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OFFICE OF THE ZONING HEARING EXAMINER
FOR PRINCE GEORGE'S COUNTY

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MCDONALDS USA, LLC, FOREST HEIGHTS : Case No. RO SP-4196-01
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A hearing in the above-entitled matter was held on
December 1, 2021, at the Prince George's County Office of
Zoning, 14741 Governor Oden Bowie Drive, Room L-200, Upper
Marlboro, Maryland 20772 before:

Joyce Nichols
Hearing Examiner

A P P E A R A N C E S

On Behalf of the Applicant:

Dan Lynch, Esq.

On Behalf of People's Zoning:

Stan Brown

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MS. NICHOLS: There we go, Mr. Lynch. All right, good morning.

MR. LYNCH: Good morning.

MS. NICHOLS: Good morning, Mr. Lynch. Good morning, Mr. Brown. All right, we are recording and I'm going to call the case. Good morning, everybody, it's approximately 9:30 in the morning on the 1st of December and we are here for revision of site plan 4196-01 for McDonalds in Forest Heights. Mr. Lynch, good morning.

MR. LYNCH: Good morning, Madam Examiner. Hope everyone had a pleasant Thanksgiving.

MS. NICHOLS: It was lovely.

MR. LYNCH: Madam Examiner, this morning, I'm here on behalf of McDonalds Corporation with regard to a revision to special acceptance site plan associated with an existing McDonalds restaurant located at 5501 Livingston Road in Forest Heights. This is an application for an alteration of an existing non-conforming use which was previously approved and there's a special exception on file for the original alteration. I have with me here today three witnesses. I have Mr. Joe Curto, with McDonald's Corporation, then I have Chris Howe, our Civil Engineer with Kenley Horn, and finally I have Mr. Mark Ferguson our land planner.

MS. NICHOLS: All right.

1 MR. LYNCH: I'm not sure whether the Examiner
2 wants to swear all the witnesses now or wait as we --

3 MS. NICHOLS: No, individually please, thank you.

4 MR. LYNCH: Okay, all right. So what I'd like to
5 do Madam Examiner is begin by calling Mr. Joe Curto and he's
6 going to take you through what McDonald's purposes are with
7 regard to this application. Mr. Curto.

8 MS. NICHOLS: All right, Mr. Curto, if you could
9 please turn on your video, your camera.

10 MR. LYNCH: Madam Examiner, I see he's having
11 trouble with the video this morning.

12 MS. NICHOLS: All right, Mr. Curto, can you hear
13 me? Mr. Curto, can you turn on your mic please?

14 MR. CURTO: Can you hear me now?

15 MS. NICHOLS: Yes, I can hear you now. All right,
16 so you're having camera issues this morning?

17 MR. CURTO: Yes, I am, I apologize.

18 MS. NICHOLS: Okay, no worries. Okay, I'm going
19 to ask you, assume you are going to comply, to raise your
20 right and repeat after me.

21 MR. CURTO: My right hand is risen.

22 MS. NICHOLS: Okay, thank you. Do you solemnly
23 swear or affirm under the penalties of perjury in the matter
24 now pending, to tell the truth, the whole truth, and nothing
25 but the truth?

1 MR. CURTO: I do.

2 MS. NICHOLS: Thank you. Please state your name
3 and business address for the record?

4 MR. CURTO: Yes, my name is Joseph Curto. The
5 address is 6903 Rockledge Drive, Suite 1100, Bethesda,
6 Maryland 20817.

7 MS. NICHOLS: Thank you.

8 MR. LYNCH: Thank you, Madam Examiner. And Mr.
9 Curto, by whom are you employed?

10 MR. CURTO: I'm employed by McDonalds USA.

11 MR. LYNCH: And what is your job title?

12 MR. CURTO: I'm an Area Construction Manager.

13 MR. LYNCH: And what are your responsibilities as
14 an Area Construction Manager?

15 MR. CURTO: I am responsible for all design
16 entitlement permits and construction of a new or rebuilt
17 facilities.

18 MR. LYNCH: Now the site located in Fort
19 Washington, which is the subject, excuse me, in Forest
20 Heights that's subject to this application, is that a
21 rebuild? Is that part of your rebuild program?

22 MR. CURTO: Yes, it is.

23 MR. LYNCH: And you're familiar with the
24 application which is before the Zoning Hearing Examiner?

25 MR. CURTO: Yes, I am, it's the revision of our

1 approved special exception.

2 MR. LYNCH: Now just generally, could you just
3 tell us what the purpose from your standpoint and from
4 McDonalds' standpoint, what is the purpose of this
5 application?

6 MR. CURTO: Well, we are, as most people know,
7 some don't, we are in the process of modernizing all of our
8 facilities in the U.S. This facility interesting enough, is
9 the first McDonalds that was in Maryland. It was built in
10 1958. So we are applying to modernize the facility as well
11 as upgrade the infrastructure of the facility because it's
12 so old.

13 MR. LYNCH: Okay, when you say it's so old, this
14 facility was first built back in the late 50s, is that
15 correct?

16 MR. CURTO: Yeah, 1958, November of 1958. Our
17 oldest facility in Maryland.

18 MR. LYNCH: Okay, now once this is constructed and
19 your basic intention is to make sure that this operates more
20 efficiently than it does today, is that correct?

21 MR. CURTO: Yes, yes, it is. Our intention is not
22 just to upgrade the infrastructure and the physical building
23 itself, but our intention is to modernize this facility to
24 one of our, will be one of our most modernized facilities in
25 the region. What we do is we modernize the kitchens with

1 all the new kitchen equipment, and all the new kitchen
2 layout. We're very precise with the number of steps staff
3 members take to move product from one area to another to
4 eventually get to the customer. We take great pride in the
5 limited amount of time our customers are in the drive thru.
6 Also to update the facility technology-wise. We have a
7 digital kiosk, we have outdoor digital menu board. At this
8 point, we have internal communications, and we have table
9 locators, so staff, if people are seated, staff knows
10 exactly where our customers are when it comes to delivering
11 their orders. And the biggest modernization piece of it is
12 the drive thru. As we all know in this new normal of Covid,
13 a lot more people are reluctant to come into the buildings,
14 and they are in the drive thru. So the dual lane drive thru
15 incredibly increases the efficiency of moving cars through,
16 as well as the third window. There's a third window just in
17 case there is an order that is taking a little more time,
18 we're able to pull people forward and keep the drive thru
19 going. So all those aspects of modernization really make
20 the customer and the local community have a much better
21 experience when they come to our facility.

22 MR. LYNCH: Okay, thank you Mr. Curto. And I
23 believe, Madam Examiner, that pretty much outlines what
24 McDonalds' purpose is, and I have no further questions for
25 Mr. Curto.

1 MS. NICHOLS: All right, Mr. Brown, do you have
2 any questions?

3 MR. BROWN: Yes, good morning, Mr. Curto.

4 MR. CURTO: Good morning.

5 MR. BROWN: I understand you're having problems
6 with your video and I'm not trying to make a big deal of it,
7 but normally witnesses are required to be seen so that we
8 can determine or assess their credibility. Could you just
9 try one more time here to turn on your video?

10 MR. CURTO: Yes, I will attempt to.

11 MR. LYNCH: And Joe, is it possible for you to
12 access this through your phone?

13 MR. CURTO: I can. If I can get the dial in. I'm
14 on the phone now, but it's a dial in --

15 MR. LYNCH: No, no, no, I mean just use the camera
16 on your phone.

17 MR. CURTO: How do I dial into the meeting with
18 the phone?

19 MR. BROWN: Click on the same link in the email
20 that was sent to you.

21 MR. CURTO: Okay, hold on. I'm clicking on it
22 now. I'm downloading the app, they're making me download the
23 app, so I'm doing that now. It's making me create an
24 account.

