

IN THE MATTER OF	:	BEFORE THE
HIGH'S OF BALTIMORE, INC.	:	HOWARD COUNTY
Petitioner	:	BOARD OF APPEALS
	:	HEARING EXAMINER
	:	BA Case No. 14-030C

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DECISION AND ORDER

On June 9, 2016, 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 High's of Baltimore, LLC, (Petitioner) to enlarge and modify an existing gasoline service station and convenience store in a B-2 (Business: General) Zoning District, pursuant to § 131.0.N.24 of the Howard County Zoning Regulations (HCZR).

A Preliminary Matter

At the outset of the June 9, 2016 hearing, Petitioner introduced into evidence a 4-page, amended conditional use plan (CUP) reducing the conditional use site area to 32,517sf. Wayne Newton testified the reduced site is the result of the Pizza Hut operation (within the Lisbon Shopping Center) objecting to High's being assigned the 11-space parking area next to the cul-de-sac turnaround (as shown on the petition CUP). The amended CUP therefore proposes 21 parking spaces. The Hearing Examiner concluded the petition comported with Hearing Examiner Rules of Procedure 9.4 and 9.5 and admitted the amended plan.¹ This decision and order is based

¹Rule 9.4. Amendments to Petition. If a petitioner proposes to amend a petition during the course of the proceedings, the petitioner must submit the amendment as an exhibit.

Rule 9.5. Substantive Amendments. If the hearing examiner determines that an amendment to a petition is substantive, i.e., the amendment proposes a use that is likely to adversely impact vicinal properties, then the hearing examiner will suspend the hearing for at least three (3) weeks. At least two (2) weeks prior to the rescheduled

on the June 9, 2016 Amended CUP (Amended Plan).

Petitioner certified to compliance with the notice, posting, and advertising requirements of the Howard County Code. The Hearing Examiner viewed the property as required by the Hearing Examiner Rules of Procedure.

Andrew Robinson, Esquire, represented the Petitioner. John Phelps, Wayne Newton and Ellen Bockelman testified in favor of the petition. Doris (Billie) Whited also testified, but not in opposition or in favor.

Petitioner introduced into evidence the exhibit as follows.

1. An Amended Conditional Use Plan, June 9, 2016 (the Amended Plan)
2. Photographs, current use and ingress/egress driveway
3. BA 96-02E decision and order
4. Elevations, High's convenience store
5. Landscape Plan
6. Lighting Study
7. Letter from Property Owner Lisbon, LLC consenting to Petitioner filing petition for conditional use and revised CUP, June 8, 2016

FINDINGS OF FACT

Based upon the petition, plan and all evidence of record, the Hearing Examiner finds the following facts:

1. Property Identification. The 14.19-acre subject property is located in the 4th Election

hearing, the petitioner must send written notice of the amendment and of the date, time, and place of the next hearing to all adjoining property owners, and must file an affidavit of written notification with the clerk. In addition, the petitioner must post the property with notice of the date, time, and place of the next hearing for at least 10 days immediately before the next hearing in accordance with §2.203(b) of the Board's Rules. The hearing examiner may request that DPZ review and make recommendations on the amendment.

District at the terminus of Old Woodbine Road, about 165 feet north of old Frederick Road. It is referenced as Tax Map 0002, Grid 0024, Parcel 82, Parcel G and is also known as 708 Lisbon Center Drive (the Property). The Property is the site of the Lisbon Center shopping center.

2. Existing Conditional Use Site (the Site). The Site is currently improved with a convenience store with six parking spaces and two fueling islands with 3 double-sided multi-fuel dispensers (6 fueling positions, two of which dispense diesel fuel) under a 60'x27' wide canopy. The Site is accessed from a cul-de-sac at the terminus of Old Woodbine Road, off Old Frederick Road, and from within the shopping center.

3. Vicinal Uses and Properties. To the Site's north and northeast is a large parking lot in front of Buildings A and B of the Lisbon Center. To the northeast is the remainder of Building B, which has vacant tenant spaces. To the south, beyond the service lane, the B-2 zoned Parcel 226 is improved with a bank located close to Old Frederick Road and separated from the Lisbon Center by a wide lawn. To the southwest are the Old Woodbine Road cul-de-sac and a park-and-ride lot, both of which are located within the MD 94 right-of-way (ROW). To the northeast are a restaurant and bank on pad sites within Lisbon Center.

