

IN THE MATTER OF : BEFORE THE
GIANT OF MARYLAND, LLC : HOWARD COUNTY
Petitioner : BOARD OF APPEALS
: HEARING EXAMINER
: BA Case No. 11-034C

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DECISION AND ORDER

On April 23, May 31, and June 21, 2012, 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 Giant of Maryland, LLC, for a gasoline service station in a B-2 (Business: General) Zoning District, pursuant to Section 131.N.25 of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner certified that notice of the hearing was advertised and that the subject property was posted as required by the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Stacy Silber, Esquire, represented the Petitioner. Ross Infeld, Joseph Rutter, Lance Kirby, and Kevin Sitzman testified in support of the petition.

William Erskine, Esquire, represented Opponents Hugh Forton, Shahid Mahmood, Energy Management Building and Land, LLC and the Howard County Independent Business Association, Inc. Hugh Forton, Chris Alleva, John Seitz and Paul Revelle testified in opposition to the petition.

The Petitioner introduced into evidence the exhibits as follows.

1. Curriculum vitae, Joseph Rutter
2. Existing area gas stations
3. Nearest residence to proposed gasoline service station

4. Curriculum vitae, Lance Kilby
5. Truck turning moving plan
6. Vending machine pad
7. Curriculum vitae, Kevin Sitzman
8. Driveway accident diagrams
9. Aerial views of Waverly Woods Shell station and drive aisles
- 10A&B. Fuel delivery tank photographs, Exxon (Centre Park Drive)
11. Waverly Woods Site Development Plan
12. Photographs of the Waverly Woods Shell station with views to area residences
13. Photographs of views to area residential uses from proposed conditional use site

Opponents introduced into evidence the exhibits as follows.

1. Critical Lane Volume
2. Videos produced by Chris Alleva
3. Location of Chris Alleva during production of video
4. Video produced by Jon Seitz
5. Aerial photograph marked with vehicular movement at principal ingress/egress
6. Parking Analysis, May 23, 2012 prepared by Paul Revelle
7. Aerial photograph depicting parking behind Giant

FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, the Hearing Examiner finds the following facts:

1. Property Identification. The subject property is located in the 6th Election District on the northwest quadrant of the intersection of MD 108 and Centre Park Drive. It is referenced as Tax Map 30, Grid 18, Parcel 104, Lot A-1 and is also known as 8805 Centre Park Drive (the "Property").

2. Property Description. The Property is the site of the B-1 (Business: Local) and B-2 zoned Columbia Palace Shopping Center (the shopping center), which is anchored by a Giant Food Store (the Giant). The Property itself is irregularly shaped. The principal access to the shopping center is from Centre Park Drive about 250 feet north of MD 108. This access drive

runs in a generally east-west direction through the Property, dividing it into northerly and southerly sections. The Giant is located in the northerly B-2 zoned section, specifically the northeast portion, as is a small retail building. Between these stores and Centre Park Drive is a large parking lot. A long row of parking spaces runs along the west side of the small retail building and behind the Giant. There is vehicle circulation around the entirety of these buildings.

The southerly, B-1 zoned section is improved with a three-building retail/service center. The building closest to Centre Park Drive is a convenience store. The two other buildings house restaurants, stores and service businesses. There is a parking lot between the fronts of these buildings and Centre Park Drive/MD 108. A stormwater management pond occupies the area behind these buildings.

Additional access is possible from a secondary egress/ingress drive sited about 460 feet north of MD 108 and this access runs along the Property's easterly lot line. It serves development on adjacent parcels to the east.

The Property has a gradual downward slope from the Centre Park Drive frontage to the southwest. The parking lot perimeter along Centre Park Drive has an embankment.

3. Vicinal properties.

West Side of Centre Park Drive. On the Property's northeast side, is Parcel A-3 of the Oakland Executive Park. This POR (Planned Office Research) zoned, pipestem lot fronts Centre Park Drive and is developed with an office building. Parcels A-5, A-6 and A-4 of the Park lie

further toward the northeast and front Centre Park Drive. These B-1 zoned parcels are improved with various commercial and specialty retail operations.

East Side of Centre Park Drive. Parcel B of the Oakland Executive Park lies across Centre Park Drive, to the east and southeast. The M-1 (Manufacturing: Light) zoned parcel is improved with an office building and restaurant at the corner of MD 108. To the north of this building is a two-story office building and large parking lot.

Further north across Centre Park Drive, is the M-1 zoned Parcel A-4, the site of an Exxon gasoline service station, convenience store and car wash. This site was rezoned from POR to M-1 with Zoning Board Case No. 977M in 1997, which also approved a special exception to operate the gasoline service station, convenience store and car wash. To the north of this parcel, the M-1 zoned Parcel A-5 is the site of a water tower. The POR zoned Parcel A-2 to the north of Parcel A-5 is improved by a commercial building. Beyond Parcel A-5 are the eastbound lanes of MD 100.

Across MD 108 to the south. The NT (New Town) zoned properties lie within the Village of Long Reach, Section 1, Area 1. On the east and west sides of Phelps Luck Drive are residential properties, each of which is improved with a single-family detached dwelling, excepting Parcel N. According to the Technical Staff Report (TSR), the closest dwelling in this community would lie about 500 feet from the proposed gasoline service station (gas station).

Parcels further west are zoned NT (New Town) and are designated Employment Center-Industrial. The lots are part of the Oakland Ridge Industrial Park and the warehouse buildings on these lots front on the east side of Red Branch Road.

4. Roads. Centre Park Drive has about 80 feet of paving and one through travel lane in each direction with acceleration and deceleration lanes within a 100-foot right-of-way (ROW). Centre Park Drive has a median at MD 108, by the main access to the Property. According to State Highway Administration (SHA) data, the traffic volume on Centre Park Drive was 21,871 average daily trips (ADT) as of March 2005. The posted speed limit is 30 MPH.

MD 108 has one through lane in each direction with dedicated left and right turn lands within a 100-foot ROW. According to SHA data, the traffic volume on MD 108 east of US 29 was 20,000 annual ADT as of 2010.

The estimated sight distance from the existing principal access drive on Centre Park Drive to MD 108 is about 250 feet to the south and more than 400 feet to the north. According to the TSR, the existing driveway was previously approved as acceptable for the Shopping Center and the proposed gas station does not propose new road connections.

5. Water and Sewer. The Property is served by public water and sewer.

6. General Plan. The 2000 General Plan Policies Map 2000-2020 designates the Property as "Employment Areas Including New Town." The 2000 General Plan Transportation Map 2000-2020 depicts MD 108 as a Minor Arterial and Centre Park Drive as a Major Collector.

7. The Proposed Conditional Use. Petitioner is proposing to construct a gas station in the northeastern portion of the Property. The proposed location (the Site) is currently used as part of the shopping center parking lot. The operation will consist of dispensing gasoline, water and pressurized air. No tire changing, vehicle servicing or propane sales will be offered. No convenience mart is proposed.

The gas station would comprise a double-sided, four-pump fuel facility allowing eight vehicles to refuel simultaneously. A 20' x 109.5' canopy will cover the gas station operation. The canopy will be located 24 feet from Centre Park Drive at its closest point. Vehicles would access the pumps from either the grocery store side of the parking lot or the Centre Park Drive side. A 10-foot parking setback from Centre Park Drive is depicted on the plan to accommodate queued vehicles waiting for a pump. A 10,000-gallon and a 30,000-gallon underground fuel storage tank will be located parallel to the Centre Park Drive side of the canopy. A 7.5' x 17' attendant kiosk (with restroom) will be sited on the northerly side of the fuel pumps. A 6' x 18.5' vending machine pad with enclosure would be located to the northwest of the kiosk. Two underground fuel storage tanks totaling 40,000 gallons will be located on the south side of the fuel pumps. A 24-foot drive aisle will run along the south, east and north sides of the fuel pump area.

