

Case No.: S.E. 4448

Applicant: Safeway, Inc.

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND,
SITTING AS THE DISTRICT COUNCIL

ORDER OF DENIAL

IT IS HEREBY ORDERED, after review of the administrative record and oral argument from the parties, that Application No. S.E. 4448, for a special exception for a gas station on property described as 0.63 acres of C-S-C land in the Old Forte Village Shopping Center, in the northwest quadrant of the intersection of Livingston Road and Swan Creek Road, Fort Washington, is hereby:

DENIED, for the reasons stated below, in Attachment A, which are hereby adopted as the findings of fact and conclusions of law of the District Council in this case.

ORDERED this 12th day of July, 2004, by the following vote:

In Favor: Council Members Knotts, Bland, Dean, Dernoga, Exum, Harrington,
Hendershot, and Peters

Opposed:

Abstained:

Absent: Council Member Shapiro

Vote: 8-0

COUNTY COUNCIL OF PRINCE GEORGE'S
COUNTY, MARYLAND, SITTING AS THE
DISTRICT COUNCIL FOR THAT PART OF
THE MARYLAND-WASHINGTON REGIONAL
DISTRICT IN PRINCE GEORGE'S COUNTY,
MARYLAND

BY: _____
Tony Knotts, Chairman

ATTEST:

Redis C. Floyd
Clerk of the Council

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This case concerns an application for a special exception for a gas station in Fort Washington. The application is by Safeway, a national grocery retailer. The application is opposed by area citizens and citizens associations and two gasoline retailers.
2. The subject property, in the C-S-C Zone, includes 0.63 acres of land in an existing retail center, the Old Forte Village Shopping Center. The property lies at the intersection of Livingston Road and Swan Creek Road, about 170 feet north of East Swann Creek Road. The property and shopping center have Indian Head Highway (MD 210) immediately to the east and the Tantallon residential community to the west.
3. The neighborhood for this application, as found by staff and adopted by the District Council, is bounded by Fort Washington Road to the north and west, Swan Creek Road to the south, and Indian Head Highway to the east. The neighborhood, dominated by residential development in Tantallon, is rural residential in character.
4. In the C-S-C Zone, gas stations are allowed by special exception, subject to compliance with the general requirements in § 27-317 (a) of the Zoning Ordinance and the specific gas station special exception requirements in § 27-358.
5. Section 27-317 (a) of the Zoning Ordinance contains general requirements which apply in all special exception cases. To obtain a special exception, an applicant must prove:
 - (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 Tree Conservation Plan.

6. Section 27-258 has specific dimensional (or “bulk”) and use requirements for gas stations:

- (a) A gas station may be permitted, subject to the following:
 - (1) The subject property shall have at least one hundred and fifty (150) feet of frontage on and direct vehicular access to a street with a right-of-way width of at least seventy (70) feet;
 - (2) The subject property shall be located at least three hundred (300) feet from any lot on which a school, outdoor playground, library, or hospital is located;
 - (3) The use shall not include the display and rental of cargo trailers, trucks, or similar uses, except as a Special Exception in accordance with the provisions of Section 27-417;
 - (4) The storage or junking of wrecked motor vehicles (whether capable of movement or not) is prohibited;
 - (5) Access driveways shall be not less than thirty (30) feet wide unless a lesser width is allowed for a one-way driveway by the Maryland State Highway Administration or the County Department of Public Works and Transportation

whichever is applicable, and shall be constructed in compliance with the minimum standards required by the County Road Ordinance or Maryland State Highway Administration regulations, whichever is applicable. In the case of a corner lot, a driveway may begin at a point not less than twenty (20) feet from the point of curvature (PC) of the curb return or the point of curvature of the edge of paving at an intersection without curb and gutter. A driveway may begin or end at a point not less than twelve (12) feet from the side or rear lot line of any adjoining lot;