4. Roads. The Site has frontage on and access to the cul-de-sac at the Old Woodbine Road terminus. This section of the road has no travel lanes or posted speed limit. Except for customer vehicles already within Lisbon Center, this access is the principal ingress/egress for the convenience store and gas station, the main Lisbon Center entrance off MD 94 being much further north. Old Frederick Road has 2 travel lanes and about 21 paving feet. The ROW width is variable and becomes very wide between Old Woodbine Road and the Old Woodbine

Road/Frederick Road traffic circle. There is no current traffic data for Old Frederick Road in this location. According to Department of Public Works data, the traffic volume on Old Frederick Road east of MD 94/Woodbine Road was 2,517 average daily trips as of 2008.

5. Water and Sewer. The Property is served by private well and septic.

6. General Plan. PlanHOWARD 2030 designates the Property as "Rural Resource." DPZ's Land Use Plan, which is not part of the General Plan, designates the use as "Commercial." The Functional Road Classification Map depicts Old Woodbine Road as a Local Road and Old Frederick Road as a Major Collector.

7. Zoning History. In Board of Appeals Case No. 96-02C, decided July 18, 1996, A special exception (conditional use) was granted to petitioner High's of Baltimore, Inc., t/a High's Dairy Store, for a gasoline service station and convenience store.

8. The Proposed Enlargement and Modification of the Gasoline Service Station Conditional Use and Convenience Store (based on the Amended Plan and the petition/supplement). Petitioner proposes to enlarge the gasoline service station with three fueling islands containing two double-sided multi-product dispensers (MPDs) on each island, for a total of 6 MPDs and 12 fueling positions. Two MPDs will dispense diesel fuel. A new 16'7" tall, 48'x86' (4,128sf) canopy is proposed over the fueling island. The fuel field for underground tank storage would be located on the south side of the canopy.

The convenience store would be enlarged to 3,600sf by expanding within Building B vacant space. Twenty-one parking spaces are proposed; 18 for the convenience store and 3 for the gasoline service station. Six spaces are proposed on the northwesterly side of the

convenience store, 8 on the westerly side, including one accessible space and 7 spaces to the north of the fueling stations. Vender deliveries would be made to the rear of the convenience store from the shopping center service drive aisle behind Building B. The existing enclosed dumpster/recycling area on the Site's south side, between the fueling station and convenience store will remain. The proposed hours of operation are 5:00am to 12:00am. A maximum of four employees will continue to work on the Site at any time.

The Amended Plan also depicts existing pressurized vacuum and air pump services next to the dumpster and a propane exchange area on the western side of the convenience store. The Board of Appeals did not specifically approve these uses in BOA Case No. 96-02C; however, the Hearing Examiner acknowledges that older BOA decisions and orders did not always reference such accessory uses. The Hearing Examiner is therefore including these "proposed" uses as part of the proposed enlargement and modification, they being shown on the Amended Plan.

The Landscape Plan (Exhibit 5) depicts the existing landscaping on the south side of the Site as remaining. Six red maple trees are proposed. The proposed square footage of the conditional use Site is 32,517sf. According to the Amended Plan, the gasoline service station area is 20,000sf, the convenience store is 3,600sf, the 21-space parking area is 3,402sf and the parking drive aisles are 4,536sf. The total conditional use site area required is 31,538sf and the total Site area is 32,517sf.

9. The TSR/DPZ Recommendation. DPZ recommends the pre-amended plan and petition be granted subject to Petitioner submitting a landscaping plan for the Site.

10. Agency Comments. The Health Department's Bureau of Environmental Health

commented on April 27, 2016 that any Health Department requirements must be met prior to Health approval of a building permit. The Department of Inspections, Licenses and Permits had no comments. The Departments of Recreation and Parks & Fire and Rescue Services did not provide comments.

