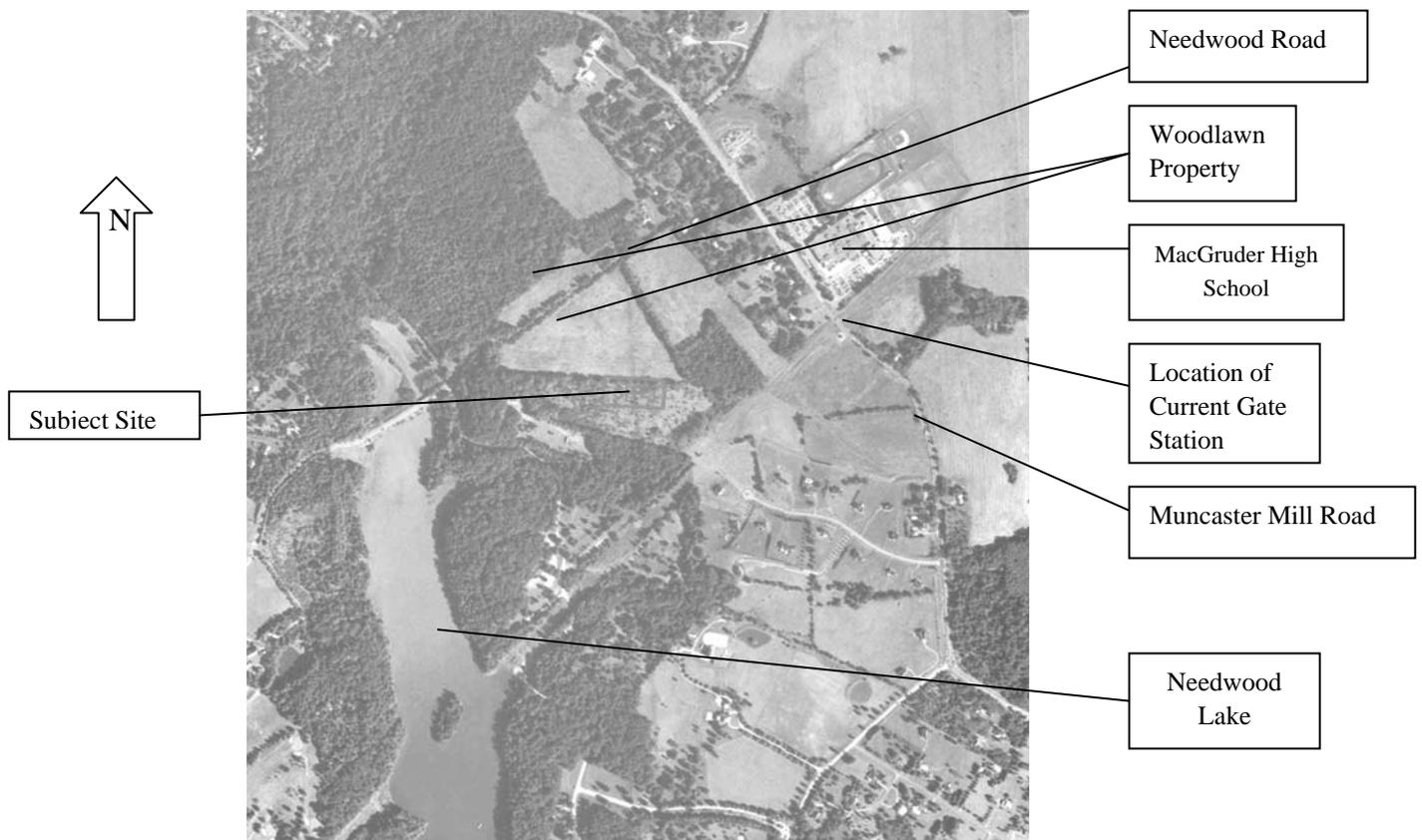
There are two unusual situations in this case. The first is that Petitioner does not yet have a contractual right to the land on which it is seeking a special exception and the second is that Petitioner's plans for the access road it intends to construct may have to be changed to an alternative plan, depending on soil conditions. As will be seen below, Petitioner has made the

case that it is entitled to its special exception in spite of these obstacles.

## II. BACKGROUND

### A. The Subject Property

As noted above, the subject property is located on a 15.99 acre parcel of parkland<sup>3</sup> adjacent to Rock Creek Regional Park and the Rock Creek Maintenance Yard Facility, about a third of a mile south of the intersection of Needwood Road and Muncaster Mill Road, in the Upper Rock Creek planning area. It is identified as Parcel N374 on Tax Map GS 63. Because the subject parcel is owned by the Maryland National Capital Park and Planning Commission, construction of the gate station will require an easement of 2.07 acres for the structure, plus access easements of approximately 49,920 square feet. The aerial photo from Petitioner's Land Planning and Zoning Report depicts the park-like setting of the subject property:



<sup>3</sup> To avoid confusion, the 15.99 acre parcel will be referred to as the "subject parcel," and the 2.07 acre rectangular area where the "gate station" will be located will be referred to as the "subject site" or the "subject property."

The subject parcel is described by Petitioner in its Land Planning and Zoning Report as “a fallow [and vacant] field with scrub growth and a hedgerow along the northern property line.”

(Exhibit 3) Petitioner also states that “[t]here are no historic structures within or adjacent to the property and there are no rock outcroppings or significant views from existing conditions.”

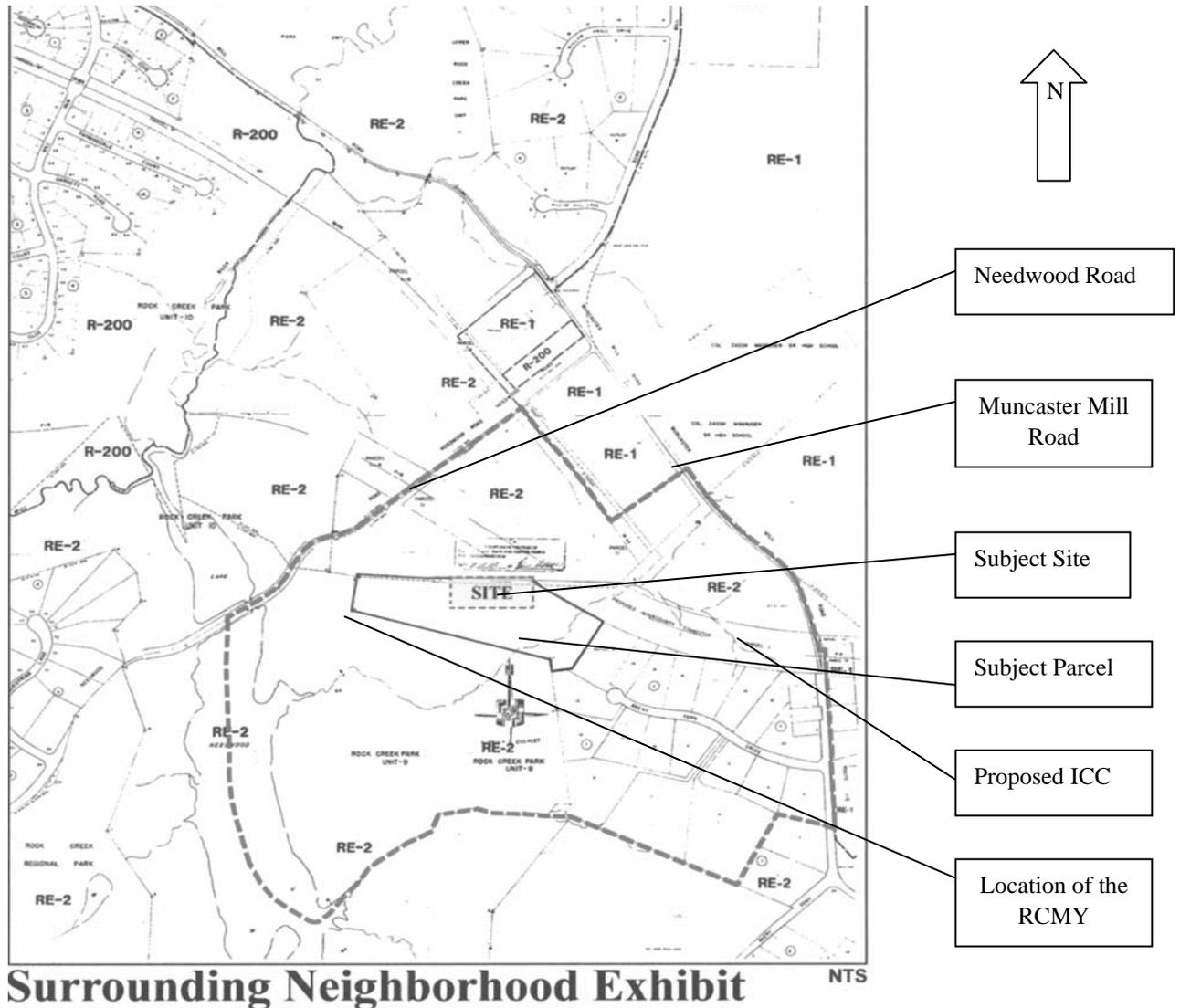
Technical Staff describes the site as a rectangular meadow, “with gentle rolling terrain and trees and vegetation along its perimeter . . . [and] a stream valley buffer and several steep slopes in the southeastern portion of the [parcel].” (Exhibit 17) Existing easements for gas lines run east to west and are located in the southeastern portion of the subject parcel, with additional easements for fiber optic lines and gas lines running north to south in the eastern portion of the parcel. Technical Staff also reports evidence of a significant deer population throughout the area.