25 MR. BROWN: All right, I'll tell you what, don't

1 worry about, don't worry about it. If you figure it out
2 before the hearing's done, that's fine. We'll just go ahead
3 and ask you one or two questions now. I don't have anything
4 really pressing for you.

5 MR. CURTO: Yeah, what I'll do is once there's
6 other testimony, I'll attempt to get in and then I'll let
7 you know when I'm in.

8 MR. BROWN: Yeah, that's fine. Now how long have
9 you been the Area Construction Manager for McDonalds?

10 MR. CURTO: For about three years and seven months
11 roughly.

12 MR. BROWN: Well, you're generally familiar with
13 the history of the prior entitlement approval process for
14 this particular McDonalds, is that correct?

15 MR. CURTO: I am aware of it, but I wasn't here
16 when it took place.

17 MR. BROWN: Are you aware of the issue where the
18 technical staff has indicated that they believe the
19 applicant should apply for a detailed site plan?

20 MR. CURTO: Yeah, I'm aware of that request.

21 MR. BROWN: Were you the Area Construction Manager
22 at the time that issue arose?

23 MR. CURTO: Yes.

24 MR. BROWN: Did you or why have you not filed a
25 detailed site plan application?

1 MR. CURTO: Because we feel that the work, the
2 improvements is really a revision of the approved special
3 exception at this point.

4 MR. BROWN: Summarize in your words what the
5 improvements are, proposed?

6 MR. CURTO: The improvements are to modernize the
7 existing facility to do the exact same thing it's doing now
8 to bring it up to a modern facility.

9 MR. BROWN: That's sort of a conclusion to
10 modernize it, tell me specifically your plan to do what,
11 change the facade of the structure, is that correct?

12 MR. CURTO: Yeah, we're planning on changing the
13 interior, the entire interior kitchen-wise and décor. The
14 exterior facade look to the building as well.

15 MR. BROWN: Are you increasing the number of
16 parking spaces?

17 MR. CURTO: I don't think so.

18 MR. BROWN: Are you expanding the square footage?

19 MR. CURTO: I believe we are.

20 MR. BROWN: I'll ask another witness later, if you
21 don't know the specifics of that. Also, the staff report and
22 yourself indicated this structure was constructed in 1958
23 and you then testified that it was the first McDonalds in
24 the State of Maryland, or in Prince George's County, is that
25 correct?

1 MR. CURTO: Yes, because my actual basis for that
2 is the actual location number is 190001, and typically that
3 is, indicates the number that McDonalds facility was in that
4 state. So I haven't looked at it specifically, but I'm
5 looking at it based on the number, the ID number.

6 MR. BROWN: I don't doubt that. Did the Historic
7 Preservation Commission for Prince George's County evaluate
8 this application?

9 MR. CURTO: That, I do not know.

10 MR. BROWN: So you don't know whether or not there
11 are any historic preservation issues related to the fact
12 that it was built in 1958 and it was the first McDonalds in
13 Prince George's County?

14 MR. CURTO: No, I'm not aware.

15 MR. BROWN: All right. No further questions at
16 this time.

17 MS. NICHOLS: All right, thank you. Mr. Lynch,
18 any redirect?

19 MR. LYNCH: No, not at this time.

20 MS. NICHOLS: All right, Mr. Curto, thank you very
21 much.

22 MR. CURTO: Thank you and Mr. Brown to help get
23 the video working.

24

25 MS. NICHOLS: All right, thank you. Mr. Lynch,

1 your next witness.

2 MR. LYNCH: Yes, my next witness is Mr. Chris
3 Howell.

4 MS. NICHOLS: Mr. Howell, can you get your video
5 working? There we go.

6 MR. HOWELL: There we go, all right.

7 MS. NICHOLS: I'm going to swear you in. Do you
8 solemnly swear or affirm in the matter now pending, to tell
9 the whole truth, and nothing but the truth?

10 MR. HOWELL: Yes.

11 MS. NICHOLS: Please state your name and business
12 address for the record?

13 MR. HOWELL: My name is Chris Howell, I work at
14 11400 Commerce Park Drive, Suite 400, Reston, Virginia
15 20191.

16 MS. NICHOLS: Thank you.

17 MR. LYNCH: Mr. Howell, by whom are you employed?

18 MR. HOWELL: Employed by Kimley-Horn.

19 MR. LYNCH: And what is your profession?

20 MR. HOWELL: My profession is I'm a professional
21 civil engineer.

22 MR. LYNCH: Are you registered in the State of
23 Maryland?

24 MS. NICHOLS: A professional what engineer?

25 MR. HOWELL: I'm a civil engineer and I'm a

1 licensed professional engineer in the State of Virginia and
2 Maryland.

3 MS. NICHOLS: Okay.

4 MR. LYNCH: Okay, and was Kimley-Horn employed by
5 the applicant to perform certain services associated with
6 the subject property?

7 MR. HOWELL: Yes, we were.

8 MR. LYNCH: And could you just tell us the nature
9 of those services?

10 MR. HOWELL: Yes, we were just hired, just
11 professional civil services doing site engineering design
12 for the subject parcel.

13 MR. LYNCH: Okay, and are you familiar with the
14 special exception application which is the subject of
15 today's hearing?

16 MR. HOWELL: Yes, I am.

17 MR. LYNCH: Now, there is a site and landscape
18 plan that is in the record, and it is marked as Exhibit 37.
19 Did you or someone working for you prepare the site and
20 landscape plans that is marked as Exhibit 37?

21 MR. HOWELL: Yes.

22 MR. LYNCH: And can you just, for the purposes of
23 this hearing, just describe for us, and Madam Examiner, this
24 may be a good time to pull up the existing additions plan.

25 MS. NICHOLS: All right, is that Exhibit 37 or a

1 different exhibit?

2 MR. LYNCH: The 37, that's correct.

3 MS. NICHOLS: Okay. Fatima, could you please pull
4 up Exhibit 37?

5 MR. HOWELL: Am I able to share my own screen,
6 would that be --

7 MS. NICHOLS: Yes, yes, okay. So can somebody
8 give Mr. Howell the ability to share. Okay, you're now the
9 presenter. There we go.

10 MR. HOWELL: All righty. Okay, and did you want
11 to continue with the question you asked me?

12 MR. LYNCH: Well, just take us through the
13 existing conditions on the subject property.

14 MR. HOWELL: Of course, so --

15 MR. LYNCH: And Chris, I'm sorry to interrupt,
16 just orient the Examiner as to those existing conditions.

17 MR. HOWELL: Okay. So as you'll see on my screen,
18 this is the subject property. It's about 0.77 acres. There
19 is an existing one-story McDonalds building on the site.
20 There's about 3,430 square feet in size. There is a single
21 order point for the drive thru and there is a, I believe, a
22 single pickup window and a single cash window. The site is
23 actually north points to the left. I just want to orient
24 you to that, just so that it's not confusing at all. North
25 of the property is Livingston Road. To the west of the

1 property is Arapahoe Drive. To the south of the property is
2 the town of Forest Heights town hall community center, and
3 to the east is a gas station. Previously I mentioned that
4 south of us was the town of Forest Heights town hall. As
5 you'll see here, there is an existing concrete swell that
6 runs along the rear of our site. This is contained within
7 our property and there is an easement that's, I believe it's
8 about 20-feet in width that encumbers the southern portion
9 of the site. Going back to Livingston Road, as you'll see,
10 the existing right-of-way is actually pretty significantly
11 far from the edge of (indiscernible). Bending, but ranges
12 in width from 40 to 70-feet. Within this area, there is an
13 existing sidewalk. I believe there are ADA improvements and
14 ramps for the sidewalk. There are two access points to our
15 site, these are just asphalt driveways. And the rest of the
16 area is just landscaped with shrubs. Continuing through the
17 site, there is an existing nylon sign right about here in
18 the northwest corner of the site. The remainder is just
19 pretty standard commercial improvements. There are 30
20 parking spaces existing, and there are about eight queuing
21 spaces from this border point as it wraps around this
22 boundary point.

