

**DISTRICT COUNCIL FOR PRINCE GEORGE'S COUNTY, MARYLAND  
OFFICE OF THE ZONING HEARING EXAMINER**

**SPECIAL EXCEPTION  
4816**

**AND**

**APPLICATION TO AUTHORIZE THE ISSUANCE OF BUILDING PERMITS FOR  
STRUCTURES WITHIN A PROPOSED RIGHT-OF-WAY**

**DECISION**

Application: Gas Station in Conjunction with a Food or Beverage Store  
Applicant: Two Farms, Inc.  
Opposition: Sangee and Sulojana Tharmarajah, et al.  
Hearing Dates: November 6, 2019, December 17, 2019, December 18, 2019, January 21, 2020, January 22, 2020, February 12, 2020, February 25, 2020, February 27, 2020 and March 5, 2020  
Hearing Examiner: Joyce B. Nichols  
Disposition: Approval with Conditions

**NATURE OF PROCEEDINGS**

(1) Special Exception 4816 is a request for permission to use approximately 2.94 acres of land, in the C-S-C (Commercial Shopping Center) Zone, located on the west side of MD 210 (Indian Head Highway), in the southwest quadrant of its intersection with MD 375 (Livingston Road), also identified as 15808 and 15812 Livingston Road, 100 Biddle Road, and 16001 Indian Head Highway, Accokeek, Maryland, for a Gas Station with an associated Food or Beverage Store.

(2) Application to Authorize the Issuance of Building Permits for Structures Within a Proposed Right-of-Way is for two (2) pylon signs, 22 parking spaces, free air station, five (5) multi dispenser gasoline pumps with canopy, large vehicle parking areas, all of the required landscaping, and a stormwater management facility, all within the proposed rights-of-way for F-11 and C-525. The original hearing on this Application was held April 10, 2019 and the Zoning Hearing Examiner issued its Decision dated May 1, 2019 recommending approval of this Application. On November 1, 2019, the District Council issued its ORDER of Remand to the Zoning Hearing Examiner to reopen the record and receive additional evidence regarding (1) the ownership of Accokeek Exxon and (2) any additional evidence relating to the statutory approval requirements of §27-259(g)(1)(A)-(D).

(3) Sangee and Sulojana Tharmarajah et al, appeared in opposition to the Applications.

(4) The Technical Staff (Exhibit 24) recommended approval of the Special Exception with conditions and the Planning Board did not elect to have a hearing but in lieu thereof adopted the recommendation of the Technical Staff (Exhibit 26).

(5) At the conclusion of the evidentiary hearing on March 5, 2020, the record was left open for the submittal of legal Memoranda from all counsel. Subsequent to the March 5, 2020 hearing date, emergency measures were adopted by the Prince George's County Council to help stem the spread of COVID-19. Deadlines for action on matters before the Legislative Branch were stayed by CR-10 and CR-35-2020 from March 17- July 18, 2020. Owner/Applicants filed their Joint Post-Hearing Memorandum on July 20, 2020. Protestants Dharam Singh Geiaya et al., filed their Proposed Finding of Fact and Conclusions of Law on July 20, 2020. The Memorandum of Accokeek, Mattawoman, Piscataway Creek Communities Council, Inc., in Opposition to Two Farms, Inc.'s Request for a Special Exception and Appendix was filed June 3, 2020<sup>1</sup>

## FINDINGS OF FACT

### Subject Property

(1) The Subject Property is comprised of four (4) parcels of unsubdivided acreage known as Tax Map 151, Grid E-4, Parcels 52, 53, 54 and 55. The Subject Property is triangular in shape, and is bounded on each of its edges with public roads: Indian Head Highway to the south and east, Livingston Road to the north, and Biddle Road to the west.

(2) The Subject Property is currently occupied by four main buildings, three of which are believed to be vacant. All of the buildings appear to have been constructed in the late 1950s, and all are visible on the M-NCPPC 1965 aerial photograph and a 1963 aerial photograph from a commercial source, but no development of the Subject Property existed in a 1957 aerial photograph from the same commercial source. From east to

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<sup>1</sup> Madeline Kochen is not admitted to the Maryland Bar. Ms. Kochen may be admitted to the Bar in other states but has agreed that she is not admitted in Maryland. Ms. Kochen was advised as early as December 2019 that if she wanted to be accorded attorney status in the Application and be awarded all the rights and privileges thereof that she would be required to obtain admission to the Maryland Bar. Ms. Kochen has repeatedly refused to obtain admission to the Maryland Bar. On June 3, 2020, Ms. Kochen filed a self-styled "Legal Memorandum" in this Application in violation of Maryland Rules of Professional Conduct, Rules 305.5 and 305.7 regarding the Unauthorized Practice of Law. Ms. Kochen's Legal Memorandum is stricken from the record in this Application as it constitutes the unauthorized practice of law by an attorney not authorized to perform legal activities in the State of Maryland.

west, the buildings are: (1) the former Clagett Realty office; (2) a small retail building most recently occupied by a church, with accessory buildings to the rear that look to having been previously occupied as contractor’s offices; (3) a contractor’s office (currently occupied); and (4) a former electrical contractor’s office, approximately 11,266 sq. ft. (GFA) in total. All of these existing structures are to be razed in the construction of a 4,649 sq. ft. Gas Station and Food or Beverage Store.

(3) Access to the subject site is available almost continuously across its Livingston Road frontage; channelization is limited to six curb depressions without any channelization and with paving running right up to the curb along almost 90% of the property’s frontage; an entrance to the accessory buildings behind the retail building also exists off of Biddle Road. No medians exist on either Livingston Road or Biddle Road.

**Master Plan and Sectional Map Amendment**

(4) The Subject Property is located in Planning Area 83. The applicable Master Plan is the *Approved Subregion 5 Master Plan and Sectional Map Amendment*, approved on July 24, 2013. The Master Plan designated the Subject Property for “Commercial” Future Land Use.

The Approved Sectional Map Amendment retained the previous C-S-C zone.

The Growth Policy Map in the May, 2014 General Plan placed the property in the Established Communities category. The Generalized Future Land Use Map is too small a scale for the Subject Property to be legible; the PGAtlas site indicates that the Generalized Future Land Use is Commercial land use.

The site is not within a Priority Preservation Area.

**Neighborhood**

(5) The neighborhood of the Subject Property is described in the Technical Staff Report as having the following boundaries:

- North – Livingston Road
- West – Biddle Road
- South & East – Indian Head Highway (Maryland Route 210)

This neighborhood definition appears to have been taken from a description of the project’s surroundings in the Applicant’s Statement of Justification, and is not an appropriate neighborhood from the perspective of an evaluation of the impact of the subject Application.

Because of the more rural character of the surrounding area, and the centralized character of the nearby commercial uses, the affected neighborhood is necessarily much larger than it would be in an urban or suburban location, and could even cross features which would uniformly be considered as barriers in denser locations. For example, a divided highway with (a minimum of) ~175' of right-of-way, functioning as an Expressway (and planned to be upgraded to a Freeway) would certainly be considered to be a barrier (and therefore a neighborhood edge) in almost any other case; the historic orientation of the surrounding community to the activity on Livingston Road, however, suggests that the neighborhood could very reasonably be deemed to extend across Indian Head Highway.

Accordingly, your Zoning Hearing Examiner accepts the neighborhood as proposed by the Applicant's expert land planner, Mr. Mark Ferguson, which is also the neighborhood for the Accokeek Community in the Master Plan (*id.*, at 250-251), with the following boundaries:

- North – Piscataway Creek/Floral Park Road
- East – Danville Road and Gardner Road
- South – Mattawoman Creek (the Prince George's County limit)
- West – Potomac River (the Prince George's County limit)

**Surrounding Uses**

(6) Across Livingston Road from the Subject Property to the north are a barber, a nonprofit organization, and the B&J's Carryout restaurant, all on land classified in the C-S-C Zone. Further to the north, beyond Bryan Point Road, are a Gas Station with vehicle repair, a Chinese food restaurant, and undeveloped land in the C-S-C Zone.

The planned Freeway roadway, Indian Head Highway, lies to the south and east. Beyond Indian Head Highway to the east, the commercial character of the immediately surrounding area continues, with the Accokeek Village Shopping Center occupying the northwest quadrant of the intersection of Livingston Road with Indian Head Highway, on land classified in the C-S-C Zone. The main line of that center is occupied by a Weis supermarket, a cleaner, a Chinese food restaurant, a pharmacy, a nail salon and a liquor store. Pad sites along Livingston Road include a Burger King restaurant, a Dunkin' Donuts/Baskin Robbins restaurant, and an Exxon Gas Station which also includes a Food or Beverage Store and a Jerry's Sub's restaurant. Beyond the Accokeek Village Shopping Center are a park & ride lot and the Accokeek branch library (approximately 1,500 feet distant from the nearest corner of the Subject Property), both in the R-R (Rural

Residential) Zone.

Beyond the commercial area surrounding the Subject Property as described above, the portion of the neighborhood to the east of Indian Head Highway is generally characterized by suburban residential development on quarter-acre (clustered lots) to half-acre lots in the R-R Zone, transitioning to an agricultural character (typically zoned R-A (Rural Agricultural)) beyond the line of Bealle Hill Road/Livingston Road. Exceptions of note to the foregoing are the developments in the M-X-T (Mixed Use-Transportation Oriented) Zone by the intersection of Indian Head Highway and Berry Road (MD 228), including : (1) the planned Signature Club at Manning Village, currently undergoing infrastructure construction, which will include attached dwellings; and (2) the Manokeek Shopping Center, which includes in its main line a Giant supermarket, an auto parts store, a cleaner, a hair salon, a nail salon, a cleaner, a barbeque restaurant, a Chinese food restaurant, a Starbucks coffeeshop, and on pad sites two banks, a barber, a tobacco store, a liquor store, a Wendy's restaurant and a 7-11 Gas Station with a Food or Beverage Store.

Across Biddle Road to the west are four single-family dwellings in the R-R Zone. For approximately one half mile to the north and west, the neighborhood character is more suburban, with single-family dwellings in the R-R Zone on lots between one-half and one acre in size (as well as a church just to the northwest of the Subject Property); beyond that, the character is more classically rural, with large-lot residential development on mostly-wooded lots predominating.

### **Applicants Proposal**

(7) The proposed use for SE-4816 is the razing of the existing buildings and their replacement by a new Gas Station and Food or Beverage Store.

The new Food or Beverage Store will be located roughly in the center of the site, oriented with its front towards Indian Head Highway and its side towards Livingston Road. The eight pump islands (with sixteen MPDs) will face Indian Head Highway to the west, under a canopy.

Modern landscaping in conformance with the Landscape Manual will be provided, including enough tree planting to meet the Tree Canopy Coverage provisions of Subtitle 25.

The new facility will be provided with modern stormwater management using bioretention techniques where no stormwater management now exists.

The unchannelized, almost unrestricted entrances from Livingston Road will be modernized, reducing the number of points of access from six curb cuts to two modern channelized entrances, providing much greater safety, particularly for a site in close

proximity to a signalized intersection. The entrance closest to the intersection of Livingston Road with Indian Head Highway will be much further from the intersection, and will further be limited to a right-in, right-out operation. A third entrance is also proposed off of Biddle Road.

The Applicant is proffering the construction of an additional right turn lane onto eastbound Livingston Road.

(8) The Site Plan proposes a total of three points of vehicular access; one full access entrance and one right in and right out along the frontage of Livingston Road, and one full access along the frontage of Biddle Road. Direct access to Indian Head Highway (MD 210) is not proposed. The proposed site design places the primary Gas Station canopy with eight pump islands parallel to the alignment of Indian Head Highway (MD 210). Surface parking is proposed abutting the proposed Food or Beverage Store, and along the perimeters of the property to ensure safe and efficient on-site circulation. In addition, and more importantly, the proposed layout creates a safe environment for patrons utilizing all of the services offered by Royal Farms. Further the Owner/Applicant very strongly contends that its layout will result in a very successful and high quality development.

The Food or Beverage Store for the Royal Farms is designed to reflect a somewhat rural aesthetic which is a trademark of Royal Farms. The new model has been constructed throughout Maryland and most recently, on Sansbury Road and Ritchie Marlboro Road (Westphalia North), and at National Harbor. The building design incorporates a band of composite siding at the top portion of the building, brick veneer in the middle, and stone veneer at the base of the building. The main entrance projects from the rest of the building and features two side entry points. The front elevation is accented with a shed-style roof over the main entrance supported by stone veneer and painted steel columns and topped with a cupola, and over-size windows that help break up the horizontal mass. The rear elevation presents long uninterrupted bands of the composite siding, red brick and stone veneer, with one additional entrance to the Store. The Owner/Applicant is proposing two twenty-five foot tall pylon signs; one on its frontage on Livingston Road, west of the site entrance, and another along the frontage of Indian Head Highway (MD 210).

The proposed exterior building materials, which include stone, brick, and composite siding, are of notable quality and durability. The pumps and canopy are reflective of the architecture and materials of the main building. Due to the visibility of the pumps, canopy, and retail building, the design of these features are important and are of high quality. The Owner/Applicant anticipates that the proposed development will have a similar positive impact to the County in the form of new jobs, reinvestment, and increased taxes. As evidenced by DSP-13007, DSP-15012, DSP-08043-01, DSP-15020-02, DSP-16027, and DSP-17057, the Owner/Applicant uses high end finishes, and designs a project that is often used as the model for other similar uses. Indeed, from 2006-2008, the Owner/Applicant began to incorporate energy and water-efficient "green"

building features, and by 2010, the Owner/Applicant had fully embraced sustainability and has since incorporated LEED sustainable building designs into its construction. Exhibit 5.

(9) The Authorization to Issue Building Permits for Structures within a Proposed Right-of-Way includes two (2) pylon signs, 22 parking spaces, a drive aisle, free air station, five (5) pump islands (with 10 multi pump dispensers) with canopy, large vehicle parking area, all of the required landscaping, and a stormwater management facility within the proposed rights-of-way for F-11 and C-525.

### LAW APPLICABLE

(1) A Special Exception for a Gas Station and a Food or Beverage Store in the C-S-C Zone is permitted pursuant to §27-461(b)(1)(B) in accordance with §27-358 and §27-355 of the Zoning Ordinance. All Special Exceptions must be found to comply with the general criteria of §27-317.

(2) Section 27-358 states:

*(a) A Gas Station may be permitted, subject to the following:*

*(1) The Subject Property shall have at least one hundred and fifty (150) feet of frontage on and direct vehicular access to a street with a right-of-way width of at least seventy (70) feet;*

*(2) The Subject Property shall be located at least three hundred (300) feet from any lot on which a school, outdoor playground, library, or hospital is located;*

*(3) The use shall not include the display and rental of cargo trailers, trucks, or similar uses, except as a Special Exception in accordance with the provisions of Section 27-417;*

*(4) The storage or junking of wrecked motor vehicles (whether capable of movement or not) is prohibited;*

*(5) Access driveways shall be not less than thirty (30) feet wide unless a lesser width is allowed for a one-way driveway by the Maryland State Highway Administration or the County Department of Public Works and Transportation, whichever is applicable, and shall be constructed in compliance with the minimum standards required by the County Road Ordinance or Maryland State Highway Administration regulations, whichever is applicable. In the case of a corner lot, a driveway may begin at a point not less than twenty (20) feet from the point of curvature (PC) of the curb return or the point of curvature of the edge of paving at an intersection without curb and gutter. A driveway may begin or end at a point not less than twelve (12) feet from the side or rear lot line of any adjoining lot;*

*(6) Access driveways shall be defined by curbing;*

(7) A sidewalk at least five (5) feet wide shall be provided in the area between the building line and the curb in those areas serving pedestrian traffic;

(8) Gasoline pumps and other service appliances shall be located at least twenty-five (25) feet behind the street line;

(9) Repair service shall be completed within forty-eight (48) hours after the vehicle is left for service. Discarded parts resulting from any work shall be removed promptly from the premises. Automotive replacement parts and accessories shall be stored either inside the main structure or in an accessory building used solely for the storage. The accessory building shall be wholly enclosed. The building shall either be constructed of brick (or another building material similar in appearance to the main structure) and placed on a permanent foundation, or it shall be entirely surrounded with screening material. Screening shall consist of a wall, fence, or sight-tight landscaping material, which shall be at least as high as the accessory building. The type of screening shall be shown on the landscape plan.

