

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

**SPECIAL EXCEPTION
REVISION OF SITE PLAN
4196/01**

**ALTERNATIVE COMPLIANCE
20004**

DECISION

Application:	Revision of Site Plan for Non-Conforming Eating and Drinking Establishment
Applicant:	McDonald's
Opposition:	N/A
Hearing Date:	December 1, 2021
Hearing Examiner:	Joyce B. Nichols
Disposition:	Approval with Conditions

NATURE OF PROCEEDINGS

(1) Special Exception 4196/01 is a request to revise Special Exception 4196 (Alteration, Enlargement, Extension or Reconstruction of a Certified Non-Conforming Use) (Fast Food Restaurant), approved in 1995 to enclose the play area and add additional parking. AC-20004 is a request for Alternative Compliance to Sections 4.2 and 4.7 of the Landscape Manual to allow a reduced bufferyard. The Subject Property is located on 0.77 acre of C-M (Commercial Miscellaneous) zoned land located in the southeast quadrant of the northernmost intersection of Livingston Road with Indian Head Highway (MD Route 210) and the western boundary abuts the service road in the Indian Head Highway right-of-way, which is known as Arapahoe Drive, and identified as 5501 Livingston Road, Town of Forest Heights, Maryland.

(2) The Technical Staff recommended denial of ROSP 4196-01 and AC-20004 for Section 4.7 and approval of AC 20004 for Section 4.2. (Exhibit 29) The Planning Board chose not to schedule a hearing on the request and adopted the Technical Staff's recommendation as its own. (Exhibit 29)

(3) The Subject Property is located within the municipal boundaries of the Town of Forest Heights. The Town is not opposed to the Application.

- (4) The record was closed on January 20, 2022, upon receipt of additional documents.

FINDINGS OF FACT

Subject Property

- (1) The Subject Property is known as Parcel D, recorded in the Prince George's County Land Records in Plat Book WWW 74-91, recorded in 1970.

History and Previous Approvals

- (2) In 1958, the original McDonald's restaurant was established on the Property. At the time, the restaurant was in the General Commercial, Existing Zone and an Eating and Drinking Establishment was a permitted use. The Property was rezoned to Commercial Miscellaneous (C-M) in 1984, with the adoption of the Subregion VII Sectional Map Amendment. When Fast-Food Restaurants became a defined use in the Prince George's County Zoning Ordinance (Prince George's County Council Bill CB-102-1986), they also became a Special Exception use in the C-M Zone. At that time, the McDonald's restaurant became a Non-Conforming use, as no Special Exception had been approved for the site. The use was certified as Non-Conforming on June 12, 1987, per Permit Number 2161-87-U.

In 1988, McDonald's sought to build a minor addition to the existing building to provide a vestibule around the entrance and a freezer facility. The Prince George's County Planning Board approved Non-Conforming Fast-Food Restaurant NCFRR-1 on February 11, 1988 (PGCB Resolution No. 88-54), to allow those minor additions.

In 1992, McDonald's proposed to add a soft play area to the Property and consequently, on November 23, 1992, SE-4085 was approved by the Zoning Hearing Examiner and declared final by the Prince George's County District Council, to allow the Alteration of the Non-Conforming Use. A Departure from Parking and Loading Standards, DPLS-145, was also approved by the Planning Board on October 15, 1992 (PGCPB Resolution No. 92-279), as a companion to SE-4085, to remove 3 of the 33 parking spaces on-site for construction of the play area.

McDonald's then sought to enclose the play area, and on October 12, 1995, the Planning Board approved DPLS-204 (PGCPB Resolution No. 95-321) for the purpose of waiving 10 parking spaces required to enclose the play area on-site, leaving the parking requirement at 30 parking spaces that remained on-site. A Special Exception to alter the Non-Conforming Use (SE-4196) was approved the Zoning Hearing Examiner and declared final by the District Council on March 27, 1997, for the play area enclosure.

In 2010, CB-19-2010 amended the Table of Uses to permit Eating and

Drinking Establishments with drive-through service to be permitted in the C-M Zone, subject to Detailed Site Plan (DSP) approval. As there is no DSP approved for the Property, the use is currently a Certified Non-Conforming Use, pursuant to Permit Number 2161-1987-U.

Neighborhood and Surrounding Uses

(3) The general neighborhood is bounded to the north by Livingston Road and Arapahoe Drive, a service road of MD 210, with MD 210 beyond to the west. The neighborhood of the property is the area located south and west of Livingston Road, north of the Capital Beltway, and east of MD 210. This area includes commercial areas along Livingston Road and residential areas in the Town of Forest Heights. Near the Property but outside of the neighborhood, as defined, are office uses and apartments. The surrounding neighborhood includes primarily commercial, and one-family detached residential uses. The immediate uses surrounding the property are as follows:

North	-	Office building in the C-O (Commercial Office) Zone
South	-	Community Center in the R-55 (One-Family Detached Residential) Zone
East	-	Auto Repair in the C-M Zone
West	-	Arapahoe Drive and MD 210

(4) The Subject Property comprises a single platted parcel and is located in the southeast quadrant of the (northernmost) intersection of Livingston Road with Indian Head Highway (MD Route 210). The western boundary of the Subject Property abuts the service road in the Indian Head Highway right-of-way which is also known as Arapahoe Drive. The Subject Property is currently occupied by an operating McDonald's restaurant.