The use would operate from 6:00 a.m. to 12:00 a.m. (midnight) seven days a week, the same operating hours as the Giant. One employee would work on each shift. According to the Petitioner's March 12, 2012 Statement of Justification, as noted in the TSR, Giant markets its fueling stations to its customers. There will be no flashy signage or high illuminations. The fueling station canopy will have a Giant logo but will not be illuminated. Recessed lighting is proposed under the canopy and a LED lighting system directing light downward. Pressurized air will be provided.

The Truck Turning Movement Plan indicates that fuel delivery trucks will utilize a right-in/right-out turning pattern and enter the Property via the secondary access drive, circulate

around the rear of the Giant store and ultimately exit the Property via the principal access drive after passing in front of the Giant.

Sheet 3 of the January 25, 2012 Conditional Use Plan reprints an October 14, 2010 letter from Cindy Hamilton, DPZ Division of Public Service and Zoning Administration Chief, to C. Dean Smith and the consulting firm who prepared the plan (the shopping center parking letter). (Note: The shopping center letter is based on a conditional use plan that was subsequently revised and resubmitted on February 10, 2012). In that letter, Ms. Hamilton acknowledges her review of the three parking analyses submitted to her. These analyses used alternative assumptions for calculating the overall parking for the five buildings within the complex.¹ The second analysis assumes two buildings (8765 and 8775) would employ the "shopping center" rate of five spaces per every 1000 square feet of all the businesses located within those buildings, resulting in an overall decrease in parking to 442 spaces. The third assumes the use of the shopping center rate for 8775, 8765 and 8775, with a resultant 124 parking space requirement. Based upon the information submitted, Ms. Hamilton reasons as follows.

1. The shopping center parking rate appears appropriate for buildings 8765 and 8775.
2. The five buildings constitute a single complex, given the mix of uses, their distribution, the common access and parking lots and the orientation of the buildings.
3. Based on the field counts provided, parking spaces may be available even during periods of peak demand.
4. The displacement of 57 parking spaces in front of the Giant store will create a shortage of 19 spaces. This shortage could be compensated for by the fifty-space excess located to the south, west and east of buildings 8755, 8765 and 8775.

¹ The first analysis is not relevant to this decision and order.

Based on this assessment, Ms. Hamilton concludes that the shopping center complex parking appears to remain adequate.

Petitioner's Case in Chief

8. Petitioner witness Ross Infeld testified to being a fuel field specialist for Giant. The gas station is intended to provide a convenience to customers. A small kiosk sells a few items through the window, but the fueling center is the primary use. There would also be a screened vending machine. He visits fueling facilities once a week to ensure the station is well maintained.

9. Petitioner witness Joseph Rutter, a former director of the Howard County Department of Planning and Zoning, testified to his significant experience in land design, as represented by his resume (Petitioner Exhibit 1). He is a principal in the design firm that worked on the Conditional Use petition. Referring to Petitioner Exhibit 2, he explained it shows two gas stations within a one-mile radius around the Site's center, including an Exxon gas station just up Centre Park Drive and a Shell gas station south of Route 108 on Route 104 (Waterloo Road). In his opinion, the proposed facility's primary market is the Village of Long Reach.

10. Mr. Rutter opined the gasoline service station is contemplated in the General Plan, Chapter 5, Community Conservation and Enhancement, which states, "Part of maintaining a high quality of life is providing residents and workers easy access to the goods and services they need as part of their normal activities." He also referenced General Plan policy 5.11, the goal of which is to make existing commercial centers and strip commercial-industrial corridors more efficient and attractive, and give them a more positive role in the community. In his view,

the existing shopping center would be more efficient with the gas station.

11. With respect to the general conditions for granting a conditional use, Mr. Rutter opined the proposed use would not have inordinate adverse impacts. The store is easily accessed in an existing commercial area, it is a dependent use, and with only four pumps, it is a low intensity use compared to other fueling stations, which have six to eight, and possibly a convenience store or carwash. The uses on-site are diverse, including a Royal Farm store, a few restaurants and other commercial uses. The location is ideal because it is well separated from area residential uses. If the facility were to cease, everything would be removed and the area would be returned to parking. The facility would not have a blighting influence because it would not generate any unusual conditions.

12. On cross-examination and redirect, Mr. Rutter testified that the fuel delivery area would be set back ten feet from the property line.

13. Petitioner witness Lance Kilby, a professional engineer, testified to working on gas station sitings for Giant and Safeway. Describing the proposed Giant gas station, he explained that the kiosk restroom is employee-only. In his opinion, from a parking and loading perspective, the proposed use would have less impact than other fueling stations because it has only four pumps. It is an accessory use or just another grocery store department. The fuel attendant is a Giant employee trained by Giant. There is also a second employee on-site in the store to relieve the attendant if necessary.

14. Mr. Kilby testified the fueling station would cause the removal of 42 spaces. The original DPZ approved plan required 443 spaces and there are 535 existing spaces. With the

removal of 42 spaces, 494 parking spaces will be provided. On cross-examination about the shopping center letter reprinted on the conditional use plan, Mr. Kilby stated that the reference to "change in plans" in the letter came to mean the reduction of 57 lost spaces to 42.

15. With respect to landscaping, Mr. Kilby testified that at least 20 percent of the Property is landscaping. Redevelopment of the gas station actually increases the amount of landscaping, as some impervious surface is removed, and two landscape island areas will be added. Five additional trees will be added along the frontage. The fueling station is actually lower than the road. The vending area will be screened (Petitioner Exhibit 6). The light levels are consistent with the shopping center and the LED canopy lighting plans demonstrate compliance with Howard County code requirements.

16. With respect to the fuel delivery service and its relation to access, Mr. Kilby reviewed the proposed turning radii for WB50 and WB62 fuel delivery trucks in coordination with county staff. After discussion, Giant is proposing turning radii for WB62 trucks. Petitioner Exhibit 5 depicts the revised Truck turning Movement Plan (dated April 10, 2012). Discussions with fuel haulers led Giant to conclude that most haulers would use WB50 trucks, but in an abundance of caution, Giant designed the gas station for WB62 trucks.² During cross-examination, Mr. Kilby explained that fueling trucks must make a lane transition--driving across traffic in the principal access entrance lane--to enter the gas station and exit the site. The truck must also back up and then pass in front of the grocery store to prepare for exiting from the

² WB refers to "wheel base" and WB 50 is a wheel base standard developed by AASHTO (the American Association of State Highway and Transportation Officials). The wheelbase is used to determine the necessary turning radius for fuel delivery vehicles.

principal access. In Mr. Kilby's opinion, such maneuvers are no different from other facilities. On redirect, he testified that there would be three or four fuel deliveries a week.

17. Regarding the effect of backup traffic in the inbound lanes where the truck would have to pull out, Mr. Kilby opined that a driver could see from high in the cab and would stop until the lanes were clear.

18. On cross-examination about the number of parking spaces required for the restaurants on-site, Mr. Kilby explained that restaurant users could use the excess parking spaces in front of the Giant. If Giant customers had to park farther from the store, they would leave their carts in front of the store, pick up their car, and load the car.