- (6) Access driveways shall be defined by curbing;
 - (7) A sidewalk at least five (5) feet wide shall be provided in the area between the building line and the curb in those areas serving pedestrian traffic;
 - (8) Gasoline pumps and other service appliances shall be located at least twenty-five (25) feet behind the street line;
 - (9) Repair service shall be completed within forty-eight (48) hours after the vehicle is left for service. Discarded parts resulting from any work shall be removed promptly from the premises. Automotive replacement parts and accessories shall be stored either inside the main structure or in an accessory building used solely for the storage. The accessory building shall be wholly enclosed. The building shall either be constructed of brick (or another building material similar in appearance to the main structure) and placed on a permanent foundation, or it shall be entirely surrounded with screening material. Screening shall consist of a wall, fence, or sight-tight landscaping material, which shall be at least as high as the accessory building. The type of screening shall be shown on the landscape plan.
 - (10) Details on architectural elements such as elevation depictions of each facade, schedule of exterior finishes, and description of architectural character of proposed buildings shall demonstrate compatibility with existing and proposed surrounding development.
- (b) In addition to what is required by Section 27-296(c), the site plan shall show the following:

- (1) The topography of the subject lot and abutting lots (for a depth of at least fifty (50) feet);
 - (2) The location and type of trash enclosures; and
 - (3) The location of exterior vending machines or vending area.
- (c) Upon the abandonment of a gas station, the Special Exception shall terminate and all structures exclusively used in the business (including underground storage tanks), except buildings, shall be removed by the owner of the property. For the purpose of this Subsection, the term "abandonment" shall mean nonoperation as a gas station for a period of fourteen (14) months after the retail services cease.
- (d) When approving a Special Exception for a gas station, the District Council shall find that the proposed use:
- (1) Is necessary to the public in the surrounding area; and
 - (2) Will not unduly restrict the availability of land, or upset the balance of land use, in the area for other trades and commercial uses.

SUMMARY

7. In summary, the District Council finds that the applicant has not met the standard in §27-358 (d) (1), which requires proof that a proposed gas station in the C-S-C Zone will be "necessary to the public in the surrounding area." The applicant presented a flawed market analysis; it did not furnish data sufficient to prove in this record that the area surrounding its station has insufficient gasoline supplies at present.

8. Since the applicant has not proved "necess[ity]," it has also not shown harmony with the purpose of the Zoning Ordinance, § 27-317 (a) (1); conformance with applicable Zoning Ordinance requirements, § 27-317 (a) (2); absence of adverse effects

on area residents and workers, § 27-317 (a) (4); and absence of detriment to use or development of properties in the general neighborhood, § 27-317 (a) (5).

9. It is undisputed in this record that the applicant has met the special exception standard for Master Plan impairment, § 27-317 (a) (3), and that the tree conservation requirement in § 27-317 (a) (6) does not apply. It is also undisputed that the site plan shows compliance with the various dimensional (or "bulk") requirements in § 27-358.

PROOF OF "NECESS[ITY] TO THE PUBLIC"

10. The Zoning Ordinance requires every gas station special exception applicant to show by evidence that its station will serve the public in the surrounding area, the residents and workers in that area, and specifically that the station is "necessary" to serve the public in that area. This standard in retail zones has been in the Ordinance for decades, at least since the 1960s. The chief purposes of the requirement are to prevent a proliferation of stations in a single area, a land use balance test, and to avoid the closing and site abandonment of existing stations, a neighborhood quality test.

11. Proliferation of stations and neighborhood quality are tests with different meanings in different neighborhoods. Where one area may accommodate a number of stations because of nearby development and heavily traveled highways, others may not. An industrialized or commercially developed area with few nearby residences will be

treated differently, for purposes of the necessity test, from areas primarily residential in character.

12. There is no dispute in the record about neighborhood character. As the Technical Staff found, the neighborhood for this case -- the set of properties affecting and affected by the use of the subject property -- is predominantly rural residential in character. The neighborhood's primary development is residential, at suburban or rural densities. The Old Forte Village Shopping Center, in the southeast corner of the neighborhood, serves primarily this residential neighborhood and residential properties east of Indian Head Highway.

