

IN THE MATTER OF	:	BEFORE THE
WAVERLY WOODS	:	HOWARD COUNTY
DEVELOPMENT CORPORATION	:	BOARD OF APPEALS
Petitioner	:	HEARING EXAMINER
	:	BA Case No. 10-023C

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DECISION AND ORDER

On November 22, 2010, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the conditional use petition of Waverly Woods Development Corporation for a gasoline service station conditional use in combination with a permitted convenience store in a PEC (Planned Employment Center) Zoning District, pursuant to Section 131.N.25 of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner certified to compliance with the hearing advertisement and notice requirements of the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Ronald L. Spahn, Esquire, represented the Petitioner. Joseph Rutter, Kennar Warfield, and Terrel Fisher testified as witnesses for the Petitioner. Ralph Ballman also testified, but not in opposition to the petition.

FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, I find the following facts:

1. Property Identification. The subject property is located in the 3rd Election District.

It is referenced as Tax Map 16, Grid 4, Parcel B and will be known as 2200 Marriottsville Road. According to the petition, the subject property is part of the GTW Waverly Woods subdivision (Section 14) recorded as Plat # 20938.

2. Property Description. The proposed area of the Conditional Use is a wedged-shaped 1.46-acre portion of the 20.46-acre Parcel B ("the Site"). The corner Site has frontage on Marriottsville Road and Barnsley Way. Although the Site is only 20 feet wide at its northern edge, it widens to 200± feet along its curving southern edge, which abuts Barnsley Way. The Site is a recently graded, relatively level open area with a six-foot high retaining along its western edge.

3. Vicinal Properties. The remainder of the irregularly shaped, PEC-zoned Parcel B adjoins the Site on its northern and western edges. The Little Patuxent River and its 100-year floodplain dominate this western edge. Just west of the Site, the Barnsley Way bridge spans the river. Barnsley Way and its bridge culminate in a cul de sac just beyond the transcontinental gas pipeline right-of-way running northwest to southwest through the Waverly Woods development.¹

4. The Barnsley Way cul de sac provides access to the very large "Parcel A," a PSC (Planned Senior Community) zoned property, which envelopes Parcel B to the north, west and south.² In 2003, the Zoning Board approved this PSC zoning for age-restricted adult housing development through ZB 1027M. It is currently known as The Courtyards at Waverly Woods-West. The portion of Parcel A south of the Site, across Barnsley Way, is an undeveloped

¹ On Petitioner's Exhibit 2, a January 21, 2003 overall conceptual development plan for Waverly Woods, the cul de sac is located to the east of this pipeline.

² Petitioner's Exhibit 2 and the TSR refer to this Parcel as "Parcel A." Mr. Rutter referred to this parcel as Parcel A in his testimony. The vicinity map on Petitioner's Exhibit 1, the July 29, 2010 Conditional Use Plan, identifies this parcel as "Parcel C."

floodplain and wetlands area.

5. Across Marriottsville Road to the Site's east, is a wooded area with a Waverly Woods sign at the northeast corner of the Warwick Way intersection with Marriottsville Road. The southeast corner of the Warwick Way intersection with Marriottsville Road is improved with an office and retail component of Waverly Woods (including the Silo Building.)

6. Roads. Marriottsville Road along the east edge of the Site is being widened. According to the Conditional Use Plan, southbound Marriottsville Road in this area will have a dedicated southbound right turn lane at Barnsley Way and a southbound right turn lane to Warwick Road.³ Barnsley Way at its intersection with Marriottsville Road has a variable width. According to Department of Public Works data, the traffic volume on Marriottsville Road south of MD 99 (Old Frederick Road) was 15,701 average daily trips ("ADT") as of March 2005.

7. Sight Distance. The TSR did not estimate sight distance given the degree of road construction, but concludes sight distance along Barnsley Way would not likely an issue.

8. General Plan. The 2000 General Plan Policies Map 2000-2020 designates the Property as "Residential Areas." The 2000 General Plan Transportation Map 2000-2020 depicts Marriottsville Road as an Intermediate Arterial. Barnsley Way is not depicted on the Transportation Map, but the TSR states it would function as a Local Road.

9. Water and Sewer Service. The Property will be served by public water and sewer.

10. Zoning History. The TSR states "[t]here is no record of any specific Board of Appeals, Zoning Board, or Department of Planning and Zoning cases for the Site."