Across Indian Head Highway to the west are Henry's Soul Café and St. Mark's AMC church in the C-M Zone, with other varied commercial development extending along the west side of MD 210 to the north.

Across Livingston Road to the north is an office building known as the Mount Joy Baptist Church and Business Center in the C-O Zone, and further to the east, the Oaks at Park South apartments in the R-18 (Multifamily Medium Density Residential) Zone.

Abutting the Subject Property to the east is the Norris Garage Auto Repair Facility in the C-M Zone, with a BP Gas Station beyond that, also in the C-M Zone. Further to the east along the south side of Livingston Road are a small Shopping Center, a church, and a barbershop in the C-S-C Zone.

Abutting the Subject Property to the south, on the far side of a fenced and

channelized tributary of Oxon Run, is the Forest Heights Town Hall and Police Department in the R-55 Zone, with single-family residences and M-NCPPC's Forest Heights Park in the R-55 Zone beyond.

Access to the Subject Property is available from two existing entrances on Livingston Road.

Master Plan and Sectional Map Amendment

The site is located in Planning Area 76A. The applicable Master Plan is the *Approved Eastover/Forest Heights/Glassmanor Sector Plan and Sectional Map Amendment*, approved on February 18, 2014.

The Master Plan's "Livingston Road Office Building Future Land Use Map" illustrates the redevelopment of the south side of Livingston Road into a number of "Office over Retail" buildings on a land assembly of all of the existing development.

The Approved Sectional Map Amendment retained the subject Property in the previously-existing C-M 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 indicates that the Generalized Future Land Use is Commercial.

The site is not within a Priority Preservation Area.

(5) The site is located in Planning Area 76A. The applicable Master Plan is the *Approved Eastover/Forest Heights/Glassmanor Sector Plan and Sectional Map Amendment*.

Applicant's Proposal

(6) The proposed use for Revision of Special Exception Site Plan application ROSP-4196-01 includes substantial reconstruction and expansion of the existing McDonald's restaurant. Double drive-through lanes will replace the existing single-drive through-lane, and the existing outdoor seating area will be removed and incorporated into the new building's footprint. The new facility will be provided with modern stormwater management using a combination of structural and Environmental Site Design (ESD) techniques where none now exists.

APPLICABLE LAW

(1) A major revision of the approved Special Exception Site Plan for a Certified Non-Conforming Use must meet the requirements of Sections 27-317, 27-242, 27-243 and 27-322 of the Zoning Ordinance.

(2) Section 27-317 states as follows:

(a) A Special Exception may be approved if:

- (1) The proposed use and site Plan are in harmony with the purpose of this Subtitle;
- (2) The proposed use is in conformance with all the applicable requirements and regulations of this Subtitle;
- (3) The proposed use will not substantially impair the integrity of any validly approved Master Plan or Functional Master Plan, or, in the absence of a Master Plan or Functional Master Plan, the General Plan;
- (4) The proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area;
- (5) The proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood; and
- (6) The proposed site plan is in conformance with an approved Type 2 Tree Conservation Plan; and
- (7) The proposed Site Plan demonstrates the preservation and/or restoration of the regulated environmental features in a natural state to the fullest extent possible in accordance with the requirement of Subtitle 24-130 (b)(5).

(3) Section 27-242(a)(1) requires:

(1) A non-conforming building or structure, or a certified nonconforming use (except as provided for in this Section) may be altered, enlarged, or extended, provided that:

- (A) The alteration, enlargement, or extension conforms to the building line setback, yard, and height regulations of the zone in which the use is located; and
- (B) A special exception has been approved by the District Council, in accordance with Part 4 of this Subtitle.

(4) Section 27-243(a) and (b) require:

(a) Without enlargement, extension, or relocation

- (1) The restoration, reconstruction, or reestablishment of a nonconforming building or structure, or a certified nonconforming use, which has either been unintentionally destroyed by fire or other calamity, has temporarily ceased operation for the sole purpose of correcting Code violations, or has temporarily ceased operation due to the seasonal nature of the use, may be permitted without relocation, enlargement, or extension, provided that:

- (A) Where the building, structure, or use has been unintentionally destroyed by fire or other calamity, a building permit for restoration or reconstruction shall be issued within one (1) calendar year from the destruction date, and construction pursuant to the permit has begun within six (6) calendar months after the date of issuance (or lawful extension) of the permit, and proceeds to completion in a timely manner. If it has been destroyed for more than one (1) calendar year, the reconstruction, reestablishment, or restoration may only be permitted upon approval of a Special Exception in accordance with Part 4 of this Subtitle.
 - (B) Where a certified non-conforming use has temporarily ceased operation, either for the sole purpose of correcting Code violations or because the nature of the nonconforming use is seasonal, such use shall be reestablished within one (1) calendar year from the date upon which operation last ceased.
- (2) The intentional demolition and reconstruction, reestablishment, or restoration of a certified nonconforming use on the same lot, which does not involve relocation, enlargement, or extension, is prohibited within the Safety Zones of the Military Installation Overlay Zone, but may be permitted outside of the Safety Zones of the Military Installation Overlay Zone only upon approval of a Special Exception in accordance with Part 4 of this Subtitle.
- (b) With enlargement, extension, or relocation.
 - (1) The reconstruction or restoration of a nonconforming building or structure, or a certified nonconforming use, which has been unintentionally destroyed by fire or other calamity and which involves an enlargement, extension, or relocation, may be permitted only upon approval of a Special Exception in accordance with Part 4 of this Subtitle.
 - (2) The intentional demolition and reconstruction of a certified nonconforming use on the same lot, which involves relocation, enlargement, or extension, is prohibited within the Safety Zones of the Military Installation Overlay Zone, but may be permitted outside of the Safety Zones of the Military Installation Overlay Zone only upon approval of a Special Exception in accordance with Part 4. The requirement for a Special Exception shall not apply to the replacement of a mobile home, provided the new mobile home does not exceed one thousand and fifty (1,050) square feet in size.
 - (3) Notwithstanding any other provision within this Section, the reconstruction or restoration of a nonconforming building or structure, or a certified non-conforming use involving an enlargement, extension, or relocation of uses, buildings, or structures considered non-conforming pursuant to the provisions of this Subtitle is prohibited.

(5) Section 27-322 (a) and (b) require:

- (a) No use allowed as a Special Exception, and no building or structure used in connection with that use, shall be erected, enlarged, altered, or extended beyond the limits authorized in the approval of the Special Exception, unless provided for in this Subdivision.
- (b) If a use other than one allowed by Special Exception is proposed for property on which there is an existing approved Special Exception use, and if the other use involves any changes to improvements shown on the approved site plan for the Special Exception use, the site plan must still be revised in accordance with this Subdivision in order for the Special Exception use to continue.

(6) Section 27-384(a) and (b) require:

- (a) The alteration, enlargement, extension, or reconstruction of any non-conforming building or structure, or certified nonconforming use (except those certified non-conforming uses not involving buildings, those within the Chesapeake Bay Critical Area Overlay Zones as specified in paragraph 7, below, unless otherwise provided, and except for outdoor advertising signs), may be permitted subject to the following:
 - (1) A non-conforming building or structure, or a building or structure utilized in connection with a certified nonconforming use, may be enlarged in height or bulk, provided that the requirements of Part 11 are met with respect to the area of the enlargement.
 - (2) A certified non-conforming use may be extended throughout a building in which the use lawfully exists, or to the lot lines of the lot on which it is located, provided that:
 - (A) The lot is as it existed as a single lot under single ownership at the time the use became nonconforming; and
 - (B) The requirements of Part 11 are met with regard to the extended area.
 - (3) A certified nonconforming use may be reconstructed, provided that:
 - (A) The lot on which it is reconstructed is as it existed as a single lot under single ownership at the time the use became nonconforming;
 - (B) Either the nonconforming use is in continuous existence from the time the Special Exception application has been filed through final action on the application, or the building was destroyed by fire or other calamity more than one (1) calendar year prior to the filing date;
 - (C) The requirements of Part 11 are met with respect to the entire use; and
 - (D) The Special Exception shall terminate unless a building permit for the reconstruction is issued within one (1) calendar year from the date of Special Exception approval, construction in accordance with the

- building permit begins within six (6) months from the date of permit issuance (or lawful extension), and the construction proceeds to completion in a timely manner.
- (4) When not otherwise allowed, a certified nonconforming use may be otherwise altered by the addition or relocation of improvements, such as fencing, landscaping, off-street parking and loading areas, and outdoor trash enclosures, or the relocation of buildings or other improvements within the boundary lines of the lot as it existed as a single lot under single ownership at the time the use became nonconforming.
 - (5) Any new, or any addition to, or alteration or relocation of an existing building or other improvement (which is either nonconforming or utilized in connection with a certified nonconforming use), shall conform to the building line, setback, yard, and height regulations of the zone in which the certified nonconforming use is located. The District Council may further restrict the location and bulk of the building or structure where the evidence so warrants. If the use is presently permitted by Special Exception in the zone, the new building, improvement, or addition shall conform to all of the physical requirements of the specific Special Exception use.
 - (6) The District Council may grant this Special Exception for property within a one hundred (100) year floodplain only after it has determined that the proposed enlargement, extension, reconstruction, or alteration will:
 - (A) Not require additional filling in the floodplain;
 - (B) Not result in an increase in elevation of the one hundred (100) year flood; and
 - (C) Conform with all other applicable requirements of this Subtitle and of Division 2 of Subtitle 4, "Building," of this Code, entitled "Construction or Changes in Floodplain Areas."
 - (7) In a Chesapeake Bay Critical Area Overlay Zone, a Special Exception shall not be granted where the existing lot coverage in the CBCA exceeds that allowed by Section 27-548.17, and which would result in a net increase in the existing lot coverage in the CBCA. In addition, a Special Exception shall not be granted which would result in converting a property which currently meets the lot coverage in the CBCA requirements of Section 27-548.17 to a nonconforming status regarding lot coverage in the CBCA, except if a finding of extenuating circumstances is made, such as the necessity to comply with other laws and regulations.
- (b) Applications for this Special Exception shall be accompanied by a copy of the Use and Occupancy Permit for the certified nonconforming use, as provided for in Section 27-241(b).