Direct Testimony of John Phelps

11. John Phelps testified to being the president of High's of Maryland, LLC. He testified to the history of the land use at Lisbon Center and to the need to upgrade the 20-year-old use for ADA compliance. The convenience store will have larger aisles and new products including the company's new Yo' Cow frozen yogurt machine with 16% butterfat and perhaps local sourcing. The enlargement is intended to better serve existing customers, not create new demand.

12. Mr. Phelps introduced into evidence Petitioner Exhibit 2, a five-page photographic exhibit. These photographs show existing conditions, including the two-pump aisle where vehicles are commonly backed up waiting for a fueling position, access and the current store. The store will be about a third larger. Landscaping will be modified to increase visibility. The proposed change in hours will accommodate motorists who work flex hours or work in the District of Columbia. He also introduced the BOA 96-02E decision and order into evidence as Petitioner Exhibit 3. Petitioner Exhibit 4-1 and 4-2 depict more windows to let in light. Exhibit 4-1 and 4-2 shows slightly differently door locations.

13. Discussing the new lighting, Mr. Phelps testified it would be LED and designed to eliminate spillover. He also testified the proposed number of pumps (6) is designed to meet

current demand.

14. On cross-examination by Ellen Bockelman about lighting at night, Mr. Phelps clarified that up to three lights would be left on under the canopy for safety when the operation is closed.

15. The Hearing Examiner questioned Mr. Phelps about night lighting. He explained that there would be perimeter lighting, interior store lighting and three LED night lights (one for each pump area).

Direct Testimony of Wayne Newton

16. Wayne Newton testified to being the project engineer. The Amended Plan is intended to alleviate tight site and use conditions. The front wall of the convenience store would be pushed back; the number of pumps is increased to six. The vestibule will provide better access, meet energy requirements and enhance the overall appearance of the use.

17. Mr. Newton further testified to there being two existing vehicular site access points, Old Woodbine Road and the main Lisbon Center access off MD 94. The Amended Plan eliminates a drive aisle to the north of the existing canopy, as can be seen on Sheet 2. This area now has five "intersections" or travel movements and is reconfigured to direct traffic better through channelization. There is better access/circulation around the use.

18. The Landscape Plan, Petitioner Exhibit 5, depicts landscaping along the southern border, two new landscaped parking islands and a wider landscape island by the store. The area between the use and the bank has landscaping. The Amended Plan, Petitioner Exhibit 1, notes these landscaping calculations: conditional use Site area: 32,517sf/20% landscape area=6,504sf; and total landscape area provided: 6,517sf. The proposed landscaping meets or exceeds all

landscaping requirements. There is a significant area of evergreen trees along the southern lot line.

19. Petitioner Exhibit 6 is a photometric plan of light level spillage. It predicts light levels under the canopy, from the store and from existing pole lighting. The levels increase under the canopy and is higher by the store for security reasons. Landscaping along the southern lot line and other areas will cut off lighting even more.

20. Petitioner also introduced Petitioner Exhibit 7, a revised owner permission letter.

21. On cross-examination by Ms. Bockelman, Mr. Newton testified that the existing pump aisles will be removed and new ones will be installed in the general location. The new pumps are directed toward the store and shopping center.

22. The Hearing Examiner questioned Mr. Newton about the fuel tanker. He explained it would be a WB50 truck.² The tanker would access the Site from Old Woodbine Road, turn right and make a fuel deposit and then circulate around the canopy and exit from Old Woodbine Road.

23. The Hearing Examiner also questioned Mr. Newton about neighborhood pedestrian access to the convenience store. Because the Petitioner does not have control over the non-conditional use site area within the shopping center, the Hearing Examiner asked Mr. Newton if pedestrian access—a demarcated area—could be provided within the conditional use site area.

24. On redirect, Mr. Newton explained the proposed changes would be considered

² WB is the designation for a semitrailer vehicle (tractor and trailer). WB refers to "wheel base" and WB50 is a wheel base standard developed by AASHTO (the American Association of State Highway and Transportation Officials). The number after "WB" is a measure of the wheelbase from the front wheels of the truck tractor to the most rear wheels of the trailer.

redevelopment under current stormwater regulations, requiring Petitioner to reduce the impervious surface area through the proposed landscaped islands. Mr. Newton testified that there are no access sidewalks in the larger shopping center area to connect to any on-site sidewalk.