11. The Proposal. The Petitioner proposes to develop the Site with a gasoline service

³ During his soliloquy on the TSR, Mr. Rutter emphasized that F-09-57 drives the road widening, not the Conditional Use Plan.

station conditional use in combination with a convenience store and car wash. The combination of uses is permitted subject to the criteria in Section 131.N.25.i, as discussed below.

The Gasoline Service Station and Service Bays. The proposed gasoline service station use would consist of an approximate 66-foot by 90-foot canopy covering the gasoline service station operation situated in the southeasterly portion of the Site. The operation would comprise six double-sided multiple product dispensers (MDPS) (fuel pumps), which would allow 12 vehicles to refuel at the same time, based on the Conditional Use Plan. Diesel fuel would be dispensed from the same pumps. A six-bay, 3,105-square foot (30-foot by 105-foot) vehicle service building is proposed to adjoin the convenience store. An enclosed dumpster would be located to the north of the service bays.

According to the TSR, the service station would be limited to minor automotive servicing and changing of tires, gasoline dispensing, and the provision of such services as pressurized air, oil and water. Diesel fuel would be provided for automobiles, but the site is designed to restrict large truck traffic. Wrecked or dismantled vehicles would not be stored onsite. The TSR notes the Conditional Use Plan does not depict the location for the proposed air service use.

The Convenience Store. A 3,200-square foot convenience store is proposed northwest of the gasoline service station 36 feet from the Site's southwest edge. According to the petition, vending machines and the sale of propane will be limited to the convenience store.

Parking. The Conditional Use Plan depicts 27 parking spaces, 9 in front of the convenience store, 9 to the east of the service bays across from the vehicle circulation area, 5 perpendicular and 4 parallel parking spaces near the Site's southeastern corner.

Proposed Hours of Operation: The petition states the hours of operation for both uses (apparently) will not be limited because the site does not adjoin residential zoning. During the proceeding, Mr. Rutter testified the Petitioner would not object to limiting the hours to 5:00 a.m. to 12:00 a.m. seven days a week.

Employees. The petition does not specify the number of employees. Mr. Rutter testified that no operator has been selected.

Signage. The Conditional Use Plan depicts a proposed sign on the south side of the Marriottsville Road ingress.

Access. The Conditional Use Plan depicts two entrances: a 24-foot, angled ingress- only driveway on Marriottsville Road located about 35 feet south of the Site's northern edge, and a 45-foot wide ingress and egress on Barnsley Way.

Landscaping. The July 29, 2010 Conditional Use Plan (Exhibit 1) notes the type of perimeter and internal landscaping to be provided. The plan itself notes in green the general location of the landscaping. Additionally, Petitioner's Exhibit 3, an illustration of the proposed use depicts a long row of bushes along Marriottsville Road. The structures, parking, and canopy are clearly visible.

General Site Features. The convenience store, service bays, and MPDs are sited at an angle to Marriottsville Road. In the northern area of the 1.46-acre conditional use site (the Site) is a large bio-retention/landscape area located along Marriottsville Road. The 9 parking spaces in front of the convenience store and the 9 in front of the service bays area marked "Proposed Permeable Surface." Within the area of the conditional use site is a 6-foot high solid wall

constructed in association with the recently graded Site and located behind the convenience store and next to the stream buffer.

12. It was Mr. Rutter's testimony that the proposed gasoline service station is intended to draw traffic off Marriottsville Road, but not off US 70 or US 40. The diesel pumps are intended for residential and small farm consumption, not for large tractor-trailer trucks. In his opinion, such vehicles would not want to pay the price for diesel gasoline at the station, nor would they be able to fuel up because their tanks have two fill caps, one on each side of the tank. Because the pumps cannot accommodate such trucks, drivers would be disinclined to use the proposed gasoline service station because the tanks would fill too slowly.

13. Mr. Rutter testified that air and water service would be provided within the service bays. Diesel fuel would be available at the interior pumps.

14. According to Mr. Rutter, the proposed uses would comply with county lighting requirements. The Petitioner is also working with the Howard Astronomical League to ensure lighting would not interfere with its programs.