23 MR. LYNCH: And Mr. Howell, just in your steps in
24 record, is the existing property located within the
25 Department of Environmental, excuse me, Department of

1 Permanent Inspections designated 100-year floor plan?

2 MR. HOWELL: Yes, it is.

3 MR. LYNCH: Okay, all right thank you. Now you
4 said you indicated that you prepare a site landscape plan.
5 Can you pull that up and share that with the Examiner?

6 MR. HOWELL: Okay. I'll just walk you through our
7 proposal.

8 MS. NICHOLS: This is also part of Exhibit 37,
9 correct?

10 MR. HOWELL: I believe so.

11 MR. LYNCH: Yes, Mr. Howell, just so it's clear,
12 what sheet is this on?

13 MR. HOWELL: This is sheet 3 out of 13 of that
14 exhibit.

15 MS. NICHOLS: Thank you.

16 MR. LYNCH: Exhibit 37, thank you.

17 MR. HOWELL: All righty, so I'll show on the
18 screen, this is the proposed site plan for the renovated
19 McDonalds site. Right here we have a one-story McDonalds
20 restaurant, approximately 4,700 square feet in size. There
21 are now two order points which is part of the improvements I
22 was describing earlier, the punctuality of the building.
23 There are two order points now. There is a cash payment
24 window, and then there are two pickup windows. The second
25 one being the furthest around the site, or around the

1 building that would allow for a car to pull forward for
2 complicated orders. As far as improvements go, I'll just
3 start along Livingston Road like I did previously. As part
4 of the site we are to maintain the two access points here
5 and here. However, at these access points we're proposing
6 to improve them to include concrete aprons which matches the
7 local design standards. They are also proposing to
8 reconstruct the sidewalk, again because local design
9 standards prefer a little buffer between the edge of the
10 curb and the sidewalk so the provided designs will be
11 adhering to that. The new sidewalk will include ADA
12 accessibility in some areas. In other areas, it's just
13 flush pavement with proposed aprons. And as you can see
14 here, we are now constructing a sidewalk which connects this
15 new sidewalk to our proposed McDonalds building. We want to
16 clarify that there is not a sidewalk connecting exiting
17 right-of-way to the existing building, so this would
18 represent an improvement to accessibility. Continuing
19 towards this pipe, see here, we have some masonry walls,
20 they are proposed to be 3-feet in height mostly along the
21 frontage. This is part of our alternative compliance we'll
22 discuss a little bit later. In this vicinity, we're also
23 proposing two bike racks and we're proposing to maintain the
24 existing pile on sign, which I pointed out previously.
25 Moving I guess we're going counterclockwise through the

1 site, we'll have one way access flow moving counterclockwise
2 around the building adjacent to these access paths will be
3 angled parking spaces. In the proposed condition, we are
4 maintaining the quantity of parking spaces from existing, so
5 there will be 30 spaces in the proposed. Again moving to
6 the rear of the site. We are proposing a 6-foot-tall
7 composite fence separating our parking lot from the
8 neighboring parcel. And so this will be located between the
9 parking lot and that existing concrete drainage switch,
10 drainage soil in the rear of the site. In continuing
11 through the site, we have a pump enclosure, and you know,
12 just additional parking. And as part of this application, I
13 believe the queuing, the number of queuing spaces in this
14 driving lot in the drive thru will increase to approximately
15 9 or 10.

16 MR. LYNCH: And Mr. Howell, you say increase,
17 what's the existing queuing capacity of the site?

18 MR. HOWELL: The existing was about eight, and
19 that's measured from the order point to the boundary right
20 here.

21 MR. LYNCH: Now, as indicated, the property is
22 located within the 100-year plus planning is that correct?

23 MR. HOWELL: Yes.

24 MR. LYNCH: Okay, did you apply for a waiver,
25 flood plain waiver from the Department of Permanent

1 Inspectors and Enforcement?

2 MR. HOWELL: Yes, we did.

3 MR. LYNCH: Okay, could you just explain the
4 nature of that waiver?

5 MR. HOWELL: Yes, so simply by virtue of, sorry, I
6 did mention the entirety of the property is located within
7 this County map flood plain. By virtue of us working within
8 that flood plain, we are required to first do a flood plain
9 waiver.

10 MR. LYNCH: Okay and as part of that, and Madam
11 Examiner, I just want to refer you to the approval letter
12 that's marked as Exhibit 35. Is part of that, are you going
13 to be raising the building above, is the first-floor
14 elevation going to be raised above the flood plain?

15 MR. HOWELL: Yes, so in the existing condition,
16 the finished floor of the building is actually located below
17 the flood plain line as part of our proposed improvements,
18 we will be raising it out of that flood plain.

19 MR. LYNCH: Okay, thank you. Now in addition to
20 the site plan, your firm also prepared a landscape plan, is
21 that correct?

22 MR. HOWELL: Yes, we did, and I will navigate to
23 that now.

24 MR. LYNCH: Okay, and can you just identify what
25 sheet of Exhibit 37 you're referring to?

1 MR. HOWELL: Yes, this is sheet 6 of 13.

2 MR. LYNCH: Thank you. Now can you take us
3 through the landscape plan? And what I'm going to
4 specifically ask you to do is to explain to the Examiner and
5 to the People's Zoning Council of the alternative compliance
6 that was requested for this case?

7 MR. HOWELL: Yes, of course. So as I've done in
8 the past, I'll start at Livingston Road and go
9 counterclockwise around the site. Previously, I've
10 mentioned the 3-foot-tall masonry wall along our frontage.
11 This is part of our alternative compliance from the 4.2
12 buffer requirements along this roadway. Those requirements
13 dictate that the buffer be 10-feet in width and be planted
14 with three canopy trees. As part of our alternative
15 compliance, we're proposing to narrow that to approximately
16 3-feet. We'll be planting two canopy trees, and we'll be
17 installing this 3-foot-tall wall. We'll also be planting
18 additional shrubs in this area. In terms of planting units,
19 the requirement is three canopy trees, which is 30 planting
20 units. The two canopy trees and shrubs that we are
21 proposing will provide 46 planting units.

22 MR. LYNCH: And did the staff recommend approval,
23 excuse me, Planning Director recommend approval of that
24 alternative plants request?

25 MR. HOWELL: Definite. Moving to the Arapahoe

1 Drive buffer. The 4.2 requirements dictate that we provide
2 a 10-foot landscape strip along this frontage. We are
3 proposing a 9-foot-wide landscape strip to address this
4 deficiency, we are proposing to plant additional units in
5 this area. We are meeting the requirement for six canopy
6 trees, and we are exceeding the requirement for shrubs.
7 Fifty-five are required and 138 are proposed. This was also
8 recommended for approval in addition to the Livingston Road.
9 Moving south, we requested alternative compliance from
10 section 4.7. That required that we provide a 20-foot ledge
11 gate strip along the rear of our site. As mentioned
12 previously, just about that entire 20-foot landscape strip
13 is encumbered by the existing drainage swell, and so that
14 area was, it was not possible to plant there. As part of an
15 alternative compliance, we requested to meet that my
16 providing the 6-foot-tall composite fence that I described
17 previously, and that application was denied.

18 MR. LYNCH: And subsequent to that application
19 being denied, did the applicant apply for a departure from
20 design standards?