Direct Testimony of Ellen Bockelman

25. Ellen Bockelman testified to residing on Old Frederick Road about ¼ mile from the Site. She explained the community supports the proposed conditional use petition because it is the best location in the neighborhood for the use, moves it further back into the shopping center, thereby eliminating the access area.³ The shopping center has had vacancies in the last few years and the proposed use would greatly enhance the center's appeal. The expansion of the convenience store would create more food choices.

Direct Testimony of Billie Whited

26. Billie Whited testified to residing on Old Woodbine Road on the south side of Old Frederick Road. She believes new pumps will make it difficult for pedestrians to walk to the convenience store. She would like to see a sidewalk along the service drive behind the store, which would provide access to the sidewalk in front of the store. Mr. Robinson explained a pedestrian access here would not be safe because large delivery trucks use the service drive.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Hearing Examiner concludes as follows:

³ The community opposed the relocation of High's to the adjoining property at 15850 Old Frederick Road in Board of Appeals Case No. 11-011C, which the Hearing Examiner denied on December 7, 2011.

I. General Criteria for Conditional Uses (§ 131.0.B)

HCZR §§ 131.0.B.1 & 2 require the Hearing Authority to evaluate whether petitioners have met their burden of proof that the proposed Conditional Use meets these tests: harmony with the General Plan and the overall intensity and scale of use relative to the Site and the streets proposed to give access to the Site.

A. Harmony and Intensity of Use (§§ 131.0.B.1 & .2)

1. The proposed Conditional Use plan will be in harmony with the land uses and policies in the Howard County General Plan which can be related to the proposed use.

Policy 10.4 calls for the review and amendment, as appropriate, of the conditional use regulations to reflect updated land use policies to reflect current best practices and policies to minimize the impact of development on the environment, including gasoline service stations. The June 15, 2015 ZRA 159 proposes several amendments to gasoline service station zoning regulations to implement this policy, but as of the date of this decision and order, the County Council has not enacted any amendments.

2. 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 are such that the overall intensity and scale of the use(s) are appropriate for the site.

The nature of the use will not change. Although the intensity of use would likely increase due to the enlargement of the convenience store and gasoline service stations, the new site design is intended in part to resolve internal circulation problems in the area of the conditional use site as well as within the site itself. There is no evidence that the overall intensity and scale of use is inappropriate, given the location of the site with respect to streets giving

access to the site.

B. Adverse Impacts

Unlike HCZR §§ 131.0.B.1 and B.2, which concern the proposed use's harmony or compatibility with the General Plan and the on-site characteristics of the proposed use, compatibility with the neighborhood is measured under § 131.0.B.3's six, off-site "adverse effect" criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, (d) access, (e) impact on environmentally sensitive area; and (f) impact on the character and significance of historic sites. These six adverse impact tests gauge the off-site effects of the proposed conditional use.

Inherent in the assessment of a proposed conditional use under these criteria is the recognition that virtually every human activity has the potential for adverse impact. The assessment 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 the Hearing Examiner is not whether the proposed use would have adverse effects in a B-2 zoning district or other "permitted" districts. The proper question is whether there are facts and circumstances showing the particular use proposed at the particular location would have any adverse effects above and beyond those inherently associated with such a special exception [conditional use] irrespective of its location within the zones. *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, Petitioner has met its burden of production and persuasion under HCZR § 131.0.B.3 to establish the proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with a gasoline service station in a B-2 zoning district or other district where the land use is permitted by conditional use.

131.0.B.3. The proposed use at the proposed location will not have adverse effects on vicinal properties above and beyond those ordinarily associated with such uses. In evaluating the proposed use under this standard, the Hearing Authority shall consider whether or not:

a. The impact of adverse effects such as, but not limited to, noise, dust, fumes, odors, intensity of lighting, vibrations, hazards or other physical conditions will be greater at the proposed site than it would generally be elsewhere in the same zoning district or other similar zoning districts.