(10) Details on architectural elements such as elevation depictions of each facade, schedule of exterior finishes, and description of architectural character of proposed buildings shall demonstrate compatibility with existing and proposed surrounding development.

(b) In addition to what is required by Section 27-296(c), the Site Plan shall show the following:

(1) The topography of the subject lot and abutting lots (for a depth of at least fifty (50) feet);

(2) The location and type of trash enclosures; and

(3) The location of exterior vending machines or vending area.

(c) Upon the abandonment of a Gas Station, the Special Exception retail services cease.

(d) When approving a Special Exception for a Gas Station, the District Council shall find that the proposed use:

(1) Is necessary to the public in the surrounding area; and

(2) Will not unduly restrict the availability of land, or upset the balance of land use, in the area for other trades and commercial uses.

(3) Section 27-355 requires:

(a) A food or beverage store may be permitted, subject to the following:

(1) The applicant shall show a reasonable need for the use in the neighborhood;

(2) The size and location of, and access to, the establishment shall be oriented toward meeting the needs of the neighborhood;

(3) The proposed use shall not unduly restrict the availability of land, or upset the balance of land use, in the area for other allowed uses;

(4) *In the I-1 and I-2 zones, the proposed use shall be located in an area which is (or will be) developed with a concentration of industrial or office uses;*

(5) *The retail sale of alcoholic beverages from a food or beverage store approved in accordance with this Section is prohibited; except that the District Council may permit an existing use to be relocated from one C-M zoned lot to another within an urban renewal area established pursuant to the Federal Housing Act of 1949, where such use legally existed on the lot prior to its classification in the C-M zone and is not inconsistent with the established urban renewal plan for the area in which it is located.*

(4) The Applicant must also satisfy the general purposes of Commercial zones (§27-446) and the specific purposes of the C-S-C Zone (§27-454).

(5) Section 27-446(a) states:

(a) *The purposes of Commercial zones are:*

- (1) *To implement the general purposes of this Subtitle;*
- (2) *To provide sufficient space and a choice of appropriate locations for a variety of commercial uses to supply the needs of the residents and businesses of the County for commercial goods and services;*
- (3) *To encourage retail development to locate in concentrated groups of compatible commercial uses which have similar trading areas and frequency of use;*
- (4) *To protect adjacent property against fire, noise, glare, noxious matter, and other objectionable influences;*
- (5) *To improve traffic efficiency by maintaining the design capacities of streets, and to lessen the congestion on streets, particularly in residential areas;*
- (6) *To promote the efficient and desirable use of land, in accordance with the purposes of the General Plan, Area Master Plans and this Subtitle;*
- (7) *To increase the stability of commercial areas;*
- (8) *To protect the character of desirable development in each area;*
- (9) *To conserve the aggregate value of land and improvements in the County; and*
- (10) *To enhance the economic base of the County.*

(6) Section 27-454(a)(1) provides:

(1) *The purposes of the C-S-C zone are:*

- (A) *To provide locations for predominantly retail commercial shopping facilities;*

- (B) *To provide locations for compatible institutional, recreational, and service uses;*
- (C) *To exclude uses incompatible with general retail shopping centers and institutions; and*
- (D) *For the C-S-C zone to take the place of the C-1, C-2, C-C, and C-G zones.*

## **Necessity**

(7) The Zoning Ordinance and the County Code do not define the term “necessary”. However, undefined words or phrases shall be construed according to common usage, while those that have acquired a particular meaning in the law shall be construed in accordance with that meaning. (Prince George’s County Code, Section 27-108.01(a)) Webster’s New World Dictionary (2<sup>nd</sup> College Edition) defines it as “essential” and “indispensable”. In Brandywine Enterprises, Inc. v. County Council, 117 Md. App. 525, 540 (1997), the Court of Special Appeals addressed the definition of “necessary” in the County’s Zoning Ordinance as it relates to rubble fills and noted that “necessary’... means necessary rather than reasonably convenient or useful.” The Court went on to note that the best method for determining need for a rubble fill would be to assess whether there would be an actual deficit of capacity. In a case involving liquor licenses, Baltimore County License Beverage Association, Inc. v. Kwon, 135 Md. App. 178, 194 (2000), the Court of Special Appeals held that the meaning is dependent upon the context in which “necessary” is used. The Court then found that “necessary,’ in this instance, means that the transfer of the liquor license to the transfer site will be ‘convenient, useful, appropriate, suitable, proper, or conducive’ to the public in that area.” Thus, the proper standard to apply in the review of the instant request is whether the Gas Station will be “convenient, useful, appropriate, etc.” given the nature of the use.

(8) The Court of Appeals provided the standard to be applied in the review of a Special Exception Application in Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319, 1325 (1981):

Whereas, the Applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements; he does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community. If he shows to the satisfaction of the [administrative body] that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material....But if there is no probative evidence of harm or disturbance in light of the nature of the ne involved or of factors causing disharmony to the

operation of the comprehensive plan, a denial of an Application for a special exception use is arbitrary, capricious, and illegal.

The record in this case reveals “no probative evidence of harm or disturbance in light of the nature of the ne involved or of factors causing disharmony to the operation of the comprehensive plan”. It would, therefore, be proper to grant the requests once the conditions of approval addressed below are satisfied.

(9) The District Council may authorize the issuance of permits under certain circumstances pursuant §27-259, which provides in pertinent part, as follows:

(a) *Authorization.*

(1) *With the exception of an arena (stadium) proposed to be constructed on land leased or purchased from a public agency, no building or sign permit (except as provided in Part 12 of this Subtitle) may generally be issued for any structure on land located within the right-of-way or acquisition lines of a proposed street, rapid transit route, or rapid transit facility, or proposed relocation or widening of an existing street, rapid transit route, or rapid transit facility, as shown on a Master Plan; however, the Council may authorize the issuance of the building or sign permit in accordance with this Section. For the purposes of this Section, "Master Plan" means the General Plan, the Functional Master Plan of Transportation, or any Adopted and Approved Area Master Plan or, if not yet approved, any such Master Plan adopted by the Planning Board, unless the Plan has been rejected by the Council.*

(2) *Notwithstanding the definition of a "street" (Section 27-107.01), building permits may be issued without such Council authorization for any structures on:*

- (A) *Land which:*
  - (i) *Was in reservation but is now not in reservation; and*
  - (ii) *Has not been acquired and is not being acquired.*
  
- (B) *Land which was subdivided after the adoption of a Functional Master Plan of Transportation, Area Master Plan, or the General Plan, but was not reserved or required to be dedicated for a street or rapid transit route or facility shown on the Plan.*

(3) *A permit may be issued without such Council authorization for the replacement of a legally erected sign if the replacement sign is otherwise in conformance with this Subtitle, is not an intensification of signage for the Subject*

*Property, and if the proposed transportation facility is not fully funded for construction in the adopted County Capital Improvement Program or the current State Consolidated Transportation Program.*

**(b) Application.**

*(1) Where a Special Exception, Detailed Site Plan, Specific Design Plan, or Departure is pending, or where application for issuance of a permit has been made and recommended for denial pursuant to Sections 27-254 and 27-255 of this Subtitle, the owner of the land may make a written request to the District Council to authorize the issuance of the permit. In the latter case, the recommendation for denial of the permit shall not have been based on any failure of the applicant to comply with any requirement of this Subtitle (other than Subsection (a) of this Section), Subtitle 24, the Regional District Act, or any condition placed on the property in a zoning case or subdivision plat approval. The request shall be in writing and shall be filed with the Clerk of the Council within thirty (30) days after notice of the denial is given.*

*(2) Along with the application, the owner shall submit the following:*

- (A) A statement listing the names and the business and residential addresses of all individuals having at least a five percent (5%) financial interest in the Subject Property;*
- (B) If any owner is a corporation, a statement listing the officers of the corporation, their business and residential addresses, and the date on which they assumed their respective offices. The same statement shall also list the current Board of Directors, their business and residential addresses, and the dates of each Director's term. An owner that is a corporation listed on a national stock exchange shall be exempt from the requirement to provide residential addresses of its officers and directors.*
- (C) If the owner is a corporation (except one listed on a national stock exchange), a statement containing the names and residential addresses of those individuals owning at least five percent (5%) of the shares of any class of corporate security (including stocks and serial maturity bonds);*

*(3) For the purposes of (A), (B), and (C), above, the term "owner" shall include not only the owner of record, but also any contract purchaser.*

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(g) **Criteria for approval.**

(1) *The District Council shall only approve the request if it finds that:*

(A) *The entire property cannot yield a reasonable return to the Owner unless the permit is granted;*

(B) *Reasonable justice and equity are served by issuing the permit;*

(C) *The interest of the County is balanced with the interests of the property owner; and*

(D) *The integrity of the Functional Master Plan of Transportation, General Plan, and Area Master Plan is preserved.*

(h) **Conditions placed on approval.**

(1) *If the Council authorizes the issuance of the permit, it shall specify the exact location, ground area, height, extent, and character of the structure to be allowed. The Council may also impose reasonable conditions which benefit the County.*

## CONCLUSIONS OF LAW

### General Requirements

(1) §27-317(a) requires that the proposed Use and Site Plan be in harmony with the general purposes of the Zoning Ordinance, §27-102, the general purposes of Commercial zones, §27-446(a), and the specific purposes of the C-S-C Zone, §27-454(a)(1).

(2) The general Purposes of the Zoning Ordinance are listed in §27-102(a). The instant Application is in harmony with the general Purposes as follows:

(1) ***To protect and promote the health, safety, morals, comfort, convenience, and welfare of the present and future inhabitants of the County;***

The proposed Gas Station will be developed to provide substantive environmental and safety upgrades to the Subject Property in the form of modern stormwater management (where none now exists) and a more-safely-located, reduced number of channelized vehicular entrances.

The Applicant is also proffering the construction of an additional lane on eastbound Livingston Road leading up to the Indian Head Highway intersection. The Traffic Impact Analysis (Exhibit 66) and the updated Traffic Impact Analysis (Exhibit 145) prepared by the Applicant's expert transportation witness, Mr. Michael Lenhart, indicates that this improvement would more than offset the effect of the traffic from the proposed Gas Station, instead raising the level of service of the Livingston Road/Indian Head Highway intersection in the evening peak hour from E (failing) to D (acceptable), such that the intersection would perform acceptably in both the evening and the morning instead of only in the morning.

At present, there is only one single Gas Station and no Food or Beverage Stores on the west side of MD 210 in Prince George's County south of Swan Creek Road; to get convenience goods, residents of this area must currently cross Indian Head Highway. If the subject Application is approved, Accokeek residents living west of Indian Head Highway will have the option of avoiding that road to meet more of their daily needs.

By virtue of these improvements to the existing site, by the proffered improvement to the adjacent intersection, and by reducing the need for residents to cross Indian Head Highway, approval of the subject Application will actively promote the health and safety of the present and future inhabitants of the County.

**(2) To implement the (General Plan, Area Master Plans, and Functional Master Plans;**

The relevant Plans which apply to this site are the 2014 General Plan (Plan Prince George's 2035), the 2013 *Approved Subregion 5 Master Plan and Sectional Map Amendment*, and a number of Functional Master Plans, including the Green Infrastructure Plan, the County Master Plan of Transportation, the Public Safety Facilities Master Plan, The Historic Sites and Districts Plan, and the Water Resources Functional Master Plan.

## **General Plan**

As noted *supra*, the General Plan classified the subject site in its Growth Policy Map<sup>2</sup> in the Established Communities category, and the Generalized Future Land Use Map<sup>3</sup> - as reflected by the PGAtlas Generalized Future Land Use layer - designated it for Commercial land use.

"Established Communities" are described by the General Plan as "the County's heart – its established neighborhoods, municipalities and unincorporated areas outside designated centers,"<sup>4</sup> and recommends that, "Established communities are most

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<sup>2</sup> M-NCP&PC, Plan Prince George's 2035 – Approved General Plan (May, 2014), T.p.107.

<sup>3</sup> *General Plan*, T.p. 101.

<sup>4</sup> *Ibid.*, T.p. 106.

appropriate for context-sensitive infill and low- to medium-density development....”<sup>5</sup>

“Commercial” land use is described by the General Plan as, “Retail and business areas, including employment uses such as office and service uses. A range of services are provided at the neighborhood to regional level. New commercial areas have access to multimodal transportation options.”<sup>6</sup>

Given its location at a site long used for retail and service commercial uses in a commercial cluster surrounding the Livingston Road/Indian Head Highway intersection, the approval of the subject Application will constitute context-sensitive infill.

## Master Plan

As noted above, the applicable Master Plan is the *Approved Subregion 5 Master Plan and Sectional Map Amendment*, approved on July 24, 2013. Map IV-1, the Future Land Use Map, recommends the Subject Property for “Commercial” land use.<sup>7</sup>

The Master Plan describes the Subject Property as being within the Accokeek Community, which is delineated as being concurrent with Planning Areas 83 and 84. This is also concurrent with the neighborhood for the subject Application.

The Master Plan describes Accokeek as,

Accokeek is the most rural portion of Subregion 5. Development is largely concentrated along MD 210, Indian Head Highway; east and west of this highway are areas dominated by woodlands, farm fields, nurseries, and open areas. The area west of MD 210 includes Piscataway National Park, operated by the National Park Service, and the Moyaone Reserve, a low density area (standard lot size of five acres), also within the Mount Vernon viewshed protection easement. The rural area east of MD 210 extends to Gardner Road, west of Brandywine.

The linear mix of business, service, institutional, and residential uses along approximately two miles of Livingston Road between the U.S. Post Office, west of MD 210 (Indian Head Highway), and Kellers Market (near Bealle Hill Road), form the rural ‘main street’ of Accokeek. In addition to this stretch of Livingston Road, a community shopping center anchored by a grocery store, several restaurants, various businesses, and a church, located east of MD 210, along with B & J’s BBQ establishment and various commercial businesses located west of MD 210 are recognized as the heart of Accokeek.<sup>8</sup>

The Subject Property is located right in the midst of this “main street.” One of the Master Plan’s Goals for all of its Communities is to, “provide for compatible new development in older, established communities of Accokeek, Brandywine, and Clinton.”<sup>9</sup>

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<sup>5</sup> *Ibid.*, T.p.20

<sup>6</sup> *Ibid.*, T.p. 100.

<sup>7</sup> M-NCP&PC, Approved Subregion 5 Master Plan and Sectional Map Amendment (July, 2013), T.p. 32

<sup>8</sup> *Master Plan*, pp. 35-36.