(7) Section 27-107(a)(166) defines "Nonconforming Use" as:

- (A) The "Use" of any "Building," "Structure," or land which is not in conformance with a requirement of the Zone in which it is located (as it specifically applies to the "Use"), provided that:
 - (i) The requirement was adopted after the "Use" was lawfully established; or
 - (ii) The "Use" was established after the requirement was adopted and the District Council has validated a building, use and occupancy, or sign permit issued for it in error.
- (B) The term shall include any "Building," "Structure," or land used in connection with a "Nonconforming Use," regardless of whether the "Building," "Structure," or land conforms to the physical requirements of the Zone in which it is located.

(8) The request for Alternative Compliance must satisfy Section 1.3 of the Landscape Manual. That Section provides, in pertinent part, as follows:

- (a) The standards contained in this manual are intended to encourage development which is economically viable and environmentally sound. The standards are not intended to be arbitrary or to inhibit creative solutions. Project conditions may justify approval of alternative methods of compliance with the standards. Conditions may arise where normal compliance is impractical or impossible, or where maximum achievement of the purposes of this manual can only be obtained through alternative compliance. Requests for alternative compliance may be approved for any application to which the requirements of this manual apply, when one or more of the following conditions are present:
 - (1) Topography, soil, vegetation or other site conditions are such that full compliance with the requirements of this manual is impossible or impractical; or improved environmental quality would result from the alternative compliance.
 - (2) Space limitations, unusually shaped lots, prevailing practices in the surrounding neighborhood, in-fill sites, and for improvements and redevelopment in older communities.
 - (3) Change of use on an existing site increases the buffer required by Section 4.7, Buffering Incompatible Uses, of this manual, more than it is feasible to provide.
 - (4) Safety considerations make alternative compliance necessary.
 - (5) An alternative compliance proposal is equal or better than normal compliance in its ability to fulfill the design criteria in Section 3, Landscape Elements and Design Criteria, of this manual.

(9) 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 A2d 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 zone 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 zone involved or of factors causing disharmony to the operation of the comprehensive plan”. It would, therefore, be proper to grant the request, once the conditions addressed below are satisfied.

CONCLUSIONS OF LAW

(1) The existing Eating and Drinking Establishment with drive-through service is currently operating and the building has not been unintentionally destroyed by fire or other calamity, temporarily ceased operation for the sole purpose of correcting Code violations, or temporarily ceased operation due to the seasonal nature of the use. Furthermore, the Property is exempt from this requirement because reconstruction is proposed with enlargement. Section 27-243(a)(1)

(2) The property is located outside of the Military Installation Overlay Zone. Section 27-243(a)(2)

(3) The Site Plan intends to raze the existing McDonald’s restaurant building and construct a new larger McDonald’s restaurant building on the Property. This Application is a revision to a previously approved Special Exception. The criteria for Special Exception approval are provided below. Section 27-243(b)

(4) The purposes of the Zoning Ordinance are listed in Section 27-102(a). The proposed use will specifically promote the following purposes:

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

The proposed reconstruction of the existing McDonald’s Eating and Drinking Establishment will be developed to provide substantive environmental upgrades in the form of modern Stormwater Management and updated landscaping and tree planting to meet modern landscaping (with the approval of the requested Alternative Compliance)

and Tree Canopy Coverage requirements, and safety upgrades by raising the building floor elevation above the 100-year flood elevation of the abutting channelized stream. The approval of this Application will thus promote the health and safety of the present and future inhabitants of the County by providing for a safe and convenient accommodation of the public.

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

The relevant Plans which apply to the Subject Property are the 2014 General Plan, the 2014 *Approved Eastover/Forest Heights/Glassmanor Sector 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

The General Plan classified the subject site in its Growth Policy Map¹ in the Established Communities category, and the Generalized Future Land Use Map² 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,”³ and recommends that, “Established communities are most appropriate for context-sensitive infill and low- to mediumdensity development...”⁴

“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.”⁵ The Note under the Generalized Future Land Use Map, however, states that, “by definition, this map should be interpreted broadly and is intended to provide a countywide perspective of future land use patterns. To identify the future land use designation for a specific property, please refer to the property’s relevant approved sector or master plan.”

Given its existing and proposed retail commercial use, the approval of the subject Application would constitute context-sensitive infill.

¹ M-NCP&PC, Plan Prince George’s 2035 – Approved General Plan (May 2014), p. 107

² Ibid., p. 106

³ Ibid., p. 100

⁴ M-NCP&PC, Approved Eastover/Forest Heights/Glassmanor Sector Plan and Sectional Map Amendment (February, 2014), p. 50.