### **B. The Neighborhood and its Character**

The surrounding neighborhood is mostly parkland, although it is zoned RE-2. Technical Staff notes that the property immediately adjacent to and north of the subject parcel “has been placed in reservation for the future ICC [Inter-County Connector] roadway.” According to Technical Staff, the Maryland State Highway Administration is currently preparing an Environmental Impact Study for the alternative ICC plans, and only the “Rock Creek Option ‘A’ alignment” crosses the northern border of the subject parcel. The proposed gate station is located outside the “footprint” of all ICC options, as presently configured.

Beyond the proposed ICC, to the north, are vacant fields in active agricultural use (Exhibit 3), which are referred to in the *2004 Upper Rock Creek Master Plan* as the Woodlawn Property. To the east-northeast are woodlands, vacant farmland and a portion of the proposed ICC. To the east-southeast are parklands and low-density single-family residential units, also zoned RE-2. To the south and the west are the woodlands of Rock Creek Regional Park, Lake Needwood and, about 800 feet southwest of the subject site, the Rock Creek Maintenance Yard (RCMY). The Hearing

Examiner accepts the Petitioner’s designation of the surrounding neighborhood, as shown below in its “Surrounding Neighborhood Exhibit,” attached to its “Land Planning and Zoning Report.”

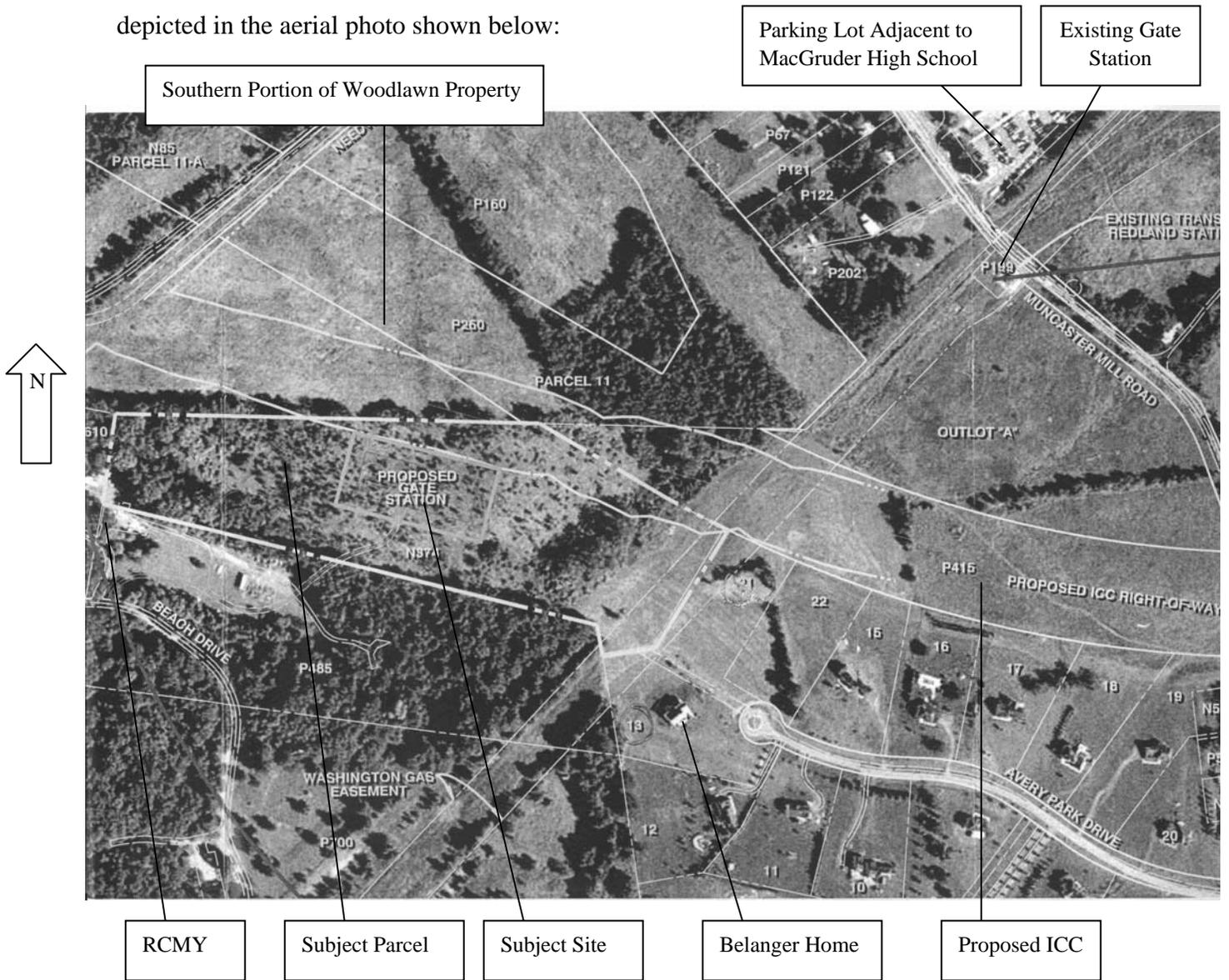


The Rock Creek Maintenance Yard has several “butler type” buildings, concrete storage bins, storage area for canoes, and parking lot for employee’s vehicles and storage of park vehicles, according to the Technical Staff report. The only other special exception in the area reported by Technical Staff is for a private riding stable (S-266) approved August 29, 1973.<sup>4</sup> There is also an

<sup>4</sup> The Technical Staff report lists the approval date as “8/28/04,” but that is clearly a typo. Board of Appeals

existing gate station located adjacent to Muncaster Mill Road and approximately ¼ mile northeast of the proposed new site. The nearest residence is approximately 700 feet to the southeast of the site and is occupied by the Belangers. The area immediately surrounding the subject site is

depicted in the aerial photo shown below:



**C. The Master Plan**

The property is located within the area covered by the recently amended *Upper Rock Creek Master Plan*, approved by the Council on February 24, 2004 and adopted by the M-NCPPC on April 21, 2004. That Plan, which has not yet been published in its final form, does not discuss the

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records, of which the Hearing Examiner takes official notice, indicate an approval date of August 29, 1973.

subject site, nor make any recommendations regarding it; however, it does discuss the “Woodlawn Property,” a 79 acre tract immediately to the north of the subject property. That discussion is relevant here because the Master Plan recommends rezoning the Woodlawn Property to RNC (Rural Neighborhood Cluster) and mentions that the “primary intent of this Plan. . . is that this property be developed for residences.”<sup>5</sup> The Plan notes, however, that much of the land is not available for development because it is under reservation for the proposed ICC and the proposed Mid-County Highway Extended, and it suggests that little or no residential development should occur east of Needwood Road (*i.e.*, in the portion of the Woodlawn Property closest to the subject site).<sup>6</sup> Nevertheless, development of the Woodlawn property will bring residential development closer to the subject site, and the potential impact of the proposed special exception on that residential development must therefore be considered.