15. It was Mr. Rutter's opinion that the proposed gasoline service station would not result in the proliferation of gasoline service stations. The nearest station with repair service is on Route 40. He also stated the proposed station would have no negative impact on the gasoline service station within the Waverly Woods Village Center because the village center station is not intended to attract outside traffic.⁴

⁴ Although Mr. Rutter testified to the village gasoline service station as being under construction, it is operational. Additionally, Mr. Rutter testified that this gasoline service station closes at 11:00 p.m. However, according to Board of Appeals Case No. 08-049C, the hours are 5:30 a.m. to 12:00 a.m. Additionally, Mr. Rutter testified that the opponents in this case were concerned about the gas station drawing traffic from Marriottsville Road. The Hearing Examiner takes notice that the opposition was primarily concerned with traffic from large tractor-trailers and other

16. Mr. Rutter further argued the TSR fails to acknowledge certain rezonings and zoning regulation amendments in the zoning history section, which he claimed caused the TSR to evaluate the petition improperly. He referenced Zoning Regulations Amendment ZRA 88, which made convenience stores a matter of right use in the PEC zone. He also referenced Zoning Bill ZB 1027M, which proposed to rezone Parcel A from PEC to PSC (Planned Senior Community Overlay District), and ZB-929-M. When the Hearing Examiner asked repeatedly if the Petitioner would be introducing into evidence the zoning actions to which Mr. Rutter referred, he replied no because they are a matter of public record.⁵

17. Disagreeing with the TSRs' commentary about the General Plan's historical policy to not expand commercial development west beyond the existing limits of such development on US 40, it was Mr. Rutter's testimony that such development was envisioned for this site from "Day 1." Expounding, he stated that ZRA 88 (County Council Bill 27-2008), which he averred was introduced at the request of "Waverly Woods" for this site, was intended in part to support commercial development at the Site and that the County Council knew very well the Petitioner's purpose for this parcel. He also stressed the presence of what he called commercial strip development across Marriottsville Road (the Silo Building complex).

18. Mr. Rutter stated the Petitioner would agree to eliminate the Marriottsville Road ingress as a condition of approval.

vehicles coming in from US 70 and 40. Two residents who lived in the area but not in the village center supported the petition because there was no nearby gasoline service station.

⁵ Although the Hearing Examiner noted at the close of the proceeding that she might review the zoning actions referenced by Mr. Rutter, she declined to do so. While the zoning actions may be a matter of public record, they are not part of the record of the case. Hearing Examiner Rule 9.6 deems only the following to be part of the record of the case without necessity of formal introduction: the TSR, any previously submitted technical reports, the Howard County Zoning Regulations, the Howard County General Plan, and all relevant laws and regulations. Had the Petitioner wanted the zoning actions to be admitted into evidence in support of the petition, it should have formally submitted the documentary evidence in accordance with Hearing Examiner Rule 9.3.

19. Mr. Rutter also disagreed with the TSR's conclusions about adverse impact of the proposed gasoline service station on the logical development of the neighborhood, especially its reliance on the reasoning set forth the TSR for Board of Appeals Case No. 99-004C, a conditional use proposal for a gasoline service station at the southeast corner of the Warwick Way intersection with Marriottsville Road (apparently in the same general area as the existing commercial condominium structures). Mr. Rutter testified the petitioner withdrew the petition for the gasoline service station when it encountered county opposition to the use at this site. According to Mr. Rutter, the county opposed the project because it would be located across from the Waverly Mansion and a portion of the golf course.

20. Testifying about safe access, Mr. Rutter stated the sight distance at the access from Barnsley Way must comport with recorded Plat # F-07-032, the plat for the westerly PSC-zoned Planned Senior Community, which includes access to Barnsley Way from Marriottsville Road.

21. Sight distance is adequate, according to Mr. Rutter, because Final Plat F-07-32 requires a dedicated southbound lane and right turn lanes at the Marriottsville Road/Warwick Way/Barnsley Way intersection. It is also a traffic controlled intersection and the county will require new light poles on Barnsley Way, which would be located for good sight distance.

22. In his testimony about safe access, Petitioner's engineer Terrel Fisher testified that the Barnsley Way ingress/egress was sited about 300 feet from the Barnsley Way intersection with Marriottsville Road. Barnsley Way here has one left out lane, two through lanes and a dedicated right-turn lane.

23. In response to the Hearing Examiner's question about the design of the gas station

to prevent large vehicles from visiting the gasoline service station, Mr. Fisher stated the islands are spaced for internal movements and would not allow the circulation of large trucks through the gas canopy area.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I conclude as follows.

I. Hearing Examiner Rule 10.4 Referral to DPZ

During the hearing, the Petitioner took exception to numerous comments in the Technical Staff Report (TSR). Pursuant to my authority under Hearing Examiner Rule 10.4, I asked the Department of Planning and Zoning (DPZ) to clarify or update the record on two TSR comments.⁶

Issue #1. In Part III, Zoning History, the TSR states, "[t]here is no record of any specific Board of Appeals, Zoning Board, or Department of Planning and Zoning cases for the Site." During the proceeding, Mr. Rutter alleged this statement is in error, averring the Petitioner filed ZRA 88 (County Council Bill 27-2008) on the request of Waverly Woods for this specific site.