⁵ Sector Plan, p. 60

Master Plan

The applicable Master Plan is the *Approved Eastover/Forest Heights/Glassmanor Sector Plan and Sectional Map Amendment*, approved on February 18, 2014. Figure 18, the Livingston Road Office Building Future Land Use Map, recommends the subject property for redevelopment as part of a larger land assembly as “office over retail” land use.⁶

The existing McDonald’s is located in the Eastover Plan’s “Focus Area 3: Southern Gateway.” The text of the Plan focuses almost entirely on the revitalization of the “Livingston Road Office Building,” which is the Mount Joy Baptist Church and Business Center in the C-O Zone across Livingston Road to the north of the Subject Property. The Eastover Plan does not have any discussion of the Subject Property or the redevelopment of the south side of Livingston Road, notwithstanding several small scale illustrations including its inclusion in Map 22, “Long-Term Development, Phase 4.”⁷ Because the proposed Application is not inconsistent with the Sector Plan’s land use recommendation, the approval of the subject reconstruction of the existing McDonald’s would be in harmony with the recommendations of the Sector Plan.

Other Applicable Functional Master Plans

The Special Exception area is entirely within an area of 100-year floodplain associated with a channelized unnamed tributary of Oxon Run which runs along the southern edge of the subject property. This tributary is no longer a natural stream, however, and the proposed stormwater management measures and tree planting are in keeping with the recommendations of the Green Infrastructure Plan. The Department of Permitting, Inspections and Enforcement has granted a waiver for construction within the existing floodplain area, requiring that the building’s floor elevation be raised above the flood elevation.

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.

⁶ Ibid., p. 101

⁷ *Sector Plan*, p. 60.

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

The Countywide Master Plan of Transportation does not contain any facilities which will be affected by the proposed reconstruction.

As the proposed McDonald's reconstruction is 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 reconstruction of a long-existing use at a developed site, and because its expansion is being accomplished in accordance with 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.

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 recognize the needs of the County's business by permitting the reconstruction of an obsolete building in a developed area, and so would abet the orderly growth and development of the County, in harmony with this Purpose of the Ordinance.

5. *To provide adequate light, air, and privacy;*

The subject McDonald's reconstruction 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, and conformance with height limitations in order to allow for 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 subject McDonald's reconstruction 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 its conformance with the Tables of Permitted Uses for the various zones as laid out in the Ordinance, by providing modern Stormwater Management, and by bringing the Subject Property into conformance with the provisions of the Landscape Manual which provide for roadside landscaping, the screening of service functions and (with the approval of the requested Alternative Compliance) buffering of neighboring uses.

7. To protect the County from fire, flood, panic, and other dangers;

The subject McDonald's reconstruction 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 and a broad, protected tax base;

The reconstruction of the subject McDonald's 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 McDonald's reconstruction would be in harmony with this Purpose as it will occur on a site which will be redeveloped 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, 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 McDonald's reconstruction would be in harmony with this Purpose because it 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. Additionally, the addition of a second drive-through lane will increase throughout of the drive-through component, and reduce any adverse effects of queuing.

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 is prima facie evidence of the Application's harmony with this Purpose.

Beyond that, however, the subject McDonald's reconstruction would promote the economic and social stability of the County by contributing to the tax base, and by continuing to provide a useful and convenient service to the surrounding community.

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 McDonald's reconstruction is a redevelopment of an existing developed site, approval of the subject Application will have no impact to the natural features in the County: It will not generate noise pollution beyond that expected by other commercial uses, 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. No steep slopes or scenic vistas will be affected. The new McDonald's will, if approved, be provided with modern Stormwater Management measures where none now exists, and will provide additional tree canopy, thus better acting against water pollution and protecting 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 McDonald's reconstruction. Section 27-317(a)(1)

(6) The Application meets the general Purposes for Commercial Zones, 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 proposed McDonald's to continue to provide a useful and convenient site for a needed service.

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

Because the proposed McDonald's reconstruction is located in a corridor where there is already a mix of retail and service commercial uses, the approval of this Application would be in harmony with this Purpose of Commercial Zones generally.

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

The reconstruction of the existing McDonald's restaurant would implement this Purpose by its physical separation from other uses, by new Stormwater Management measures, and by the supplemental planting which will provide Tree Canopy Coverage.

(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 be a like-for-like replacement, with any additional trips generated by the larger size and newer building being within the limits exempting the project from a new test for the adequacy of public facilities.

(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 McDonald's reconstruction will not impair the intent for the land use provided for in the Master Plan, it will fulfill this purpose for Commercial Zones.

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

The redevelopment of the subject property in keeping with the existing character of the surrounding commercial area will promote the stability of the surrounding commercial area by revitalizing the existing development with a new, modern building.

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

Because Eating and Drinking Establishments are a permitted use in the C-M Zone, because the reconstruction will conform to modern Stormwater Management and landscaping standards, and will be compatible with the materials, scale and character of the architecture of the surrounding 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 reconstruction of an existing commercial use that will enhance the tax base and provide additional employment for residents of the County. Section 27-317(a)(1)

(7) The Application also meets the Specific Purposes of the C-M Zone, Section 27-459(a)(1), as follows:

(A) To provide locations for miscellaneous commercial uses which may be disruptive to the harmonious development, compactness, and homogeneity of retail shopping areas;

The replacement of the existing obsolete building with a new building containing the same use will not affect the continued operation of the abutting service commercial uses.

(B) To provide these locations, where possible on nonresidential streets;

The subject property fronts on a nonresidential street.

(C) To provide concentrations of these uses which are relatively far apart.