John Sekerak, Jr., Petitioner’s land use planner testified that even if there were residential development to the north, the closest such residences could be located would be about 500 feet from the subject site (Tr. 144-145), and the view from such residences would be well-buffered by the landscaping that will surround the subject site and by the ICC, if it is built. The Hearing Examiner is satisfied that the proposed gate station would not adversely impact residential areas that may be developed on the Woodlawn property. Technical Staff also found no conflict with the Master Plan, noting that the requested use is permitted as a Special Exception in the RE-2 Zone.

In sum, it is fair to say that the planned use, a Public Utility Building and Structure, is not inconsistent with the applicable Master Plan.

#### **D. The Proposed Use**

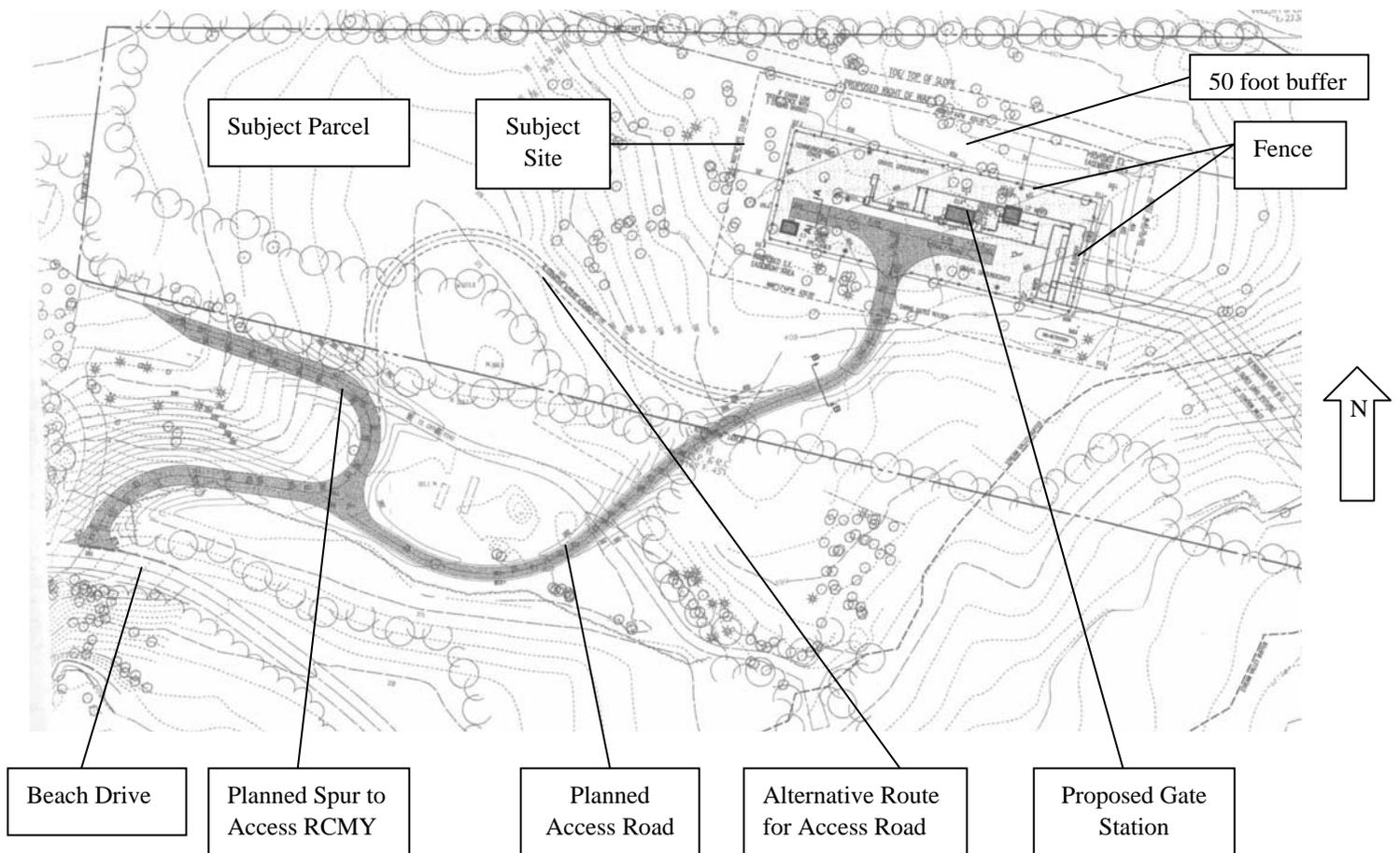
As mentioned above, Petitioner proposes to build a natural gas “gate station” on a 2.07

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<sup>5</sup> This language is quoted from the July 2003 Planning Board Draft at p. 25 because the final version of the Master Plan is not yet available. The quoted language was not changed in the final draft.

<sup>6</sup> The Plan also recommends that the western portion of the Woodlawn Property be devoted to parkland (p. 27).

acre, rectangular easement, which would be located on a 15.99 acre parcel of park area owned by the Maryland National Capital Park and Planning Commission (M-NCPPC). Access to the proposed gate station would be via a proposed asphalt easement road at the RCMY entrance driveway on Beach Drive. When the access road is built, Petitioner will also provide an additional road spur to improve M-NCPPC's access to the RCMY. If its chosen access road cannot be built because of soil conditions, Petitioner will build an alternative access road. The subject site, its proposed access road and its alternative access road are all visible in the portion of the Site Plan (Exhibit 18(a)), depicted below:

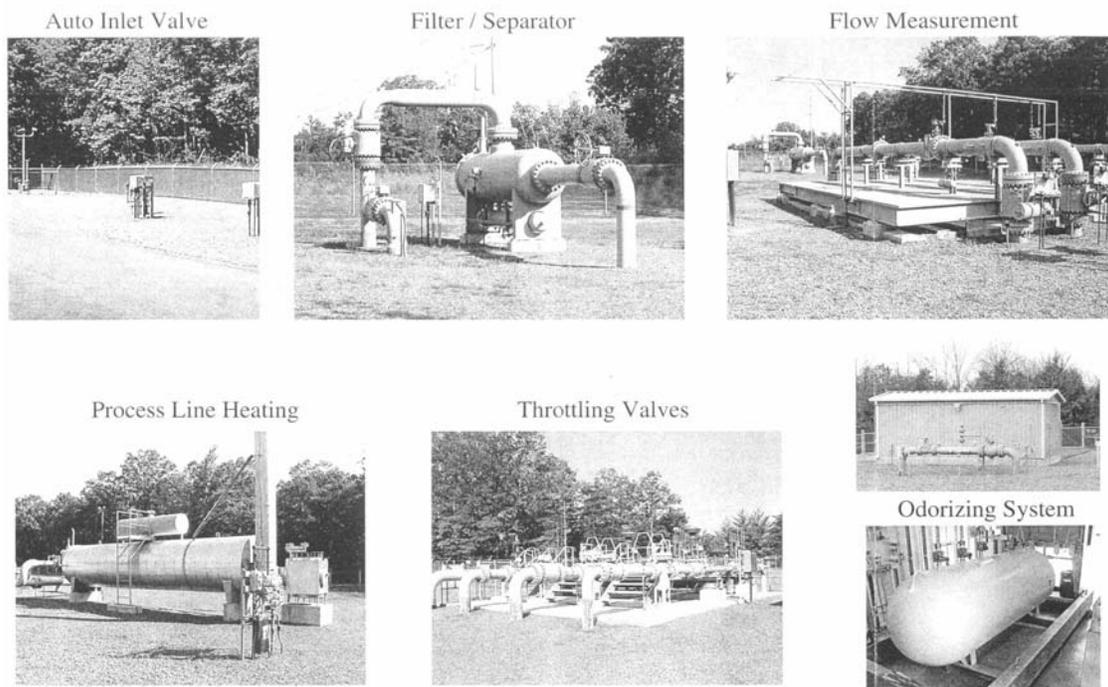


The new gate station is intended to replace the current, but much smaller, Redland Gate Station, located about ¼ mile away. Petitioner had originally sought to expand the current gate station, which is quite near Macgruder High School, but was unable to acquire the necessary land. Tr. 120. Petitioner indicates in its Land Planning and Zoning Report (Exhibit 3) that the existing