Issue #2. In Part IV, Evaluations and Conclusions, the TSR states as follows.

There has been a longstanding General Plan policy to not extend commercial strip development westward beyond the existing limits of commercial development on US 40, and to promote the integration of commercial uses within mixed-use communities. A freestanding gas station and convenience store development on this busy intersection should be avoided along a road like Marriottsville Road. An existing, well-planned and well-located gasoline station and convenience store is operating at the nearby Waverly Woods Village Center further to the east in Waverly Woods [], so a second gasoline station and convenience store is unnecessary for the Waverly Woods neighborhood, and would likely mainly serve pass-through traffic, including traffic using I-70.

The Petitioner, through Mr. Rutter's testimony, alleges there is no such policy.

⁶ A third matter concerned what turned out to be a typographical error.

Department of Planning and Zoning Director Marsha McLaughlin (DPZ) responded to this Section 10.4 request by letter dated December 2, 2010. In response to the ZRA 88 Zoning History issue, DPZ stresses that the Petitioner was "Taylor Family Limited Partnership A & B," not the Waverly Woods Development Corporation. DPZ further explains that ZRA 88 proposed two regulatory changes, neither of which was introduced specifically for the Property in this case.⁷

Concerning the second issue, the General Plan policy not to extend commercial strip development, DPZ submitted several pages from the 1982, 1990, and 2000 General Plans.

1982 General Plan, Page 25 (Commercial Centers). The highlighted section addresses commercial development policy and states: "The basic policy for governing the location, scale and level of commercial development in Howard County is to maximize such convenience yet hold in check the trend toward "strip commercial" development along major access roads. This policy provides for a system of commercial centers designed and located to fit the size and density of the area being served."

1990 General Plan, Page 204 (Commercial Centers). DPZ highlighted the following language: "Both the 1971 and 1982 General Plans emphasized the need for conveniently located

⁷ The first proposed to amend Section 115.E. of the POR District concerning requirements for age-restricted adult housing uses to add new provisions that allow retail and service uses, subject to certain limitations and requirements. The second proposed to amend Section 116.B. of the PEC District to add "Retail and Service Uses Permitted in the B-1 District" as a permitted use on lots in a planned development containing a minimum of 500 dwelling units. According to the ZRA 88 TSR, DPZ opposed the PEC amendment in part because it would allow "by right a B-1-equivalent shopping center of unknown size in Waverly Woods, likely along Marriottsville Road, and would allow this without having to justify the change to the planned development through the rigors of a Zoning Map Amendment case. The TSR further concluded Amendment No. 2 was inharmonious with the goals of both Community Conservation and Enhancement Policy 5.7 (to ensure infill development will be compatible with existing neighborhoods), and Policy 5.9 (to allow for the appropriate size, location and purpose of commercial centers). The County Council approved the PEC component of ZRA 88 on August 6, 2008 (Council Bill 27-2008).

commercial areas without further expansion of strip commercial development along main roads. This new General Plan reaffirms this policy." Also highlighted is Policy and Action No. 7.26, No Extension of Commercial Strips, which states: "Reaffirm the policy of past General Plans to not extend commercial development on area on major roads beyond their present limits."

2000 General Plan, Page 191 (Commercial and Industrial Corridors). The highlighted paragraphs state: "Since 1971, the County's General Plans have emphasized the need for conveniently commercial areas without further expansion of strip commercial development along main roads. Commercial strips will not be expanded, but they will remain an important part of the County's commercial land uses. They offer many opportunities for business with large markets and the need for direct access to arterial highways."

Page 194, Policy 5.09, Allow for the appropriate size, location and purpose of commercial centers. The highlighted section states: "No extension of commercial strips. Reaffirm the policy of past General Plans to not extend strip commercial developments area on major roads beyond their limits."

Pursuant to Hearing Examiner Rule 10.4 the parties were afforded an opportunity to comment on or challenge DPZ's response.⁸ The Petitioner, through counsel, submitted written comments on December 13, 2010. Altering its view that ZRA 88 was filed on the request of Waverly Woods for this specific site, the Petitioner concurred with DPZ that ZRA 88 is a separate issue, but insisted that the TSR case history should have referenced past map amendment cases, including ZB-929-M and ZB 10-1027M (which did not concern the subject property). The comments further noted ZRA 88 was filed by on behalf of GTW and the Taylor Family Limited

⁸ Ralph Ballman did not respond.