19. Regarding the Hearing Examiner's question about what the nearest residents would see, Mr. Kilby stated that the canopy would be visible but that the on-and off-site landscaping would buffer the uses, which are also separated by distance, buildings, and landscaping. On further questioning by Mr. Erskine about landscaping and the credit shown for trees in the public ROW on Page of the Conditional Use Plan, Mr. Kirby stated that the trees were approved in the original SDP, and that not all the trees are in the public ROW, which was dedicated after the plan was approved. Mr. Kirby explained that the presence of the berm brought the landscaping into compliance, even if the trees in the ROW were not counted. Additional landscaping, such as evergreen or shade trees could be provided outside the ROW.

20. Petitioner witness Kevin Sitzman, a traffic engineer, testified to analyzing the site for compliance with access sight distance requirements. He confirmed existing access drives would continue to provide to be safe and efficient. Most motorists going directly to the fueling

facility first could access it from either entrance. Those who shopped first, then fueled, would use the aisle where they had parked. There is little walk-up patronage to the grocery store. In his opinion, the use would not adversely affect surrounding uses. Although some gas station customers would be coming to or from work or elsewhere, most users would be Giant customers, so the increase in traffic from the use is moderate. There is safe and efficient access because the proposed operation is located within the parking lot of an established shopping center. The TSR also concludes this location will allow safe and efficient circulation, the circulation being the same as that existing for the shopping center.

21. Mr. Sitzman describes Opponents' Exhibit 1, Critical Lane Volume and Level of Service Calculations, as demonstrating both access points will operate at an A level of service (LOS), with LOS A indicating the lowest number of conflicting vehicles. MD 108, a state highway subject to different standards, operates at LOS E. The MD 108/Centre Park Drive intersection operates at LOS C in the morning and LOS D in the afternoon, which is an acceptable county standard.³

22. Regarding internal circulation, Mr. Sitzman described the internal circulation as adequate for all vehicles, including WB62 fuel delivery trucks. In his view, the AutoTurn software generating Petitioner Exhibit 5, the Truck Turning Movement Plan, is conservative, meaning actual circulation is better. Gas station customers have several drive aisles from which

³ Level of service (LOS) is a quantitative and qualitative measure of how well an intersection is functioning. "A" to "F" with LOS "A" representing uncongested, free-flow traffic conditions, and LOS "F" representing highly congested "stop and go" traffic. The average daily traffic and peak hour traffic counts are the basic indicators used in determining level of service.

to access the fuel pumps, providing choices depending on the location of the gas tank.

23. On cross-examination, Mr. Sitzman was not surprised that the number of trips on Centre Park Drive, a major collector, was higher than MD 108. Functionally, a minor arterial handles long-haul trips, and a collector "collects" traffic from local land uses. Mr. Sitzman again explained the LOS data for all critical intersections would meet county standards. The peak hour traffic counts were conducted in accordance with the Howard County Design Manual.

24. On further cross-examination regarding the Truck Turning Movement Plan (Petitioner Exhibit 5) and the potential for avoiding the drive aisle crossover depicted therein, Mr. Sitzman explained the movement is needed to avoid the raised landscape island at the throat of the Centre Park Drive access and allows the trailer and cab to become parallel. The haulers may be able to access the fueling location without backing up to the distance shown on the plan. Fueling maneuvers would block some drive aisles for about 30 minutes, but so would motorists as they left, although for only a brief time. He also noted that such transient maneuvers are common with fueling facilities. If the drive aisles were wider, internal circulation would become confusing. The stacking area can accommodate one vehicle fueling and one vehicle waiting, with room to pass to avoid blocking drive aisles. It is easier for a fueling vehicle to make a left hand turn on MD 108 from Centre Park Drive. At the Hearing Examiner's request, Mr. Sitzman explained that the Truck Turning Plan (Petitioner Exhibit 5) was mapped using AutoTurn, a vehicle simulation application within a computer-aided design program, analyses and evaluates whether a vehicle can access a site and maneuver within the parking lot. The designations "WB50" and "WB62" are specific design vehicles representing worst-case

maneuvering on the road, meaning the turning plan represents the poorest turning radius or the longest vehicle in its class.

25. Mr. Sitzman again explained that in a three-year period there were no reported accidents for at the secondary access drive and two at the principal access drive. The accident rate is 0.0 per million at the northern access and 0.11 at the southern over a three year period. Discussing Petitioner Exhibit 8, Driveway Accident Diagrams, the data indicates the absence of unsafe access conditions, including the small amount of traffic added through the fuel facility.

26. On further cross, Mr. Sitzman stated he has seen motorists making a left turn from the main entrance, despite the raised island designed to direct motorists to make right hand turns. They sometime use the entrance aisle. He assumed the speed bumps on-site might have been added to deter the perception of speeding.

Opponents Case in Chief

27. Opponent Hugh Forton testified to residing across MD 108 on the first street off Phelps Luck Drive. He often walks with his granddaughter to the Giant, but getting into the parking lot can be dangerous when nearby high schoolers are driving. It is difficult to make a right turn at the main entrance, so he uses the other drive. He is disturbed by the thought of wide-swinging fuel delivery trucks endangering pedestrians walking through the parking lot.

28. Opponents witness Christopher Alleva testified to being hired as a consultant by the Howard County Independent Business Association. He has land development experience, including the development of motor fuel companies. In his opinion, the site is too tight and will not provide safe access and consumer convenience. He visited the site on May 10, 17 and 24 of

this year and made videos to support his opinion. The edited videos were shot from various locations within and across from the shopping center.

29. According to Mr. Alleva, the late afternoon May 10 video in Opponents Exhibit 2A depicts the principal entrance. It shows nine vehicles stacked into the parking lot access from Centre Park Drive. Inside the Giant parking lot is the right-out entrance and the Royal Farms driveway. The proposed gas station would be to the left. Further back into the parking lot is the area where the fuel delivery would back up. The video also shows the stacking on Centre Park Drive. The May 17 video indicates the parking lot and access is not as congested. On the May 25 video, traffic coming from Royal Farms is also stacked up at the stop sign located at the principal access drive. In his opinion, these videos evidence the current absence of safe and efficient access, resulting in the proposed use having greater adverse impact.

30. In Mr. Alleva's opinion, the cause of the backups is the layout of the shopping center and parking areas, which create a convergence of five-way driveways and/or drive aisles. His characterized this on-site convergence as a "five-way intersection" with no stop signs or signals. Opponents Exhibit 4 is an aerial view depicting the five-way intersection and motor vehicle directional arrows. In his view, the presence of this intersection complicates the internal circulation of the shopping center. He also observed traffic backed up on Centre Park Drive waiting to turn into the main entrance. He subsequently stated there is a stop sign and speed bumps at the Royal Farms drive aisle. Giant trucks make their deliveries behind the store.

31. Mr. Alleva further opined that gas stations are typically built with ample space between the fuel delivery areas and customer pumps. In his view, the proposed gas station

would be more like the Costco gas station in the Columbia Gateway complex on MD 175, which has 6-8 vehicles stacked at a time to accommodate the large customer base. He believed the proposed gas station would pump 10,000 gallons per day because supermarket sites with gas stations generate more gas sales. Consequently, there would be frequent fuel deliveries.

32. Referring to the other uses on site, Mr. Alleva testified the site was a movie theater before it became a shopping center. The site also has two large full-service restaurants, the Asian Bistro and Tinos. There is also a Subway Restaurant, a wings place, and a Dunkin Donuts.

33. On cross-examination, Mr. Alleva acknowledged the Exxon gas station up Centre Park Drive is a member of the Howard County Independent Business Association, whose members are mostly gasoline service stations (apparently, operators and/or owners). He also confirmed that he edited his videos for continuity and to demonstrate deficiencies.