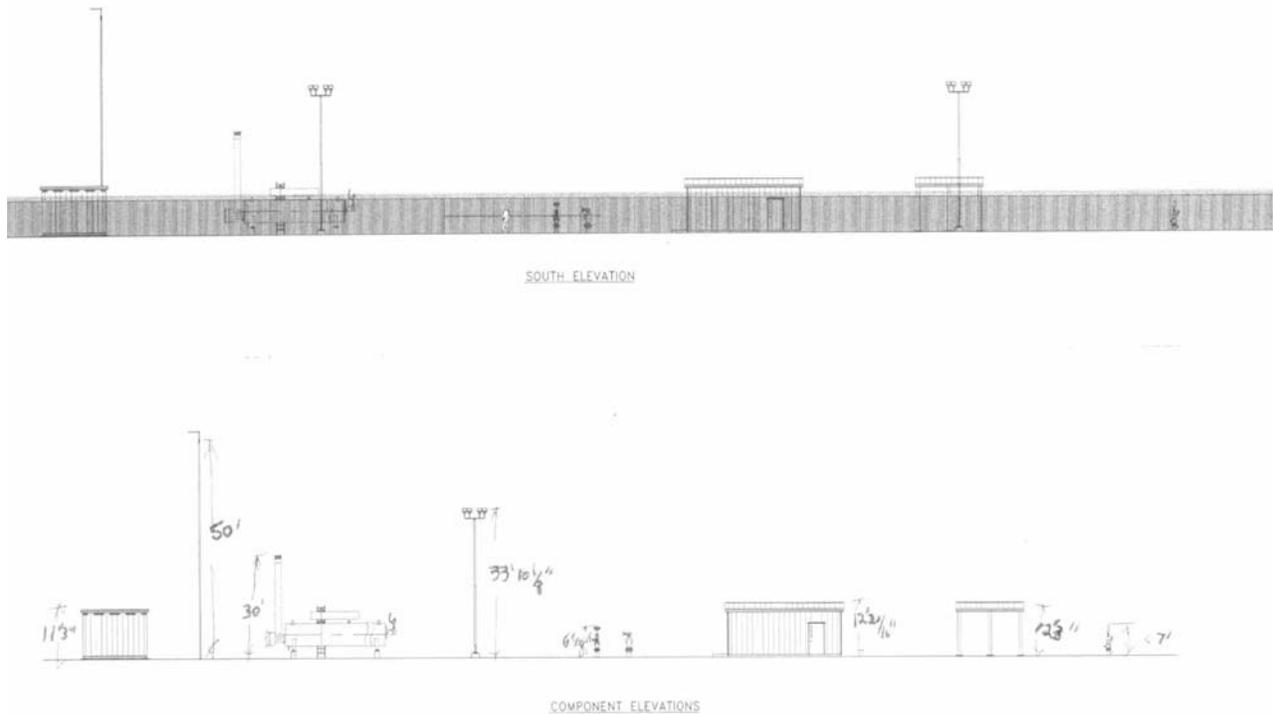
station, being right next to Muncaster Mill Road, is vulnerable to vehicular damage and possible security risks. Moreover, it does not have the capacity or equipment to serve the current and growing needs. The new gate station will handle seven to ten times the volume. Tr. 119.

The purpose of the gate station is to measure the amount of natural gas received from the supplier, to convert it for retail use and to transmit the converted gas through retail distribution pipelines to end users. The natural gas would reach the proposed gate station through three underground lines. Petitioner would install four to six feet below the surface on a 65 foot wide easement bisecting the unforested portion of the stream valley buffer. This easement is depicted on the Preliminary Forest Conservation Plan (Exhibit 18(b)), but it is not part of this special exception petition because underground utility pipes are a permitted use in the RE-2 Zone. §59-C-1.31.

A gate station functions by taking high-pressure natural gas from the nearby underground supply line through an auto-inlet valve, filtering it, measuring its flow, heating it where necessary for processing, regulating it through throttling valves, odorizing it so leaks can be readily detected and then distributing it through underground gas lines which eventually direct gas to the consumer. The equipment necessary to accomplish these functions is shown in Exhibit 5(i), and reproduced below:



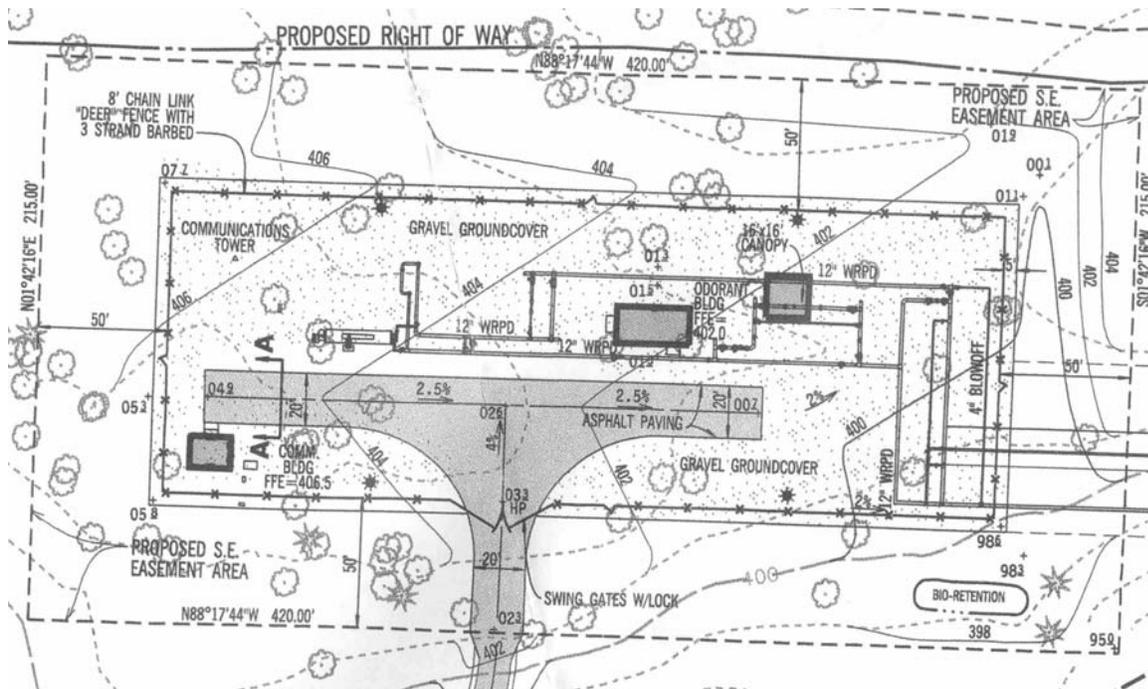
In addition, there will be a 50-foot high communications tower to communicate with the Operations Center, which will monitor the station remotely, and a heater line exhaust stack, which will be installed to a height of 30 feet. Some of this equipment will remain outdoors and some of it will be housed under a 12 foot, 3 inch tall canopy and in two proposed buildings with metal facades. One of the buildings will be 12 feet, 2<sup>1</sup>/<sub>16</sub> inches tall and the other will be 11 feet, 3 inches tall. Lights will be mounted on poles in 4 locations, at a height of 33 feet, 10<sup>1</sup>/<sub>8</sub> inches, but they will not be turned on except for repairs or emergencies. The elevations of these structures, as shown in Exhibit 29, are depicted below.



The following photo (Exhibit 5(j)) shows an installation similar to the one planned here, but without the surrounding landscaping projected for this site. (In the subject site, the gate station area within the fence will occupy less than an acre, and it will be surrounded by a 50 foot buffer, filled with trees).



An enlargement of the gate station area of the site plan (Exhibit 18(a)) depicts the intended location of the equipment and general setup of the gate station.





noticeable in any event. Moreover, this area of the park is already used for a maintenance yard (the RCMY), so the addition of the gate station on this site will not be disturbing virgin parkland.

The proposed use will be unmanned. Activity at the site will be limited to monthly maintenance and calibration, which according to Petitioner, typically require one or two service technicians in a single vehicle on site for approximately two hours. Additionally, once a year an 18-wheel tractor-trailer will deliver odorant to the facility, and this delivery will take approximately two hours.

#### **E. Petitioner's Right to Apply for a Special Exception on this Land**

As noted above, this case is a bit unusual because Petitioner does not currently have either ownership or a contractual right over the land in question. Under Zoning Code §59-A-4.22(a)(6), a petition for a special exception generally must be accompanied by “the lease, rental agreement or contract to purchase by which the applicant's legal right to prosecute the petition is established,” if the applicant is not the owner of the property. In the instant case, however, the particular special exception sought, Zoning Code §59-G-2.43 for public utility buildings and structures, has a specific provision which the Hearing Examiner finds overrides the more general provision. That provision, Zoning Code §59-G-2.43(i), provides:

- (i) A petitioner under this section is considered an interested person for purposes of filing a request for a special exception if the petitioner states in writing under oath that a bona fide effort has been made to obtain a contractual interest in the subject property for a valid consideration without success, and that there is an intent to continue negotiations to obtain the required interest or in the alternative to file condemnation proceedings should the special exception be granted.