<sup>9</sup> *Ibid.*, T.p. 36.

The Master Plan has a further discussion of the Livingston Road corridor:

With care and attention, the traditional character of Livingston Road, between the US Post Office west of MD 210 and Kellers Market, to the east, can be maintained and enhanced as additional development occurs. Today, the overall “feel” of the roadway is one of quiet, slow-paced rural life. Views are generally closed because of extensive tree cover behind buildings. The roadway can be divided into three segments: rural, residential, and commercial, based on adjoining land uses, views from the roadway, building location and settings, and landscaping and vegetation (Map IV-2: Livingston Road Corridor)<sup>10</sup>. To maintain and enhance the character of the Livingston Road corridor, the following guidelines should be applied when reviewing development applications, with due consideration given to site specific conditions and situations:

### **Overall guidelines, apply to all segments**

- Limit the number of new access points onto Livingston Road.
- Use quality building materials, vernacular if possible.
- Use compatible materials on the roadway that blend in or look rustic, such as wooden or Cor-Ten guard rails instead of galvanized steel.
- Use random massing of new plant material to complement and reinforce existing vegetation.
- Use open fencing, such as post-and-rail.
- Create pedestrian linkages or provide footpaths between commercial and residential areas; specifically, provide pedestrian access between the residential and commercial segments.
- Soften overhead utilities, with landscaping especially in the commercial segment where there are fewer trees.

### **Commercial Segment**

- Site buildings to orient the fronts or sides toward Livingston Road.
- Achieve consistent setbacks for public and private improvements.
- Locate parking to the side or rear of buildings. Screen parking along street edges. Encourage shared parking where possible.
- Limit height of freestanding signs to keep them visually below the tree line.
- Use muted lighting.
- Plant shade trees<sup>11</sup>

The subject Application addresses all of the foregoing guidelines which are

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<sup>10</sup> Map IV-2 provides that the Subject Property is in the “Commercial Segment”.

<sup>11</sup> *Master Plan*, T.p.. 37.

applicable:

The development will limit the number of access points to Livingston Road, will use quality building materials, random massing of new plant material, will provide pedestrian linkages, including new public sidewalks, and will provide new landscaping to soften overhead utilities in the commercial segment.

The proposed building will be sited with its side oriented toward Livingston Road, will have the great majority of its parking located in the side or rear yards from the Livingston Road perspective, and will screen it with landscaping along the street edges. Lighting will be accomplished with cut-off fixtures, and there will be fifty-two trees planted on a site where there now appear to be fewer than ten.

Specifically, the site design will:

- Reduce the number of curb cuts providing access from Livingston Road to the Subject Property from six (6) to two (2) modern channelized entrances. (Exhibit 86 p. 5);
- Orient the side of the proposed structure toward Livingston Road. (Exhibit 86 p. 9);
- Locate the majority of the parking areas on the side and rear yards from the perspective of Livingston Road. (Exhibit 86);
- Screen the proposed structure with landscaping along the street edges. (Exhibit 86);
- Install lighting with full cut-off optics/fixtures. (Exhibit 86); and
- Increase the number of trees located on the Subject Property from ten (10) to fifty-two (52). (Exhibit 86)

The Opposition did not present any expert testimony regarding the nature of SE-4816's potential impact on the surrounding neighborhood. Mr. Mark Ferguson, the Applicant's expert land planner, presented unrefuted expert testimony that the subject Special Exception will not substantially impair the Master Plan, which constituted the only probative evidence in the Zoning Hearing Examiner's evidentiary record with regard to this issue.

The text of the Master Plan includes substantive discussion of the Indian Head Highway and Livingston Road/Accokey Road interchange:

This plan recommends upgrading existing at-grade intersections along MD 210 to interchanges at Farmington Road, MD 373 (Livingston Road) **if deemed necessary** [emphasis added], and MD 228 (E-7). If an interchange at MD 210 and MD 373 is necessary, the preferred design to retain connectivity between communities east and west of MD 210, is for the MD 210 freeway (F-7) to run

beneath MD 373.<sup>12</sup>

The conditional nature of the Master Plan's recommendation is instructive, as the FEIS approved by the FHA does not recognize a need for an interchange at the adjacent intersection, reinforcing the appropriateness of the proposed development plan, and the continuity of use and character across the Indian Head Highway intersection, which is consistent with the Master Plan's land use recommendation, the zoning, and the proposed uses in the subject Application.

### **Other Applicable Functional Master Plans**

The Subject Property is not mapped as containing any Regulated Areas of the County's Green Infrastructure Network; as such, the subject Application conforms to the Green Infrastructure Plan.

With regard to the Historic Sites and Districts Plan, no historic sites or resources are located within the vicinity of the subject site; as such, the approval of the subject Application will have no adverse impact on this Functional Master Plan.

The Water Resources Functional Master Plan addresses broad regulatory policy and large-scale watershed planning, and as such makes no recommendations which are directly applicable to the subject Application.

No proposed sites for Public Safety facilities are in the area affected by the subject Application.

The Countywide Master Plan of Transportation was discussed at length by Mr. Ferguson in the companion ROW case requesting approval of a permit to build in a proposed right-of-way. The extensive discussion in that case is hereby adopted by reference, including its conclusion that the integrity of the Functional Master Plan of Transportation would not be impaired, particularly given the FHA's approval of an FEIS which does not propose an interchange, and the conditional language in the text of the Master Plan (which amended the Countywide Master Plan of Transportation) which provides for interchange construction only in the case of a demonstrated need. (ROW, Exhibit 34) In conclusion, because the proposed Gas Station and Food or Beverage Store are not in conflict with the General Plan, the Sector Plan or the applicable Functional Master Plans, approval of the subject Application will be in harmony with the Ordinance's purpose of implementing those Plans.

**(3) *To promote the conservation, creation, and expansion of communities that will be developed with adequate public facilities and services;***

Because this Application proposes the redevelopment of a site in accordance with

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<sup>12</sup> *Ibid.*, T.p. 101.

provisions of the laws which assure the adequacy of local public facilities, approval of it would be in harmony with this purpose of promoting the conservation of a community which will be developed with adequate public facilities.

The proposed development would not burden schools, parks, or libraries. The square footage of the development of the Subject Property would actually decrease with the proposed Application (from 11,266 sq. ft. decreased to 4,649 sq. ft.); this fact, combined with the modern construction of the new buildings, its round-the-clock occupancy, and the safety improvements along the Livingston Road frontage, will materially reduce the associated probability of the need for public safety services.

Furthermore, the Applicant's proffered intersection improvement would raise the level of service of the Livingston Road/Indian Head Highway intersection from E to D in the evening peak hour, such that the intersection would perform acceptably were it to be subjected to a test for the adequacy of transportation facilities.

**(4) To guide the orderly growth and development of the County, while recognizing the needs of agriculture, housing, industry, and business;**

Approval of the subject Application would abet the orderly growth and development of the County because it will be a modernization of an obsolete developed site rather than new development, and thus will not consume greenfields. Furthermore, it is fully in accordance with the Master Plan's land use recommendation. As such, the subject Application in harmony with this Purpose of the Ordinance.

**(5) To provide adequate light, air, and privacy;**

The subject Gas Station and Food or Beverage Store will be in harmony with this Purpose as it will be developed in conformance with the various regulations in the Zoning Ordinance to ensure the provision of adequate light, air and privacy, both for the occupants of the subject site and for its neighbors. These principles include the provision of sufficient setback distances, provision of perimeter landscape planting and planting to meet the Tree Canopy Coverage requirements, and by conformance with height limitations in order to ensure access to light and air.

**(6) To promote the most beneficial relationship between the uses of land and buildings and protect landowners from adverse impacts of adjoining development;**

The proposed Gas Station and Food or Beverage Store would be in harmony with this Purpose as it will be developed in accordance with the various principles that have been codified in the Zoning Ordinance to promote the beneficial relationships between land and buildings, including conformance with the Table of Uses as laid out in the Ordinance, and in its conformance with the provisions of the Landscape Manual which

provide for the screening of service functions and the beautification of its perimeter along public roads.

**(7) To protect the County from fire, flood, panic, and other dangers;**

The proposed Gas Station and Food or Beverage Store would be in harmony with this Purpose as it will be developed in conformance with regulations established in the body of the Zoning Ordinance, as well as other County Ordinances, which are intended to protect from fire, flood, panic and other dangers, namely: the floodplain regulations, Stormwater Management Regulations, the Fire Prevention Code, the Building Code, and the Tables of Permitted Uses for the various zones.

**(8) To provide sound, sanitary housing in a suitable and healthy living environment within the economic reach of all County residents;**

Because the subject use is commercial in nature, this Purpose is not directly applicable to this Application.

**(9) To encourage economic development activities that provide desirable employment;**

The redevelopment of the Subject Property as a Gas Station and a Food or Beverage Store would be in harmony with this Purpose because it would augment the tax base of the County directly and through the employment provided to its workers.

**(10) To prevent the overcrowding of land;**

The subject Gas Station and Food or Beverage Store would be in harmony with this Purpose as it will be developed in accordance with various principles that have been codified in the Ordinance to ensure the prevention of overcrowding, including the provisions of the Table of Uses that provides for the compatibility of uses, and the Regulations which provide for height limits and setbacks.

**(11) To lessen the danger and congestion of traffic on the streets, and to insure the continued usefulness of all elements of the transportation system for their planned functions;**

The approval of the proposed Gas Station and Food or Beverage Store would be in harmony with this Purpose because of the channelization of the existing largely-unrestricted and unchannelized entrances into the Subject Property from Livingston Road down to two defined points of access, one of them further limited to right-in, right-out operation. This modernization will materially lessen the danger to local traffic.

Furthermore, the Applicant's proffered intersection improvement would act to

lessen the congestion of traffic by raising the level of service of the Livingston Road/Indian Head Highway intersection.

Finally, the proposed Gas Station and Food or Beverage Store will be developed in accordance with the regulations established in the body of the Zoning Ordinance (and other County Ordinances) which are intended to lessen the danger and congestion of traffic on roads, such as the requirements for the provision of adequate off-street parking, and the separation of entrances from nearby intersections.

**(12) To insure the social and economic stability of all parts of the County;**

As the Zoning Ordinance is the principal tool for the implementation of the planning process by enacting legal requirements which implement the planning goals that strive to maintain the social and economic stability of the County, conformance with the requirements and regulations of the Zoning Ordinance will be prima facie evidence of the Application's harmony with this Purpose.

Beyond that, however, the subject Gas Station and Food or Beverage Store would promote the economic and social stability of the County by contributing to the tax base, and providing a useful and convenient service to the surrounding community particularly by giving the Accokeek residents who live west of Indian Head Highway the option of avoiding crossing that road to meet more of their daily needs.

**(13) To protect against undue noise, and air and water pollution, and to encourage the preservation of stream valleys, steep slopes, lands of natural beauty, dense forests, scenic vistas, and other similar features;**

Because the subject Gas Station and Food or Beverage Store would be a redevelopment of an existing commercial site, approval of the subject Application will have no impact to the natural features in the County: It will not itself generate noise pollution, and the use will be in compliance with the County's Woodland Conservation policies by virtue of its exemption from the requirement for approval of a Tree Conservation Plan (because no woodlands exist on the Subject Property). No steep slopes or scenic vistas will be affected. The proposed site development will be provided with stormwater management measures, and will thus better act against water pollution and protect the stream valleys than the existing development at the Subject Property. By conformance to these principles and regulations, the approval of this Application would be in harmony with this Purpose.

The final two Purposes,

**(14) To provide open space to protect scenic beauty and natural features of the County, as well as to provide recreational space; and**

**(15) To protect and conserve the agricultural industry and natural resources.**

are not directly applicable to the approval of this Gas Station and Food or Beverage Store because it would constitute the redevelopment of an existing commercial site. §27-317(a)(1)

(3) In addition to the general Purposes, there are Purposes for Commercial zones generally and the C-S-C (Commercial Shopping Center) Zone specifically. The ten purposes of Commercial zones generally are laid out in Section 27-446(a), as follows:

**(1) To implement the general Purposes of this Subtitle;**

As noted *supra*, the subject proposal will implement the general Purposes of the Zoning Ordinance.

**(2) To provide sufficient space and a choice of appropriate locations for a variety of commercial uses to supply the needs of the residents and businesses of the County for commercial goods and services;**

The approval of this facility at this location will allow the Gas Station and the Food or Beverage Store to provide a useful and convenient site for a needed service. There are at present no Food or Beverage Stores on the west side of MD 210 in Prince George’s County, south of Swan Creek Road. To get convenience goods, residents of this area must currently cross Indian Head Highway. If the subject Application is approved, however, Accokeek residents living west of Indian Head Highway will have the option of avoiding that road to meet more of their daily needs.

**(3) To encourage retail development to locate in concentrated groups of compatible commercial uses which have similar trading areas and frequency of use;**

The uses on the north side of the Subject Property and on the east side of Indian Head Highway form a concentrated group of compatible commercial uses. Furthermore, because the proposed Gas Station involves the replacement of a several buildings, several of which have most recently been occupied by service commercial uses, the redevelopment of the site with a compatible service commercial use (which is permitted by approval of a Special Exception) and a retail commercial use will arguably improve the retail character of the immediate area. As such, the approval of the subject Application will be in harmony with this Purpose of Commercial zones.

**(4) To protect adjacent property against fire, noise, glare, noxious matter, and other objectionable influences;**

The approval of the subject Gas Station and Food or Beverage Store would implement this Purpose by the perimeter landscaping which provides screening between it and its residential neighbors across Biddle Road. The separation of the intervening road rights-of-way and the use of cut-off fixtures will protect adjoining property from fire, noise and glare.

- (5) To improve traffic efficiency by maintaining the design capacities of streets, and to lessen the congestion on streets, particularly in residential areas;**

The approval of the subject Application will improve traffic efficiency by the channelization of vehicular entrances and by the proffered intersection improvement.

- (6) To promote the efficient and desirable use of land, in accordance with the purposes of the General Plan, Area Master Plans and this Subtitle;**

Because the subject Gas Station and Food or Beverage Store will meet the intent for the land use provided for in the Sector Plan, it will fulfill this purpose for Commercial zones.

- (7) To increase the stability of commercial areas;**

The replacement of obsolete vacant buildings use with a new, modern retail use and a complementary service commercial use will promote the stability of the surrounding commercial area.

- (8) To protect the character of desirable development in each area;**

Because the subject Gas Station and Food or Beverage Store will: (1) be developed and operated in accordance with the provisions specifically provided in the Ordinance to promote the safe and orderly layout and operation of Gas Stations, (2) meet a need for convenience goods on the west side of Indian Head Highway, and (3) be compatible with the materials, scale and character of the architecture of the surrounding commercial development, the approval of this Application will fulfill this Purpose.

The final two purposes,

- (9) To conserve the aggregate value of land and improvements in the County; and**

- (10) To enhance the economic base of the County.**

are fulfilled by allowing for the redevelopment of an existing developed site that will

enhance the tax base and provide additional employment for residents of the County. §27-317(a)(1)

(4) In addition to the Purposes for Commercial zones generally, there are also four Purposes for the C-S-C (Commercial Shopping Center) Zone specifically, which are laid out in Section 27-454(a)(1), as follows:

**(A) To provide locations for predominantly retail commercial shopping facilities;**

While the subject Application proposes the redevelopment of the Subject Property as both a retail use and a compatible service commercial use, it is not in conflict with this Purpose. The construction of the Gas Station and Food or Beverage Store – which does not propose visually disruptive auto repair services – will maintain the character of commercial uses which are found around the neighboring intersection.