34. On further cross, Mr. Alleva expressed his awareness that the principal access drive operates at an acceptable level of service, that an SDP was approved for the overall development of the Property, including the five-way intersection. He also agrees that the Costco gas station has 12 pumps, and the Giant, 8.

35. With respect to the Hearing Examiner's questions about the gasoline station at the Weis supermarket site approved in an earlier decision and order, where the fuel delivery truck had to reverse to prepare to exit the site and where the vehicle passed in front of the grocery store, Mr. Alleva explained that the fuel delivery circulation is better at the Weis site.

36. On redirect, Mr. Alleva described the typical Howard County gas station as being

located on a larger site, which makes fuel delivery access easy. He contrasted these gas stations to those located in shopping centers, where the oil companies developed the gas stations under their own specifications.

37. Opponent witness John Seitz testified to being a professional engineer and ITE-certified traffic operations engineer and being hired as a consultant by the Howard County Independent Business Association. He visited the site on Wednesday, April 11, 2012 at about 9:30 a.m. and Thursday, May 17, between 2:30-6:00 p.m. Based on his observations he concluded that there is a lot going on in a small footprint. Because the south or main entrance is close to MD 108, the signal at Centre Park Drive and Phelps Luck Road operates on a split signal, meaning their green lights run at separate times. As a result, there are long queues on Centre Park Drive, especially in the left turn lane.

38. With respect to intersection safety, Mr. Seitz described the congestion problem at the main entrance and Centre Park Lane as causing confusion for motorists, with the potential for an accident. Mr. Seitz estimated that the nose of a fuel delivery truck would block the ingress and egress lanes as the driver prepared for exit. If a car came in suddenly and the fuel truck was on the wrong side of the drive aisle it would be a dicey situation. It is not the ideal plan for safe and efficient access for a fuel delivery truck, which would need the left center and right turn lane (on Centre Park Drive, apparently) to be clear for exit from the main entrance. Tank fillers are further away from pumps. Referring to Opponents Exhibit 4, the five-way intersection aerial photograph and Opponents Exhibit 6, the video he made, Mr. Seitz explained they depict the congestion problem.

39. He also opined that internal circulation would be complicated by the location of the proposed gas station, which would be challenging for motorists, who would be driving around looking for a pump on the same side as their gas caps.

40. On cross, Mr. Seitz testified to not having prepared a traffic report to evaluate the proposed gas station. He acknowledged the existence of the access points. He has not reviewed the accident report. On recall, he described a Coca Cola truck making a delivery, but it was a smaller truck. Hence, a smaller fuel delivery tractor-trailer truck would have a smaller turning radius, which would change the circulation footprint. While acknowledging Mr. Infeld's recall testimony that the gas station uses pump retractors allowing motorists to fuel up if the side of a car with the gas cap is not next to the pump, Mr. Seitz described his personal difficulty with using such retractors.

41. Opponent witness Paul Revelle testified to being a residential land developer familiar with county landscaping and parking requirements. He is employed by the Howard County Independent Business Association. He evaluated the proposed conditional use petition and plan in relation to its conformity with the General Plan, with conditional use criteria and its impact on area residential uses.

42. With respect to harmony with the General Plan, Mr. Revelle opined that the proposed use does not comport with General Plan Policy 5.9, allowing for the appropriate size, location of commercial centers by ensuring, in part, that new, expanded or redeveloped commercial centers will be in keeping with the road capacities and their surroundings. General Plan, pgs. 193-194. Nor does the proposed use comport with General Plan Policy 5.10,

improving the design of commercial centers through parking location and landscape design standards. Based on Policy 5.10, Mr. Revelle contended that the fuel delivery area should be heavily landscaped and screened because it is a loading area.

43. Discussing the Landscape Plan on Sheet 3 of the Conditional Use Plan, Mr. Revelle described the trees shown on the plan as being in the ROW, which the Landscape Manual does not permit. He does not believe the county is required to maintain trees in the ROW. He is also concerned that the landscape buffer width along Centre Park Drive where the gas station is to be located barely meets width requirements. It may meet conditional use buffering standards, but not the general conditional use adverse impact standard that loading areas be located and screened from public roads and residential uses. He is also concerned the loading area would be visible if new residential uses are developed on the site of Grandfathers Landscaping, which is located at the southwest intersection of Phelps Luck Drive and MD 108.

44. Mr. Revelle contended there are not enough actual parking spaces in the shopping center to accommodate a loss of 42 spaces. Consequently, the shopping center parking analysis letter reprinted on Sheet 3 of the January 25, 2012 Conditional Use Plan and later incorporated in the Amended February 10, 2012 Conditional Use Plan miscalculates the number of available spaces on-site. He based this opinion on his analysis of the required parking for the two SDPs approved for the site after the development of the cinema use. Opponents Exhibit 5 tabulates these parking requirements. The Giant SDP, SDP 02-116, required 369 parking spaces and he counted only 363. SDP 92-047, the plan for the three smaller buildings housing the restaurants, other uses, and the Royal Farms, shows 162 spaces,

and he observed only 161. Thirteen additional spaces are taken up by dumpsters and cart corrals not shown on the SDP. When taking into consideration what he contended was a loss of 43 spaces for the gas station, the total number of required spaces is 531 and there are only 481 actual spaces, 50 fewer than the two SDPs required. He therefore disagreed with the shopping center parking letter's accounting for the displacement of parking spaces in front of the Giant through the application of the lower shopping center parking rate for buildings 8765 and 8775, based on the availability of excess parking to the south, west and east of buildings 8755, 8765, and 8775.

45. Mr. Revelle further opined that buildings 8765 and 8775 do not meet the Zoning Regulations definition of "shopping center," a group of six or more retail uses or retail and service uses that are designed, developed and managed as an integral entity and that share common vehicular access and parking. Zoning Regulations Section 103.A. 184. According to Mr. Revelle, the two buildings cannot be classified as a shopping center based on the definition of "use, which Zoning Regulations Section 103.A.200 defines as "a. any purpose for which a structure or a tract of land may be designed, arranged, intended, maintained or occupied; or b. Any activity, occupation, business or operation carried on, or intended to be carried on, in a structure, or on a tract of land; except that, wells, septic systems and storm water management systems are not considered uses for purposes of these regulations." In Mr. Revelle's opinion, six "uses" means six distinct types of activities, businesses or occupations. Since there are two restaurants in building 8775, Tinos and the Asian Bistro, which is the predominant use in square footage, there are not 6 distinct uses, only 6 users. A lower parking rate is applied to shopping

centers---3 per thousand square feet—because the uses will have different peak hours, with no consequent demand for parking at one time.

46. An aerial photograph provided by Mr. Revelle was introduced into evidence as Opponents Exhibit 6 to demonstrate the noncompliance of the parking spaces behind the Giant store with Design Manual and Zoning Regulations requirements for the number and location of parking spaces. Mr. Revelle believes the 34 spaces behind the Giant are not located in such a manner as to enable a motorist to find a space quickly in order to minimize the potential for vehicle conflict. On cross-examination, he admitted to not evaluating the site for congestion and not reviewing Petitioner's parking demand analysis. He acknowledged that Continental Realty owns and runs the Property as a single entity and that all buildings on site share a common vehicular access.