Because the subject parcel and the land needed for the proposed access road are owned by the M-NCPPC, condemnation proceedings are not an option in this case. Petitioner therefore argues that it has complied with subsection (i) by its ongoing efforts to obtain permanent easements from the M-NCPPC. As indicated in the Planning Board's letter of April 16, 2004

(Exhibit 21), two members of that Board voted against recommending the special exception because they believe that, absent eminent domain power, Petitioner had not satisfied Zoning Code §§59-A-4.22(a)(6) and 59-G-2.43(i); however, the majority of the Planning Board voted to recommend conditional approval of the petition, allowing Petitioner to acquire the property interest in question by way of a lease, easement or purchase agreement, any of which would have to be approved by the M-NCPPC prior to construction.

By both live testimony (Tr. 45-48) and the sworn affidavit of Matthew G. Esmacher (Exhibit 27), Petitioner established at the hearing that a *bone fide* effort has been made to obtain a contractual interest in the subject property (*i.e.*, a permanent easement) for a valid consideration (\$ 60,000 per acre), so far without success, and that Petitioner intends to continue the negotiations. Although these negotiations have been going on with the Technical Staff for almost two years, William E. Gries, Land Acquisition Specialist for the M-NCPPC, characterized the discussions as “preliminary.” (Exhibit 25). Both Mr. Gries and the Planning Board make clear in their letters that negotiations are still at the staff level and have not directly involved the Planning Board itself because, as Mr. Gries notes, “staff has not yet made a recommendation to the Board.” Nevertheless, the negotiations are clearly ongoing, and the Hearing Examiner cannot conceive of any reason Petitioner would go to the time and expense of obtaining a special exception if it did not intend to pursue its efforts to obtain a contractual right to use the subject land. Moreover, as demonstrated by Exhibit 9 (which is also Exhibit “G” to the Esmacher Affidavit), Charles R. Loehr, M-NCPPC Staff Director, wrote a letter to the Board of Appeals on June 17, 2003,<sup>7</sup> expressly “authoriz[ing] Washington Gas to petition for Special Exception approval of the proposed use” (*i.e.*, the subject gate station on the M-NCPPC land in question).

At the request of the Hearing Examiner, Petitioner researched all the Board of Appeals

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<sup>7</sup> Paragraph 12 of the Affidavit erroneously refers to the date of the Loehr letter as July 17, 2003. The best evidence of the date of the letter are the copies of it in the record as Exhibit 9 and attached to the affidavit as Exhibit G.

Opinions regarding Zoning Code §59-G-2.43 special exceptions since March 1997, and found that in only one case was a petitioner seeking to build a utility building or structure on public land (Exhibit 33). That case was S-2304, in which AT&T Wireless Services applied for a special exception to permit construction of a 180 foot tall monopole, nine panel antennas and an equipment shelter in the maintenance yard of the Wheaton Regional Park. As in the present case, the petitioner in S-2304 did not have a contractual interest in the parkland at the time it applied for its special exception, but it did have a letter from an M-NCPPC official, similar to the June 17, 2003 Charles Loehr letter in the instant case, conditionally authorizing the petitioner “to apply for status as an applicant before all County Agencies.” The Board of Appeals granted the special exception in S-2304. Thus, there is precedent for the Board of Appeals accepting a special exception application under Zoning Code §59-G-2.43 even though the subject land is owned by the M-NCPPC and the petitioner has not yet acquired a contractual interest in the subject land, as long as there are ongoing negotiations that satisfy §59-G-2.43(i).

In the instant case, the ongoing, good faith, negotiations are clearly demonstrated by the affidavit of Matthew G. Esmacher, the Charles Loehr letter, the William Gries letter and the Planning Board majority vote to recommend conditional approval of the special exception. The Hearing Examiner is convinced that, taken together, these circumstances satisfy the statutory requirements because the statute does not limit its application to situations where eminent domain is available; rather, it specifies that there must be an intent to continue negotiations “**or in the alternative**” to file condemnation proceedings should the special exception be granted. Moreover, Petitioner indicated that it would agree to a condition requiring it to formally notify the Board of Appeals in the event that Petitioner is unable to obtain a contractual interest in the needed land, and to certify that it is abandoning its special exception. The Board of Appeals would then be able to revoke the special exception. This procedure would avoid leaving an

unused special exception on the books.

#### **F. The Current Need for a Site Plan Showing Two Possible Access Roads**

The submitted site plan shows two possible access roads serving the proposed gate station. (See Site Plan on Page 9 of this Report.) The preferred alignment crosses through a portion of the maintenance yard facility that contains a former landfill. The Petitioner is also proposing an alternative alignment in the event that the technical review process yields information which would preclude the preferred alignment from being constructed. Both possible access roads are approximately the same size, so the total size of the easement will remain about the same in either case.

Whichever access road is built, it will connect through Beach Drive. Because the Beach Drive is a private park road, the Petitioner will need to obtain an easement over Beach Drive and through park property to serve the subject use. The proposed access easement begins at the intersection of Needwood Road and Beach Drive and runs initially to the entrance of the RCMY facility. That portion of the easement consists of 20,760 square feet. At the entrance to the maintenance yard, the asphalt easement road begins and continues east through the RCMY facility to the subject site. That portion of the easement consists of 29,160 square feet. Thus, the total access easement would be approximately 49,920 square feet.

Petitioner has agreed to a condition requiring it to notify the Board of Appeals and seek administrative modification of the special exception once the final location of the access road has been determined. The administrative modification would substitute a Site Plan showing the actual location of the access road, as finally determined, and eliminate the alternate access road from the Site Plan.

#### **G. Community Response**

No letters were received from members of the community; however, Brian and Dian

Belanger, the closest residents to the subject site (about 700 feet away) did attend and participate in the hearing. The location of their home at 5730 Avery Court is noted on the aerial photo (Exhibit 28) shown above at page 7. At the conclusion of the hearing, Mr. Belanger stated that, although he would have been happier if the gate station were to be located further to the west, he understood reasons why that was not feasible. In any event, he noted that Washington Gas had “been responsible in trying to minimize any adverse impact from this proposed station, for which we’re very grateful.” Tr. 201-202 .

### **III. SUMMARY OF THE HEARING**

Petitioner called four witnesses at the hearing when it resumed on April 27, 2004 – Matthew G. Esmacher, Kevin M. Murphy, John Sekerak, Jr. and Afsi T. Nikoo. Martin Klauber, the People’s Counsel, participated in the hearing, but did not call any witnesses. Community participants, Brian and Dian Belanger, articulated their concerns, but did not expressly oppose the special exception. At the outset of the hearing, the motion to amend the petition which had been filed and noticed on April 14, 2004, was granted, without objection.

#### **A. Petitioner’s Case**

##### 1. Matthew G. Esmacher

Matthew G. Esmacher testified both as a fact witness and as an expert in civil engineering, including light and noise analysis. Mr. Esmacher identified his affidavit describing Petitioner’s efforts “to secure a contractual interest in the property that is the subject of the Petition,” and his affidavit, with attachments, was admitted into evidence as Exhibit 27. Mr. Esmacher also testified that Petitioner had made a proposal to Bill Gries of M-NCPPC to purchase the land for use as the proposed gate station. The amount of Petitioner’s proposal was determined by an independent appraiser Petitioner had hired. Tr. 46. It was the M-NCPPC that recommended an easement rather than a purchase. Tr. 48. In any event, Mr. Gries recently told

Mr. Esmacher that “he should have a counter-proposal for the property this week.” Tr. 46  
Petitioner is ready to send Mr. Gries a proposed easement, and according to Mr. Esmacher, once  
Petitioner and Mr. Gries have agreed on the easement language and the price, “it’s just a matter  
of him presenting [it] before the Planning Board.” Tr. 47.