Partnerships, both of which are in the same ownership as Waverly Woods Development Corporation. Lastly, the Petitioner avers, in reference to ZB 1027M, that access to the subject property by way of Barnsley Way was a part of that case.

Concerning DPZ's General Plan response, the Petitioner contends the highlighted sections reference a county policy not to extend strip commercial *zoning* along main roads, whereas the instant case is a conditional use. The Petitioner also insists the PEC commercial and office center in Waverly Woods on the southeast corner of Warwick Way and Marriottsville Road (the Silo Building) belies this policy. Lastly, the Petitioner maintains that this commercial use and the proposed gasoline service station have their ingress and egress on side streets, not Marriottsville Road (i.e., they are not sited on main roads).

Conclusions

The Hearing Examiner finds that TSR properly excluded the ZRA 88 zoning history because it was not intended specifically for the subject property in this case, as the Petitioner concedes in its response.

The Petitioner wrongly asserts that the General Plan policies on which DPZ relies relate narrowly to the application of commercial *zoning* to property. The past and current plan policies cited in the DPZ response are broad land use planning objectives. Indeed, the use of the general phrase "policies and actions" to describe how the 2000 General Plan goals and objectives will be implemented reflects the Plan's intention that the policies therein may be implemented through any of the land use mechanisms available to the county, a change in zoning being only one such

tool. Further, when the General Plan intends to implement a policy through a specific land use mechanism, it does so expressly.⁹

The Petitioner's testimony about "strip" commercial development across Marriottsville Road is also misguided. The Silo Building is not strip development; it is one of four condominium structures designed, approved and constructed as an office and retail component of Waverly Woods. For this reason, the project site access is internal---there is no access off Marriottsville Road. It also appears on Petitioner's Exhibit 2, a 2003 overall conceptual development plan for Waverly Woods. As to the Petitioner's response comments about internal access to the proposed gasoline service station site, the Hearing Examiner did not seek clarification of any aspect of ZB 1027M because it did not involve the subject property. Because the Petitioner presented no evidence or testimony during the proceeding purporting to demonstrate such access, the Hearing Examiner concludes the record lacks credible evidence as to internal access to the site of the proposed gasoline service station.

The Hearing Examiner therefore concludes the TSR's comments, together with DPZ's Hearing Examiner Rule 10.4 response, manifest a long-standing planning policy to not extend commercial strip development along major roads.

II. General Criteria for Conditional Uses (Section 131.B)

A. Harmony with the General Plan. Section 131.B.1 requires me to evaluate whether the proposed conditional use plan will be in harmony with the land uses and policies indicated in

⁹ Chapter 5, Policy 5.6 promotes "the better design of open space and lot size requirements in the Subdivision and Land Development and the Zoning Regulations." Policy 5.19 supports the establishment of an effective, inclusive community planning process, including program coordination. One of the actions proposed to implement this objective is to emphasize community conservation through "revision of both the Zoning and Subdivision and Land Development Regulations."

the Howard County General Plan for the district based on in which it is located. In making this evaluation, I am required to consider:

a. The nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site; and

b. If a conditional use is combined with other conditional uses or permitted uses on a site, whether the overall intensity and scale of uses on the site is appropriate given the adequacy of proposed buffers and setbacks.

The Howard County General Plan designates the area in which the Property is located as a "Residential Area" land use. The Petitioner proposes to use a 1.43 portion of the Property for the uses, in compliance with the specific criteria for the proposed uses.

As discussed above, the 1982, 1990, and 2000 General Plans consistently support the policy of not extending commercial strip development along main roads beyond their present limits. The proposed gasoline service station use, in combination with a convenience store, is commercial strip development. Importantly, the site at issue in this case is shown as undeveloped on the 2003 conceptual development plan for Waverly Woods.¹⁰ The Petitioner presented no evidence that the site of the proposed gasoline service station is an intrinsic part of the conceptual development of Waverly Woods.

Clearly, the General Plan recognizes the importance of limiting strip commercial development along main roads. Although the Petitioner agreed to eliminate the proposed

¹⁰ The Hearing Examiner notes that neither this conceptual use plan nor a proposed rezoning (even with a documented site plan) could contemplate a gasoline service station because conditional uses are approved separately through the Section 131.B process.

northern access from Marriottsville Road as a condition of approval, the proposed gasoline service station would still be sited—and highly visible--along that road.