Petitioner's Rebuttal Testimony

47. On rebuttal, Mr. Sitzman testified that the Waverly Woods Shell gasoline service station shares characteristics similar to the proposed Giant fueling station, referring to SDP 10-024. Petitioner Exhibit 11. Like the Giant shopping center, there is a convergence of drive aisles by the gas station because the site is not fully perpendicular to the roadway. It is common for drive aisles to intersect when a store and street are not parallel. The arrangement would not be contrary to driver expectancy, as it is a relatively typical situation. Petitioner Exhibits 9 and 11, an aerial photograph of the Waverly Woods Shell station and the SDP, depict a confluence of drive aisles. Moreover, the Waverly Woods gas station has more pumps, a convenience store and a car wash.

48. In Mr. Sitzman's opinion, the proposed fuel delivery route/access is safe and efficient and similar to other shopping centers with fueling facilities, including the Waverly Woods gas station. Most fuel delivery trucks back up on site in a safe and efficient manner, including circulating through the site in front of stores. The location of the proposed gas station is in a less used area, so there is less conflict and the trucks are large and easily visible. It is not unusual for a delivery truck to back up into a drive aisle and/or in an opposing lane of traffic. On cross, Mr. Sitzman testified to not observing long queuing lines at the Waverly Woods Shell station.

49. Mr. Sitzman disagreed with Mr. Avella's testimony in relation to Protestants Exhibit 2, the "queuing" video, where at one minute three seconds into the video, Mr. Avella asserted that the fuel delivery truck would have to back up into the area around Royal Farms. The truck turning plan, Petitioner Exhibit 5, shows instead the truck backing up only to the edge of a drive aisle in the front parking area. The truck would swing wide around the fueling facility for a short distance and would not back up into the intersection. In his opinion, the five-way intersection is not a hazardous situation. Opponents' video Exhibit 5 is edited to show only the queuing and confluence at the principal drive aisle. What the video does not show is the dissipation of queued vehicles when the Centre Park Drive light changes, which allows the stacked vehicles to enter Centre Park Drive and continue down toward MD 108. The critical land volumes data in Opponents Exhibit 1 represent this situation in LOS terms.

50. With respect to the fueling truck positioning location during fueling, Mr. Sitzman testified that delivery trucks commonly park in front of a facility or block an aisle during fueling.

Generally, the area of a fuel station is not large enough to provide a distinct delivery area. He noted that delivery trucks park in front of the canopy at the Exxon station further up Centre Park Drive, just a few feet from the pump island. This situation is visible in Petitioner Exhibit 10A & B. Exhibit 10A shows the fuel truck between the canopy and Centre Park Drive. Exhibit 10B depicts the truck blocking some fueling drive aisles. On cross-examination, Mr. Sitzman testified that Petitioner Exhibit 10B shows that vehicles fueling in lanes one and two would have to back up to exit. For the proposed plan, a similar condition is anticipated. The truck would not block the driveways to the Site.

51. Regarding Protestants Exhibit 1, Mr. Sitzman explained that the traffic counts taken for the critical lane volume analysis were done on Tuesday-Thursday, March 6-8 between 6:00-9:00 a.m. and 4:00-6:00 p.m. The analysis indicates that actual peak hours were 8:00-9:00 a.m. and 5:00-6:00 p.m. There were no holidays and school was in session.

52. On cross, Mr. Sitzman explained the AutoTurn-generated turning movements depicted on Petitioner Exhibit 5 are conservative, meaning the articulated design vehicle used in the program has the longest length, the shallowest turning radius and the overall worst performance, which produces a worst-case scenario for a factor of safety. When looking at actual vehicle maneuvers, they are well within AutoTurn parameters.

53. When questioned about when a fuel delivery driver knows it is safe to cross lanes when traffic flows in the outbound segment cannot be predicted, Mr. Sitzman offered the analogy of a Coca Cola truck exiting after making a delivery to the Royal Farms store. To exit, the truck had to turn into the entrance lane of the principal drive aisle. An inbound car entered

this lane, slowed down, the truck continued its maneuver and then the car continued its exit. If an inbound car meets a fuel delivery truck, the car driver could circulate up an aisle or the truck would continue its outbound movements. This is an infrequent, likely thrice-weekly movement during off-peak hours situation.

54. Mr. Rutter explained the county's approval of landscaping as related to the berms, which are Landscape Manual and Subdivision Regulations substitutes for certain perimeter landscaping requirements. The Landscape Manual and county subdivision regulations also mandate certain plantings, including street trees in the ROW in addition to on-site landscaping.

55. Regarding Opponent Revelle's opinion that a fuel delivery area is a loading area requiring screening under the general conditional use criteria and pursuant to General Plan Policy 510, Mr. Rutter referred to Petitioner Exhibit 12, several photographs of the view of area residences from the Waverly Woods Shell gas station. These photographs demonstrate that the fuel truck delivery area, and indeed the entire site, is buffered, but still visible from area residential uses.

56. Referring to Petitioner Exhibit 11, Mr. Rutter explained it is a series of photographs depicting views to area residences, which are more than 500 feet away. He described these photographs as demonstrating that the combination of berms, landscaping, signage will make the canopy barely visible from MD 108, and even less from the residential areas to the south. Any view of the fueling area would be blocked by the large Giant sign close to Centre Park Drive.

CONCLUSIONS OF LAW

I. Background Issues

The Hearing Examiner's evaluation of the proposed gasoline service station under the general and specific conditional use criteria requires consideration of two background issues: whether the proposed landscaping is adequate and comports with county standards and whether the fuel truck delivery area is a loading area requiring it to be screened. Part I also addresses the parties' dispute about the number of parking spaces available for all shopping center uses.

A. Landscaping, Generally. Opponents contend Petitioner is impermissibly counting the trees in the ROW toward its perimeter landscaping requirements. They further argue the Howard County Subdivision and Land Development Regulations (Subdivision Regulations) and the Landscape Manual prohibit trees in the ROW, which leads them to claim the landscaping and landscape buffer width along Centre Park Drive is inadequate.

Having reviewed the Subdivision Regulations and the Landscape Manual, the Hearing Examiner finds no support for these general claims. Section 16.124.(a) of the Subdivision Regulations imposes certain landscaping and screening requirements on county development. With respect to street trees, Subdivision Regulations Section 16.124.(e) requires street trees of a certain caliper in all zoning districts. Section 16.124.(b) provides in pertinent part that

landscaping shall accord with the Zoning Regulations and the Howard County Landscape Manual (the Landscape Manual).⁴

The Landscape Manual, in turn, requires two distinct types of landscaping, perimeter landscaping and street tree landscaping. These landscape obligations must be computed separately. The type of perimeter landscaping required is based on the type of land use proposed and the compatibility of the proposed land use with adjacent land uses. Depending on the type of land use, the perimeter landscape treatment will either buffer or screen the use. The Landscape Manual also permits a berm that is a minimum of three feet high, or a change in grade that causes a parking lot to be located lower than the adjacent roadway by three feet or more to be substituted for shrub planting in a Type E landscape buffer when the parking is next to a roadway. Landscape Manual, pg. 13. Similarly, when a non-residential use is adjacent to a non-residential use and the grade change is greater than three feet such that the project is lower than the roadway, a three-foot berm may be substituted with a Type A landscape buffer. Landscape Manual, pgs. 23-24. Chapter 5 of the Landscape Manual sets forth the specific requirements for street trees and emphasizes the county's preference that they be located in the ROW either adjacent to the road pavement or within a landscaped median. Landscape Manual, pg. 45.