The nearest concentration of C-M Zoning is approximately two miles south on Livingston Road. Section 27-317(a)(1)

(8) The Application is also in conformance with all of the requirements of a Special Exception. Section 27-317(a) (1):

- (1) **The proposed use and site plan are in harmony with the purpose of this Subtitle;**

See *supra* Section 317(a)(1)

- (2) ***The proposed use is in conformance with all the applicable requirements and regulations of this Subtitle.***

Based upon an inspection of the proposed Special Exception Site Plan, the revised parking compliance calculation discussed at length under §27-384(a)(3)(C), below, with the grant of Alternative Compliance to the provisions of the Landscape Manual regarding Landscape Strips along Streets and Buffering Incompatible Uses, *infra*, the proposed use will be in conformance with all of the applicable requirements and regulations of the Zoning Ordinance.

It should be noted that, in addition to the parking and loading requirements of Part 11 of the Zoning Ordinance. The Applicability provisions of Section 1.1(g) of the Landscape Manual provide that, "...the following are exempt from the requirements of Section 4.3, Parking Lot Requirements: (1) Permits for any building renovation, expansion, or change of use that does not necessitate an increase in the number of parking or loading spaces beyond the number currently existing." Since the parking computation *infra* demonstrates that no increase in the number of spaces currently existing is necessary, the provisions of Section 4.3 of the Landscape Manual are not applicable. Section 27-317(a)(2)

- (3) ***The proposed use will not substantially impair the integrity of any validly approved Master Plan or Functional Master Plan, or, in the absence of a Master Plan or Functional Master Plan, the General Plan;***

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 neither the approved Master Plan nor the County's General Plan. Section 27-317(a)(3)

- (4) ***The proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area;***

It has been demonstrated, that 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, the long history of the use at the Subject Property and the substantive improvements to the existing development, including the provision of modern Stormwater Management and augmented landscape planting 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. Section 27-317(a)(4)

- (5) *The proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood; and***

The long-established history of this use at the subject property, and the diverse character of uses in the neighborhood, including office buildings, gas stations, and other retail uses, indicates that the character of the McDonald's at the Subject Property will continue to be compatible with the surrounding commercial uses, and the replacement of the old restaurant with a new building use will not be detrimental to the use or development of adjacent properties or the general neighborhood. Section 27-317(a)(5)

- (6) *The proposed site plan is in conformance with an approved Tree Conservation Plan.***

The Subject Property has received an exemption from the requirement for a Tree Conservation Plan. Section 27-317(a)(6)

- (7) *The proposed site plan demonstrates the preservation and/or restoration of the regulated environmental features in a natural state to the fullest extent possible.***

While the entirety of the Subject Property is located within the 100-year floodplain, the stream associated with this floodplain area has been confined within a concrete channel for many years. As such there will be no disturbance to a natural riparian area, and the provisions of the waiver granting approval to construct within the 100-year floodplain provide that no fill will be placed outside of the building footprint. Section 27-317(a)(5)

COMPLIANCE WITH SECTION 27-384

(9) The alteration, enlargement, extension, or reconstruction of any nonconforming building or structure, or certified nonconforming use (except those certified nonconforming uses not involving buildings, those within the Chesapeake Bay Critical Area Overlay Zones as specified in paragraph 7, below, unless otherwise provided, and except for outdoor advertising signs), may be permitted subject to the following:

- (1) A nonconforming building or structure, or a building or structure utilized in connection with a certified nonconforming use, may be enlarged in height or bulk, provided that the requirements of Part 11 are met with respect to the area of the enlargement.**
- (2) A certified nonconforming use may be extended throughout a building in which the use lawfully exists, or to the lot lines of the lot on which it is located, provided that:**

These two provisions are not applicable, because a reconstruction is proposed, which is governed by subparagraph (3), *infra*.

- (3) A certified nonconforming use may be reconstructed, provided that:**
 - (A) The lot on which it is reconstructed is as it existed as a single lot under single ownership at the time the use became nonconforming;**

The lot and its single ownership associated with the subject Application has not changed since the use became nonconforming with the passage of CB-102-1986.

- (B) Either the nonconforming use is in continuous existence from the time the Special Exception application has been filed through final action on the application, or the building was destroyed by fire or other calamity more than one (1) calendar year prior to the filing date;**

The nonconforming McDonald's has been in continuous existence from the time this Application was filed; the Development Activity Monitoring System (DAMS) indicates that the Application was accepted on October 30, 2020, and there is no intent to discontinue its existence before the final action on this Application.

- (C) The requirements of Part 11 are met with respect to the entire use;**

Demonstrating compliance with the requirements of Part 11 for the subject Application is somewhat complicated. As the subject use was established in 1958, before the enactment of the current parking regulations, the grandfathering provisions of §27-584 must be taken into account. Unfortunately, the Special Exception Site Plan applies the grandfathered parking generation rate to the entirety of the proposed improvement. This is not correct.

The parking requirement instead must account for the 1958 requirement for the area of the existing building, but must also add the current parking generation requirements for any proposed building areas in excess of the existing. This total requirement can then be compared to the amount of parking which will be provided,

including both physically-proposed spaces, and “virtual” spaces which have been waived through past approvals of Departures.