Areas outside the neighborhood may provide some retail customers, including drive-by motorists on Indian Head Highway, but the record has no data to show how many. The applicant estimated that 25% or more of its gasoline sales would come from drive-by (non-local) traffic, but one local gasoline retailer now operating a station estimates that only 1% of his customers come from outside the local area.

13. The applicant's necessity theory was presented by witness John Walker, a marketing expert. Mr. Walker estimated that 25 to 30% of the retail sales at the proposed station would come from drive-by traffic. No evidence, hard or soft, was admitted to support this assumption, crucial to Mr. Walker's analysis. Without the "capture" of drive-by motorists, the applicant's retail sales would be confined to residents of the local community, and even the applicant's analyst would concede that serving

local residents exclusively would take customers away from other gas stations in the area.

14. In addition, the market analysis submitted, exhibits 12 and 57, draws the market area for the proposed gas station to exclude one of the stations, the Friendly Market station on Old Fort Road, which clearly lies geographically close to – and immediately adjacent to -- the applicant's defined area. As the opposition argued, the Friendly station is just beyond Mr. Walker's market area boundary, and common sense would suggest that the presence of the Friendly station would affect this market area. The Walker market area has four stations, and Mr. Walker testified that the proposed Safeway station would be the fifth, which the market area needs, to provide adequate supplies. But if the Friendly station is counted, then the proposed Safeway station becomes the sixth, and is not needed.

The District Council agrees with the opposition that Mr. Walker's attempt to use an Anne Arundel County case to support his demand analysis was not proper proof, in this Prince George's County case. No proof was made that the Anne Arundel example had similarities, as to market area, number of existing stations, nearby traffic volumes, or otherwise, so that data from that case could appropriately be transferred to this one.

15. The applicant attempted to use testimony from a qualified traffic planner and engineer, Mr. Wes Guckert, to support its transient traffic theory, but the Council agrees with the opposition that this effort was a failure. Mr. Guckert had average daily

traffic volume data for the section of Indian Head Highway adjacent to the applicant's market area, data showing average traffic over 43,000 trips per day, but he had no information about the number of those trips originating or terminating in the area. (That is, he had no data about the "public" to be served by the proposed station, those motorists who live or work in the market area.) Moreover, his analysis, summarized and relied on by the Examiner, did not substantiate any better than Mr. Walker's the 25% "transient traffic capture" assumption. Both Walker and Guckert used data and calculations to support an argument that if drive-by traffic sales were 25 or some other percentage of sales, then demand in the market area exceeded supply. But neither analyst was able to say where the percentage figure came from, and no proof was entered in the record to support their assumptions.

16. The Technical Staff did not agree with Mr. Walker's analysis. Dr. Joseph Valenza, a qualified economist and market analyst with the Planning Commission staff, stated in report and testimony that the applicant's "capture" or "transient traffic" analysis had no empirical basis. That is, Dr. Valenza stated, the applicant's assumptions might seem reasonable, in some general way, but no facts of record support them. Dr. Valenza also did not agree with Mr. Walker's supply analysis, and he stated that existing stations were capable of pumping much more gasoline than Walker estimated. Staff, through Dr. Valenza, rejected Mr. Walker's analysis and determined that the applicant did not prove that the new station would be "necessary to the public in the surrounding area."

17. Mr. Walker's analysis is also flawed, as the opposition states, in its use of income levels to project gasoline sales. In short, Mr. Walker attempted to use the household incomes in the nearby Tantallon community, a relatively affluent residential area, as the basis for an opinion that there would be a higher local demand for gasoline than in other areas, or in the market area in earlier years. (Mr. Walker also used 1990 income data, carried forward by the Consumer Price Index. He had no recent neighborhood household income data.) There may be generally accepted marketing theories among gasoline retail market analysts for Mr. Walker's household income methodology. But no proof was made of that fact, if it is one, nor was it proved in this record that the household income assumption reflects actual consumption patterns, in Prince George's County generally or this market area in particular. In other words, as to the proposed station's market area, the record has no proof that a rise in neighborhood income level leads to a quantifiable increase in gasoline consumption by its residents.