The Conditional Use Landscape Plan (pg. C-3 of the Conditional Use Plan), depicts a 3-foot+ berm or grade change along two perimeters of the proposed gasoline service station use, the

⁴ The evaluation of the landscape plan's compliance with general conditional use standards and the specific requirements for gasoline service stations is presented in Parts II and III below

secondary access drive and Centre Park Drive. These berms/grade changes are plainly visible in the photographs comprising Petitioner Exhibit 13. Petitioner is proposing a Type A landscape buffer along the secondary access drive and Type E landscape buffer along Centre Park Drive. The proposed landscaping adds to the existing perimeter landscaping approved in a previous SDP. Some of the existing trees are in the ROW and these trees will be retained. Five new shade trees and several new shrubs are proposed in the Type E buffer.

The TSR concludes, as does the Hearing Examiner, that the landscaping on site will accord with the Howard County Landscape Manual and will be similar to existing landscaping the shopping center.

B. The Motor Fuel Vehicle Transportation Delivery Area. The Conditional Use Plan depicts two underground fuel storage tanks parallel to the Centre Park Drive side of the canopy, a 24-foot-wide drive aisle and a ten-foot parking use setback from Centre Park Drive. According to the Truck Turning Movement Plan (Petitioner Exhibit 5), the motor fuel transportation vehicle would be positioned between the canopy and Centre Park Drive when fuel deliveries are made. Opponents contend this fuel transfer area is a "loading area" subject to the adverse impact analysis for neighborhood compatibility, especially Zoning Regulations Section 131.B.2.c, which tests for whether loading areas are properly located and screened from public roads and residential uses. Opponents offered no regulatory or statutory grounds for this assertion.

The Subdivision and Zoning Regulations and the Landscape Manual defeat these contentions. There is no regulatory or Landscape Manual definition of "loading area." However, a search of the terms "loading," "loading area," "loading facilities" and "loading

docks" in the Zoning Regulations indicates these spaces are functional areas used for servicing or handling and deliveries of certain types of material goods, merchandise, vehicles, equipment, tools, supplies and sometimes passengers. This functional definition is echoed in the Landscape Manual's discussion of the requirements and guidelines for parking lots and loading areas, where "loading and service areas" are described as including truck loading facilities such as dock areas, drive-in loading bays and at grade service entrances to structures. Landscape Manual, pg. 25.

In the Hearing Examiner's view, the site where a motor fuel transportation vehicle transfers fuel into underground storage tanks is not a loading area, the level and type of activity having substantially different effects on a neighborhood. The transfer of motor fuel from a fuel hauler to underground storage tanks is an occasional, unobtrusive use of land. Loading areas, on the other hand, implicate a more intense land use; hence the need for screening. The land use policy behind requiring loading areas to be screened can be gleaned from the Zoning Regulations definition of "landscaped area" and "screening" in Section 103.A.112.

A "landscaped area" is "[a]n area improved by vegetation and other natural or decorative materials, established or maintained for enhancement of the appearance of the site, noise reduction, buffering or screening. Areas used for buffering or screening are intended to provide a visual separation between uses as described below:

- a. Screening is the use of landscape materials to substantially shield a structure or use from view, to the extent possible given the topographic and other features of specific site.
- b. Buffering is the use of landscape materials to lessen the visual impact of a use, or to visually or physically separate uses, while not necessarily concealing a structure or use from view.

A conditional use loading area must be visually separated from other uses to safeguard the character of these other uses and provide some balance between adjoining land uses by enhancing the appearance of loading areas work area, which at times is a high-activity use during loading or unloading. This land use characteristic is not associated with the occasional action of transferring motor fuel from a fuel hauler to an underground storage tank.

The photographs in Petitioner Exhibit 10 bolster the Hearing Examiner's determination that motor fuel transfer areas are not loading areas. These images depict a motor fuel transportation vehicle transferring motor fuel at the Exxon station on Centre Park Drive in plain view. A motor fuel transportation vehicle at the Waverly Woods Shell gas station would likewise be visible from area residential uses, based on Mr. Rutter's testimony in reference to Petitioner Exhibit 12, photographs depicting views of area residences from the gas station. Moreover, the Hearing Examiner has presided over multiple gasoline service station conditional use petitions and is unable to recall any instance where the motor fuel transportation vehicle delivery area was called out as a loading area and screened or that the TSR required the area to be screened.

C. Shopping Center Parking. The general conditional use criteria require parking areas to be of adequate size for the particular use. Zoning Regulations Section 133.D.4.e requires three parking spaces per 1,000 square feet of floor area of a gasoline service station without service bays or a car wash. The Conditional Use Plan indicates these spaces will be provided within the existing shopping center parking area.

With respect to the adequacy of the number of parking spaces for all five buildings within the shopping center complex, no Zoning Regulations conditional use regulation requires the Hearing Examiner to evaluate the matter as part of a conditional use petition hearing. Resolution of this issue is a necessary appraisal, but one undertaken at the site development plan phase, excepting as it relates to the intensity of the use. This evaluation proceeds in Part II below. The Petitioner's purpose in copying the shopping center letter to the Conditional Use Plan is informational, to report DPZ's formal interpretation that the parking requirements for the entire Columbia Palace Shopping Center are adequate. In reaching this conclusion, the Hearing Examiner also relies on Zoning Regulations Section 133.D.8, which permits DPZ to consider alternative parking standards through a parking needs study submitted to it during the site development application.⁵

The Hearing Examiner further concludes the conditional use hearing process precludes a denial of the proposed gasoline service station based on Opponent' testimony that the actual number of parking spaces in the entire shopping center is less than what was approved through SDP 92-047 (the three buildings housing the restaurants and other uses) and SDP 02-116 (the

⁵ The Hearing Examiner's finds this perspective consistent with her reasoning in Board of Appeals Case No. BA 12-006C, wherein she granted a conditional use for the expansion of a religious facility, including new parking areas to accommodate, in part, twice-yearly religious services. While the conditional use plan did not specify the actual number of parking spaces to accommodate this use, the Hearing Examiner nonetheless granted the expansion, recognizing the somewhat complex issue of determining the necessary parking for the land use should be evaluated within the context of the available parking for the entire site. For these reason, the Hearing Examiner agreed with the Petitioner that this determination should be made during the SDP process, where DPZ could direct its considerable expertise to the appropriate resolution. For this same reason, the TSR for the religious facility expansion petition limited its conclusions about parking to its adequacy for the proposed expansion, as does the TSR with the proposed gasoline service station use in this case.

Giant grocery store). Opponents are effectively claiming that with the loss of 42/43 parking spaces, the Petitioner is violating Subdivision Regulations Section 16.106(a), continuation of a development without being in compliance with the approved Site Development Plan. It is an improper exercise of the Hearing Examiner's function to transform zoning application proceedings into a violation and enforcement process. *Klein v. Colonial Pipeline Co.*, 55 Md. App. 324, 337, 462 A.2d 546, 554, 1983 (internal citations omitted).

Lastly, the Hearing Examiner finds no merit in Opponent testimony that the parking spaces behind the Giant do not comply with Design Manual and Zoning Regulation requirements. This evaluation was addressed during the DPZ's evaluation of the two SDPs submitted for the three buildings near MD 108 and the Giant. DPZ approved the location of all parking spaces as compliant with all county regulations and standards when it approved these SDPs and Opponents may not make an indirect challenge to the agency's determinations through the instant conditional use hearing.

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 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.

In applying this test, the Hearing Examiner is guided by the decisions of the Maryland Courts, which has said evaluations of whether a proposed conditional use is in harmony with the General Plan are not synonymous with "in conformity with," "consistent with" or in "compliance with" the General Plan. Rather "in harmony with" is a more flexible standard requiring the Hearing Examiner to determine whether the particular proposed use would be "so inimical or injurious to the announced objectives and goals of the comprehensive development plan so as not to be able to co-exist with the plan's recommendations." *Richmarr Holly Hills, Inc. v. American PCS L.P.*, 117 Md. App. 607, 656, 701 A.2d 879, 903 (1997).