**(B) To provide locations for compatible institutional, recreational, and service uses;**

As described above, the Gas Station component of the subject Application – when redeveloped in accordance with the provisions of the Ordinance that promote a safe and orderly operation – fulfills this Purpose by being a compatible service use.

**(C) To exclude uses incompatible with general retail shopping centers and institutions; and**

Because these uses are compatible with general retail uses (and one of them is in fact a general retail use), it fulfills this Purpose.

**(D) For the C-S-C ne to take the place of the C-1, C-2, C-C, and C-G zones.**

This Purpose is not applicable to the subject Application. §27-317(a)(1)

(5) Based upon the Special Exception Site Plan (Ex 28) (and fulfillment of the conditions of approval) with the issuance of a permit to construct the improvements in the proposed right-of-way, the proposed use will be in conformance with all of the applicable requirements and regulations of the Zoning Ordinance. §27-317(a)(2)

(6) As discussed *supra*, the subject Application is in harmony with the Purposes of the Zoning Ordinance generally to implement the General and Master Plans and to provide for the efficient and desirable use of land in accordance with those Plans. Accordingly, the approval of the subject Application will not impair the integrity of either the approved Master Plan or the County's General Plan. §27-317(a)(3)

(7) The conformance of the subject Application with the principles laid out in the Purposes of the Zoning Ordinance, its compliance with the provisions of the Zoning Ordinance, its compliance with the provisions of other State and County regulations for environmental protection, and building construction, represent a high level of protection against adverse effects to the public health, safety and welfare.

Beyond those basic principles, however, several of the specific features of the subject Application will actively improve the health, safety and welfare of residents and workers in the area as compared to the development currently existing on the Subject Property. Those improvements have been discussed *supra*.

First, the subject Application, if approved, would represent the first Food or Beverage Store on the west side of Indian Head Highway in Prince George's County, south of Swan Creek Road (a distance of almost seven miles). Its approval would allow Accokeek residents living west of Indian Head Highway to have the option of avoiding that road to meet more of their daily needs.

Second, the Applicant will provide modern stormwater management to an existing developed site which has none. This will improve the water quality of the surrounding watersheds, and will diminish the runoff volumes in the existing storm drain network north of Livingston Road.

Third, the Applicant has proffered an intersection improvement which will more than offset the traffic associated with the proposed development, and will act to raise the level of service at the Livingston Road/Indian Head Highway intersection from failing to passing.

Fourth, the frontage improvements along Livingston Road will convert the Subject Property from almost-unrestricted, uncontrolled access to two modern, controlled, channelized entrances, one of which will be limited to right-in, right-out operation. This will be materially safer than the existing situation, which is almost an extension of the paving of Livingston Road, right up to the existing intersection. §27-317(a)(4)

(8) Opposition testified that emergency response times are very poor in the area surrounding the proposed Royal Farms.

Sandra Miles testified,

[I]n the first nine months of 2019 police districts 5 and 7 which serve Accokeek, Fort Washington and Brandywine had priority emergency times that exceed the 10 minute emergency benchmark every month.<sup>13</sup>

Kelly Canavan spoke of six fires she had personal knowledge of and that "in all

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<sup>13</sup> 12/17/19 T.p. 43

cases response time were a problem.”<sup>14</sup> A contributing factor to slow response times is the overburdened Indian Head Highway/Livingston Road/210 intersection. Holiday Wagner explained, “I’ve seen the fire truck and the EMT’s sitting there and sitting there and sitting there, because they can’t, we can’t move out of their way.”<sup>15</sup> Assistant Fire Chief Kathryn Lucus testified that adding Royal Farms to this location “will gravely affect our mission”<sup>16</sup> by making it more difficult for the Fire Department to safely and quickly negotiate the Indian Head Highway/Livingston Road intersection. The instant Application proposes road improvements at this intersection which will improve the existing hazardous conditions testified to by the Opposition.

(9) As noted by Technical Staff, transportation adequacy is not a required test at the time of Special Exception, but is tested at the time of Preliminary Plan of Subdivision (PPS). The subject Application is exempt from the requirement of a PPS, as less than 5,000 square feet of gross floor area of development is proposed. However, in accordance with the *2020 Prince George’s County Transportation Review Guidelines*, Part 1 (Transportation Review Guidelines, Part 1), Staff compared AM and PM peak-hour trips for the existing uses to the proposed use of the site utilizing data from the *Institute of Transportation Engineers Manual* 10<sup>th</sup> Edition. The Transportation Review Guidelines, Part 1 (page 30) states:

In cases where the new traffic impact would exceed 100 peak-hour trips, applicants are encouraged and may be requested to prepare a TIS as described in Section 3. This is done to ensure that applicants, the reviewing agencies, and the general public are aware of the traffic impacts of larger Special Exception Applications and also to consider conditions that are necessary to protect surrounding properties or the general neighborhood.

Through Staff’s analysis of the subject Application, in accordance with the Transportation Review Guidelines, Part 1, Staff has concluded that the subject Application will generate 54 additional trips in the AM peak and 3 additional trips in the PM peak, posing no major transportation impacts, as outlined in the Transportation Planning memorandum dated June 17, 2019 (Thompson to Cannady II). Exhibit 24

(10) It is undisputed that a traffic impact study is not required for SE-4816 under any of the applicable provisions of the Zoning Ordinance. See Exhibit 24, pp. 16-17. However, out of an abundance of caution, the Applicant engaged Michael Lenhart of Lenhart Traffic Consulting, Inc., qualified as an expert in the field of transportation engineering, to prepare a Traffic Impact Analysis (TIA) to determine whether SE-4816 would adversely impact safety in the area surrounding the Subject Property. See 12/18/2019 T.p., 150-151. See *also* Exhibit 145 (TIA)

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<sup>14</sup> 2/25/20 T.p. 100

<sup>15</sup> 12/17/19 T.p. 93.

<sup>16</sup> 2/25/20 T.p. 40

The TIA prepared by Mr. Lenhart indicated an existing level of service (“LOS”) of “E” at the intersection of Livingston Road and MD 210 during both the AM and PM peak hours, with or without the construction of the Gas Station and the Food or Beverage Store proposed in SE-4816 (assuming no road improvements occur).<sup>17</sup> See Exhibit 145, p. 18. However, in conjunction with SE-4816, the Applicant has proposed to include one of two possible roadway improvements to this intersection. The first proposal, which would include restriping lanes at the intersection to create additional turn lanes and widen Livingston Road, would not affect the LOS during the AM peak hour, but would mitigate any traffic impact from SE-4816 during the peak PM hour. *Id.*

The second option offered by the Applicant involves more extensive improvements to the surrounding roadways and intersection, including “split phasing” the traffic signal at the intersection, and restriping eastbound and westbound minor street approaches to create a single left turn lane, one shared thru/left turn lane, and one right turn lane. *Id.* This more extensive series of improvements would provide 100% mitigation of all traffic impacts resulting from SE-4816, and would further raise the LOS to “D” for both the AM and PM peak traffic hours. *Id.* See also Exhibit 146. Accordingly, the impact of SE-4816 upon traffic would not adversely impact the health, safety or welfare of the community. To the contrary, due to the roadway improvements that would accompany this development, SE-4816 would provide a valuable benefit to the community by increasing the LOS of the Indian Head Highway/Livingston Road intersection.

Mr. Lenhart also responded to concerns raised by citizens at the Zoning Hearing Examiner Hearing relating to traffic traveling westbound through the MD 210 and Livingston Road intersection, and shortly thereafter slowing down and turning right into the B&J Carryout’s parking lot, and driving north through the lot to access the local road to the north. See 3/05/2020 T.p., 169-170. Vehicles may also, at times, travel southbound from the local road, then cut-through the B&J Carryout’s parking area to turn right on to Livingston Road, then immediately turn left onto Biddle Road to avoid the traffic light at the intersection. *Id.* In response to these concerns, Mr. Lenhart suggested an additional road improvement proposal that would provide a new right turn lane for westbound traffic on Livingston Road after the MD 210 intersection, which would be used for traffic in and out of the BJ’s driveway, while also providing a second westbound lane for traffic to bypass any turning vehicles. *Id.* at 170-172. See also Exhibit 146, Roadway Improvement Proposal. The Roadway Improvement Proposal would also improve the intersection by split phasing the eastbound and westbound traffic on Livingston Road at the intersection, as described in detail by Mr. Lenhart. *Id.* at 172.

(11) Opponents to SE-4816 presented no probative evidence regarding adverse impacts resulting from SE-4816. Generalized fears regarding increased crime

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<sup>17</sup> Adequate Public Facility Ordinance (“APFO”) and the testing required therein is not applicable in this matter, and there is no legal requirement that this development meet any APFO test. The development is exempt from Subtitle 24 (Subdivision) of the County Code.

(12/17/2019 T.p., 36, 2/25/2020 T.p., 97-99, 142, 162; 2/27/2020 T.p., 44), traffic dangers (12/17/2019 T.p., 10, 30, 39, 49, 62, 97, 99; 2/25/2020 T.p., 49-53, 142, 149, 155-156), and air pollution (2/25/2020 T.p., 52) are not sufficient to establish adverse impacts unless they are based on evidence that those circumstances will arise as a result of the proposed use. Moseman v. County Council of Prince Georges County, 99 Md. App. 258, 265, 636 A.2d 499, 503 (1994)(citing Rockville Fuel v. Board of Appeals, 257 Md. 183, 191-93, 262 A.2d 499 (1970)). The Opposition's generalized fears regarding the proposed use, are, at best, merely possible adverse impacts, all of which are inherent to the use. Based upon well-established case law it is clear that any Special Exception use is presumed to have some adverse impacts, but the Opponents presented no probative evidence to demonstrate that any of the possible adverse impacts from the proposed use upon the Subject Property would be "above and beyond those inherently associated with such a special exception use irrespective of its location within the ne." Schultz v. Pritts, 291 MD 1, 291 MD 1, 432 A.2d 1319, 1331 (1981). See also, People's Counsel for Baltimore Cty. v. Loyola College of Md., 406 MD 54, 106 (2008); Clarksville Residents Against Mortuary Def. Fund, Inc. v. Donaldson Props. 453 MD 516, 541 (2017); and Mayor & Council of Rockville v. Rylyns Enterprise, Inc., 372 MD 514, 542 (2002).

(12) None of the evidence produced by the Opponents at the Zoning Hearing Examiner Hearing demonstrated that SE-4816 would, in any way, adversely affect the health, safety, or welfare of the community. Ms. Sangeetha Tharmarajah, the daughter of the owners of the Accokeek Exxon gas station operating just across MD 210, engaged her friend, Sharjeel Chaudhry, a 4<sup>th</sup> year medical student, to provide testimony relating to the available food choices in the area, and his view on the impact of a Royal Farms Food or Beverage Store. See 2/25/2020 T.p., 203; 3/05/2020 T.p., 115-116. Despite the Opposition's efforts to qualify him as an expert witness in the field of public health, Mr. Chaudhry was not accepted as an expert in that field or any other professional field, and provided his testimony strictly as a lay witness. *Id.*

For the purpose of these proceedings, Mr. Chaudhry and his company, Access Strategies, LLC, prepared a document titled "Health Impact Assessment." Exhibit 115 (HIA) In the HIA, Mr. Chaudhry attempted to identify what he described as establishments offering "unhealthy food options" within a 10-mile radius of the Subject Property – generally, along the MD 210 corridor.<sup>18</sup> Exhibit 115, pp. 10-12. See also 3/05/2020 T.p., 48-49. In doing so, Mr. Chaudhry identified 79 such locations, and then included a survey in the HIA in which he categorized the items sold at those establishments as either sweet and salty snacks, fast food, or fried chicken. Exhibit 115, pp. 12-14. Based upon this survey, Mr. Chaudhry concluded that "Accokeek, Maryland and the surrounding 10-mile radius" was a "food swamp," a buzz phrase that he used repeatedly throughout the HIA and in his testimony. *Id.* at 15, 19, 24, 36. In the HIA, Mr. Chaudhry defined "food swamp" as an area where:

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<sup>18</sup> Although it is not abundantly clear it appears that Mr. Chaudhry identified retail establishments within a 10-mile area of the Subject Property that only operated as either gas stations, convenience stores, fast food eateries, tobacco shops or liquor stores. Exhibit 115, p. 11.

**[D]ue to a lack of grocery stores**, food swamps have an abundance of unhealthy food options, such as convenience stores and fast food stores that are more readily available and accessible **than healthy food outlets such as supermarkets**.

*Id.* at 24 (emphasis added). Upon cross examination, it became apparent that Mr. Chaudhry's "survey" was nothing more than his subjective, lay opinion as to what constituted unhealthy food options. A scientific approach was not utilized. The following constitutes just a few examples of the inconsistencies in Mr. Chaudhry's survey, analysis, and testimony:

- Mr. Chaudhry admitted that he alone determined whether a food option at one of the 79 establishments constituted a "sweet and salty snack," versus some other category, by simply eyeballing the food items at the store. 3/05/2020 T.pp., 45-47, 67-68. This was a subjective determination only, utilizing no objective criteria whatsoever.
- Although conveniently omitted in the HIA, Mr. Chaudhry admitted that there were three (3) major grocery stores located in shopping centers within only a few miles of the Subject Property, notably the Weis Market just across MD 210 from the Subject Property in the northeast quadrant of the MD 210/Livingston Road intersection. Again, Mr. Chaudhry did not include any of these grocery stores among the 79 establishments identified in the HIA, nor did he consider their presence in concluding that the area was a "food swamp." *Id.* at 50-52<sup>19</sup> His failure to include the grocery stores in his "survey" completely undermines his conclusion, since the definition he claims to have used and relied upon for determining that the area is a "food swamp" requires a comparative analysis of food options, **specifically to include access to grocery stores**. Exhibit 115, p. 24.
- Mr. Chaudhry admitted that he could not provide a definition for the term "oversaturated," in his conclusion that the area was "oversaturated with an inequitable distribution of unhealthy food, tobacco, and alcohol," and ultimately admitted that he only subjectively made that determination himself. See 3/05/2020 T.pp., 70-71. Again, this conclusion was made without regard to the presence of multiple nearby grocery stores, and without any type of relative analysis to other areas.
- Mr. Chaudhry admitted that his determination as to whether any restaurant in the area constituted a "fast food establishment" was, again, based upon his own subjective opinion. *Id.* at 76-77.

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<sup>19</sup>There is also a Safeway grocery store located approximately 4.1 miles north of the Subject Property. Exhibit 10, p. 25.