21 MR. HOWELL: Yes, we did.

22 MR. LYNCH: And did the Planning Board approve
23 that departure?

24 MR. HOWELL: Yes, they did.

25 MR. LYNCH: Thank you.

1 MR. HOWELL: Moving to the east boundary.

2 MS. NICHOLS: I'm sorry, is a copy of that
3 approval in the record?

4 MR. LYNCH: Not it is not Madam Examiner, but I
5 can have that submitted.

6 MS. NICHOLS: Okay, great.

7 MR. HOWELL: Moving to our east boundary adjacent
8 to the existing gas station, staff believes that this was
9 subject to a 4.3 buffer. We disagree and we believe that we
10 are exempt from that requirement because we are not
11 increasing the number of parking stalls at the site. With
12 that said, I would like to point out that requirement is a
13 3-foot buffer and that there is actually 3-feet of
14 separation between our proposed improvements and the
15 existing boundary.

16 MR. LYNCH: And Madam Examiner, I'll have Mr.
17 Ferguson testify to the basis, further testify to the basis
18 for the applicant's position with regard to the 4.2
19 landscape strip along our eastern boundary.

20 MS. NICHOLS: All right, and that was also
21 approved right?

22 MR. HOWELL: No, we took the position that we
23 weren't required to apply the 4.3 along our eastern property
24 line, although we have sufficient space, we took the
25 position we're not required to because we're not increasing

1 the number of parking spaces. Staff disagreed, so that's
2 where we're, another point of contention we have with staff.

3 MS. NICHOLS: Okay.

4 MR. LYNCH: And then finally Mr. Howell, the plan
5 that you're looking at today, that has been marked as
6 Exhibit 37, has this been revised since the staff made its
7 recommendation?

8 MR. HOWELL: Yes, we provide, we've made some
9 minor revisions to the plan.

10 MR. LYNCH: Thank you. Could you just please take
11 the Examiner through each one of the changes that were made
12 to the plan, so she understands the distinction between this
13 plan and the plan that was originally submitted in
14 conjunction with the application?

15 MS. NICHOLS: Okay, so 37 is the revised plan?

16 MR. LYNCH: That's correct, yes.

17 MS. NICHOLS: Okay.

18 MR. HOWELL: Yes, sure thing. Just to be clear,
19 none of these plan changes or none of these changes to the
20 exhibit were made to the design sheet, so existing
21 conditions, the site plan, the landscape plan, none of them
22 are actually changing the improvements. They are more just
23 clarification. On the cover sheet, we added the relevant
24 application numbers, you'll see those here, revisions of the
25 site plan, alternative compliance, and then the design

1 departure. The only other change was to the seventh page of
2 the exhibit which is the landscape tabulations. We just
3 provided clarification to the areas that we were requesting
4 alternative compliance and design departures from, which
5 were described just a short while ago. So in this table you
6 see here, and then in this table here. And that concludes
7 the revisions.

8 MR. LYNCH: Okay, thank you Mr. Howell. Madam
9 Examiner, I have no further questions at this time for Mr.
10 Howell.

11 MS. NICHOLS: All right, Mr. Brown.

12 MR. BROWN: Yes, good morning, Mr. Howell.

13 MR. HOWELL: Morning.

14 MR. BROWN: Do we have a rendering that shows the
15 proposed structure raised out of the flood plain?

16 MR. HOWELL: We have proposed building elevations
17 which can be found on page 11 of the application. You
18 wouldn't really see anything in regard to the flood plain,
19 but we're proposing to raise it approximately 1-foot out of
20 the flood plain.

21 MR. BROWN: So the height of the existing building
22 is what compared to the proposed building, it's just the 1-
23 foot difference in height?

24 MR. HOWELL: Can you let me just review this. So
25 the proposed height of the building is approximately 19 and

1 a half feet, and the existing, bear with me here. The
2 existing building height is approximately 16-feet. So we're
3 proposing to raise the height of the structure by about 3
4 and a half feet.

5 MR. BROWN: So, I read the DEPI letter concerning
6 the flood plain issues. Clarify for me if you can, by
7 raising the building out of the flood plain, it protects the
8 building, but does it have any positive impact on the flood
9 plain area itself?

10 MR. HOWELL: Well, as part of the application,
11 we'd be required to not alter the existing flood plain, and
12 so by raising that, we are theoretically spilling in the
13 flood plain and so we are entrusting that by cutting in
14 other areas so that there is a net zero impact to the flood
15 plain.

16 MR. BROWN: And that's my question. Show me where
17 you are cutting into the land elsewhere to compensate for
18 the flood plain overflow?

19 MR. HOWELL: Okay, so right here where the
20 building is, we are spilling most of the area that we are
21 proposing to cut is along the perimeter of the site. We
22 kind of need to be as far away from the building as possible
23 so we're not providing these super steep slopes. So over
24 here, we'll be cutting, over here we'll be cutting --

25 MR. BROWN: I'm sorry, my mind doesn't move that

1 fast. When you said over here, where are you talking about?

2 MR. HOWELL: I'm jumping a little quickly. Over
3 here, up in the, I guess it would be the southeast corner of
4 the site.

5 MR. BROWN: All right.

6 MR. HOWELL: It's over here in the southwest
7 corner of the site, we are lowering the grades and also in
8 the areas that we're providing storm water management, we'd
9 be cutting in those areas to provide the new facility. So
10 right here, we have a proposed buyer retention. We'd be
11 cutting in the area to install the section beneath the
12 surface. Same goes for here, over here we're proposing
13 underground detention, those are just kind of empty arch
14 pipes. So, all of that would be cut and spout.

15 MR. BROWN: All right, now also in looking at this
16 particular exhibit, you now have a proposed I guess two
17 lanes of queuing for the drive in, is that correct?

18 MR. HOWELL: Well it's not as, I guess it
19 wouldn't, if its two lanes in this area right here, there
20 are two order points, again just to, the order time and the
21 queue time for any customers, as you exit these order
22 points, it would narrow to one queue along this.

23 MR. BROWN: All right, so that's where my
24 confusion is. I believe you testified that there were eight
25 queuing spots, if you will, on the existing building, along

1 with what I'm going to describe as the bottom half or bottom
2 side of the building, is that correct?

3 MR. HOWELL: Yeah.

4 MR. BROWN: In other words, I want to compare your
5 testimony of there were, I believe you said eight queuing
6 spots on the existing structure and there were eight plus
7 queuing spots on the proposed. I want you to tell me
8 specifically where those two queuing lines are in comparison
9 to one another.

10 MR. HOWELL: Okay. Hopefully this addresses your
11 question. So in the existing condition, the queue would
12 look something like this.

13 MR. BROWN: Right.

14 MR. HOWELL: In the proposed condition, it would
15 look something like this.

16 MR. BROWN: That's what I thought, so the
17 additional queuing is really just that additional of maybe
18 four spots?

19 MR. HOWELL: Yes, so there's additional queuing
20 behind the order point, so you can, you know going from 8 to
21 8 plus, is really it's just the addition of this other order
22 point here. Plus, have the benefit also of providing
23 additional queuing from the pickup window to the order
24 point.

25 MR. BROWN: Right, and is there any type of raised

1 concrete separation or distinction between what I'm going to
2 describe as the drive thru lane on the north side of the
3 building, it may not be the north, but on the top side of
4 the building from the driveway and the parking spaces? And
5 the only reason I ask is, I mean I've been at a couple of
6 McDonalds, and it always seemed to be potential accident
7 with somebody backing out of those parking spaces on the top
8 and into the cars waiting to pick up food on the top side of
9 that building. So, is that just a stripe separation, or is
10 it a concrete separation between that waiting area and the
11 parking area?

12 MR. HOWELL: That is not raised concrete, but it
13 is a material difference. There will be asphalt on the
14 access drive and then concrete in the drive thru lane. So
15 there would be a bit of a visual difference there. There is
16 also actually a stripe as well delineating the two areas.

17 MR. BROWN: Okay.

18 MR. HOWELL: That would be a yellow stripe, you
19 know, once it's installed.

20 MR. BROWN: Right. And looking at the right-of-
21 way of is that what, is it Livingston Road on the left-hand
22 side?