Mr. Esmacher then testified on the way a gate station operates, by taking high-pressure  
natural gas from the nearby underground supply line through an auto-inlet valve, measuring its  
flow, heating it where necessary for processing, regulating it though throttling valves, odorizing  
it so leaks can be readily detected and then distributing it through underground gas lines which  
eventually direct gas to the consumer. Tr. 49-56. The odorant itself is non-toxic; it just adds a  
smell to the natural gas which would otherwise be odorless.

To be feasible, a gate station needs to be within half a mile of the intersection of the  
natural gas supply lines and Petitioner’s distribution lines. The site for the proposed gate station  
was selected because it is near the intersection of the interstate natural gas supply lines run by  
Transco and the Petitioner’s own distribution lines. Tr. 59-60.

The gate station would serve residents of Montgomery County. All of the pipes connecting  
to the supply and distribution lines would be underground.<sup>8</sup> Tr. 58-66. Petitioner had originally  
sought to expand the current Redland gate station, but was unable to acquire the necessary land. Tr.  
120. The proposed gate station is essential to permit Petitioner to supply natural gas to increasing  
numbers of customers in Montgomery County, since the current gate station does not have  
sufficient capacity or equipment. Tr. 60. The new gate station will handle seven to ten times more  
gas volume than the current one. Tr. 119.

Mr. Esmacher described the various structures which will comprise the gate station,  
including their heights. The tallest structure would be the 50 foot communications tower, which

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<sup>8</sup> Underground utility pipelines are a permitted use in the RE-2 Zone, and their installation for this project is therefore not a part of this special exception request.

will be disguised to look like a wooden utility pole. The line heater stack, which was originally thought to be 35 feet, will actually be 30 feet tall. Tr. 71-78. The deer fence around the gate station would be made of metal latticework, with black slats woven in. Its height would be limited to eight feet, including any barbed wire on top. Tr. 81. There would be trees all around the fence. Tr. 82.

Since natural gas is odorless, an odorant is added so that gas leaks can be detected. There are gas detectors on site, and the flow of gas can be shut down either remotely or locally. Absent a leak of either odorant or odorized gas, there would be no detectable fumes or odors from the site. Tr. 83. The facility should not represent a danger to the local residents even in the event of a leak because any gas leaking from the site would dissipate to an unignitable level by the time it reached the closest residence. Tr. 84-96.

Mr. Esmacher also identified Exhibit 30 and testified that sound levels would not exceed the County's 55 decibel limit, even without considering the dampening effect of the buildings, fence and landscaping. Tr. 98-101. He then testified how the photometric study (Exhibit 6(b)) demonstrates that light within the easement area would fall off to less than .1 foot candle. At the nearest residence, the Belangers, who live 700 feet away, the light would be essentially zero, according to Mr. Esmacher. Tr. 102

Finally, Mr. Esmacher testified, in response to cross-examination questions, that the chain link fence would be locked and the buildings would have sensors to detect any unauthorized entry and notify headquarters. Tr. 111-112.

## 2. Kevin M. Murphy

Kevin M. Murphy testified that he is an engineering "area head" for Washington Gas, and as such, is Mr. Esmacher's supervisor. He testified that because of the spacing between the facility and all existing residences, "there would be no danger in the event of a fairly catastrophic

occurrence with ignition . . .” Tr. 127-128 The federal government regulations provide for a safety study of areas surrounding gas pipelines out to 220 yards. The nearest residence is beyond even that conservative safety zone and very safe, according to Mr. Murphy. Tr. 128-131.

### 3. John Sekerak, Jr.

John Sekerak, Jr. testified as an expert in land planning and landscape architecture. Mr. Sekerak testified that the proposed gate station will replace the existing Redland gate station. Tr. 184. He identified the neighboring area around the subject site. Tr. 147. He then addressed the *Upper Rock Creek Master Plan's* proposal for residential development to the north of the subject site. Mr. Sekerak testified that even if there were residential development to the north, the closest such residences could be located would be about 500 feet from the subject site (Tr. 144-145), and the view from such residences would be well-buffered by the landscaping that will surround the subject site and by the ICC, if it is built.

Mr. Sekerak explained that an alternate access road plan had to be included in the site plan because the preferred access route would traverse a former landfill, and the designers are not yet sure that the land will properly support a road. Tr. 150-151.

Mr. Sekerak further testified that the 50 foot communications tower planned for the subject site will be disguised as a wooden utility pole to blend in with the background. In his expert opinion, the utility pole disguise would make the pole less noticeable than a tree disguise because it would add less bulk. Tr. 164-165. He stated that it was not practicable to make the utility buildings here look residential. Tr. 166-167. The buildings are quite small (around 12 feet tall), and it would be impossible to make them look like residences without bulking them up in a way that would also result in them being more obtrusive. Instead, Petitioner has proposed an eight foot tall metal fence, with vertical black slats, surrounded by numerous large trees.

Mr. Sekerak discussed the Preliminary Forest Conservation Plan (Exhibit 18(b)), filed by

Petitioner and explained that, pursuant to the Plan, Petitioner will clear .25 acres of forest and retain 1.47 acres. After a credit for landscaping, the total reforestation and afforestation required is .56 acres. Petitioner will provide 1.99 acres of forestation. This Plan was approved by the Technical Staff (Tr. 174), and Petitioner plans to plant these trees in a way that will provide an additional buffer between the proposed gate station and the nearest residences. Tr. 174-176.

The gate station, as landscaped, should be in harmony with the park-like area, and there should be no light or noise from this facility detectable by the closest residences. Tr. 181-182. There will also be no detectable vibrations. Tr. 184.

Although the proposed gate station will be unmanned, it does have an asphalt area large enough to hold the vehicles which transport the monthly maintenance workers and the odorant deliverer, as well as a turn-around area for the trucks. Tr. 190.

#### 4. Afsi T. Nikoo

Afsi T. Nikoo testified as an expert in civil engineering. She stated that the subject site is not within a special protection area, and Petitioner's concept storm water management plan was approved by Department of Permitting Services. Tr. 198. According to Ms. Nikoo, the approved preliminary water quality plan requires quality control via a bio-retention facility. That facility is shown on the site plan in the southeast corner of the gate station. Tr. 198. Quantity control was not required. Tr. 198.

#### **B. People's Counsel**

The People's Counsel expressed concern about four aspects of the instant petition, but ultimately supported its approval.

Mr. Klauber's first concern was that the Petition asked the Board of Appeals to grant a special exception before Petitioner had a contractual interest in the land on which the use would take place. Tr. 22-24. This issue is discussed at length in Part II.E. of this report, beginning on page 14. The

language of Zoning Code §59-G-2.43(i) places utilities in a more flexible position than other applicants in this regard because it provides that a petitioner will have standing to file for a utility building or structure as long as it shows that a *bona fide* effort has been made to obtain a contractual interest and there is an intent to continue negotiations. To avoid the potential of having an unusable special exception on the books, Petitioner and Mr. Klauber agreed upon a proposed condition that requires Petitioner to formally notify the Board of Appeals that it is abandoning its special exception and that it consents to its revocation, if it is unable to obtain a contractual interest in the needed land. Tr. 205-208.

Mr. Klauber also indicated that he would have preferred a tree disguise for the communications tower, but both Petitioner's expert, John Sekerak, and the Technical Staff opined that a utility pole disguise was appropriate in this case, and there was no expert testimony in favor of the tree disguise.

A third issue raised by Mr. Klauber was the problem with approval of a site plan with alternative access roads, only one of which will actually be built. Mr. Klauber suggested a condition to resolve this problem which was agreeable to all parties. Tr. 154-155. The condition requires that when the final location of the access road is determined, Petitioner will notify the Board of Appeals and seek administrative modification of the special exception to substitute a Site Plan showing the location of the access road, as finally determined, and eliminating the alternate access road from the Site Plan.

Finally, all parties agreed to a language change Mr. Klauber suggested to the final condition proposed by Technical Staff. That change would require Petitioner to submit to M-NCPPC, prior to construction, not only its detailed design plans, but also the site plan to be approved by the Board of Appeals in this case. Tr. 203-204.

### **C. Community Testimony**

#### **Brian and Dian Belanger**

The Belangers cross-examined Petitioner's witnesses and, at the conclusion of the hearing, Mr. Belanger stated that, although he would have been happier if the gate station were to be located further to the west, he understood reasons why that was not feasible. In any event, he noted that Washington Gas had "been responsible in trying to minimize any adverse impact from this proposed station, for which we're very grateful." Tr. 201-202 .