- Further demonstrating the ambiguity and imprecision of his definitions, Mr. Chaudhry admitted that grocery stores would fall under the definition of “convenience store” provided in his report. *Id.* at 77-78. Yet, as noted above, Mr. Chaudhry was aware of three (3) grocery stores within the vicinity of the Subject Property, and failed to include them in his analysis.
- Despite the definition of “food swamp” provided in the HIA, which specifically requires a lack of grocery stores or fresh food choices in a particular area, Mr. Chaudhry refused to acknowledge, on cross-examination, that the presence of the three nearby grocery stores provided access to fresh, healthy food options. *Id.* at 90-91.
- Mr. Chaudhry testified that the area he investigated for “social detriments of health” was the same area identified as the “trade zone” in the Valbridge Needs Analysis prepared by Mr. Steere. *Id.* pp. 17, 21. However, Mr. Chaudhry identified the region he surveyed for unhealthy food options as being an area encompassing a 10-mile radius of the Subject Property from the “MD 210 Ramps to and from I-495/I-295” to “MD 228.” Exhibit 115, pp. 10-11. On cross examination, Mr. Chaudhry acknowledged that the 10-mile area he investigated extended along the MD 210 corridor from the Charles County line up to just south of the Beltway at Wilson Bridge Drive in Oxon Hill, which is consistent with the area he identified in the HIA – **but much of that area is also clearly well beyond the northern boundary of Mr. Steere’s trade area.** 3/05/2020 T.pp., 145-146. Yet in the face of this undisputed fact, Mr. Chaudhry would not concede that any of the 79 establishments he identified in the larger 10 mile zone in the HIA were located outside of Mr. Steere’s trade area. *Id.* at 147.

These examples constitute only a small sample of Mr. Chaudhry’s testimony during cross-examination, in which he demonstrated a pattern of using key terms in the HIA that lacked clear and objective definition, using terminology based solely on his own subjective observations, and of willfully ignoring the presence of healthy food options available at many, if not most, of the 79 stores identified in the HIA, including the three major grocery stores located within minutes of the Subject Property. The grocery stores were intentionally omitted from the HIA — the presence of these three (3) grocery stores alone entirely undermines Mr. Chaudhry’s characterization of the Accokeek area as a “food swamp.” In addition, Mr. Chaudhry’s refusal to concede obvious and undisputed facts during his cross examination renders his testimony unreliable.

Mr. Chaudhry was not qualified as an expert witness, and his lay testimony was inconsistent and unreliable at best. Beyond that, Mr. Chaudhry failed to demonstrate any educational training or experience that would give him any basis to make a determination as to whether the Accokeek area constitutes a food swamp. Mr. Chaudhry failed to

employ a scientific approach to support his conclusion. Furthermore, due to his lack of expertise, the HIA constitutes nothing more than a compilation of observations and conclusions by a lay witness lacking the professional expertise or technical background to draw any conclusion about food options available in the area, and, more critically to the issue, the impact of those food options on the health of the community.

(13) A Food or Beverage Store under 125,000 square feet is a use permitted by right in the Table of Uses for the C-S-C Zone. See §27-461. The only reason that the request for a Food or Beverage Store is included in Special Exception 4816 is because it is proposed in combination with a Gas Station, which requires a Special Exception to operate in the C-S-C Zone. The Food or Beverage Store to be built at the Subject Property would include only 4,649 square feet. See Exhibit 28. See *also* Exhibit 24, p. 11. Within this context, it is significant to note that not only would the proposed Food or Beverage Store, as a stand-alone use, be permitted upon the Subject Property, but fast-food restaurants such as McDonald's, Burger King, and Wendy's are also uses permitted by right in the C-S-C Zone, and thus, upon the Subject Property, subject only to Detailed Site Plan Approval. See §27-461. Accordingly, the District Council for Prince George's County, in enacting the Table of Uses contained in the Zoning Ordinance, has already determined that food service establishments offering far fewer healthy options than Royal Farms are permitted to operate in the C-S-C Zone without the additional scrutiny required by a Special Exception.

(14) For opponents to argue that the Royal Farms Food or Beverage Store would pose a health hazard to the community constitutes nothing more than an attempt to misuse the "health, safety, and welfare" concerns contemplated by the District Council in §27-317(a)(4), as the District Council has clearly determined that fast-food restaurants are proper and appropriate uses in the C-S-C Zone.

(15) Several considerations protect the adjacent properties and the general neighborhood from adverse effects to their uses and development.

First, the Subject Property is set apart from all of its neighbors by surrounding roads; the physical separation this condition affords is a substantive protection to both the use and the development of the adjacent properties.

Second, the proposed Gas Station is a compatible service commercial use in an existing commercial area on an existing commercially-developed site which has historically been occupied by service commercial uses. As a result, the adjacent properties and the general neighborhood are accustomed to this type of activity on the Subject Property.

The Subject Property is a part of an existing commercial area which is both planned and zoned to continue as the commercial anchor for the surrounding community. It does not represent an extension of new commercial uses or even new service commercial

uses; those have been previously existing at the site. The uses proposed are consistent with and complementary to the other existing land uses in the existing commercial area.

Finally, the proffered intersection improvements will improve the level of service at the adjacent intersection from a failing level to a passing level. This fact would operate to enable the development of adjacent properties or the general neighborhood to the extent that it makes a finding of adequacy of public facilities possible when it might not now be. §27-317(a)(5)

(16) The Technical Staff concluded in its Staff Report that the use proposed by SE-4816 will not be detrimental to the use or development of adjacent properties or the general neighborhood:

The subject Application proposes to add a gas station use, in combination with a food and beverage store. The proposed development will not detrimentally impact the use or development of adjacent properties, as the proposed gas station and food and beverage store, pursuant to the conditions recommended, will be in architectural harmony with the existing surrounding developments and will provide goods and services, which will supplement those on abutting properties.

Exhibit 24, p. 8. The Land Planning Analysis and Mr. Ferguson's testimony regarding SE-4816's lack of impact upon the surrounding neighborhood, as set forth above, also demonstrates that the proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood. Exhibit 86, pp. 8-9. The Subject Property has historically been occupied by service-oriented commercial uses (including a prior fueling station), and the proposed Gas Station and Food or Beverage Store is simply a modernization and consolidation of the commercial uses that have existed at the Subject Property for decades. The proposed Gas Station and Food or Beverage Store on the Subject Property, therefore, are not only planned for, as evidenced by the Subject Property's commercial zoning but will also be a more comprehensive and better-planned use. *Id.* at 16-17. Finally, Mr. Ferguson noted that the intersection improvements proposed by the Applicant at Livingston Road and MD 210 will raise the level of intersection's service from a failing level to a passing level, which not only further justifies the conclusion that these uses will not be detrimental to the use or development of adjacent properties or the general neighborhood, but it will actually enhance the neighborhood. *Id.* at 17. §27-317(a)(5)

(17) The Subject Property is exempt from the requirement for approval of a Tree Conservation Plan because no woodland exists on the Subject Property. §27-317(a)(6)

(18) No regulated environmental features exist on the subject site. §27-317(a)(7)

(19) As the site is not located within the Chesapeake Bay Critical Area, the provisions

of §27-317(b) are not applicable to the subject Application.

### **Gas Station**

(20) Both Indian Head Highway and Livingston Road have rights-of-way widths of at least seventy feet, though direct vehicular access is not available to Indian Head Highway. The Subject Property has direct vehicular access to Livingston Road and the Subject Property has 526.74' of frontage on Livingston Road. §27-358(a)(1)

(21) On February 25, 2020, Kelly Canavan, a local resident and President of the AMP Creeks Council, appeared at the Zoning Hearing Examiner Hearing and provided testimony in opposition to SE-4816. In her testimony, Ms. Canavan attempted to argue that a "school" that was part of the Accokeek First Church of God (the "Church") was located within 300 feet of the Subject Property. See 2/25/2020 T.p., 82-84. Ms. Canavan testified that the Church held Sunday school classes, and offered a bible instruction program requiring a registration fee and which included a textbook provided to attendees. *Id.* at 82-83. Although Ms. Canavan provided testimony regarding these activities occurring at the Church, it is noteworthy that no member of the Church appeared during any of the six (6) days of the Zoning Hearing Examiner Hearing to testify in opposition to SE-4816, or to provide any corroborating testimony regarding this issue.

Ms. Canavan's effort to characterize the Church as a school in the context of §27-358(a)(2) is unsupported by the evidence. If it is a school at all, the "school" she referenced in her testimony would have to be classified as a "private school," which is defined in the Zoning Ordinance as:

A private school or training institution which offers a program of college, professional, preparatory, high school, middle school, junior high school, elementary, kindergarten, or nursery school institution; or any program of trade, technical, professional, or artistic instruction.... The term does not include; ... (B) Any activity offering instruction which is carried on by a single teacher, tutor, or instructor having a total enrollment of less than six (6) students.

§27-107.01(a)(206). The only "evidence" relating to this issue is the uncorroborated description of the purported activities on the Church property by Ms. Canavan. Not only does her description of these activities fail to satisfy the definition of a "private school" as set forth in the Zoning Ordinance, but there was no probative evidence to allow the Examiner to conclude that her testimony was either accurate or current. Similarly, there is no way of determining whether the information shown on Exhibit 96 is either accurate or current. Furthermore, the Applicant submitted into the record the printed information from the Prince Georges County Department of Permitting, Inspection and Enforcement, showing the use shown on the Use and Occupancy Permit for the Church is noted as "Church or Synagogue" – without any mention of a school.

(The Examiner stated that while this document could not be entered into evidence, she would take administrative notice of it as a government document.) *Id.* at 118-119. There is no evidence in the record to demonstrate that the purported “school” is licensed as such with the Maryland State Department of Education, or any other governmental agency. Quite simply, there is no probative evidence in the record whatsoever to prove that the Church does, in fact, operate a “Private School” as defined in the Zoning Ordinance, or that a “school” exists at that location under any definition.

Finally, the church property is located in the C-S-C Zone, and a “private school,” such as the one described by Ms. Canavan, would fall into the “All Others” category in §27-461(b), and is subject to Special Exception approval in that zone. The only other possible category in which a school would be permitted in the C-S-C zone would be under §27-463, but this Section requires not only Detailed Site Plan approval, but also that the school offer “a complete program of nursery school education accredited by the Maryland State Department of Education, or a complete program of nursery school education accredited by the Maryland State Department of Education, or a complete program of academic elementary (including kindergarten), junior high (middle), or senior high school education....” This section also requires that the property upon which the school is located be at least five (5) acres in size, but the Church property, according to the PGAtlas, consists of only 1.23 acres. Ultimately, absolutely no evidence was presented by Ms. Canavan to demonstrate that the Church (or the church property) met the academic requirements for a school, as set forth in the Zoning Ordinance, or had either a Special Exception or Detailed Site Plan approval to operate a private school. Accordingly, a “school” does not exist within the three hundred (300) feet of the Property.

(22) No lots containing schools, hospitals or outdoor playgrounds exist within 300’ of the subject site. The nearest such facility appears to be the Accokeek Branch Library parcel on Livingston Road, located approximately 1,510’ away to the east as the crow flies. §27-358(a)(2)

(23) No display or rental of any vehicles is proposed at the subject site. §27-358(a)(3)

(24) No storage or junking of any vehicles is proposed at the subject site. §27-358(a)(4)

(25) The Special Exception Site Plan (Exhibit 28) indicates that each of the proposed two-way access driveways will be 35’ wide, and the two lanes of the right-in-right-out entrance will be 20’ wide, in accordance with the requirements of the Maryland State Highway Administration. The edge of the westernmost of the proposed driveways along Livingston Road is approximately 80’ east of the point of curvature of the intersection with Biddle Road; the edge of the easternmost proposed driveway along Livingston Road is approximately 155’ west of the point of curvature of the intersection with Indian Head Highway. The proposed entrance from Biddle Road is approximately 260’ south of the intersection with Livingston Road. §27-358(a)(5)

(26) The Special Exception Site Plan (Exhibit 28) indicates that the access driveways are to be defined by curbing. §27-358(a)(6)

(27) The Special Exception Site Plan (Exhibit 28) indicates that a 5' wide sidewalk is proposed between the building and the proposed sidewalk along the site's frontage along Livingston Road. §27-358(a)(7)

(28) The dimensions of the gasoline pumps to the street line are indicated on the Special Exception Site Plan (Exhibit 28) to be not less than 78.1' from the nearest right-of-way line. §27-358(a)(8)

(29) No repair service is proposed. (Exhibit 28). §27-358(a)(9)

(30) The architectural details of the proposed structure are compatible with the roadside commercial character of the surrounding neighborhood, including the nearby commercial shopping center to the east and its pad sites. *Supra* §27-358(a)(10)

(31) Topography of the subject lot and its surroundings has been shown on the Special Exception Site Plan. (Exhibit 28). §27-358(b)(1)

(32) The location of a trash enclosure has been shown on the Special Exception Site Plan. (Exhibit 28). §27-358(b)(2)

(33) No exterior vending machines or a vending area are proposed; sales will be inside the proposed Food or Beverage Store. §27-358(b)(3)

(34) §27-358(c) requires:

*Upon the abandonment of a gas station, the Special Exception shall terminate and all structures exclusively used in the business (including underground storage tanks), except buildings, shall be removed by the owner of the property. For the purpose of this Subsection, the term "abandonment" shall mean nonoperation as a gas station for a period of fourteen (14) months after the retail services cease.*

This Requirement is noted on the Special Exception Site Plan (Exhibit 28) §27-358(c)

(35) §27-358(d) requires:

*When approving a Special Exception for a gas station, the District Council shall find that the proposed use:*

(1) *Is necessary to the public in the surrounding area:*

(36) As the Technical Staff recognized in its Staff Report, there is a “reasonable need” for the proposed Gas Station proposed in SE-4816 as required under §27-358(d)(1). Exhibit 24, p. 9-10. The meaning of the term “need” or “necessity” in the context of Maryland’s zoning laws has not been interpreted to mean “absolute necessity” but has instead been defined as requiring that the proposed use be convenient and useful to the public. As held by the Court of Special Appeals:

The judicial gloss given to the definition of the ‘need’ requirement in Maryland special exception lore has been that it means ‘expedient, reasonably convenient and useful to the public.’ ‘Need’ does not mean absolute necessity. The term is elastic and relative, infusing the designated local government decision-maker with a degree of discretion, not unfettered or to be arbitrarily exercised, in interpreting and applying the facts of each case to this requirement.

Friends of the Ridge v. Baltimore Gas & Elec. Co., 120 Md. App. 444, 448, 707 A.2d 866, 888 (1988), affirmed in part, vacated in part, 352 Md. 645, 724 A.2d 34 (1999)<sup>20</sup> See also Neuman v. City of Baltimore, 251 Md. 92, 98-99, 246 A.2d 583, 587 (1968) (holding that, “need has been judicially held to mean expedient, reasonably convenient and useful to the public.”); Lucky Stores, Inc. v. Bd. Of Appeals of Montgomery Cty., 270 Md. 513, 528, 312 A.2d 758, 766 (1973) (quoting the Court’s definition of “need” in Neuman in the context of a surrounding neighborhood and further holding that the terms “neighborhood” and “need” do not suggest the authority of a zoning board to consider whether the use will harm competing businesses); Baltimore Cty. Licensed Beverage Ass’n Inc. v. Kwon, 135 Md. App. 178, 193-95, 761 A.2d 1027, 1035-1036 (2000) (citing Neuman and holding that the term “need” in the context of zoning should be “considered in light of what is necessary for the accommodation of the public”).