Thirty (30) spaces physically exist today, to which can be added the thirteen spaces waived by DPLS-145 and DPLS-204. Accordingly, 43 parking spaces (30 existing spaces + 13 waived spaces) can be counted as “provided” by the proposed Special Exception Site Plan.

As to the parking requirement: At the time of the building’s construction, the parking requirement was for, “one (1) parking space for each fifty (50) square feet of floor area devoted to patron use, including lounges, rest rooms and other spaces customarily open to patrons.” Sheet C-100 of the Special Exception Site Plan set indicates that the patron seating area of the existing building is 1,195 square feet in area, which would yield a 1958 requirement for 24 parking spaces.

Sheet C-200 of the Special Exception Site Plan set indicates that the proposed seating area is to be 1,761 square feet, but the current parking requirement for patrons is based on seats, not area. The new seat count will be 72 seats, whereas the existing seat count is 66 seats. This means that there will be a net increase of six seats in the new building, or a requirement for an additional two parking spaces at the current parking generation rates of one parking space required per three (3) seats.

The new building also proposes an expansion of the kitchen areas, with 744 new square feet being added to the existing kitchen area. This means that there will be a requirement for an additional fifteen parking spaces at the current parking generation rates of one parking space required per fifty square feet of “GFA (excluding any area used exclusively for storage or patron seating, and any exterior patron service area).”

Accordingly, the new parking requirement is:

24 spaces (§27-584 requirement for existing building area)
+2 spaces (for 6 additional seats)
+15 spaces (for 744 SF additional kitchen area)
41 spaces total requirement.

Against this, the 43-space total of the physically-proposed and waived spaces meets the requirement.

With regard to the loading space requirements of Part 11, no loading spaces are proposed. Again, this must be evaluated while accounting for the 1958 loading requirement for the area of the existing building, to which the current loading space

generation requirements must be added for any proposed building areas in excess of the existing.

The 1958 requirement for loading spaces was historically interpreted as beginning at 50 feet of building width; Sheet C-100 of the Special Exception Site Plan set indicates that the existing building is 48.6 feet wide, so no loading space would have been required.

The proposed building adds 1,310 square feet of new area to the existing; §27-582(a) provides that no loading spaces are required for less than 2,000 square feet of building area.

Accordingly, the new loading space requirement is still zero.

These calculations accounting for both the existing building's requirement and the added requirement for new construction was not demonstrated on the Special Exception Site Plan; the Plan should be revised to demonstrate the correct computation.

- (D) *The Special Exception shall terminate unless a building permit for the reconstruction is issued within one (1) calendar year from the date of Special Exception approval, construction in accordance with the building permit begins within six (6) months from the date of permit issuance (or lawful extension), and the construction proceeds to completion in a timely manner.***

The Applicant will comply with this requirement.

- (4) *When not otherwise allowed, a certified nonconforming use may be otherwise altered by the addition or relocation of improvements, such as fencing, landscaping, off-street parking and loading areas, and outdoor trash enclosures, or the relocation of buildings or other improvements within the boundary lines of the lot as it existed as a single lot under single ownership at the time the use became nonconforming.***

This provision is not applicable to the instant Application.

- (5) *Any new, or any addition to, or alteration or relocation of an existing building or other improvement (which is either nonconforming or utilized in connection with a certified nonconforming use), shall conform to the building line, setback, yard, and height regulations of the zone in which the certified nonconforming use is located. The District Council may further restrict the location and bulk of the building or structure where the evidence so warrants. If the use is presently permitted by Special Exception in the zone, the new building, improvement, or addition shall conform to all of the physical requirements of the specific Special Exception use.***

The reconstructed McDonald's will conform to the building line, setback, yard and height regulations of §27-462(b) of the Zoning Ordinance.

(6) The District Council may grant this Special Exception for property within a one hundred (100) year floodplain only after it has determined that the proposed enlargement, extension, reconstruction, or alteration will:

(A) Not require additional filling in the floodplain;

As provided for in the January 5, 2021 letter from Melinda M. Bolling, Director of the Department of Permitting, Inspections and Enforcement, granting waiver from the County's Floodplain Ordinance to allow construction within the 100-year floodplain, no fill will be placed outside of the existing building footprint as required to raise the finish floor elevation.

(B) Not result in an increase in elevation of the one hundred (100) year flood; and

Because no new fill is proposed, no net increase will result.

(C) Conform with all other applicable requirements of this Subtitle and of Division 2 of Subtitle 4, "Building," of this Code, entitled "Construction or Changes in Floodplain Areas."

These provisions (now in Subtitle 32) are addressed in the January 5, 2021 waiver approval.

(7) In a Chesapeake Bay Critical Area Overlay Zone, a Special Exception shall not be granted where the existing lot coverage in the CBCA exceeds that allowed by Section 27-548.17, and which would result in a net increase in the existing lot coverage in the CBCA. In addition, a Special Exception shall not be granted which would result in converting a property which currently meets the lot coverage in the CBCA requirements of Section 27-548.17 to a nonconforming status regarding lot coverage in the CBCA, except if a finding of extenuating circumstances is made, such as the necessity to comply with other laws and regulations.

The Subject Property is not located within the Chesapeake Bay Critical Area.

(b) Applications for this Special Exception shall be accompanied by a copy of the Use and Occupancy Permit for the certified non-conforming use, as provided for in Section 27-241(b).