There is no evidence of atypical noise, dust, fumes, odors, intensity of lighting, vibrations, hazard or other physical conditions at the proposed site than elsewhere in the B-2 zoning district or other similar zoning districts. The proposed LED lighting will prevent spillover. As a condition of approval, the Hearing Examiner is requiring Petitioner to reduce the canopy lighting to three LED lights, one for each pump area, when the convenience store/gasoline service station is closed between 12:00am and 5:00am. The petition complies with § 131.0.B.3.a.

b. The location, nature and height of structures, walls or fences, and the nature and extent of the existing and/or proposed landscaping on the site are such that the use will not hinder or discourage the development and/or use of adjacent land and structures more at the subject site than it would generally elsewhere in the same zoning district or other similar zoning districts.

No wall or fences are proposed. The convenience store, fuel pumps and canopy meet all setback requirements. Existing and proposed landscaping as shown on the Landscape Plan, (Petitioner Exhibit 5) will buffer the use from the adjacent commercial development and the B-

2 zoned property to the east. Existing and proposed landscaping and distance from adjacent residential uses ensure that the use will not discourage the development and/or use of adjacent land and structures more at the subject site than it would generally elsewhere in the same zoning district or other similar zoning districts. The petition complies with § 131.0.B.3.b.

c. The number of parking spaces will be appropriate to serve the particular use. Parking areas, loading areas, driveways and refuse areas will be appropriately located and buffered or screened from public roads and residential uses to minimize adverse impacts on adjacent properties.

HCZR § 133.0 requires, and the Amended Plan depicts, 21 parking spaces: 18 for the convenience store and 3 for the gasoline service station. Six spaces are proposed on the northwesterly side of the convenience store, 8 on the westerly side, including one accessible space and 7 spaces to the north of the fueling stations. These spaces would be located toward the interior of the Property and away from public roads and residential uses. The petition accords with § 131.0.B.3.c.

d. 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. For proposed Conditional Use sites which have driveway access that is shared with other residential properties, the proposed Conditional Use will not adversely impact the convenience or safety of shared use of the driveway.

No shared driveway access is proposed. The evidence shows the proposed, existing ingress/egress drives provide adequate sight distance. There is no evidence that the continued use of these drives would not provide safe access. The petition complies with § 131.0.B.3.d.

e. The proposed use will not have a greater potential for adversely impacting environmentally sensitive areas in the vicinity than elsewhere.

There are no known environmentally sensitive areas in the vicinity. A stream and wetlands area is located about 1,400 feet to the northeast. The petition complies with § 131.0.B.3.e.

f. The proposed use will not have a greater potential for diminishing the character and significance of historic sites in the vicinity than elsewhere.

There are no known historic sites in the vicinity. The closest historic site, Knock-Franklin Farm House (HO 980), lies about 2,500 feet from the Site. The proposed use will not have a greater potential for diminishing the character and significance of historic sites in the vicinity than elsewhere, in accordance with § 131.0.B.3.f.

II. Specific Criteria for Gasoline Service Stations (§ 131.0.N.24)

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.

The proposed modification and enlargement land use reconfigures the Site with a modest increase in use area. The use therefore will not adversely affect the general welfare and logical development of the neighborhood in which the station is proposed. There are no gasoline service stations in the immediate area of MD 94/Old Frederick Road. The petition complies with § 131.0.N.24.a.

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 131.0.N.24.i.

The Conditional Use Site is 32,517sf. According to the Amended Plan, the gasoline service station area is 20,000sf, the convenience store is 3,600sf, the 21-space parking area is 3,402sf and the parking drive aisles are 4,536sf. The total conditional use site area required is 31,538sf

and the total Site area is 32,517sf. The combination of uses meets the minimum required lot size, in accordance with § 131.0.N.24.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 Plan, the Property has more than 700 frontage feet on MD 94 and Old Frederick Road, in accordance with § 131.0.N.24.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.

According to the Amended Plan and the Landscape Plan, the 20% landscaped area must be 6,504sf and a 6,517sf area is provided, in compliance with § 131.0.N.24.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 TSR states this section is inapplicable.