23 MR. HOWELL: Yes.

24 MR. BROWN: Now, I want to make clear, so the two
25 red lines they are from the center line, are Bluestone Road

1 onto the white, all of that is the right-of-way of
2 Livingston Road, is that correct?

3 MR. HOWELL: Yes.

4 MR. BROWN: And the two driveways that are
5 depicted or illustrated within the right-of-way, that is
6 part of the subject property, is it not?

7 MR. HOWELL: Functionally, people might think it's
8 part of the subject property, but that is actually land that
9 is in the right-of-way. So these two access points you know,
10 any customer would probably assume they're part of
11 McDonalds, but they're actually within the right-of-way.

12 MR. BROWN: Well I mean, that's my question. That
13 is, it may be, they may be in the right-of-way, but is it
14 property that is owned by McDonalds?

15 MR. HOWELL: It is not.

16 MR. BROWN: Well that's State highway or Prince
17 George's County owned property?

18 MR. HOWELL: I believe Prince George's County,
19 yes.

20 MR. BROWN: Because Livingston Road is a county
21 road, correct?

22 MR. HOWELL: Yes.

23 MR. BROWN: I'm sorry, I didn't hear you.

24 MR. HOWELL: Yes.

25 MR. BROWN: So explain to me what authority you've

1 gotten from DEPI, the Department of Public Works and
2 Transportation to change the configuration of the entry and
3 exit points for this property within the right-of-way.
4 Because I didn't see that in the record. It may be in
5 there, but I just didn't see it.

6 MR. HOWELL: So DEPI has approved our storm water
7 concept for this plan, but they have not reviewed any
8 engineering design for these two access drives. We are not
9 really, we're not proposing to alter really the
10 configuration of the access drives. They're mostly
11 remaining in place. We're just updating these access drives
12 to reflect current design standards that DEPI enforces.

13 MR. BROWN: I'm a little bit confused.
14 Graphically, what you have here proposes completely
15 different from the existing.

16 MR. HOWELL: That is jump between the two
17 subjects, if you look at the sheet?

18 MR. BROWN: Yes.

19 MR. HOWELL: Visually, they're still in the same
20 spot. The only thing that is --

21 MR. BROWN: All right, I see the smoke and mirrors
22 now, okay, all right, you made your point.

23 MR. HOWELL: Okay. I just drove off the lag.

24 MR. BROWN: Right, right. All right no other
25 questions, thank you.

1 MS. NICHOLS: All right, I have one for you Mr.
2 Howell, and that is, you said the proposed square footage in
3 the new building is basically 4,700. What was the footprint
4 of the existing building?

5 MR. HOWELL: The existing was about, it says 3,428
6 on here, 3, 428 square feet.

7 MS. NICHOLS: Thank you, that was all I had. Mr.
8 Lynch, any redirect?

9 MR. LYNCH: Yes, I just want to further, I want to
10 ask Mr. Howell one question with regard to just a follow up
11 from Mr. Brown's questions. The improvements where you're
12 showing within the right-of-way, were those improvements
13 shown on your site development and concept plan that was
14 filed in conjunction with this site?

15 MR. HOWELL: To an extent they were. Or actually,
16 let me think about that. Yes, they were.

17 MR. LYNCH: Okay, but those improvements are
18 subject to further review and approval by the Department of
19 Permit Inspections and Enforcement, correct?

20 MR. HOWELL: Yes. Actually, I would like to
21 clarify. These were improvements that were requested during
22 that review process.

23 MR. LYNCH: Okay, thank you very much. No further
24 questions.

25 MS. NICHOLS: All right, thank you Mr. Howell.

1 I'm guessing next up is Mr. Ferguson?

2 MR. LYNCH: Yes, this is where the fun begins
3 Madam Examiner. Yes, Madam Examiner, I'd like to call Mr.
4 Ferguson as my final witness.

5 MS. NICHOLS: There you are, good to see you Mr.
6 Ferguson.

7 MR. FERGUSON: Thank you, Madam Examiner,
8 likewise.

9 MS. NICHOLS: Do you solemnly swear or affirm
10 under the penalties of perjury in the matter now pending to
11 tell the truth, the whole truth, and nothing but the truth?

12 MR. FERGUSON: I do.

13 MS. NICHOLS: Thank you. Please state your name
14 and business address for the record.

15 MR. FERGUSON: My name is Mark Ferguson, my
16 business address is 9500 Medical Center Drive, Suite 480,
17 Largo, Maryland 20774.

18 MS. NICHOLS: All right, you have been previously
19 accepted as an expert in the field of land planning, and you
20 will continue to testify in that capacity today.

21 MR. FERGUSON: Thank you, Madam Examiner.

22 MR. LYNCH: And Mr. Ferguson's resume has been
23 marked Exhibit 34. All right, now Mr. Ferguson, are you
24 familiar with the special exception application which is the
25 subject of today's hearing?

1 MR. FERGUSON: I am.

2 MR. LYNCH: And could you just briefly tell us a
3 little bit about the history of the subject property?

4 MR. FERGUSON: Well, the staff really laid it out
5 in a fair extent on the, I guess page 4 of the staff report.
6 So, in summary, as Mr. Curto said, the building was built in
7 1958, and at that time, it was a permitted use. I believe
8 that the building probably was modified in between 1958 and
9 the mid-1980s because McDonalds in 1958 don't look like the
10 McDonalds that's there now, that's probably a 1980s
11 iteration if I'm really remembering my McDonalds sort of
12 history from growing up. But the important event really in
13 the history of the McDonalds that's particularly relevant to
14 this proceeding is the passage of CB102 1986, which changed
15 fast food restaurants from being a permitted use to
16 requiring special exception. Because at that time,
17 McDonalds had not received a special exception. They were
18 non-conforming and so they sought certification for that
19 non-conforming use which was in fact granted under permit
20 2161-87-U. So we do have a certified non-conforming use
21 situation. Subsequent to that, there were several
22 alterations to that special exception which were approved by
23 SE4085 and SE4196. So far so good, the contention really
24 arises out of the passage of CB19210 which removed the
25 requirements for special exception for fast food

1 restaurants, and instead substituted the requirement for a
2 detailed site plan. Now, this property had never received
3 the approval of a detailed site plan, so it does in fact
4 remain non-conforming. And that brings us really up to the
5 status of the current application. So staff contends that
6 because an eating and drinking establishment is permissible
7 in the CM zone with the approval of a detailed site plan,
8 therefore you have to go get a detailed site plan. However,
9 the zoning ordinance does also say that to alter extend or
10 reconstruct a non-conforming use, you need a special
11 exception. So what you have here is a situation where there
12 are two venues that are available. And so the question is,
13 does the code compel either you know, venue of approval, and
14 I don't believe that it does. So to me, that leaves the
15 applicant with the option of whether they wish to proceed by
16 a special exception for an alternation of non-conforming
17 use, or by a new application under the permissible use in CM
18 zone via the route of a detailed site plan. Now the
19 effective difference for this application really comes down
20 to parking. Because if you are a non-conforming use and
21 you're entitled to the rights that you had under the
22 previous ordinance that were applicable to the extent of
23 your existing non-conforming use. And the operable affect
24 in this case is parking. The existing use has 30 parking
25 spaces which appear to be sufficient based on my limited