The applicant used household income as a primary analytical tool while ignoring other more straightforward research methods. For example, as the opposition argued, the applicant did not attempt to study whether area residents had to spend time waiting in line for service or had to drive extra miles, compared to other County residents, to purchase gasoline. The applicant did no surveys and made no observations of local or regional consumption patterns. Again, the Walker methodology for determining area gasoline demand was flawed and unpersuasive.

18. An important gap in the Walker proof of necessity lies in his "transient capture rate" theory, which relies on facts not proved in the record. If the applicant has no evidence to show how many drive-by vehicles (from outside the market area) presently use area gas stations, and if the applicant also cannot say how many drive-by vehicles will use its proposed station, then its transient traffic theory cannot be a part of its analysis.

Another point about transient traffic is that it is largely irrelevant to the necessity inquiry. The questions to be answered are whether the proposed station will serve the public *in the surrounding area*, not the public generally, and whether the station is "necessary" to that public. The fact, even if proved, that the proposed Safeway station will derive 25 or 30 or even a higher percentage of its sales from transient traffic does not help prove that the station is necessary to the public in the surrounding area, the Tantallon community.

For this reason, the applicant's supply-and-demand approach is questionable, highly questionable, as to a market study area whose supply and demand figures are so debatable. The supply figures are debatable because the applicant's market area supply does not include the Friendly Market station, just outside Mr. Walker's defined area but less than a mile from the subject site. If the Friendly Market is included in the supply side, then the Walker analysis fails. And the Walker analysis also did not address the possibility that area stations presently are able to supply more gasoline to the public.

Similarly, the demand figures in the Walker analysis are debatable because of the assumptions about household income demand generation and transient traffic capture. As to household income, Mr. Walker did not show that this market area fits well his assumption that higher-income households generate higher demands for gasoline. Even if there is some truth to the assumption, Walker failed to show that the rise in gasoline demand is quantifiable. And as to transient traffic capture, he did not show, and Mr. Guckert did not help show, that any particular number or percentage of drive-by vehicles would use local area stations generally or the proposed Safeway station in particular.

It is one thing to use a supply-and-demand analysis where there is a substantial disparity, based on reliable data, between existing gasoline supplies and projected gasoline demand. If, for example, the proof were that area stations could supply no more than 5 million gallons per year and the area demand was clearly more than 8 million, then the applicant might have a sound basis for claiming a need in the area for an additional gasoline station. If there were a 3 million gallon gap between supply and demand, the applicant could also show that area residents and workers were forced to wait in line or travel outside the area. But it is quite another matter to claim a necessity to the public when the supply data excludes an adjacent station (the Friendly Market station) and does not quantify what increases local stations could add to supplies. The demand data is based on critical and unproved assumptions (household income and

transient traffic capture), and the difference between supply and demand is so slim (less than 2 million gallons per year, or 170,000 gallons per month) that minor alteration of the supply or demand figures will result in an excess of supply over demand.

The supply-and-demand analysis does not work, as to the necessary to the public issue, in any case where supply and demand figures are reasonably close to one another. What must be proved is not simply that demand exceeds supply: to show necessity to the public, an applicant must prove an absence of adequate supply *and* a detriment to the public. For in the absence of public detriment which results from inadequate gasoline supplies, it cannot be said that a proposed gas station is "necessary" to that public.

Viewed simply on their own, without regard to opposition evidence, the applicant's proofs and analysis of the necessary to the public issue are severely flawed, and the applicant did not meet the burden imposed in § 27-358 (d) (1). But the opposition testimony, particularly that of two gas station owners within the market area, shows plainly that the proposed station is not necessary to the public in the surrounding area.