The Hearing Examiner concludes the proposed gasoline service station is not in harmony with the land uses and policies indicated in the General Plan for the district. The petition does not comply with Section 131.B.1.

B. Adverse Impacts. Unlike Section 131.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, compatibility with the neighborhood is measured under Section 131.B.2's four "adverse effect" criteria": (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, and; (4) access.

The assessment of a proposed conditional use under these criteria recognizes the potential for adverse impact by virtually every human activity. Conditional use zoning therefore accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before me is not whether the proposed uses would have adverse effects in an RR district. The proper question is whether there are facts and circumstances showing the particular use proposed at the particular location would have any adverse effects beyond those inherently associated with such a special exception use irrespective of its location within the zone. *People's Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md. 54, 956 A.2d 166 (2008); *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981); *Mossburg v. Montgomery County*, 107 Md. App. 1, 666 A.2d 1253 (1995).

For the reasons stated below, the Hearing Examiner concludes the Petitioner has not met its burden of presenting sufficient evidence under Section 131.B.2 of the Zoning Regulations to

establish the proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with a gasoline service station in a PEC district.

a. Physical Conditions. The impact of adverse effects such as noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions will be greater at the subject site than it would generally be elsewhere in the zone or applicable other zones.

There is no evidence of the proposed gasoline service station generating inordinate noise detectable within the neighborhood. Accordingly, the Hearing Examiner concludes the Petitioner has adequately shown that any noise generated by the proposed uses will not be greater than that which is ordinarily associated with a gasoline service station use in the district.

Mr. Rutter testified the lighting will comply with county lighting requirements and the Petitioner is working with working with the nearby Howard Astronomical League to ensure lighting would not interfere with its programs. Nonetheless, the specific criteria for the conditional use include a detailed lighting plan because the use is adjacent to a PSC district, the site of a large age-restricted adult housing development. There being no detailed lighting plan, the Hearing Examiner is unable to evaluate the adverse effects of lighting from the use.

b. Structures and Landscaping. The location, nature and height of structures, walls and fences, and the nature and extent of the landscaping on the site are such that the use will not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.

The heights of the canopy, convenience store and service bays are unknown but they will comply, presumably, with all Zoning Regulations height restrictions.

The Hearing Examiner's evaluation of the proposed gasoline service station with respect to structures and landscaping, and in this case, walls, turns on their impact on the use and

development of adjacent land and structures. The petition reasons here will be no adverse impact because the Site does not border a residential area.

The Site is separated from the senior community to the West by a stream buffer, floodplain and utility easement. However, as a matter of law, this provision requires the Hearing Examiner to assess the use with respect to "adjacent" land and structures. Not all adjacent properties have physical contact.

The Hearing Examiner had occasion to visit the issue of "adjacency" in Board of Appeals Case No. 09-035C, wherein she concluded as follows.

[T]he Zoning Regulations are replete with requirements pertaining to adjoining parcels and lots, by which the regulations mean properties that physically touch at some common property line. These same regulations also prescribe a broad array of design or performance standards intended to protect "adjacent" residential properties, by which the regulations mean neighboring properties. This definition accords with the plain meaning of "adjacent": "not distant: nearby, like the city and adjacent suburbs." Adjacent may or may not imply contact but always implies absence of anything of the same kind in between, like a house with an adjacent garage. <http://www.merriam-webster.com/netdict/adjacent>.

What is adjacent to the proposed Site? The Courtyards at Waverly Woods – West, an age-restricted adult housing development.

The Hearing Examiner is not persuaded the proposed landscaping will not discourage the use of the adjacent residential area, the evidence being thin or non-existent on the issue. The landscaping depicted on the Conditional Use Plan is generic, in the TSR's words. Additionally, in Petitioner's Exhibit 2, the structures are clearly visible through the depicted landscaping.

Furthermore, within the area of the conditional use site is a 6-foot high solid wall constructed in association with the recently graded Site and located behind the convenience store and next to the stream buffer. The TSR declined to evaluate the wall for adverse impact because

it is opposed to the entire use and the Petitioner did not present evidence on the wall, reasoning the site or wall is not adjacent to any use or structure. The Hearing Examiner was unable to observe the wall during her site visit due to road improvement work. The Hearing Examiner concludes the Petitioner has not met its burden of demonstrating the proposed gasoline service station will not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.

c. Parking and Loading. Parking areas will be of adequate size for the particular use. Parking areas, loading areas, driveways and refuse areas will be properly located and screened from public roads and residential uses to minimize adverse impacts on adjacent properties.