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.

The refuse area is screened. There are no vehicle repair operations. The proposed use complies with § 131.0.N.24.f.

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

The design of the proposed land use will ensure safe and efficient movement of traffic. Additionally, Petitioner has redesigned a drive aisle to the north of the existing canopy to better direct traffic through channelization. Motorists who park in the proposed spaces will be able to

walk to the store without crossing the fueling area. The issue of safe pedestrian access to the convenience store access for neighbors who have not driven to the Site is discussed below in Part III. The petition accords with § 131.0.N.24.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.

Outside operations will be limited to the dispensing of gasoline, oil, water and pressurized air. The petition accords with § 131.0.N.24.h.(1).

(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.

No vending machines are proposed. There is an existing propane exchange program on the western side of the convenience store, which the Hearing Examiner is not requiring to be screened. The petition accords with § 131.0.N.24.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.

Petitioner agrees to comply with this standard, including refreshing or replacing plant materials harmed by construction, in accordance with § 131.0.N.25.h.(3).

(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.

The TSR concludes this standard is inapplicable, as the proposed use is not "directly" adjacent to a residential district. This "directly" adjacent language inserts an impermissible extra-legislative qualifier into the standard, implicating an "adjoining" residential test. The Hearing

Examiner has construed the terms "adjoining" and "adjacent" as used in the HCZR in multiple conditional use petition decisions and orders. Most recently in Board of Appeals Case No. 15-014C (denying a commercial solar facility on August 11, 2015), the Hearing Examiner explained the terms "adjoining" and "adjacent" as applied in the HCZR invoke different standards of compliance.

HCZR § 103.0 defines "Adjoining Property" as "[l]and which is touching or would be touching in the absence of an intervening utility or road right-of-way, other than a principal arterial highway." Consistent with this definition, the HCZR uses the term "adjoining" in the context of regulations that bear on bulk regulations, such as setback line restrictions from adjoining properties, or other narrowly defined requirements where specific information is needed about properties next to each other, and importantly, for pre-submission meeting notifications, which go only to a narrow class of persons, adjoining property owners and certain community associations. All properties on the south side of Old Frederick Road, including Mr. Kreider's, are adjoining properties.

The ordinary and usual meaning of the term "adjacent" applies, potentially, to more properties than those that adjoin the subject property: "close or near: sharing a border, wall, or point;" "not distant: nearby <the city and adjacent suburbs>; "having a common endpoint or border <adjacent lots> <adjacent sides of a triangle>." <http://www.merriam-webster.com/dictionary/adjacent>. Consistent with this broader meaning of "adjacent," the HCZR uses "adjacent" where, as in this standard, a broader geographic impact is implicated perforce of potential impacts of a regulated use or structure. The adjoining properties south of Old Frederick Road are therefore also adjacent properties. So are the properties further west on Old Frederick Road (those on the hilly stretch by Parcel 152) and those on the across MD 32, where Ms. Booth resides.

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Here, the adjacent residential district includes the residential areas on the south side of Old Frederick Road and east of the Lisbon Center. The Hearing Examiner is requiring Petitioner to reduce the fuel canopy lighting to three LED night-safety lights (one for each pump area)

between the hours of 12:00am and 5:00am, when the operation is closed. The requested hours of operation, 5:00am to 12:00am are granted, there being no evidence that these hours are inappropriate. The petition complies with § 131.O.N.25.h.(3).

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 Conditional Use Site is 32,517sf. According to the Amended Plan, the gasoline service station area is 20,000sf, the convenience store is 3,600sf, the 21-space parking area is 3,402sf and the parking drive aisles are 4,536sf. The total conditional use site area required is 31,538sf and the total Site area is 32,517sf. The petition accords with §131.O.N.25.i.(1).

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

This section is inapplicable.

j. Abandonment

(1) The premises (including landscaping) of any gasoline service station which is not in continuous operation or is abandoned shall be maintained in the same manner as is required under these Regulations for operating gasoline service stations.