(37) In support of SE-4816, Mr. Edward Steere, Valbridge Property Advisors, accepted as an expert in the field of market analysis, prepared an analysis of the need for a Gas Station in the neighborhood, and provided testimony regarding that analysis at the Zoning Hearing Examiner Hearing on January 21, 2020 and March 5, 2020. Exhibit 10 (Needs Analysis). In his Needs Analysis and testimony, Mr. Steere originally defined the applicable trade area as being generally bound on the east by Maryland Route 301, on the north by Fort Washington Road, and on both the west and the south by the Potomac

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<sup>20</sup> Friends of Ridge involved a request for both a variance and a special exception. The petition for certiorari to the Court of Appeals did not challenge the holding on the special exception, and the Court of Appeals’ subsequent decision vacated only the portion of the Court of Special Appeals’ holding regarding the need for a variance, because a variance was not required. 352 Md. 645, 662, 724 A.2d 34, 42 (1999). The Court of Appeals explicitly noted that the special exception was not at issue, and affirmed the remainder of the Court of Special Appeals’ holding which included the need analysis in the context of special exceptions. *Id.*

River (the "Trade Area"). Exhibit 10, p. 14.<sup>21</sup> The Trade Area includes census tracts from 2010 in both Prince George's County and Charles County, and captures the majority of the commuters and consumers likely to travel through or do their shopping on the MD 210 corridor, which borders the Subject Property to the east. *Id.* at 15.

The Needs Analysis prepared by Mr. Steere indicates that residential consumers in the trade area will use approximately 58 million gallons of gasoline during the calendar year of 2019 and a total of approximately 77.60 million gallons when combined with commercial, workforce, and pass-through consumers. *Id.* at 21. Despite the 77.60 million gallon demand, the Needs Analysis demonstrates that only about 25.20 million gallons of gasoline are being supplied to these consumers by the thirteen (13) Stations located within the trade area.<sup>22</sup> *Id.* at 29. Therefore, there is a 52.40 million gallon shortfall in output in the trade area, which includes the proposed location of SE-4816.

Mr. Steere was also asked to provide an analysis of the supply and demand for the eight (8) census tracts within his Trade Area that are located solely within Prince George's County. Exhibit 84, (Alternate Needs Analysis). In his Alternate Needs Analysis, Mr. Steere determined that the total demand from residential and commercial sources in this smaller segment of the Trade Area was at least 21.49 million gallons of gasoline per year. *Id.* at 4. Mr. Steere also determined that the total supply within this more limited trade area was 14.7 million gallons. *Id.* at 5.

(38) Sangeetha Tharmarajah appeared at the Zoning Hearing Examiner Hearing on February 27, 2020 and offered lay testimony in opposition to Mr. Steere's Needs Analysis. In her testimony, Ms. Tharmarajah identified a map that she had prepared, and which purported to show the following four (4) gasoline stations located within the Trade Area defined by Mr. Steere which were omitted from his analysis:

- (1) Friendly Market, 11500 Old Fort Road, Fort Washington, Maryland 20744;
- (2) Shell Gasoline, 11001 Livingston Road, Fort Washington, Maryland 20744;
- (3) Falcon Fuel, 9500 Allentown Road, Fort Washington, Maryland 20744; and
- (4) Shell Gasoline, 10901 Fort Washington Road, Fort Washington, Maryland 20744.

2/27/2020 T.p., 59-60, 72-87<sup>23</sup> The map prepared by Ms. Tharmarajah was taken from Google Maps. *Id.* at 63.

(39) In response, Mr. Steere prepared a supplement to his Alternate Needs Analysis and testified again on March 5, 2020. Exhibit 151. Contrary to Ms. Tharmarajah's

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<sup>21</sup> A map of the Trade Area with the precise boundaries is included at Exhibit 10, p. 15

<sup>22</sup> The Needs Analysis identified thirteen (13) gas stations in the trade area, each with the ability to dispense approximately 2.1 million gallons of gasoline annually. *Id.* at 28-29. The thirteenth station has only a single pump, therefore it is not considered to contribute overall output of the trade area. *Id.* at 28.

<sup>23</sup> The Trade Area map from Exhibit 84 was used for the purpose of comparison. 2/27/2020 T.p., 107.

testimony, this Falcon Fuel station is not located within the Trade Area identified in Mr. Steere's Alternate Needs Analysis, as it lies approximately one-half mile to the north of the Trade Area boundary line. 3/05/2020 T.p., 251-251. See also Exhibit 151, p. 7. Mr. Steere's Supplemental Needs Analysis took into account the impact of the additional three stations identified by Ms. Tharmarajah, and, with regard to only the Prince George's County census tracts, the adjusted gasoline supply was 16.8 million gallons, while demand was 21.06 million gallons. 3/05/2020 T.p., 252. Mr. Steere also noted that the three stations addressed in his Supplemental Needs Analysis had a total of five (5) gas pumps, and that each of the remaining seven stations in the Prince George's portion of the Trade Area averaged five (5) pumps per station. As a result, the combined contribution to the gasoline supply of the three additional stations was equivalent to only one station, or 2.1 million gallons of gasoline. *Id.* p. 253-254.

(40) In its unreported opinion in Mohammed Anvari, et. al. v. County Council of Prince George's County, et. al., the Court of Special Appeals upheld the findings of the Zoning Hearing Examiner in Special Exceptions SE-4436, who in discussing how the term "necessary" should be construed, concluded that "...the proper standard is one that addresses whether the Gas Station is 'convenient, useful, appropriate, suitable, proper or conducive' to the public in the surrounding area...."

The establishment of a Gas Station use at the subject site in an established commercial area at the intersection of a collector roadway with a planned freeway is suitable and appropriate, as it is convenient and useful to the substantial traffic (2019 ADT 54,681 vehicles per day on Indian Head Highway, 2015 ADT 3,451 vehicles per day on Livingston Road (west of Indian Head Highway)) which passes the site. §27-358(d)(1)

(41) Finally, Section 27-358(d)(2) requires that, "the District Council shall find that the proposed use ... Will not unduly restrict the availability of land, or upset the balance of land use, in the area for other trades and commercial uses."

The preponderance of the zoning in the surrounding commercial area is C-S-C, but outside of the Accokeek Village Shopping Center (which also contains a Gas Station with a Food or Beverage Store), many of the existing land uses are (or have been) service commercial in nature, whether vehicle repair or contractor's offices. The Gas Station component of the proposed Application is a service commercial use that is representative of the service commercial uses which have been on the Subject Property and are sprinkled through the rest of the surrounding commercial area, but because of both its lack of repair facilities and the presence of the Food or Beverage Store, it is a much more retail-commercial-compatible use.

There is only one Gas Station on the west side of the southernmost seven miles of Indian Head Highway in Prince George's County. As such, there is not a preponderance of this land use type.

Undeveloped land for other retail commercial land uses is available in both the northwest and southeast quadrants of the Livingston Road/Indian Head Highway intersection.

Because the proposed use would replace historic service commercial uses with a compatible service commercial use (with a permitted retail commercial component), because it is in the midst of a group of complementary commercial uses, (including other service commercial uses), because it will be constructed to a high standard of site planning and architectural detail, and because it does not propose vehicle repair or vehicle storage and the attendant visual disruption caused by these activities. It will not upset the balance of land use, or restrict the availability of land for other trades and commercial uses.

### **Food or Beverage Store**

(42) A Needs Analysis for Convenience Store (Exhibit 49) was prepared for the subject Application and Technical Staff concurred with the Analysis finding that the proposed Food or Beverage Store is reasonably convenient and will serve the needs of the community. Exhibit 24, p.11. The following are excerpts from the Analysis:

“Valbridge has examined the community of Accokeek and determined that the entirety of the land mass west of Indian Head Highway (MD-210) is devoid of convenience services. Specifically, census tract 8013.02 lies entirely west of MD -210, between Piscataway Creek, the Potomac River and the Charles County line. The most distinctive feature of this trade area is that all the residents, business and institutions like the Fire Department, must cross MD-210 to access any type of convenience services and groceries.

We examined this trade area, in contrast to the larger gasoline trade area, based on consumer demand for convenience food and beverage. Although consumers will travel 10 minutes out of their way for cheaper gas, food and beverage retail prices are relatively static among convenience retailers. There are, however, different preferences noted in coffee and other specialty prepared foods, which may draw consumers from greater distances. Effectively, the trade area for a convenience store is much smaller than gasoline sales. The “convenience” factor is moot if consumers are passing one or more stores to reach another farther away. For the consumers on the west side of MD-210 this would be the most convenient location relative to all other existing convenience stores in and around Accokeek.”

“Using the demographic statistics, we estimate the number of households

in the defined trade area at 976 in 2019. This community is stable and not experiencing any growth in the recent 10 years and forecast five years. Those households have the following socio-economic characteristics:

Median Household Income (2019)	\$122,963
Average Household Size –Persons (2019)	2.93
Average Owner-Occupied Home Value (2019)	\$400,640
Estimated Homeownership Rate (2019)	88.0%
Average Vehicles per Household (2013-2017)	2.5
Workers Driving Alone to Work (2013-2017)	72.5%
Travel Time to Work 30+ minutes (2013-2017)	72.0%

This trade area is a very stable suburban space with no planned growth. A high median income of \$125,894 enables a very solid 86.9% homeownership rate with homes being valued at an average of \$400,640 in 2019. The Census Bureau’s American Community Survey for 2013-2017 estimates that there are 2.5 vehicles per household on average and that the vast majority (72.5%) of workers drive alone to work. Nearly three-quarters of workers commute more than 30 minutes to work.

The trade area’s aggregate income is calculated as \$120,011,888 in 2019:

**976 households x \$122,963 average income = \$120.0 Million  
Aggregate Income**

### **Convenience Store Demand**

The NACS and Nielson conducted a national count of convenience stores as of December 2018 and determined there are 153,237 stores operating in America. Of those, 121,998 sell gasoline. Based on a national population of 327.2 million people, there is approximately one store for every 2,100 people.

$327,000,000 \text{ people} \div 121,998 \text{ C-stores w/gas} = 2,682 \text{ people/store}$

“There are no food and beverage businesses in census tract 8103.02. Census statistics suggest there are a total of 79 businesses in the tract, of which seven are classified as retail and 35 are classified as “other businesses,” which typically cover various home occupations. There are 893 employees in the tract, which would be expanded by 4.5% with the addition of 40 employees at Royal Farms.

Valbridge Property Advisors believes that census tract 8013.02 is

underserved with convenience store options. Based on the national average of one store per 2,100 people (or 2600 people) alone, the community is not served. However, the greater need is demonstrated by the convenience of accessing this retail use on the west side of MD-210.

This entire community on the west side of MD 210 is not presently serviced with any conveniences, and that at this site there will be pedestrian accessibility and seating, further providing an asset to the community that is not available even on the east side of the highway.

The proposed store will also improve the neighborhood with highway frontage improvements, access controls, curb and gutter with stormwater management, sidewalks and socially advantageous indoor and outdoor seating, with conventional architecture emphasizing natural elements such as locally sourced stone and muted natural colors and effects. These elements would not be available to the neighborhood if the existing four parcels were independently developed. Today the site is underperforming with three vacant spaces, which brings down the property values, offers no income taxes, and depressed property tax revenue for the entire community. The Royal Farms will not only boost the economy of the community, by adding revenues to the county and state coffers, but also contribute to the overall accessibility of the commercial intersection and provide enhanced environmental and social benefits by providing infrastructure at no cost to the public. Therefore, the convenience factor for the 2700 people living on the west side of MD-210, as well as the various other businesses and the fire department are multiplied by the community benefit provided by Royal Farms.”

“In the alternative, an analysis of a greater Accokeek trade area demonstrates that there is still an unmet demand for convenience stores.

Valbridge expanded the trade area to extend east of MD-210 to include a total of three census tracts:

- 8013.02
- 801310
- 8013.11

This area is bounded (clockwise) by the Potomac River, and Piscataway Creek, Tinkers Creek, Steed Road, Piscataway Road (MD-223), Tippet Road, Butler Branch, Piscataway Creek, Windbrook Drive, Floral Park Road, South Springfield Road, Accokeek Road (MD-375), Gardner Road and Mattawoman Creek which generally represents the Charles County Line to Billingsley Road, then northwest to the Potomac River.”

Using the demographic statistics, we estimate the number of households in the defined trade area at 5,667 in 2019. This community has had slight growth. Those households have the following socio-economic characteristics:

Median Household Income (2019)	\$130,778
Average Household Size –Persons (2019)	2.99
Average Owner-Occupied Home Value (2019)	\$388,916
Estimated Homeownership Rate (2019)	87.5%
Average Vehicles per Household (2013-2017)	2.5
Workers Driving Alone to Work (2013-2017)	77.8%
Travel Time to Work 30+ minutes (2013-2017)	74.8%

This trade area is a very stable suburban space with minimal planned growth. A high median income of \$130,778 enables a very solid 87.5% homeownership rate with homes being valued at an average of \$388,916 in 2019. The Census Bureau's American Community Survey for 2013-2017 estimates that there are 2.5 vehicles per household on average and that the vast majority (77.8%) of workers drive there alone to work. Approximately three-quarters of workers commute more than 30 minutes to work.

The trade area's aggregate income is calculated as \$2,215,379,320 in 2019.

**16,940 households x \$130,778 average income = \$2.22 Billion Aggregate Income"**

"Census reports that there is a total of 278 businesses in this trade area, of which five are food and beverage stores, which includes Exxon, 7-11, Giant Food and Weis. There are only 47 retail businesses.

**16,940 people ÷ 2,135 C-stores/person = 793 stores**

**16,940 people ÷ 2,682 C-stores/person = 6.32 stores**

Since there are only five food and beverage stores in the greater Accokeek area, there appears to be an unmet demand for at least two stores. If we were to differentiate the food and beverage definition among grocery stores vs. convenience stores, we would find an even greater unmet demand."

"Whether testing the Accokeek neighborhood area only on the west side of MD-210 or the greater Accokeek area of southern Prince George's County, there is unmet demand for convenience store services. However, the greatest need is for the convenience of access to this type of retail on the west side of the highway.

The necessity or demand of the gas station creates a reasonable need for a food or beverage store, which will provide convenience and expedient service to the community.

The establishment of a convenience store with gasoline sales on the west side of Indian Head Highway will provide a service not presently available to the community while also reducing congestion and cross traffic on Livingston Road at MD-210. This is a safer space for this type of food and beverage outlet, not only because it will serve an underserved community, but also because it will channel traffic better by eliminating the need for left turn movements and cross traffic. Additionally, the site will be pedestrian friendly with sidewalks and indoor and outdoor seating, which also does not exist in the community.”

(43) The subject Application would represent the first Food or Beverage Store on the west side of Indian Head Highway in Prince George’s County, south of Swan Creek Road. Its approval would allow Accokeek residents living west of Indian Head Highway to have the option of avoiding that road to meet more of their daily needs, which speaks directly to the ‘convenient, useful, appropriate, suitable, proper or conducive’ standard. §27-355(a)(1)

(44) Vehicular access to the site is provided via two entrances on Livingston Road located on the east side of the site, and a singular access drive along Biddle Road. The 4,649-square-foot building will be an appropriate size for the site and conforms to the regulations applicable in the C-S-C Zone. The size and location of the building, as well as access points to the Food or Beverage Store, are oriented toward meeting the needs of the neighborhood. §27-355(a)(2)

(45) Neither the availability of land nor the balance of land uses will be restricted or upset by the proposed Food or Beverage Store component of the subject Application. Food or Beverage Stores are ordinarily permitted in the C-S-C Zone without any special conditions of approval; in fact, historically, these specific conditions of approval were only applicable to Food or Beverage Stores in the C-M Zone, where the concern was that introducing retail uses would restrict the availability of land for service commercial uses.