1 data point at site visits at you know the time of the lunch
2 hour. It does track with the ITE's parking generation
3 manual which would require a restaurant with 34, I'm sorry,
4 with 72 seats, which is what it proposed in the new
5 building. It would say those would generate 29 you know
6 parking spaces in a peak hour. So the 30 spaces do track
7 with what the ITE study aggregates to. If however, you were
8 to apply the current parking standards, what you would need
9 to do if you went in with a new application through the
10 detailed site plan process. The provisions of the current
11 ordinance would require you to have 84 parking spaces. Now,
12 the new ordinance, which I believe was adopted yesterday, to
13 be put into effect in next spring, would only require 48
14 spaces. With regard to queuing and Mr. Brown's questions
15 earlier, the new ordinance does have a queuing requirement
16 section which the current ordinance does not. The new
17 ordinance would require six queuing spaces. And as Mr.
18 Howell testified, 8 or 9, are proposed. So I think that's
19 good, but the essence is do you need 86 parking, or 84
20 parking spaces, excuse me, or are 30 sufficient which my
21 calculation that I go through in later in my report would
22 get you to compliance with applying part 11 factoring in the
23 grandfathering provisions of 27584 or the excluded uses
24 provisions as they are properly called. So that I think is
25 really why the applicant chose to go through this proceeding

1 rather than a detailed site plan proceeding where you're
2 essentially able to recognize the character and operation of
3 the law in existing use at the site. One more point that I
4 guess I'd make with regard to the parking regulations is
5 that in 1958, the parking requirement was to provide one
6 space for every 50-feet of customer area, and that was that.
7 Relatively recently, I don't recall the date, within the
8 last decade, the zoning ordinance was changed so that the
9 seating requirement for a fast-food restaurant with a drive
10 thru or eating and drinking establishment with a drive thru
11 was given an extra parking requirement. So a regular
12 restaurant requires one parking space for every three seats,
13 and one for every three seats at 72 spaces is 24. But the
14 new or relatively new provision of the current code requires
15 you to add one space for every 50 square feet of area which
16 is exclusive of the patron seating area. So, essentially,
17 the kitchen is what it amounts to. And as Mr. Curto
18 testified, the kitchen in these new McDonalds and certainly
19 this one, is larger to the optimized for getting the drive
20 thru customers processed very quickly. So it would be the
21 kitchen that would require the vast proportion of those 84
22 required spaces. Really, 60 of those spaces would be
23 attributable to the kitchen use, which is a little bit
24 absurd on its face. The only conclusion I can come to is
25 that those regulations were passed actively to

1 disincentivize drive thru, because drive thru restaurants
2 take people that would otherwise park and go into the store
3 and send them through the drive thru lane. So really, they
4 result in fewer people going into the store, fewer people
5 requiring parking spaces. And I'm sure you can remember
6 from your own experience, certainly I'm not a big fast-food
7 guy, but back in the day, it wasn't uncommon to go into a
8 fast-food restaurant and find the tables full. I can't
9 remember how long it's been, even pre-Covid, that that's
10 been the case. So really you have some tension, I think, in
11 maybe planning desires, the provisions of the code, and this
12 application. And I think that's why where we are today.

13 MR. LYNCH: Mr. Ferguson, one other point I
14 potentially have, we often have with staff with regard to
15 the application of section 4.3 of the landscape manual. Can
16 you kind of take us through why you believe the applicant
17 does not need to comply with section 4.3?

18 MR. FERGUSON: The applicability provisions of the
19 landscape manual are in section 1.1 right at the very front
20 of it, and section 1.1, I'm sorry, G, provides that the
21 following are exempt from the requirements of section 4.3.
22 And exemption number one under that is permits for any
23 building renovation, expansion, or change of use, which is
24 not applicable here, that does not necessitate an increase
25 in the number of parking or loading spaces beyond the number

1 currently existing. So, my calculation demonstrates that
2 this application meets that with two parking spaces actually
3 to spare. Now in defense of staff, that calculation that I
4 show was not shown on the drawings, so they contend that
5 they didn't have enough information to properly evaluate it
6 and that may have been the case. But I do believe that this
7 is conforming to the requirements of part 11 and therefore,
8 because it requires no increase in the number of spaces
9 above that that's now existing, section 4.3 of the landscape
10 manual is not applicable.

11 MS. NICHOLS: Mr. Ferguson, let me butt in here
12 for just one second. You indicated that the current
13 property is developed with 30 parking spaces.

14 MR. FERGUSON: Correct.

15 MS. NICHOLS: You indicated that with 72 seats,
16 the ITE study indicates that 29 would be needed during rush
17 hour. The DSP would require 84, and the new standing
18 ordinance 48.

19 MR. FERGUSON: Right.

20 MS. NICHOLS: You're two to spare.

21 MR. FERGUSON: No, no, I'm sorry, the calculation
22 that I refer to with two to spare, is on pages 15 and 16 of
23 my report.

24 MS. NICHOLS: Okay.

25 MR. FERGUSON: And effectively, what I say is that

1 the existing requirements is, the past by the way, part of
2 the approval history I didn't go into is that over the
3 course of the approval history and the last two special
4 exceptions, there were two parking, loading departures
5 granted as well. So in addition to the, you have to balance
6 departures and existing parking spaces with the proposed
7 amount.

8 MS. NICHOLS: So, two parking and loading?

9 MR. FERGUSON: Yes.

10 MS. NICHOLS: And they were granted, just give me
11 a rough date?

12 MR. FERGUSON: I believe in 1992 and 19971.

13 MS. NICHOLS: Thank you.

14 MR. FERGUSON: I'm sorry, 1995 for the second
15 DPLS.

16 MS. NICHOLS: Okay, Mr. Lynch, are both of those
17 DPLS approvals in the record?

18 MR. LYNCH: Yes, they are Madam Examiner, all
19 prior approvals are contained in the record.

20 MS. NICHOLS: All right, all prior, but we don't
21 have the DDS, you're going to get that.

22 MR. LYNCH: The only part that has not been
23 submitted is departure.

24 MR. FERGUSON: Madam Examiner, that by the way
25 brings up one thing that I would like to draw your attention

1 to. In the course of preparing this report, I normally ask
2 for the staff report and the site plan, and then go through
3 and do my thing. And you'll notice that the staff report
4 that was forwarded from Park and Planning contained
5 recommendations on the alternative compliance. Namely, the
6 recommendation for approval for the 4.2 landscape strips and
7 the recommendation for denial for the 4.7, which was later
8 the subject of the departure from design standards which was
9 granted. I only actually found out about the existence of
10 that departure from design standards on Monday, after the
11 preparation of my report. So the provisions of my report
12 which refer to that alternative compliance are nugatory and
13 the qualifications of my recommendation that provide for the
14 grant of alternative compliance do remain with respect to
15 the 4.2 requirements but are no longer applicable with
16 regard to 4.7 requirements.

17 MS. NICHOLS: All right, Mr. Lynch has already
18 agreed to put in a copy of the DDS approval before pulling
19 this up. Thank you.

20 MR. LYNCH: And Madam Examiner, what I'll, unless
21 you would like to take administrative notice of it, I'd also
22 like to submit a copy of the decision and special exception
23 4686. Mr. Ferguson previously testified on that case. That
24 was for a McDonalds located on University Boulevard, where
25 we also obtained a special exception offer non-conforming

1 use, even though we had the option at that time to obtain a
2 detailed site plan. The zoning hearing Examiner at that
3 time did recommend approval and it was eventually approved
4 by the District Council. So, its similar fact situation to
5 what we have here today.

6 MS. NICHOLS: What year was that?

7 MR. FERGUSON: 2015, I think.

8 MS. NICHOLS: Was I the hearing Examiner?

9 MR. LYNCH: No, you were not.

10 MR. FERGUSON: Are you sure?

11 MR. LYNCH: I'm almost 90 percent sure.

12 MR. FERGUSON: Okay.

13 MS. NICHOLS: I can look it up, thank you though.

14 MR. LYNCH: And otherwise, Mr. Ferguson, do you
15 agree with Mr. Howell's description of the property and
16 proposed improvements associated with this case?