The proposed parking meets minimum requirements. Because the proposed landscaping plan is generic, the Hearing Examiner is unable to determine if the parking areas, loading areas, driveways and refuse areas are located and screened from public roads and the age-restricted adult housing development will be properly located and screened from public roads and residential uses to minimize the adverse impacts of the proposed gasoline service station on adjacent properties.

d. Access. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate.

The Petitioner agreed to eliminate the Marriottsville Road access point. The proposed access on Barnsley Way appears to provide adequate sight distance. However, the evidence of record does not permit the Hearing Examiner to determine what impact the elimination of the Marriottsville Road ingress point may have on safe access to the site.

III. Specific Criteria for Gasoline Service Stations (Section 131.N.25)

a. The use will not adversely affect the general welfare or logical development of the neighborhood or area in which the station is proposed and will not have a blighting influence as a result of a proliferation of gasoline service stations within a particular area.

Adverse Effects on the general welfare or logical development of the neighborhood.

DPZ, through the TSR, opposes the proposed gasoline service station at the proposed Site in significant part because it will adversely affect the logical development of the neighborhood. Analogizing to its conclusions in the TSR for the withdrawn Board of Appeals Case No. 99-04E petition for a gasoline service station across Marriottsville Road, DPZ reasons the gasoline service station outside the village center area is not conducive to the logical development Waverly Woods, in part because it would diminish the overall design character of Waverly Woods, and specifically, the Barnsley Way entrance to the Courtyards at Waverly Woods-West.

The Hearing Examiner agrees. No commercial use is proposed for the site in the 2003 Waverly Woods conceptual plan and the evidence of record is devoid of any probative evidence that commercial uses at this specific site are part of the decades-long planning and development of Waverly Woods. The Hearing Examiner concludes the use will adversely affect the logical development of the neighborhood.

Blighting Influence. Howard County amended the specific conditional use standards for gasoline service stations in 2001.¹¹ Then Section 131.N.25.c was amended and retitled as Section 131.N.25.A (and subsequently retitled as Section 131.N.25.a.) It is reproduced here as it appears in Bill No. 11-2001 (ZRA 30).

¹¹ The 2001 amendments were part of a comprehensive revision of the Special Exception provisions of the Zoning Regulations, including changing the title of Special Exceptions to Conditional Uses. Bill No. 11-2001 (ZRA 30).

c]]A. The use will not adversely affect the general welfare or logical development of the neighborhood or area in which the station is proposed AND WILL NOT HAVE A BLIGHTING INFLUENCE AS A RESULT OF A PROLIFERATION OF GASOLINE SERVICE STATIONS WITHIN A PARTICULAR AREA.

Section 131.N.25.a is written in the conjunctive, requiring the Petitioner of a proposed gasoline service station conditional use to prove the use will not adversely affect the general welfare or logical development of the neighborhood or area AND not have a blighting influence. Hence, by operation of Section 131.N. 25.a, if the Hearing Examiner makes a negative finding as to the affect of the use on the general welfare or logical development, the evaluation ends without consideration of the blighting influence test.

Having concluded the proposed gasoline service station in this case will adversely affect the logical development of the neighborhood or area in which it is proposed, the Hearing Examiner makes no conclusions as to blighting influence.

b. The minimum lot size for a gasoline service station is 20,000 square feet. If a gasoline service station is combined with another use on the same lot, the minimum lot size shall be increased in accordance with the provisions of Section 131.N.25.i.

The Conditional Use Site is 63,899 square feet in area. The gasoline service station operation is 6,594 square feet, the service bays, 3,105-square feet, and the convenience store is 3,200-square foot, or 12,889 total square feet, in accordance with Section 131.N.25.b.

c. The lot shall have at least 120 feet of frontage on a public road. If at the intersection of two public roads, the total of the frontage along both roads may be used if ingress or egress is provided to both roads.

According to the amended Conditional Use Plan, the Site has about 470 feet of frontage on Marriottsville Road and about 246 feet on Barnsley Way, in accordance with Section 131.N.25.c.

d. At least 20 percent of the site area shall be landscaped. The landscaping plan shall include plantings which enhance the appearance of the site from public roads and provide appropriate buffering for adjacent uses.

The petition states that at least 20 percent of the site area will be landscaped. However, for the reasons discussed above, the Hearing Examiner is unable to make any determination about the use of plantings to enhance the appearance of the site from Marriottsville Road or Barnsley Way and whether the buffering is appropriate for the adjacent age restricted housing development. The petition does not accord with Section 131.N.25.d.

e. Solid walls such as masonry or wood and masonry may be required by the Hearing Authority when the site borders a residential district. When solid walls are required, landscape planting is required on the outside of the wall.