In the review of any proposed conditional use, the use would have to frustrate or preempt achievement of the plan's recommendations before a finding of non-harmony would be justifiable. This approach is consistent with the legal nature of a conditional use, which is presumed to be valid and correct absent any fact or circumstances negating the presumption. Where the Plan stands silent, the use will be found to meet the test. *Id.* Thus, in order to defeat the presumption of harmony, an opponent must identify from within the General Plan a use or policy that would be frustrated by the proposed use.

The Howard County General Plan designates the area in which the Property is located as "Employment Areas Including New Town." Gasoline service stations are commonly found in employment areas and are presumptively compatible with the uses therein.

Chapter 5 of the General Plan is important to this evaluation of the harmoniousness of the proposed gasoline service station. One goal of Chapter 5 is the renovation or redevelopment of older commercial centers in order to maintain a high quality of life by providing residents and workers easy access to the goods and services they need as part of their normal activities. General Plan, pgs. 188-189. Petitioner's witnesses situated the proposed gasoline service stations in a 20+-year old shopping center in reference to several Chapter 5 policies as evidence of its harmony with the General Plan. Witness Joseph Rutter, for example, referenced General Plan policy 5.11, making existing commercial centers and strip commercial-industrial corridors more efficient and attractive, and giving them a more positive role in the community. In his view, the existing shopping center would be more efficient with the gas station.

With respect to Opponent witness Paul Revelle's contrary opinion that the proposed use is disharmonious with General Plan Policy 5.9 because the expanded or redevelopment commercial center is not in keeping with road capacities and their surroundings, the Hearing Examiner concludes it would not frustrate or preempt the plan's recommendations. Road "capacity," when used in relation to road facilities means the total number of vehicles that can be accommodated by a road facility during a specified time period under prevailing roadway operating conditions. Howard County Charter, Subtitle 11, Adequate Road Facilities, Section 16.1110.(d). Road capacity is tested through the applicant's submission of a traffic study in accordance with the Howard County Design Manual, Volume III (Chapter 4) at the SDP phase. The road facilities test in pertinent part must analyze the impact of the proposed development

on the first major road intersection in all directions within 1.5 roads mile of the property entrance, if the site is located in the eastern metropolitan area of the County.

In 2002, two years after the adoption of the General Plan, DPZ approved a site development plan (SDP 02-116) for a major renovation of the shopping center to accommodate the Giant grocery store. As part of this SDP, the Giant prepared, and DPZ approved, the requisite traffic study. For the proposed gasoline service station, Mr. Sitzman explained that Opponents Exhibit 1, Critical Lane Volume, LOS calculations, demonstrate critical intersections will meet the county adequate road facilities test with no unsafe conditions. Both access points operate at LOS A. MD 108, a state highway subject to different standards, operates at LOS E. The MD 108/Centre Park Drive intersection operates at LOS C in the morning and LOS D in the afternoon. For the three-year period 2009-2011, there were no reported accidents at the secondary access driveway and two at the principal access.

With respect to the nature and intensity of the use, the proposed gasoline service station is a relatively small facility, compared to other stations approved by the Hearing Examiner. It would be located near the signalized intersection of two major roads in an area dominated by commercial development. The location is both logical and appropriate. Functionally, the use would operate as a department of the Giant grocery store. The use would occupy a small portion of an 11+acre Property. The gasoline service station would be combined with a grocery store, two restaurants and other commercial uses.

With respect to Opponents' arguments that overall intensity and scale of uses is inappropriate owing to a lack of parking, the Hearing Examiner observes that Opponents video

Exhibits 2 & 3 taken, respectively, during the late afternoon and evening, shows large numbers of vacant parking spaces in front of the Giant and around the three buildings. The Hearing Examiner therefore concludes the overall scale and intensity of uses on the site is appropriate, as both the proposed use and all uses on the site meet or exceed all buffering standards and setback requirements.

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 use would have adverse effects in a B-2 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 (conditional) 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, and as conditioned, the Hearing Examiner concludes the Petitioner has 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 B-2 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.

With respect to noise, the TSR notes the petition statement that local and Maryland Department of the Environment regulations to ensure no adverse impacts on air quality or the environment. There is no evidence of any vibrations or other hazards. Canopy lighting will be include downward focused LED lights and a Giant logo; this lighting will not spill over onto vicinal properties. Notably, the conditional use site is several feet lower in elevation than the Centre Park Drive and secondary access drive roadbeds, owing to perimeter berms, and this physical condition will result in a lesser impact than most gasoline service stations, which are generally the same elevation as the roadway. Only pressurized air and water will be offered, in addition to a small, enclosed vending machine.

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 background issues discussion leads to the necessary conclusion that the location, nature and height of the gasoline service station use and the extent of the landscaping on the site will not hinder or discourage the use of adjacent land and residences more at the subject

site than it would generally in the B-2 district. The existing berms, in combination with the landscaping requirements imposed by the Landscape Manual and the general and specific conditional use landscaping standards, and as evidenced by the photographs of views to adjacent land uses in Petitioner Exhibit 13, demonstrate that the use will be effectively buffered, such that it 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 three parking areas required for the gas station will be provided on the parking lot in front of the Giant grocery store. No loading areas are proposed. No dumpsters are proposed. No refuse area is proposed. No loading area is proposed. There is no evidence that the access drives are not properly located and screened.

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.

Petitioner's witnesses testified to motorists being able to access the gasoline service station safely from either entrance, as well as from several drive aisles in the front parking lot. Although there will be times when motorists are queued at the principal egress drives, Mr. Sitzman testified to the low accident rates at the two access points, 0.0 per million at the northern access and 0.11 at the southern. There is no evidence that changes to any

acceleration or deceleration lanes are appropriate. The estimated sight distance from the existing main access drive on Centre Park Drive to MD 108 is about 250 feet to the south and more than 400 feet to the north.

Safe access is extensively reviewed under the Section 131.N.25.g. Subject to the conditions imposed therein, the Hearing Examiner concludes the two access points will provide safe access.

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.**

For the reasons discussed heretofore, the Hearing Examiner concludes the proposed gasoline service station will not adversely affect the logical development of the neighborhood or area in which the station is proposed. Logical development also means "logical location," which, with respect to conditional uses, requires that the land uses be logically situated in relation to each other and the objectives of the General Plan and the Zoning Ordinance, which establish options for the logical development of an employment area, and further south, a residential community. The proposed gasoline service would have only eight pumps, with a consequent absence of adverse influence relative to other gasoline service stations, including the Exxon station just up Centre Park Drive, which has about ten or twelve pumps.

The Petitioner presented credible evidence that the customers of the proposed gasoline service station will most often be the same customers using the Giant store. While the use may

attract some new customers, there is no evidence of any significant increase. The Hearing Examiner does not find credible Opponents' testimony that the customer base would be similar to the Costco gas station at Columbia Gateway on Route 175 or that gas stations affiliated with grocery stores have larger customer bases. With only two gasoline service stations in a one-mile radius, there is no evidence of any blighting influence resulting from a proliferation of gasoline service stations within a particular area.

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 Property is 11.1 acres in area, which exceeds the minimum lot size, 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.

The Property has about 505 frontage feet on Centre Park Drive, 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.