The Certified Non-Conforming Use and Occupancy Permit has been provided.

(c) In a Chesapeake Bay Critical Area Overlay Zone, in order to permit the alteration, enlargement, extension, or reconstruction of any nonconforming building or structure or

nonconforming use, the District Council shall find that... [several subsections not reproduced here follow].

The Subject Property is not located within the Chesapeake Bay Critical Area.

Alternative Compliance AC-20004

(10) The subject Application proposes Alternative Compliance for the provisions of Section 4.2 for Requirements Landscape Strips Along Streets and for the provisions of Section 4.7 for Buffering Incompatible Uses. The Planning Director has forwarded a recommendation of approval to the Zoning Hearing Examiner for Alternative Compliance to the provisions of Section 4.2.

In the matter of compliance with Section 4.7, Alternative Compliance is requested for the required buffer along the Property's southern boundary, abutting the Forest Heights Town Hall and Police Station. The Subject Property is a "Drive-in or Fast-Food Restaurant," which is classified as a High Impact use. The abutting property could be described as either a "Public Office Building" or a "Community Center (public or private), both of which are classified as Medium Impact uses.

A High Impact use abutting a Medium Impact use requires a "B" buffer, which required a 30-foot building setback and a 20-foot landscaped yard planted with 112 plant units. The Applicant has instead proposed an 80-foot building setback, a 6-foot sight-tight fence (which reduces the setback, bufferyard depth and planting requirements by 50%), and the planting of a greater number of plant units (83) along the western boundary, along Arapahoe Drive, which is the approach route to the Forest Heights Town Hall.

Section 1.3a of the Landscape Manual provides that, *"Requests for alternative compliance may be approved for any application to which the requirements of this manual apply, when one or more of the following conditions are present:*

(1) Topography, soil, vegetation, or other site conditions are such that full compliance with the requirements of this manual is impossible or impractical; or improved environmental quality would result from the alternative compliance.

(2) Space limitations, unusually shaped lots, prevailing practices in the surrounding neighborhood, in-fill sites, and for improvements and redevelopment in older communities.

(3) Change of use on an existing site increases the buffer required by Section 4.7, Buffering Incompatible Uses, of this manual, more than it is feasible to provide.

(4) Safety considerations make alternative compliance necessary.

(5) An alternative compliance proposal is equal or better than normal compliance in its ability to fulfill the design criteria in Section 3, Landscape Elements and Design Criteria, of this manual.”

Section 1.3b further provides that, “*A proposed alternative compliance measure must be equally effective than normal compliance in terms of quality, durability, hardiness, and ability to fulfill the design criteria in Section 3.*”

In this case, the conditions which apply to the approval of Alternative Compliance are provisions (1) and (2), namely that the proposal at the subject site constitutes redevelopment in an older community, and the buffer area is occupied by the channelized stream.

The entirety of the unreduced 20-foot buffer depth requirement is in fact being provided on site, in the area of the channelized stream. Second, there is a substantial wooded slope on the Town Hall property on their side of the channelized stream. This slope, which would be regulated as a wooded riparian buffer were the Town Hall site to be redeveloped, provides a substantial – and likely permanent – buffer between the Town Hall and the subject property. Furthermore, the approach to the Town Hall for almost all vehicular traffic is past the subject property along Arapahoe Drive. Providing the extra planting along this boundary, while not appropriate for strict compliance, would provide a better environment as a whole for visitors to the Town Hall, particularly given the existing wooded slope on its property which would make any planting on the Subject Property far less visible.

CONCLUSION

With the grant of Alternative Compliance from the provisions of Sections 4.2 and 4.7 of the Landscape Manual, the approval of the subject Application would be in compliance with the general criteria for approval of a Special Exception found in §27-317(a), and the specific criteria for approval of an Alteration, Enlargement, Extension, or Reconstruction of a Non-Conforming Use §27-384.

Additionally, because of: (1) the long history of the use at the subject property, (2) the provision of modern stormwater management; and (3), the augmented landscape planting, that the approval of this particular application would not entail a more adverse impact on the public health, safety and welfare than those inherently associated with reconstructions of nonconforming uses, irrespective of their location in the C-M Zone.

DISPOSITION

SE/ROSP 4196/01 is approved, subject the following conditions:

1. The required setbacks have not been accurately reflected on the Plans.
2. The parking schedule should be revised to reflect parking and loading space requirements set forth on pages 15 and 16 of Exhibit 36.
3. The Section 4.2 landscape schedules should reflect “shades trees” instead of “canopy trees” and reflect the provided landscape strip width, in accordance with the *2010 Prince George’s County Landscape Manual*.
4. The Section 4.2 landscape schedules need to be updated on the Landscape Plan.
5. A Sign Area Table has not been provided on the Site Plan to demonstrate the maximum required sign area. The Site Plan will need to provide sign area calculations to show conformance to Part 12 of the Prince George’s County Zoning Ordinance.
6. The plant schedule on the Landscape Plan should indicate all plant materials as native or non-native.
7. The existing use of the abutting property to the east should be indicated on the Site Plan, in accordance with the uses provided in the Prince George’s County Zoning Ordinance.

AC-20004 is approved.