### **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 (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 Code § 59-G-1.21 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-1.21. Inherent adverse effects, alone, are not a sufficient

basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a Public Utility Building and Structure use. Characteristics of the proposed Public Utility Building and Structure use that are consistent with the “necessarily associated” characteristics of Public Utility Building and Structure uses will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with Public Utility Building and Structure 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, though not breaking out “inherent” characteristics separately, specified that “[t]he inherent and non-inherent characteristics associated with the proposed use, are the asphalt access road, buildings, equipment, lights, fencing, and communications tower.” The Hearing Examiner considers these physical features to be inherent in the use and would add that some traffic for maintenance and servicing the facility would also be an inherent characteristic of the use. Possible non-inherent characteristics from this type of use, in the Hearing Examiner’s opinion, would include unusual structure heights, excessive traffic or activity, high levels of light, noise, odor, fumes or vibrations and any danger to the surrounding neighborhood from the use.

Technical Staff points out that the proposed buildings (both under 13 feet) are well below the 50-foot height requirement of the RE-2 Zone and will be fenced and surrounded by substantial landscaping and screening. The 50 foot communications tower will be constructed to resemble a wooden telephone pole, and Technical Staff feels it will be “compatible with the low density undeveloped character of the surrounding area. Visibility of this pole to the surrounding area is expected to be minimal.” Staff also noted that “[t]he setbacks and landscaping will mitigate the non-inherent impacts of height and location of structures.”

Absent an emergency, traffic to, and activity in, the subject site is expected to be minimal. The gate station is designed to be unmanned. It requires only monthly visits by one or two technicians in the same vehicle for maintenance, and once a year, a truck will come to the site to refill the odorant tank. There will be no addition to peak hour traffic. Exhibit 3 and Technical Staff report (Exhibit 17).

The lights will be used only during emergencies or necessary repairs and will not create excessive illumination onto nearby residential properties, as is evident from photometric studies attached to Exhibit 3.

Noise levels at the property line will be within the 65 decibel daytime and 55 decibel nighttime limits set for residential areas in Montgomery County Code § 31B-5(a)(1), as demonstrated by Exhibit 30. Moreover, the property line is 700 feet from the nearest residence, so there should be no detectable noise from this facility. Tr. 182. There will also be no detectable vibrations. Tr. 184.

Since natural gas is odorless, an odorant is added so that gas leaks can be detected. There are gas detectors on site, and the flow of gas can be shut down either remotely or locally. Absent a leak of either odorant or odorized gas, there would be no detectable fumes or odors from the site. Tr. 83

The facility also should not represent a danger to the local residents even in the event of a leak because any gas leaking from the site would dissipate to an unignitable level by the time it reached the closest residence. Tr. 84-96.

In sum, based on the evidence in this case, and considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner agrees with the conclusion of the Technical Staff that “[t]here are no non-inherent effects that require a denial.”

### **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, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

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

Conclusion: A Public Utility Building and Structure use is a permissible special exception in the RE-2 Zone, pursuant to Code § 59-C-1.31.

*(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-2.43 for a Public Utility Building and Structure 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 property is located within the area covered by the recently amended *Upper Rock Creek Master Plan*, approved by the Council on February 24, 2004 and adopted by the M-NCPPC on April 21, 2004. That Plan, which has not yet been published in its final form, does not discuss the subject site, nor make any recommendations regarding it; however, it does discuss the "Woodlawn Property," a 79 acre tract immediately to the north of the subject property. Development of the Woodlawn property may bring residential development closer to the subject site; however the Hearing Examiner is satisfied, because of distance from the closest possible residential development and intervening buffers, that the proposed gate station would not adversely impact residential areas that may be developed on the Woodlawn property. Technical Staff also found no conflict with the Master Plan, noting that the requested use is permitted as a Special Exception in the RE-2 Zone. In sum, it is fair to say that the planned use, a Public Utility Building and Structure, is not inconsistent with the applicable Master Plan.

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

Conclusion: The proposed gate station (*i.e.*, the area inside the 8 foot fence) will occupy less than an acre. The fence around the gate station will be surrounded by a 50 foot

buffer area which will be densely covered with trees. Moreover, because it will be an unmanned site and will have few visits for maintenance, there will be almost no activity or traffic to disturb the neighborhood. The Hearing Examiner finds that the use will be of such low intensity and will be so well screened, both by its fence and the trees which will surround it, that it will blend in with the park-like setting. In fact, it will likely be less obtrusive than the nearby RCMY. Moreover, it will be so distant from the closest residences that it should have no impact on them. The use will thus be in harmony with the general character of the 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.*

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 noted above, the proposed use is located in parkland and will have almost no physical impact on the nearest residences. On the positive end, it will help ensure continued supply of natural gas to the area.

- (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: As discussed at length in Part IV.A, above, the special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area.*

*Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: According to the Technical Staff, the only other special exception in the area is a private riding stable (S-266). Moreover, Mr. Sekerak testified that the proposed gate station will replace the existing Redland gate station. Tr. 184. Thus, the evidence supports the conclusion that the Public Utility Building and Structure use proposed in this case will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely or 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: As discussed in Part IV.A., above, the evidence supports the conclusion that the gate station will not be a danger to public health, safety or security. Tr. 84-96. The nature of the use makes the morals issue inapplicable. 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. By its nature, the use does not burden public schools, nor does it require sewer or water service. Police and fire protection are presumed adequate by the Annual Growth Policy unless those agencies specify otherwise. The use will generate no traffic during

peak periods and only occasional maintenance trips. The subject site is not within a special protection area (Technical Staff report), and Petitioner's concept storm water management plan was approved by Department of Permitting Services (Appendix D to Exhibit 3 and Tr. 198).

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

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the public facilities review must include analysis of both the Local Area Transportation Review ("LATR") and the Policy Area Transportation Review ("PATR"). The Technical Staff did do such a review, and determined that because there will be no peak hour trips, LATR is satisfied without the need for a traffic study. Moreover, the Rock Creek Policy Area is one of five rural policy areas with no assigned staging ceilings for jobs or housing units, and the Technical Staff therefore determined that PATR is satisfied. The Hearing Examiner agrees with these conclusions.

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

Conclusion: As mentioned above, the proposed gate station will require only one visit a month for maintenance and one visit per year to refill the odorant tank. A safe access road will be constructed. Technical Staff determined that this minimal usage of the roads is unlikely to create any conflicts with vehicles or pedestrians. Thus, the evidence of record supports the finding 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 Report (Ex. 17)] provide sufficient evidence that the specific standards required by Section 59-G-2.43 are satisfied in this case, as described below.

#### ***Sec. 59-G-2.43. Public Utility Building and Structure.***

*(a) A public utility building or public utility structure, not otherwise permitted, may be allowed by special exception. The findings of this subsection (a) do not apply to electric power transmission or distribution lines carrying in excess of 69,000 volts. For other buildings or structures regulated by this section, the Board must make the following findings:*

*(1) The proposed building or structure at the location selected is necessary for public convenience and service.*

Conclusion: The proposed gate station is essential to permit Petitioner to supply natural gas to increasing numbers of customers in Montgomery County, since the current gate station does not have sufficient capacity. Tr. 60. Its location was determined by the fact that, to be efficient, it needs to be within half a mile of the intersection of the natural gas supply lines and Petitioner's distribution lines, as is the case here. Tr. 59-60.

*(2) The proposed building or structure at the location selected will*

*not endanger the health and safety of workers and residents in the community and will not substantially impair or prove detrimental to neighboring properties.*

Conclusion: As discussed in Part IV.A., above, the evidence supports the conclusion that the gate station will not be a danger to the health or safety of nearby residents. Tr. 84-96. Its location on parkland, in a fenced area, 700 feet from the nearest residence reduces any potential safety hazards. There will be no workers on site, except the monthly maintenance crew and the annual odorant crew. Thus, the Hearing Examiner finds that the proposed use would not adversely affect the health and safety of workers and nearby residents or be detrimental to neighboring properties.

*(b) A public utility building allowed in any residential zone, must, whenever practicable, have the exterior appearance of residential buildings and must have suitable landscaping, screen planting and fencing, wherever deemed necessary by the Board.*

Conclusion: It is not practicable to make the utility buildings here look residential. Tr. 166-167. The buildings are quite small (around 12 feet tall), and it would be impossible to make them look like residences without bulking them up in a way that would also result in them being more obtrusive. Instead, Petitioner has proposed an eight foot tall metal fence, with vertical black slats, surrounded by numerous large trees. (See the Landscape Plan reproduced, in part, on page 13 of this Report). The Hearing Examiner concludes that Petitioner has satisfied the requirements of this section.