17 MR. FERGUSON: I do.

18 MR. LYNCH: Do you agree with Mr. Howell's
19 description with regard to the flood plain waiver?

20 MR. FERGUSON: I do.

21 MR. LYNCH: Okay, and do you have anything further
22 you'd like to add to your testimony here today?

23 MR. FERGUSON: Two things. I guess the first is
24 that I do obviously adopt the contents of my land planning
25 analysis which is Exhibit No., what's the exhibit number of

1 my report?

2 MR. LYNCH: 36.

3 MR. FERGUSON: 36, so I adopt the contents of
4 Exhibit 36 as my testimony today with the exception of the
5 qualifications for the alternative compliance discussion on
6 the 4.7 buffer. The other thing that I do want to bring out
7 with regard to contention, between the applicant and the
8 staff in the review of this case, is one where I'm going to
9 give an arched eyebrow if you will, to the behavior of staff
10 on this one. Because there was some discussion in the staff
11 report about how because this is a major change, this needs
12 a whole new application for a special exception, and the
13 applicant didn't ask for that, and they don't meet the
14 requirements, so therefore we recommend disapproval, which
15 to me is pretty petulant behavior on their part. Normally
16 what they simply will do is assign a C number and treat it
17 as a new filing. Now, as near as I can tell, all of the
18 requirements of the new filing have been met in this case.
19 Certainly, we have all reviewed it. My report certainly
20 does and even staff in their staff report to a certain
21 extent reviewed it as if it were a new special exception
22 filing. But I would also draw Madam Examiner's attention to
23 at least one case I'm familiar with in the past. I happened
24 to be routing through my files to look for a relevant
25 example and in the course of flipping by a file, I looked at

1 RO SP 4464-02 which was also a major change that was reviewed
2 and approved as an RO SP, not as a new SC filing. So
3 certainly there's precedent in the past for treating a case
4 like this as an RO SP rather than giving it SC 46, 50 or
5 whatever we're up to now.

6 MS. NICHOLS: Do you happen to know roughly the
7 year on that one?

8 MR. FERGUSON: I can look that up if I can beg
9 your indulgence for a moment.

10 MS. NICHOLS: Yes.

11 MR. FERGUSON: 2017, I'm sorry, 2015. Again,
12 January 13th, 2015, is the date of my report on that.

13 MS. NICHOLS: Thank you.

14 MR. LYNCH: Madam Examiner, as indicated by Mr.
15 Ferguson, we adopt Mr. Ferguson's land planning analysis,
16 Exhibit 36, as part of our case, and I have no further
17 questions at this time.

18 MS. NICHOLS: All right, Mr. Brown.

19 MR. BROWN: Good morning, Mr. Ferguson, how are
20 you?

21 MR. FERGUSON: Good morning, Mr. Brown, I am too
22 much information, but I had my Covid booster yesterday, so
23 I'd much rather be in bed.

24 MS. NICHOLS: Oh, I'm sorry, I'm sorry.

25 MR. BROWN: Good for you, that arm will get

1 better. I just have three or four clarifying questions.
2 You testified that the ITE would require 29 parking spaces
3 for the existing use, is that correct?

4 MR. FERGUSON: Well no, and let me be, let me be
5 maybe more precise with my language. The ITE is of course
6 not standard, so it doesn't require anything. They do have
7 an aggregate of parking studies that have been conducted by
8 transportation engineers over the years, and they find that
9 the average fast-food restaurant with a drive thru with 72
10 seats generates a peak hour parking demand of 29 or 28.8 to
11 be precise, parking spaces. That's the ITE, it's not a
12 requirement per se, that's their average of the studies.

13 MR. BROWN: Yeah, I understand that, but you
14 testified that a detailed site plan would require 84 parking
15 spaces. Doesn't Park and Planning use the same IT
16 calculations for a detailed site plan for the same use?

17 MR. FERGUSON: No, they do not. The parking
18 standards are those in the zoning ordinance, which is 27568,
19 is the table of spaces required. And sometimes there is a
20 conformance in between those numbers and the ITE numbers,
21 and sometimes there isn't. You know, parking generation
22 rates to change over the years. Sometimes the numbers are
23 you know, the numbers that the zoning ordinance used are
24 historically out of date because they don't get
25 legislatively updated. And again, sometimes as I testified,

1 my belief is sometimes there is a planning intent to put a
2 thumb on the scale and use parking as a regulatory device to
3 limit development.

4 MR. BROWN: And finally, you indicated that the
5 new ordinance would require how many parking spaces for this
6 use?

7 MR. FERGUSON: Forty-eight.

8 MR. BROWN: And the existing zoning is CM,
9 correct?

10 MR. FERGUSON: Correct.

11 MR. BROWN: What is the proposed zoning under the
12 new ordinance?

13 MR. FERGUSON: I believe, I did not actually look
14 that up, so I'm not going to believe, I'm going to click and
15 let you know. I believe it is CS, it is CS, commercial
16 service. So the corresponding use to the CM zone.

17 MR. BROWN: Then the other question I had, sort of
18 a devil's advocate type question here. And that is, in
19 1986, a special exception was required for this particular
20 use, correct?

21 MR. FERGUSON: Correct. Well no, I'm sorry.
22 Certification of non-conforming use was required in 1986
23 when a subsequent desire was made to alter the McDonalds .
24 That was when a special exception was first required. And
25 then subsequent alterations, subsequent special exception.

1 MR. BROWN: Right. So the County approved or
2 certified a non-conforming use for this use because it was
3 not a special exception approved us on or about '86 or '87,
4 correct?

5 MR. FERGUSON: Correct.

6 MR. BROWN: So then in 2010, the uses changed and
7 an eating and drinking establishment required a detailed
8 site plan, correct?

9 MR. FERGUSON: Correct.

10 MR. BROWN: And this applicant never applied for
11 certification or a non-conforming use eating and drinking
12 establishment pursuant to a detailed site plan requirement,
13 did it?

14 MR. FERGUSON: Not to my knowledge, no.

15 MR. BROWN: So is it not true that the 35 non-
16 conforming use in '86, '87 is null and void. There is no
17 longer a requirement for a special exception therefore that
18 certification is void. And that this applicant has not
19 applied to certify an eating and drinking establishment that
20 requires a detailed site plan, and so therefore, how can
21 this applicant conclude that it can apply for revision of a
22 special exception site plan when the special exception on
23 longer exists. And more importantly, the certification no
24 longer exists.

25 MR. FERGUSON: Well I think Mr. Brown, you are in

1 the very technical sense, begging the question there,
2 whereas you're assuming the outcome. You do raise an
3 interesting point which I believe is a point of law I can't
4 really speak to, which is exactly that because the
5 circumstances of the non-conformity changed, does that
6 invalidate the prior certification. I don't know the answer
7 to that question.

8 MR. BROWN: Even if it does not invalidate the
9 prior certification, it may require a new certification for
10 the new use under the detailed site plan, and I have not
11 read special exception 4686 or the other case that Mr. Lynch
12 cited the Examiner and/or the County did something similar.
13 But I would venture to say more likely than not neither of
14 those cases involve a conversation from a special exception
15 to certify requirement to a detailed site plan certified
16 requirement.

17 MR. FERGUSON: Well, the circumstances were
18 similar. I certainly don't remember this question coming up
19 and really, I think the reason that we're being so
20 penetrating in our analysis here is the fact that staff
21 really, really just you know, in my view, held their breath
22 until their face turned blue over how this project was to be
23 regulated, whereas they didn't in 2015. They looked at it
24 and yep, okay, you know, this is the same end result. I
25 don't think, the weird thing about this, and the thing which

1 frankly gets me a little bit irritated is that I don't
2 believe that staff actually had any issue with the proposed
3 improvements as evidenced by their perfect willingness to
4 grant the alternative compliance and the departures
5 involved. They're just like, no we want it to be our say
6 so, not the Examiner's say so. That's my take on it. I,
7 you know, hearsay or unfounded opinions you may opine freely
8 on that, and I won't dispute it. But you know, standing
9 from this office, that how it looks to me.