(2) A Conditional Use for a gasoline service station shall become void upon notice of abandonment by the owner. If notice of abandonment is not received, but it is determined by the Department of Planning and Zoning that a gasoline service station has not been in continuous operation for a period of twelve months, a revocation hearing shall be initiated by the Department of Planning and Zoning in accordance with the procedures set forth in Section 131.O.L. For purposes of this subsection, "continuous operation" shall mean operation as a gasoline service station at least eight hours per day, five days per week.

(3) If a gasoline service station is abandoned and the Conditional Use becomes void as provided above, all gasoline pumps, pump island canopies and other improvements (not

including buildings) shall be removed from the site within six months of the date the Conditional Use becomes void.

The Petitioner agrees to comply with this standard, in accordance with § 131.0.N.25.j.

III. A Final Note: Pedestrian Access

At the end of the hearing, the Hearing Examiner had a general conversation with the community and Petitioner about pedestrian access to convenience stores with gasoline service stations, in light of Ms. Whited's interest in walking to the store.

Ms. Whited's interest, as a matter of zoning, would be considered under the evaluation of Petitioner's compliance with HCZR § 131.0.N.24.f, the safe access test. The Hearing Examiner in recent years has reviewed petitioners' compliance with the pedestrian safe access test more closely where the intensity of the proposed conditional use and site, in combination with other accessory uses, warranted visual demarcation of on-site pedestrian access to the convenience store. Thus, in Board of Appeals Case No. 14-011C (granted August 14, 2014), the Hearing Examiner conditioned approval of a gasoline service station/convenience store accessory carwash on Petitioner providing highly visible pedestrian walkway striping between certain parking spaces and the convenience store. In Board of Appeals Case No. 14-022C (denied June 29, 2016), Petitioner agreed to install visible pedestrian markings for persons who parked their cars in an area where they would have to walk to the store in the general location of a difficult driveway access.

More recently, the Hearing Examiner has generally considered the safe pedestrian access standard in the context of neighbors and area workers desiring to patronize a convenience store

with a gasoline service station by actually walking to the store: "walking customers." Certainly, petitioners should demonstrate pedestrian safe access for walking customers when the conditional use is not the typical suburban site, but one with more urban characteristics, by which the Hearing Examiner means the "neighborhood" is walkable. This is now certainly the trend when a petitioner is conducting a traffic impact study for adequate public facility ordinance (APFO) purposes, the preliminary results of which often go to prove safe access. Even the auto-centric Institute of Transportation Engineer's trip generation rates in ITE's *Trip Generation Handbook*, 3rd Edition, include recommendations for estimating trip generations for potential development sites in urban, suburban and rural settings to account for "walking customers." On this point, the Hearing Examiner notes here that the Adequate Public Facilities Task Force recommendations submitted to the County Executive on April 1, 2016 acknowledge that as the county moves closer toward an urban environment, a transportation network that meets the needs of pedestrians (and bicyclists) is vital.

In this case, Petitioner's provision of "walking customer" access to the convenience store is hampered by the fact that Petitioner does not control the larger shopping center Property within which High's is located and the Hearing Examiner may not exact off-site improvements as a condition of approval. Still, the Hearing Examiner encourages Petitioner to work with the Property owner to provide safe "walking customer" access to the conditional use Site.

ORDER

Based upon the foregoing, it is this **11th day of July 2016**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:


That the Conditional Use petition of High's of Baltimore, LLC, (Petitioner) to enlarge and modify an existing gasoline service station and convenience store in a B-2 (Business: General) Zoning District, is **GRANTED**;

Provided, however, that:

1. The Conditional Use shall be conducted in conformance with and shall apply only to the Conditional Use as described in the petition and depicted on the June 9, 2016 Amended Conditional Use Plan and not to any other activities, uses or structures on the Property.
2. Petitioner shall reduce the canopy lighting to three LED lights, one for each pump area when the convenience store/gasoline service station is closed between 12:00am and 5:00am.
3. Petitioner shall obtain all required permits.
4. Petitioner shall comply with all applicable federal, state and county regulations and laws.

HOWARD COUNTY BOARD OF APPEALS

HEARING EXAMINER


Michele L. LeFaivre

Date Mailed: _____

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 calendar 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.