No new impervious surface area is proposed. The Planting/Landscape Plan indicates 40 percent of the site will be landscaped and five new trees will be added along the frontage. As discussed above in Part I, the landscaping plan includes perimeter berms, street trees and other planting. This buffering will enhance the appearance of the site and provide an appropriate

buffer by lessening the visual impact of the proposed gasoline service station. The petitioner accords 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.

Solid walls are not required for the use, because the existing and proposed landscaping, in combination with the berms, will adequately buffer the use from nearby residential districts.

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 Petitioner will use existing Giant refuse areas to service the small trash receptacles on the fueling stations. No vehicle repair is proposed. The petitioner accords 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.

The evaluation of the proposed gasoline service station use for compliance with this standard implicates the interaction between two types of traffic, motorists fueling at the gas station or frequenting another onsite use and motor fuel transportation vehicles delivering motor fuel to the gasoline service station. The findings of fact indicate that as motorists traverse the site, they must negotiate other vehicles looking for parking spaces, including vehicles queued in the exit lane of the principal access waiting for the Centre Park Drive/MD 108 intersection signal to change so they can exit. They may also encounter vehicles queued at gas pumps, or waiting to enter the principal access exit lane from one of the parking lot drive

aisles in front of the Giant, or from the drive aisle next to the Royal Farms store. Sometimes there is spillback. Traffic at this convergence or confluence of drive aisles and the southern access is busy.⁶ It is slow, but moves at a moderate speed once the vehicles at the Centre Park Drive/MD 108 intersection clears. Petitioner's witnesses testified to the absence of reported accidents at this access point and a LOS that meets county adequate public road facilities standards. Opponents' video convey motorists' awareness of these traffic patterns and their skill in negotiating the Site.⁷

Three or four times a week, a motor fuel transportation vehicle would transfer fuel to underground motor fuel storage tanks. Based on the Truck Turning Movement Plan, these motor fuel transportation vehicles will enter the site via the secondary access drive, circulate around the rear of the Giant store, make a left turn to access the drive aisle between the pumps and Centre Park Drive, and ultimately exit the site via the principal access exit lane. The vehicle would likely back up to the edge of a drive aisle the northern side of the principal access in its internal circulation through the Site. As the vehicle prepares to exit the southern access, its turning plan requires the corners of the vehicle body or trailer, including the inside rear

⁶ Opponent witnesses misidentified this convergence of drive aisles and the southern access as a "five-way intersection." The internal drive aisles are not intersections where they meet the principal access drive. "Intersection" is not defined in the Zoning or Subdivision Regulations or the Design Manual, Volume III (DM III). However, the context in which the term is used consistently refers to the area where roadways intersect.

The DM III, which in Chapter 4 establishes adequate road facilities testing standards, states its purpose is to supplement and substantially conform to AASHTO criteria. The AASHTO Green Book defines "intersection as the general area where two or more roadways join or cross and is defined by both its functional and its physical areas." Association of State Highway and Transportation Officials (AASHTO), A Policy on Geometric Design of Highways and Streets, 2011, pgs. 559-560.

⁷ In the Hearing Examiner's view, these videos speak to the civility of Howard County drivers.

wheels, apparently, to maneuver, merge, weave into the main entrance lane. The need to use the two lanes to begin and complete the exit creates the potential for interference with incoming traffic or traffic exiting the drive aisles closest to Centre Park Drive. This traffic must make an operational accommodation to the exiting vehicle, resulting in some loss of traffic operational efficiency.

Although this maneuvering will be infrequent—a few times a week—motorists must accommodate it. Of consequence is the evidence visible in Opponents' videos that when vehicles are queued in the principal access exit lane, motorists making a left turn from Centre Park Drive into the principal access have a blind spot and little time to react. Petitioner witness Lance Kilby acknowledged these motorists' need to accommodate the fuel hauler and the fuel hauler driver's commensurate need to wait to exit until the principal access lanes were clear.

Mr. Kilby's and Mr. Sitzman's testimony about the common nature of fuel hauler circulation routes notwithstanding, this situation impresses upon the Hearing Examiner the need to ensure traffic and pedestrian safety with the addition of the gasoline service station. The Hearing Examiner is therefore requiring Petitioner to limit the type of motor fuel transportation vehicles servicing the gasoline service station to those able to initially access the site from the principal access (the access closest to MD 108), pass around the rear of the Giant grocery store, approach the underground tanks from the northernmost drive aisle and exit the site from the drive aisle generally parallel to Centre Park Drive. It is likely that these will be WB50 vehicles, based on Mr. Kilby's testimony. WB62 motor fuel delivery vehicles are prohibited.

Concerning access to the gasoline service station once a motor vehicle has entered the site, there is not probative evidence of unsafe or inefficient conditions. The Truck Turning Movement Plan imposed by the Hearing Examiner will not cause any unsafe or inefficient conditions and left-turning incoming motorists will be able to see the fuel hauler, who can wait in the drive aisle until the final exit turn can be negotiated. At this location, the fuel hauler will be visible to incoming traffic. Concerning pedestrian access, there is no probative evidence that, as conditioned, the access driveways and on-site paved areas will be unsafe or inefficient. As conditioned, the petition accords 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 operation will include the dispensing of gasoline, water and pressurized air. No tire changing, minor vehicle servicing, vacuuming, or sale of propane will be provided. The petition accords with Section 131.N.25.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.

A 6' x 18' vending machine pad and enclosure will be located to the northwest of the attendant kiosk. The vending machine will be about 79 inches in height and a 72-inch cedar fence will enclose it. The petition accords 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.

The premises and landscaping will be maintained by the owner or lessee, in accordance with Section 131.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.

As discussed above, the gasoline service station is adjacent to a residential district, separated by MD 108, but it would be about 500 feet from the nearest residence, as depicted in Petitioner Exhibit 3. The Petitioner proposes to operate the gasoline service station seven days a week from 6:00 a.m. to 12:00 a.m., the same hours as the Giant grocery store. LED lighting will be used on the canopy, as depicted on Sheet SL-1, Fuel Facility Photometric Plan, of the Conditional Use Plan. The Giant logo will also appear on the canopy.

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.

This section is inapplicable. No other uses are proposed in association with the gasoline service station use.

(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 because the Site is zoned B-2.

ORDER

Based upon the foregoing, it is this **23rd day of July 2012**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petition of in Giant of Maryland, LLC, for a gasoline service station in a B-2 (Business: Local, and Business: General) Zoning District, is hereby **GRANTED**;

Provided, however, that:

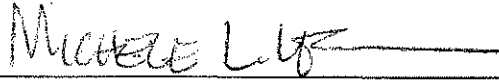
1. The Conditional Use shall be conducted in conformance with and shall apply only to the Conditional Use for A Gasoline Service Station as described in the petitioner and as depicted on the Conditional Use Plan submitted on February 19, 2012.
2. Outside operations are limited to dispensing gasoline, water, pressurized air, and a vending machine area.
3. All motor fuel transportation vehicles (fuel haulers) servicing the gasoline service station shall initially access the Site from the principal access drive (the access closest to MD 108), pass around the rear of the Giant grocery store, approach the underground fuel storage tanks from the northernmost drive aisle and exit the site from the drive aisle generally parallel to Centre Park Drive. WB62 fuel hauler vehicles are prohibited.
4. 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.

5. Abandonment. The premises (including landscaping) of the gasoline service station, if not in continuous operation or abandoned shall be maintained in the same manner as is required under these regulations for operating gasoline service stations.

6. Voidance of the Use. The gasoline service station conditional use 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 the 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.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.

7. Removal. If the 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.

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 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.