10 MR. BROWN: I mean, I would agree with that
11 assessment they seem to be making a mountain out of a mole
12 hill, but I guess when you started your testimony the
13 Examiner and the County also would not be compelled to
14 approve a revision of a site plan for a certified non-
15 conforming use if there is another avenue which is certified
16 or rather approval of a detailed site plan certified, would
17 you not agree? It would be making a big mountain out of a
18 mole hill.

19 MR. FERGUSON: No, and again, that's an
20 interesting legal question. You know, I do think it's a
21 question of law rather than a question of planning. You
22 know, because the substance of the question is what are we
23 trying to get to, right, and how do we get there. And
24 presumably, what's the way to get there that requires the
25 least amount of encumbrance both upon the applicant and upon

1 the public resources involved in getting everybody to the
2 right thing. So you know I think the applicant judged at
3 the beginning of this process that where we are here is
4 actually the path of least resistance particularly given
5 staff's attitudes. And I think that has some value.

6 MR. BROWN: Thank you, no other questions.

7 MR. FERGUSON: Thank you, Mr. Brown. It's an
8 interesting subject, isn't it?

9 MS. NICHOLS: I just have a couple questions, Mr.
10 Ferguson. Carrying on with what you were just saying, does
11 the site have space available to it to provide the extra
12 parking spaces required by the detailed site plan?

13 MR. FERGUSON: No. No, I mean absolutely not.

14 MS. NICHOLS: All right, okay. If you could
15 please, let's look at the technical staff report, if we go
16 to page 20, please.

17 MR. FERGUSON: Okay.

18 MS. NICHOLS: So forgetting about the first
19 paragraph and the disapproval for this, that and the other,
20 let's go through the eight things that they assess as being
21 wrong with the site plan and tell me whether they've been
22 corrected or would still need to be done in the event that
23 this were approved?

24 MR. FERGUSON: Okay, so I do believe the last site
25 plan that I saw does in fact show a 12-foot side yard

1 setback along Arapahoe Drive where the Indianhead Highway
2 service road. That really should be a 10-foot front yard.
3 So number one would be an appropriate condition.

4 MS. NICHOLS: We still need, you would still need
5 number one, okay. How about two?

6 MR. FERGUSON: So two is something that I
7 specifically spoke to in my report, the parking schedule
8 does need to be amended to reflect a calculation that
9 conforms to part 11, such as the one that I did in my
10 report.

11 MS. NICHOLS: Okay, and number three?

12 MR. FERGUSON: Number three I believe should be
13 deleted because in my opinion, conforms to section 4.3 is
14 not required given that there is no increase required in the
15 number of spaces now physically existing.

16 MS. NICHOLS: Okay, so if it is found that 4.3
17 does not apply, obviously condition number 3 wouldn't carry
18 further. How about four?

19 MR. FERGUSON: I believe the last institute, so
20 shade trees is the correct terminology rather than canopy
21 trees. And there was a discrepancy that I noted on Monday
22 between the provided landscape strip, provided with a
23 required width on one of the schedules. So that would
24 appropriately remain.

25 MS. NICHOLS: All right, and five as well then?

1 MR. FERGUSON: I believe that's correct.
2 Actually, Mr. Howell is probably better to confirm that
3 because I don't know that I had seen the latest plant
4 counts.

5 MS. NICHOLS: All right, Mr. Howell is still with
6 us, so I'm going to ask him the same questions. I'm going
7 to go back and ask him the same questions. How about number
8 six, the sign area table?

9 MR. FERGUSON: Number six should be provided. I
10 would note that staff did the analysis of the sign area and
11 found in the staff report that the application does meet the
12 sign area requirements, but certainly some documentation to
13 that effect on the plan is appropriate.

14 MS. NICHOLS: Okay, number seven?

15 MR. FERGUSON: The plan that I showed did not
16 include a native listing on the plan schedule. So unless
17 the most recent submittal is one subsequent to that, then
18 that should remain as well.

19 MS. NICHOLS: Okay, and eight as well?

20 MR. FERGUSON: Yes, and I would note by the way,
21 the gas station that's been referred in the testimony is
22 actually one property further to the east. There is a
23 narrow strip in between the subject property and the gas
24 station which is occupied by the driveway to a commercial
25 vehicle repair facility, which is actually the abutting

1 property. The gas station is just you know one long jump
2 over the top of that.

3 MS. NICHOLS: Right okay, okay. All right, then I
4 have no further questions of you Mr. Ferguson.

5 MR. FERGUSON: Thank you.

6 MS. NICHOLS: Thank you. Mr. Lynch, do you have
7 any redirect of Mr. Ferguson?

8 MR. LYNCH: No, but I do have one clarification to
9 address Mr. Brown's contention. The special section 48686
10 was an alteration, but non-compliant a fast-food restaurant,
11 not an eating and drinking establishment. I just reviewed
12 the Planning Board resolution in that case and that's what
13 it refers to. Now, I think you had one additional question
14 for Mr. Howell?

15 MS. NICHOLS: I do, yes.

16 MR. LYNCH: Okay.

17 MS. NICHOLS: So Mr. Howell, if you could turn
18 your, thank you, Mr. Ferguson. If you could turn your video
19 back on, please sir, and I would remind you that you
20 continue under oath. And the same questions I asked of Mr.
21 Ferguson with regards to the conditions on page 20 of the
22 technical staff report. Mr. Ferguson opined to the best of
23 his knowledge that only three would not be needed based on
24 my finding if indeed I concluded that, that 4.3 is not
25 applicable to the subject property. Would you agree that

1 all of the rest of the conditions would need to carry
2 forward?

3 MR. HOWELL: Yes.

4 MS. NICHOLS: Okay, all right, thank you.

5 MR. LYNCH: And Madam Examiner, finally Mr. Curto
6 was able to get his camera to work if Mr. --

7 MS. NICHOLS: Yes.

8 MR. LYNCH: -- Brown has or you have any closing
9 questions for Mr. Curto?

10 MS. NICHOLS: Mr. Brown, did you have any further
11 questions of Mr. Curto?

12 MR. BROWN: No questions, good to see you Mr.
13 Curto.

14 MS. NICHOLS: All right. All right, thank you and
15 thank you and congratulations on getting your video going.

16 MR. CURTO: Thank you.

17 MS. NICHOLS: All right, Mr. Lynch.

18 MR. LYNCH: And Madam Examiner, just one more
19 request, in addition to submitting for the record a copy of
20 this DDS resolution, we also would like to submit a copy of
21 the existing (indiscernible) permit for the restaurant.
22 That's one of the requirements which doesn't seem to have
23 made it into the record. So, we'll have that submitted.

24 MS. NICHOLS: Okay. Anything further?

25 MR. LYNCH: Nothing further, Madam Examiner.

1 MS. NICHOLS: All right, then it is approximately
2 11 o'clock and the hearing in this matter will deem to have
3 been concluded. The record will remain open for two
4 documents: one, the DDS approval; and two, the existing
5 PUNO. And if there's nothing further, I thank everybody for
6 participating.

7 MR. LYNCH: Thank you very much.

8 MR. BROWN: Thank you.

9 MR. LYNCH: Thank you, have a good day.

10 MS. NICHOLS: Everybody take care, thank you, bye-
11 bye.

12 (Whereupon, the hearing was concluded.)
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C E R T I F I C A T E

DEPOSITION SERVICES, INC., hereby certifies that the attached pages represent an accurate transcript of the electronic sound recording of the proceedings before the Prince George's County Office of the Zoning Hearing Examiner in the matter of:

MCDONALDS USA, LLC, FOREST HEIGHTS

Case No. ROSP-4196-01

By:



Pat Purnell, Transcriber

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