*(c)The Board may approve a public utility building and public utility structure exceeding the height limits of the applicable zone if, in the opinion of the Board, adjacent residential developments and uses will not be adversely affected by the proposed use.*

Conclusion: The proposed structures will not exceed the 50 foot height limit of the RE-2 Zone.

*(d) Any proposed broadcasting tower must have a setback of one foot from all property lines for every foot of height of the tower; provided, that any broadcasting tower lawfully existing on September 1, 1970, is exempt from the setback limitations imposed by this subsection, and may be continued, structurally altered, reconstructed or enlarged; provided further, that any structural change, repair, addition, alteration or reconstruction must not result in increasing the height of such tower above the then existing structurally designed height.*

Conclusion: There is no “broadcasting tower” proposed here; however, even if one were to consider the 50 foot communications tower as a broadcasting tower, it would meet the 1:1 setback requirements since it will be located about 80 feet from the easement line and 100 feet from the nearest property line (Exhibit 3).

*(e) Examples of public utility buildings and structures for which special exceptions are required under this section are buildings and structures for the occupancy, use, support or housing of switching equipment, regulators, stationary transformers and other such devices for supplying electric service; telephone offices; railroad, bus, trolley, air and boat passengers stations; radio or television transmitter towers and stations; telecommunication facilities; above ground pipelines. Additional standards for telecommunication facilities are found in subsection (j).*

Conclusion: Technical Staff and the Hearing Examiner agree that the proposed use does require a special exception, but it is not a telecommunications facility. Therefore, subsections (j), (k) and (l) and their subparts are inapplicable.

*(f) Reserved.*

*(g) In addition to the authority granted by Section 59-G-1.22, the Board may attach to any grant of a special exception under this section other conditions that it may deem necessary to protect the public health, safety or general welfare.*

Conclusion: Recommended conditions are set forth in Part V, below.

*(h) Petitions for special exception under this section may be filed on project basis.*

Conclusion: Not applicable.

*(i) A petitioner under this section is considered an interested person for purposes of filing a request for a special exception if the petitioner states in writing under oath that a bona fide effort has been made to obtain a contractual interest in the subject property for a valid consideration without success, and that there is an intent to continue negotiations to obtain the required interest or in the alternative to file condemnation proceedings should the special exception be granted.*

Conclusion: Petitioner is engaged in ongoing negotiations with the M-NCPPC to obtain permanent easements which will permit construction of the gate station and an access road. This issue is discussed at length in Part II.E., beginning on page 14 of this Report. The Hearing Examiner concludes that Petitioner does qualify as an interested party under this section and should be allowed to request a special exception.

*(j), (k) and (l)*

Conclusion: Subsections *(j), (k) and (l)* apply only to telecommunication facilities, and are therefore inapplicable here.

#### **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 17), modified to coincide with testimony at the hearing, demonstrates compliance with all development standards:

## Comparison of Development Standards:

Item	Required in RE-2 Zone	Proposed
Lot Area	2 acres	15.99 acres for parcel 2.07 acres for subject site
Minimum Building Setback from Street	50 feet	800+ feet
Minimum Building Setback from Rear of Site	35 feet	125 feet
Maximum Coverage	25 percent	0.1 percent
Maximum Building Height	50 feet	12 feet $2\frac{1}{16}$ inches for buildings 12 feet 3 inches for canopy 30 feet for the heater stack 33 feet $10\frac{1}{8}$ inches for the lights 50 feet for the communications tower

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

Conclusion: The proposed use is unmanned, and thus has no need for regular parking; however, it does have an asphalt area large enough to hold the vehicles which transport the monthly maintenance workers and the odorant deliverer, as well as a turn-around area for the trucks. Tr. 189-190.

- (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) *Public utility buildings and public utility structures, 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 RE-2 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: Petitioner has filed a Preliminary Forest Conservation Plan (Exhibit 18(b)), under which it will clear .25 acres of forest and retain 1.47 acres. After a credit for landscaping, the total reforestation and afforestation required is .56 acres.

Petitioner will provide 1.99 acres of forestation. This Plan was approved by the Technical Staff (Tr. 174), and Petitioner plans to plant these trees in a way that will provide an additional buffer between the proposed gate station and the nearest residences. Tr. 174-176. The Hearing Examiner concludes that this plan is consistent with the approved Preliminary Forest Conservation Plan.

- (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 Hearing Examiner concludes that the special exception sought in this case would be consistent with the approved preliminary water quality plan, which requires quality control via a bio-retention facility. That facility is shown on the site plan in the southeast corner of the 50 foot buffer around the gate station. Tr. 198 and Exhibit 18(a).

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

Conclusion: Petitioner did not propose any signs in this case.

- (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: The compatibility of the proposed gate station with its surroundings is discussed above in connection with the requirements of Zoning Code §59-G-1.21(a)(4). The Hearing Examiner concludes that the structures planned in this case will be compatible based on the relatively small bulk of the structures, the low elevations of the buildings, the thorough landscape buffer and the distance from all residences.

- (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: The photometric study attached as Appendix G to Exhibit 3 demonstrates that the four lights planned for the gate station will not create lighting levels exceeding 0.1 foot candles along the side and rear lots; nor will glare or light spill into any residential property, the nearest one being 700 feet away. Moreover, the lights will only be turned on in the event of an emergency or when required for occasional maintenance. Therefore, the Hearing Examiner concludes that Petitioner's lighting does not violate applicable standards.

Based on the testimony and evidence of record, I conclude that the Public Utility Building and Structure 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-2596, seeking a special exception for a Public Utility Building and Structure to be located on park area owned by the M-NCPPC adjacent to Rock Creek Regional Park and the Rock Creek Maintenance Yard Facility, about a third of a mile south of the intersection of Needwood Road and Muncaster Mill Road, in the Upper Rock Creek Park area of the County, 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. Petitioner shall coordinate with Technical Staff regarding the sight distance adequacy at the proposed gate station access road intersection with Beach Drive.
3. Petitioner shall submit a final Forest Conservation Plan (FCP) to the M-NCPPC Environmental Planning staff prior to issuance of sediment and erosion control permits.
4. If the access road's alternative alignment is constructed, the Petitioner must submit a revised FCP and detailed Tree Save Plan, prepared by an ISA certified arborist. This alternative alignment shall be constructed so as to preserve two-thirds or more of the critical root zone of the 57 inch Tulip Poplar tree referenced in the Technical Staff report (Exhibit 17).
5. An acceptable land lease, easement or purchase agreement between Washington Gas and the M-NCPPC, for all property affected by the project, must be finalized before construction of the gate station begins.
6. The access road for ingress and egress to the gate station site from Beach Drive will be located as shown on the submitted plan. The "alternate access alignment" as shown on the submitted plan will be used only if the Petitioner demonstrates to the M-NCPPC's satisfaction that the preferred alignment is not workable from a construction and engineering perspective, recognizing that specialized construction measures are likely to be required

- within the preferred alignment that passes through an area previously used as a landfill.
7. When the final location of the access road is determined, Petitioner will notify the Board of Appeals and seek administrative modification of the special exception to substitute a Site Plan showing the location of the access road, as finally determined, and eliminating the alternate access road from the Site Plan.
  8. The Petitioner agrees to relocate, at its cost and expense and in a timely manner, any or all portions of the established access road to the gate station, as may be required in the future, to accommodate approved facility plans for the future redevelopment of Rock Creek Regional Park Maintenance Yard.
  9. Prior to commencement of construction, the Petitioner must submit the site plan approved by the Board of Appeals for the project, as well as detailed design plans, and obtain approval by the Park Development Division through the Park Permit Technical Review and Construction Permit process. Following approval of the detailed design plans, the Park Development Division will issue a Permit for Construction on Park Property which will itemize and detail conditions and requirements that must be met by the Petitioner.
  10. Petitioner's construction and maintenance of the subject gate station must comply with all applicable federal, state and local statutes and regulations.
  11. In the event that Petitioner is unable to obtain a contractual interest in the needed land, it must, within a reasonable time, formally notify the Board of Appeals that it is abandoning its special exception and consenting to its revocation.

Dated: May 14, 2004

Respectfully submitted,

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Martin L. Grossman  
Hearing Examiner