Staff notes that there are 13 similar uses located within the subject site’s trade area. As shown within the analysis of their Report, Staff believes that development of the site will not unduly restrict the availability of land or upset the balance of land use in the area, based upon the market analysis.

The proposed uses at the Subject Property are representative of and complementary to the other uses in the surrounding commercial area. Furthermore, substantial amounts of undeveloped commercially-zoned land remains available for development on both sides of Indian Head Highway, in both the northwest and southeast

quadrants of the Livingston Road/Indian Head Highway intersection. §27-355(a)(3)

(46) The Subject Property is not located in the I-1 or I-2 zones. §27-355(a)(4)

(47) No retail sale of alcoholic beverages is proposed. §27-355(a)(5)

### **Authorization to Build in Right-of Way**

(48) The Subject Property is located within the Subregion V Master Plan and Sectional Map Amendment. The 1993 Subregion V Master Plan and Sectional Map Amendment shows the entire property within the proposed interchange of MD 210 (Indian Head Highway) (F-11) (Master Plan Freeway) and MD 375 (Livingston Road) (C-525) (Collector Road). (ROW, Exhibits 32 and 34)

(49) In September, 2004, the Maryland Division of the Federal Highway Administration issued its Record of Decision selecting Alternative 5A Modified for propose infrastructure improvements along F-11 (Indian Head Highway). (ROW, Exhibit 5, p. 6 and Exhibit 34)

(50) ROW Exhibit 9 are the scaled plans showing Alternative 5A Modified, MD 210-I-95/I-495 to MD 228. ROW Exhibit 9(o) is the section along the frontage of the Subject Property. The Subject Property is in yellow and the Alternative 5A Modified is shown in red across part of the frontage along MD 210.

(51) The 2009 Subregion V Master Plan and Sectional Map Amendment continued to carry forward the 1993 Subregion V Master Plan and Sectional Map Amendment designation of the complete taking of the Subject Property by the right-of-way needed for the F-11/C-525 interchange. The 2009 Subregion V Master Plan and Sectional Map Amendment did not acknowledge FHA/SHA's endorsement of Alternative 5A Modified which discarded the 1993 large intersection and provided minimal effect on the Subject Property. (ROW, Exhibit 29)

(52) The November 2009 Countywide Master Plan of Transportation retains the 1993 Subregion V designation of the entire property within the proposed interchange of F-11 and C-525. (Exhibit 28) The 2009 Master Plan of Transportation does not reflect the 2004 right-of-way along the Subject Property as selected by the FHA/SHA.

(53) As a result of legal challenges which are not relevant to the Subject Property, the Subregion V Master Plan and Sectional Map Amendment was readopted in July, 2013 retaining the 1993 Master Plan and Sectional Map Amendment's acknowledgment of the total taking of the property by the (no longer) proposed interchange. (ROW, Exhibit's 31(a) and (b)) However, 'Table VI-4: Recommended Road Improvements by 2030' shows a shift in this perspective as it includes the MD 210 and MD 375 interchange with the added proviso "if deemed necessary". (ROW, Exhibit 31(c))

(54) The County's Priority Project's List for the Fiscal Year 2019-2024 State Consolidated Transportation Program notably fails to include the MD 210 and MD 375 interchange. (ROW, Exhibit 35, FHA/SHA approval of Alternative 5A Modified).

(55) Interestingly, PGAtlas does not show the total taking provided in the 1993, 2009 and 2013 Subregion V Master Plans and the 2009 Master Plan of Transportation, nor does it provide the very limited taking envisioned by the 2004 FHA/SHA approval of Alternative 5A Modified. Instead, PGAtlas provides an unsupported right-of-way designation across approximately 40 percent of the Subject Property. (ROW, Exhibit 3)

(56) The Owner/Applicants raised the following issue at the December 17, 2019 Zoning Hearing Examiner remand hearing on the ROW – that the Owner/Applicants strongly disagree with the underlying predicate of the remand, being the assumption that the ultimate right-of-way for the proposed Indian Head Highway/Livingston Road interchange impacting the Subject Property is as shown on PGAtlas. As noted at the December 17, 2019 hearing on the Right-of-Way, it is the Owner/Applicant's position that the ultimate right-of-way for this proposed interchange is actually as shown on the County's Master Plan of Transportation, upon which all four of the parcels constituting the Subject Property would be eliminated in their entirety by the proposed interchange. See generally 12/17/2019 T.p., 55-57 and Exhibits 12 to 17. The Land Use Article of the Maryland Code, Section 21-203(B)(1) and (2), requires that "[t]he resolution [adopting the plan] shall refer expressly to the maps and the descriptive and other matter that the Commission intends to form the whole or part Commission." Quite simply, the Master Plan of Transportation for the County includes that information, and is signed as required, while PGAtlas has no such information, and is not signed as required. See Exhibit 14. Indeed, PGAtlas specifically provides "[a]ll maps, imagery, and associated data are intended to provide general information and are not to be used as a recognized reference or for official purposes."

(57) The record in this case demonstrates that Owner/Applicants have proven all of the required findings to obtain the requested Authorization, as set forth in Zoning Ordinance §27-259(g)(1)(A)-(D) and as determined by the Zoning Hearing Examiner in her May 1, 2019 Decision on this Application. The Order of Remand does not require that these be revisited or otherwise addressed; said Order, instead, sets forth contain specific issues to be addressed, and it is those issues that were addressed during the hearings before the Zoning Hearing Examiner on this Order of Remand, as follows.

(58) The first issue to be addressed by the Zoning Hearing Examiner under the Order of Remand is identified as follows:

The ownership of the Accokeek Exxon – i.e. – testimony or evidence shall be received on whether the parents of Sangeetha Tharmarajah owns the business entity as a corporation, a general partnership, a joint venture, a limited liability company, a limited partnership, or a

sole proprietorship. Once ownership is clarified on remand, if necessary, the person, persons, or entity may register to become a party or person of record in this case.

See Order of Remand, p. 5. As noted above, Sangee Tharmarajah and Sulojana Tharmarajah claim to hold an ownership interest in a business entity, Saraniya Fuel Marketing Corporation (“SFMC”), which operates as the Accokeek Exxon across MD 210 from the Subject Property. However during the Zoning Hearing Examiner Hearing on December 17, 2019, evidence that SFMC was not in good standing with the Maryland State Department of Assessments and Taxation (“SDAT”). See 12/17/2019 T.p., 5. In response to that issue, the Zoning Hearing Examiner told counsel for SFMC: “I’m going to hold your part of the case in abeyance until tomorrow morning ... Tomorrow morning you need to provide evidence that the Council has asked for on remand.” *Id.* at 54-55. That testimony, however, did not occur until the third day of the Zoning Hearing Examiner Hearing, which was held on January 21, 2020, during which it was found that SFMC was still not in good standing with SDAT. See, 1/21/2020 T.p., 34. Furthermore, and more importantly, during the portion of the Zoning Hearing Examiner Hearing on January 21, 2020, it was determined that:

- (a) Neither the Tharmarajah family nor SFMC owns the land upon which Accokeek Exxon is located. *Id.* at 5;
- (b) As evidenced by Exhibit 30B, SFMC is a franchise to two entities, namely Alliance Energy, LLC and Global Montello Group Corp. See also *Id.* at 6-7; and
- (c) Pursuant to Exhibit 30C, SFMC leases the property from both Alliance Energy, LLC and Global Montello Group Corp., but the property upon which the Accokeek Exxon is located is actually owned by a third party, which Ms. Tharmarajah testified was a party she referred to as “Getty.” *Id.* at 21.

Accordingly, the only evidence in the Zoning Hearing Examiner’s record on this issue demonstrates that neither Sangee Tharmarajah, nor SFMC have any personal or property ownership rights that would be adversely affected by the granting of the building within a right-of-way. Aside from the prevention of competition, which is not a basis for aggrievement, there is no other basis to find that there is any interest by those parties that would be affected specifically and differently from the general public. Bryarski v. Montgomery Cty. Board of Appeals, 247, Md. 137 (1966). See also A Guy Name Moe, LLC v. Chipotle Mexican Grill of Colo., LLC, 447 Md. 425 (2016); Gosain v. County Council of Prince George’s County, 178 Md. App. 90 (2008); and Kreatchman v. Ramsburg, 224 MD 209, 219-20, 167 A.2d 345, 350-51 (1961). Therefore, neither the Tharmarajahs nor SFMC, had standing to file the May 31, 2019 Tharmarajah Exceptions to the Zoning Hearing Examiner’s Decision approving the Right-of-Way.

(59) The second issue identified in the Remand Order requiring presentation of additional testimony and evidence is as follows:

The criteria for approval to authorize the issuance of a permit within proposed rights-of-way—i.e.,-- the Tharmarajahs, or any other party or person of record, shall be allowed, through their attorney or *pro se*, to present additional testimony or evidence, if any, relating to the specific criteria for approval outlined in PGCC Sec. 27-259(g)(1)(A)-(D).

See Order of Remand, p. 5. Aside from the Tharmarajahs' testimony with respect to ownership issues concerning the Accokeek Exxon station and the land upon which it operates, the only other party who sought to testify about the right-of-way as a new party of record was Dharam Singh Goraya. During the hearing, Owner/Applicant objected to the testimony of Mr. Singh, since he would be entering his appearance and testifying as a new party of record, and not as a party of record from the Right-of-Way hearing proceedings that occurred prior to the Order of Remand. Owner/Applicant objected to Mr. Singh's testimony since the relevant issue established by the District Council related solely to parties or persons of record that were already accepted as such through the prior record in this case, and not to any new parties or persons of record. See 12/18/2019 T.p., 47-53. While Mr. Singh's testimony was permitted by your Hearing Examiner, the Owners/Applicant argue that his testimony was impermissible, and do not concede the correctness of the Zoning Hearing Examiner's ruling. With regard to the substance of his testimony, however, while Mr. Singh attempted to testify to §27-259(g)(1)(C) (i.e. "The interest of the County is balanced with the interest of the property owners"), the Hearing Examiner expressed great skepticism regarding Mr. Singh's requisite basis to do so. *Id.* p. 53. In the end, however, the only testimony given by Mr. Singh regarding the proposed authorization to construct within a proposed/ultimate right-of-way was his statement that "I strongly oppose anything this space used by any kind of business," and "[i]t will be bad". *Id.* p. 56-57. Not only does Mr. Singh's testimony ignore the commercial zoning of the Subject Property, but absolutely no basis was given for his testimony. Therefore, his testimony was conclusory only, and entitled to little if any weight.

(60) The third issue under the Remand Order is posed as follows:

Whether the entire property cannot yield a reasonable return to the owner if PGAtlas only depicts the proposed interexchange to encumber approximately +/- 40 percent or +/- 1.14 acres of the property[.]

See Order of Remand, p. 9. As noted above, four parcels of land have been assembled for the proposed use of a Gas Station in combination with a Food or Beverage Store, which require approval of SE-4816 and the ROW. The four parcels are located in the southwest quadrant of the MD 210/Livingston Road intersection in Accokeek, and are designated on Prince George's County Tax Map 151, Grid E-4, as Parcels 52, 53, 54 and

55. Mr. Mark Ferguson, who, as noted above, was qualified as an expert in land planning, testified to the location and approximate acreage of each, as follows: Parcel 52 (Clagett Properties) -- .5170 acres; Parcel 53 (America's Best Home Improvement) -- .50 acres; Parcel 54 (H. Manning & Christine Clagett) -- .333 acres; and Parcel 55 (B&H Hardware) -- 1.6 acres. See 12/17/2019 T.p., 78-80. Regarding the amount of encumbrance to each of those four properties as shown on the PGAtlas version of the ultimate right-of-way for Livingston Road and Indian Head Highway along the frontage of these properties, Mr. Ferguson testified that, as shown on Exhibit 18, the proposed taking encumbered approximately ten percent of both Parcels 52 and 53, approximately fifty percent of Parcel 55, and one hundred percent of Parcel 54. *Id.* Mr. Charles Clagett then testified that he has an ownership interest in Parcels 52 and 54, and he also testified as to the current uses on each of the four subject Parcels as follows: Parcel 52 – Vacant; Parcel 53— Home Improvement; Parcel 55 – Vacant; and Parcel 54 – Vacant. *Id.* at 81-88.

(61) Mr. Michael Lenhart, who, as also noted *supra*, was qualified as an expert in the field of transportation and transportation engineering, first confirmed the percentage of encumbrance upon each of the four parcels under PGAtlas scenario, as being approximately ten (10) percent of Parcels 52 and 53, fifty (50) percent of Parcel 55, and one hundred (100) percent of Parcel 54. If those four Parcels are assembled as proposed in the Right-of-Way Application, as well as the accompanying Special Exception Application, Mr. Lenhart testified that of the approximately four hundred fifty (450) feet of frontage along Livingston Road between MD 210 and Biddle Road, the proposed right-of-way as shown on PGAtlas would take approximately one hundred eighty (180) feet, leaving approximately two hundred and seventy (270) feet of frontage. See 12/17/2019 T.p., 90. Livingston Road between MD 210 and Biddle Road is owned and controlled by the Maryland State Highway Administration ("SHA"), and any access and/or improvements along that portion of Livingston Road will require a permit from the SHA, and compliance with the SHA's Guidelines for access to a State roadway. According to Mr. Lenhart, the recommended corner clearance by the SHA is one hundred fifty (150) feet, which is the separation between an intersection and a driveway, without including the turn radius. *Id.* at 90-91. Taking into consideration the turn radius at the MD 210 interchange, as well as the curb radius of Biddle Road and Livingston Road, the required corner clearance of one hundred fifty (150) feet could not be obtained. *Id.* Mr. Lenhart testified that the SHA has a minimum seventy-five-foot (75) corner clearance, which could be obtained even with the proposed taking, but that reduced corner clearance would not be able to support a full movement access, only a right-in, right-out access, likely with a median, to assure no left turns in or out, and this would be limited to one access point on Livingston Road between Indian Head Highway (MD 210) and Biddle Road. *Id.* at 90. Mr. Lenhart also testified that Biddle Road is only a twenty (20) foot right-of-way, and as a result of that minimal right-of-way width, and in its current configuration, it could not accommodate commercial traffic. In order to do so, Biddle Road would have to be a dedicated seventy (70) foot right-of-way, which would require an additional fifty (50) feet of dedication from the adjacent commercial parcels, thus further reducing the amount of developable area upon the Subject Property. *Id.* pp. 96-97.