The term "border" is herein used geographically, as a boundary or endpoint between the site and a residential district. Another word for "border" is adjacent: not distant: nearby <the city and *adjacent* suburbs. <http://www.merriam-webster.com/dictionary/border>. The conditional use site borders the PSC district to the west and east, the site of the age-restricted adult housing development.

There is currently a retaining wall on the conditional use adjacent to this housing development. There being nothing in the record to evaluate it, I must conclude the proposed conditional use does not comply with Section 131N.25.e.

f. Refuse areas shall be fenced or screened from view. The plan shall indicate the disposal methods to be used for all waste material generated by vehicle repair operations.

According to the petition, the dumpster will be fenced and screened from view. Conditional Use Plan Note 15 provides the methods of disposal for waster material, in accordance with Section 131.N.25.f.

g. Access driveways and on-site paved areas shall be designed and located to ensure safe and efficient movement of traffic and pedestrians.

Based on the plan submitted, the Hearing Examiner agrees with the TSR that the Marriottsville Road ingress is a potential traffic hazard. The Hearing Examiner is also persuaded that the Petitioner did not meet its burden of proving that a single means of ingress/egress at Barnsley Way will be designed and located to ensure safe and efficient movement of traffic and pedestrians. The petition does not accord with Section 131.N.25.g.

h. Operation

(1) Outside operations shall be limited to the dispensing of gasoline, oil, water, pressurized air, the changing of tires and minor servicing. Storage of all automotive supplies shall be within the main structure.

The petition states the uses will be limited to minor automotive servicing within the service bays and the dispensing of gasoline at the dispensers under the canopy. Pressurized air and water service would be provided within the service bays. Diesel fuel would be available at the interior pumps.

(2) Vending machines and the sale of propane are permitted as accessory uses, provided these uses are screened or enclosed if required by the Hearing Authority.

According to the petition, vending machines and the sale of propane will be limited to the convenience store. Lacking sufficient information about their location however, the Hearing Examiner is unable to determine if they should be screened. The petition does not comply with Section 131.N.25.h.2.

(3) The premises shall be maintained at all times in a clean and orderly condition, including the care or replacement of plant materials required in the landscaping plan. The responsibility for compliance with this provision shall be with all parties having a lease or ownership interest in the gasoline service station.

Because the Hearing Examiner is denying the proposed gasoline service station, the use is not evaluated for compliance with these standards.

(4) Where a gasoline service station is adjacent to a residential district, its hours of operation and a detailed lighting plan shall be approved by the Hearing Authority.

As discussed above, the gasoline service station is adjacent to the PSC residential district. The petition proposes a 24-hour operation for all uses, apparently, although the Petitioner agreed to limit the hours from 5:a.m. to midnight as a condition of approval. The Petitioner did not provide a detailed lighting plan, contending the station is not adjacent to a residential district. Because I am unable to approve hours of operation and a detail lighting plan, I must conclude the petition does not accord with Section 131.N.25.h.4.

i. Other Uses

(1) Other uses may be located on the same lot as a gasoline service station, including uses permitted in the zoning district as well as car washes and convenience stores, provided that all uses are approved by the Hearing Authority and the minimum lot area is increased to accommodate the combination of uses. At a minimum, the minimum lot size of 20,000 square feet must be increased by an area equal to the gross square footage of floor area, parking area and loading or stacking areas required for the additional uses.

The gasoline service station use will be combined with a 3,200-square foot convenience store and it complies with the gross-floor area requirements in of this section.

The Petitioner is also proposing to dispense diesel fuel. Because the basic proposed use, a gasoline service station is contrary to the logical development of the neighborhood or area in which it is proposed to be located, the Hearing Examiner declines to approve it. No vacuuming or outdoor air pressure uses (excluding those within the service bays) are proposed.

(2) In the PEC, M-1 and M-2 districts, the gross floor area of convenience stores shall not exceed 3,500 feet.

Because the proposed convenience store will be 3,200 square-feet in area, it complies with Section 131.N.25.i.2.

ORDER

Based upon the foregoing, it is this 19th day of January 2011, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petition of Waverly Woods Development Corporation is **DENIED**.

HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER

MICHELE L. LEFAIVRE

Michele L. LeFaivre

Date Mailed: 1/19/11

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.