(62) The next witness, Mr. Edward Steere, who, as also noted above, was qualified as an expert in the field of market analysis, testified that with the single right-in/right-out limitation on access from Livingston Road into the Subject Property, and also based upon the amount and location of the proposed taking for the right-of-way (per the PGAtlas configuration), the three properties that could be developed (the fourth, being Parcel 54, which would be taken in its entirety under any scenario) would not be able to accommodate parking along the Livingston Road frontage. Specifically, Mr. Steere testified that, “parking in front of the storefront is eliminated by the right-of-way and parking is critical to any retail use. The access, the front door is critical to any retail use.” *Id.* p. 102. Regarding the largest of the three remaining developable parcels, Parcel 55, Mr. Steere testified that given the impact of the proposed SHA taking upon this Parcel, the buildable area would be in the rear of this property closer to Biddle Road, which would require not only a significant amount of additional dedication, but also a significant upgrade to the size and quality of the right-of-way and the need to raze the existing building where a church was formerly located. *Id.* pp. 102-103. As a result, according to Mr. Steere, “[Y]ou end up with a parcel that has exceptional development costs, investment in road right-of-way, drive lanes and so forth for what would amount to a small building’s footprint.” *Id.* p. 103. Considering that the area of Parcels 52 and 53 combined is only about two thirds the size of Parcel 55, and that with the taking, the access to both parcels would also need to be from Biddle Road, with the consequent requirement of additional dedication and cost of right-of-way improvements for those parcels as well (whether developed individually or collectively), it is not difficult to conclude that the taking proposed under the PGAtlas scenario would virtually eliminate any economically viable development of Parcels 52, 53 or 55 individually. It should be noted that while a technical problem resulted in the failure to capture all of Mr. Steere’s opening testimony, he testified that in addition to the limiting factors discussed *supra*, the acres limitation previously testified to by Mr. Lenhart (right-in/right-out only on Livingston Road), as well as the elimination of parking along the Livingston Road frontage, are additional factors that would significantly limit the development and market potential of Parcels 52, 53 or 55 individually. *Id.* at 104. In consideration of all of those factors, Mr. Steere concluded that, in his expert opinion, as assemblage of all four parcels “is critical in order to get appropriate access on Livingston Road, ... in order to widen Biddle Road, all the way along there and to dedicate the appropriate right-of-way ... and then parking could be accommodated appropriately, a larger building could be paced in there and the result of all that is that the property value escalates significantly.” *Id.* p. 103.

(63) Mr. Steere then discussed two different types of retail uses – pass-by and destination. He described pass-by uses as:

uses that depend on pass-by traffic is what we call impulse buys, and where you’re driving down the highway and you go oh shoot I got to stop and get that on my way to wherever I’m going, you know, or I need gas I better pull over now and take care of that before I go farther down the highway.

He then described destination uses as:

uses that you plan to head to, such as a major grocery store outing or furniture or you know a sit down restaurant, some like that, where it isn't something you thought of as you saw it, it's something that you knew you were headed to. *Id.* p. 105-106.

Mr. Steere testified that the value would be higher for a pass-by then a destination use. *Id.* p. 111. In further discussing the factors involved in determining whether a proposed purchaser would find a particular property attractive for a pass-by use, and with regard to the access limitation testified to by Mr. Lenhart, Mr. Steere stated:

... access is key to the convenient pass-by user. That access point needs to be, if at all possible, on Livingston Road a full access, a full directional access in order, and they have to have visible available parking. That's critical to a convenient use to a retail that is depending on customers showing up .... Pushing parking behind a building is an issue in a suburban atmosphere.... In the suburban atmosphere, people want to pull up to the front, get out of their car, go straight in. And so from the vendor's point of view they want to have a site where they can have their building set behind parking with easy access to the highway. *Id.* p. 107-108.

He then testified that destination uses, on the other hand, do not require that type of access, stating:

the destination user, the vendor of a destination use is not interested in paying a premium for that visibility, that frontage and that accessibility that is demanded by the high volume retailers... the assemblage creates the right economy of scale for redevelopment of the entire site to accommodate all those infrastructure improvements. Individually each of these parcels can't accommodate the improvements to Livingston Road or Biddle Road as part of their developments, redevelopment. *Id.* p. 109, 112.

(64) The next witness to testify for the Owner/Applicant was Mr. Daniel LaPlaca. While Mr. LaPlaca was qualified as an expert in the field of real estate transactions, the Zoning Hearing Examiner stated that he could also testify with regard to the values of property in this case because he served as the real estate agent for the Owners of the four parcels. *Id.* p. 140. Mr. LaPlaca testified that he was originally retained by the owner of Parcel 55 to list its property for sale, but he later realized that an assemblage of all four of the parcels would be far more valuable than simply selling that one parcel alone. Mr. LaPlaca stated:

And as Mr. Steere testified, we knew that the highest end and best use for a three acre site, C-S-C zoned site on that highway was going to be as he called them the

pass-by retail uses, gas stations, fast food restaurants, pharmacy, something like that, that benefit from the exposure and access of a highway. *Id.* p. 143.

He then stated the following:

So we came up with a price of approximately a million dollars an acre.... Which was about twice what any of them could have gotten for that property marketing it individually and we reached out to Wawa, Royal Farms, 7-Eleven and said we got a great site for you and every one of them agreed and it created a bidding war. And ultimately the buyer at that point was Visconsi Development who was a developer for Royal Farms went out and the sales price was significantly higher than what we listed it for. *Id.* p. 144.

Mr. LaPlaca testified that the annual rental income for the Clagett property on the corner (Parcel 52) would be in the range of \$27,000.00 to \$30,000.00, and Parcel 53 could yield approximately \$33,000.00 to \$35,000.00 per year.” *Id.* p. 150. He also estimated the annual rental value for Parcel 54 to be approximately the same as for Parcel 52 (approximately \$27,000.00 to \$30,000.00), and ) and testified that Parcel 55 had been rented for \$3,500.00 per month, or \$42,000.00 per year. *Id.* pp. 148, 142. Mr. LaPlaca then testified that Royal Farms rents sites within Prince George’s County, and that they are paying rents of \$30,000.00 to \$35,000.00 per month:

So you’re comparing rent of \$30,000.00 a year against rent of \$360,000.00 a year. So the potential value to a property owner who can attract one of these pass-by retail uses is extreme. *Id.* pp. 152-153.

In comparing the potential value of destination uses upon the four parcels at issue, as opposed to a pass-by use of the four parcels, Mr. LaPlaca gave some examples of possible destination uses upon these properties, but then stated:

there is nothing you could put there that would approach the value of one of these highway retail uses ... in my experience it [destination uses] would be 25 to 30 percent of what you could get for the pass-by uses. *Id.* p. 154.

Finally, Mr. LaPlaca testified that:

the contract with Visconsi Development which was later assigned to [Applicant], was for all or none. They are reciprocal and contingent upon all four owners conveying their properties, all four owners participating in the special exception. If one of them is excluded or terminates for any reason, then the purchaser has no obligation to complete the purchase. *Id.* pp. 160-161.

(65) In sum, the testimony clearly established that the value of the four parcels assembled far exceeds the value of each of the four parcels valued separately. With the

encumbrance as shown on PGAtlas, and without the authorization to construct within the proposed right-of-way, there is likely to be only one right-in/right-out access point along Livingston Road; Biddle Road would need to be widened from its current twenty (20) foot right-of-way to a seventy (70) foot right-of-way and improved; at least one existing building on Parcel 55 would need to be razed; and each of the three developable parcels would almost assuredly be limited to attracting only destination retail uses, which would be likely to generate only approximately thirty percent (30%) of what could otherwise be generated by a pass-by retail use upon an assemblage of the four parcels. Since a pass-by retail use upon an assemblage of the parcels would require a full and unlimited access along Livingston Road, which could not occur without approval of the ROW, as well as parking along the Livingston Road frontage, the entire property cannot yield a reasonable return to the owner with the ultimate right-of-way as shown upon PGAtlas, even though it would only encumber approximately +/-forty percent or +/-1.14 acres of the property.

(66) The fourth issue that the District Council ordered the Zoning Hearing Examiner to take additional evidence upon in the Order of Remand is as follows:

The Table of Uses in the C-S-C zone for the Subject Property which would not require issuance of a permit or permits to build within proposed right-of-way as depicted by PGAtlas.

See Order of Remand, p. 9. At the hearing on this matter, the Table of Uses for the C-S-C Zone, which are found at §27-461, was submitted into the record as Exhibit 23. In point of fact, however, it is impossible to determine any particular uses “which would not require issuance of a permit or permits to build within proposed rights-of-way as depicted by PGAtlas” as stated in the Order of Remand. Any use permitted by right in the C-S-C Zone could occupy any of the existing buildings on any of the four parcels. However, if one wishes to obtain a permit to build a new structure upon any of the subject parcels, the proposed use will not be relevant to whether one would be required to obtain permission to build within the proposed rights-of-way depicted on PGAtlas. The determination of whether a use can locate upon a particular property encumbered by a proposed right-of-way is not dependent upon the proposed use. Rather, it would depend upon the size and configuration of the property, the size of the building for the contemplated use, access requirements, the location of the use upon the property, the amount and location of parking that would be required to support the use, landscaping requirements, and other technical requirements of the Zoning Ordinance such as setbacks and minimum lot size and frontage. This finding, therefore, cannot be addressed without the evaluation of a site plan to review these and other factors for any specific use in the Table of Uses contained in § 27-461. See 12.17.2019 T.p. 185-186.

(67) The next issue identified in the Remand Order upon which additional evidence was to be taken is:

The existing uses on the Subject Property and the return to the owner

without issuance of a permit or permits to build within proposed rights-of-way as depicted by PGAtlas.

See Remand Order, p. 9. As discussed in the response to the third issue addressed *supra*, Mr. Daniel LaPlaca, the real estate agent for the property owners, testified that the annual rental income for the Clagett parcel on the corner of Livingston Road and Biddle Road (Parcel 52) would be in the range of \$27,000.00 to \$30,000.00, and the amount rental income for Parcel 53 would be approximately \$33,000.00 to \$35,000.00, and the annual rental income for Parcel 53 would be approximately \$33,000.00 to \$35,000.00 per year. See 12/17/2019 T.p., 150. The annual rental income for Parcel 54 was estimated by Mr. LaPlaca to be about the same as that of Parcel 52 (approximately \$27,000.00 to \$30,000.00), and the annual rental income for Parcel 55, (based upon the actual rental amount for a church that was located there in the recent past for \$3,500.00 per month) was estimated to be approximately \$42,000.00 per year. *Id.* at 142, 149. See also *Id.* pp. 163-164. As also previously noted, Charles Clagett testified that with the exception of a home improvement business upon Parcel 53, the buildings located upon Parcels 52, 54 and 55 are all currently vacant. *Id.* p. 82-83. Since the Authorization to Build within a Proposed Right-of-Way would only become an issue in connection with a redevelopment of any or all of the parcels, the testimony by Mr. LaPlaca with regard to the current rental values for each of those properties would represent the return to the owner without the issuance of a permit or permits to build within proposed rights-of-way as depicted by PGAtlas.

(68) The final issue upon which additional evidence was to be taken by the Zoning Hearing Examiner as required by the Remand Order was:

How the integrity of the 2014 General Plan or Plan 2035 will be preserved if the District Council approved issuance of a permit or permits to build within proposed rights-of-way as depicted by PGAtlas.

See Remand Order, p. 9. Evidence on this issue was provided by the testimony of Applicant's expert witness in land planning, Mr. Mark Ferguson. Mr. Ferguson testified that the recommendation for an interchange at MD 210/Livingston Road intersection is conditional only, in the sense that Plan Prince George's 2035 states that the interchange should be built only "if necessary." See 12/17/2019 T.p., 183, 185. See also Subregion 5 Master Plan, pp. 100, 101, 104. Since the State's final Environmental Impact Statement, which was approved by the Federal Highway Administration, did not recommend the construction of the interchange at this location, but only intersection improvements, the interchange cannot at this time be found to be "necessary." *Id.* at 183. Additionally, Mr. Ferguson testified that the General Plan "recommends deprioritizing improvements like this in any case, instead directing them toward centers and transit options." *Id.* For these reasons, Mr. Ferguson concluded that "even with an entire encumbrance of the property, the integrity of those plans, including the General Plan,

would be preserved. Under the PGAtlas taking with a smaller encumbrance of the property it would still be preserved for the same reasons.” Id. Based upon this testimony, the integrity of the 2014 General Plan and Plan 2035 will be preserved if the District Council approves this Application.

### **Parking Regulations**

(69) In accordance with the Parking and Loading Regulations contained in Part 11 of the Zoning Ordinance, 44 parking spaces, including 3 handicap accessible parking spaces, are required. The subject Site Plan shows 69 parking spaces being provided, including 3 handicap-accessible parking spaces, exceeding the parking requirements for this site. The Site Plan (Exhibit 28) also correctly shows one loading space required and provided. In addition, six bicycle spaces are provided on-site, proximate to the building entrance. The location and sizes for the proposed parking and loading areas are in accordance with the requirements of Subtitle 27.

### **Landscape Manual**

(70) In accordance with §27-450 of the Zoning Ordinance, the proposed development is subject to the 2010 *Prince George’s County Landscape Manual* (Landscape Manual), specifically Section 4.2, Requirements for Landscape Strips Along Streets; Section 4.3, Parking Lot Requirements; Section 4.4, Screening Requirements; Section 4.6(c)(1)(C)(2), Buffering Development from Special Roadways; Section 4.7, Buffering Incompatible Uses; and Section 4.9, Sustainable Landscape Requirements, and is in compliance with the Landscape Manual.

### **Tree Canopy Coverage**

(71) Subtitle 25, Division 3, the Tree Canopy Coverage Ordinance, requires a minimum percentage of the site to be covered by Tree Canopy for any development projects that propose 5,000 square feet or greater of gross floor area or disturbance and require a grading permit. The subject site is zoned C-S-C and is required to provide a minimum of 10 percent of the gross tract area to be covered by Tree Canopy. The revised Landscape Plan provides the required schedule showing the requirement being met through landscape trees that also are planted to meet the requirements of the Landscape Manual, which is allowed in the Tree Canopy Coverage provisions of the Code.

### **Sign Regulations**

(72) The one 439-square-foot fuel canopy sign; one 212-square-foot building-mounted sign; two 25-foot-high pylon signs; and one 3-square-foot directional arrow sign are all in accordance with the Sign Ordinance. Exhibit 28

**DISPOSITION/RECOMMENDATION**

SE 4816 is Approved subject to the Following Conditions:

1. Prior to certification of the Special Exception, the Site Plan shall be revised as follows:
  - a. Delineate an 8-foot-wide sidewalk (or shared-use path) along the site's entire frontage of MD 210 (Indian Head Highway) and a 5-foot-wide sidewalk along the site's entire frontage along Biddle Road.
  - b. Revise the building and canopy sign table so that the allowable square footage for the canopy sign is applied at a ratio of 1-square-foot for each lineal foot of the canopy width, and show the percentage of signage to be divided between the building and canopy is applied to the allowable square footage shown in the table, consistent with Section 27-613(c)(3)(G) of the Prince George's County Zoning Ordinance.
  - c. Label the underground gas tanks.
2. In accordance with the 2013 *Approved Subregion 5 Master Plan and Sectional Map Amendment*, the Applicant and the Applicant's heirs, successors, and/or assignees shall provide:
  - a. An 8-foot wide sidewalk (or shared-use path) along the site's entire frontage of MD 210 (Indian Head Highway), unless modified by the Maryland State Highway Administration.
  - b. Provide a 5-foot-wide sidewalk along the site's entire frontage along Biddle Road, unless modified by the Prince George's County Department of Public Works and Transportation.
3. Prior to approval of building permits, the Applicant and the Applicant's heirs, successors, and/or assignees shall:
  - a. Demonstrate that Prince George's County District Council authorization to construct within the proposed master plan rights-of-way of MD 210 (Indian Head Highway) and Livingston Road (C-525), pursuant to Section 27-259 of the Prince George's County Zoning Ordinance, has been obtained.
  - b. Provide a financial contribution of \$420 to the Prince George's County Department of Public Works and Transportation for placement of a "Share the Road with a Bike" sign on Livingston Road.

- c. Provide detailed access permit plans and all supporting documentation to the Maryland State Highway Administration for detailed review.

Authorization to Build in Right-of-Way is recommended for Approval  
The Approved Site and Landscape Plan is Exhibit 28