19. Mr. Blynn Kuhstoss, owner of the Shell station within one mile of the proposed station, testified in opposition to the application. Mr. Kuhstoss testified that over the last ten years, going back to the early 1990s, his station's gasoline sales have dropped from 250,000 gallons per month to just 90,000. He added that the largest

reductions in his sales occurred after construction of the nearby Texaco and Pride of America stations. The Kuhstoss Shell station, according to the owner's undisputed testimony, is capable of adding supplies to the market area, but the demand does not exist.

Mr. Kuhstoss also estimated that only 1% of his gasoline sales are to motorists outside the local area. This witness, with direct gasoline retailing experience over many years, refuted the applicant's 25% transient traffic theory.

20. Mr. Thomas Daras, who owns the Pride of America station on Livingston Road, also testified in opposition. The Daras station sits adjacent to the Old Forte Village Shopping Center, just across the road from the proposed Safeway station, and it is the competitor station referred to by Mr. Kuhstoss. Mr. Daras pointed out that the Friendly station, within one mile of the proposed station, was just outside the boundary of the applicant's market study area but had not been included, for purposes of determining market area supply. Mr. Daras also testified that about four years earlier (before his 2003 testimony) an Exxon station within one mile of the subject site had gone out of business. That station, according to Mr. Daras, suffered a loss of business and closed after another station opened nearby.

21. The testimony of Kuhstoss and Daras indicates that there is more than enough existing and potential gasoline supplies within or right next to the market area -- the *applicant's* market area -- to meet the needs of the public in the area, for the present

and near future. This evidence also supports the Council's conclusion that the proposed Safeway station is not necessary to the public in the surrounding area.

22. Mr. Richard Krueger, a Tantallon area resident, also testified in opposition. He testified, and it was not disputed, that there are five gas stations with 44 pumps within one mile of the Old Forte Village Center. He also testified -- as an area resident with personal knowledge of the subject matter -- that there were a sufficient number of stations already in the area to meet the needs of him and his Tantallon neighbors. He also testified, as a series of anecdotal observations, that he saw only one instance, when he drove around his neighborhood to the five existing gas stations, when a customer had to wait in line before a pump became open. At this one station, in other words, one motorist had to wait for a short time to get to an open pump, and at the other four, every motorist had an open pump when she arrived.

23. Dr. Valenza, in a memorandum dated June 2, 2003, Exhibit 46, made the following observations:

Gilbarco, a manufacturer of gas dispensers, claims that their fueling positions (i.e., a gas pump) can realistically pump up to 30,000 gallons of gasoline per month. (This fact was submitted as testimony in SE-4436.) This means the existing gas stations in the applicant's market area have the equipment to pump up to 15 million gallons of gasoline per month. Gas station size and configuration along with traffic patterns may reduce the number of gallons that could be pumped, but still the capacity of the existing gas pumps is almost three times greater than the applicant's estimate of demand using the 75% and 25% capture rates. This indicates that even if the demand from the transient trips were as great

as combined demand from the residents and workers in the market area, the gas stations in the primary market area could satisfy this demand and would still have the capacity to pump additional gasoline.

Dr. Valenza concluded that the existing gas stations – and he also did not include Friendly – had the capacity to pump gasoline well in excess of the applicant's demand estimates.

EXAMINER ERRORS

24. The Examiner in her decision, filed 4 March 2004, approved the special exception application. She determined that the applicant had shown by evidence, as § 27-358 (d)(1) requires, that the proposed Safeway station is "necessary to the public in the surrounding area." Though this decision is not evidence in the record, the Council will here respond to it, lest it appear that the Examiner's decision was in some way more careful or more sound than the Council's.

25. First, though the Examiner summarizes the Maryland case law on the "necessary" standard in special exception cases, par. 26, one cannot tell from the decision what "necessary to the public in the surrounding area" in § 27-358 means in this case. The Council concludes, as the Examiner seems to suggest, that the standard in this case is a very high one, requiring proof of actual public necessity for, or public detriment in the absence of, the proposed station. That is, the applicant is required to prove, as this one certainly did not, that the public in the surrounding area will in some way be disadvantaged, unless the proposed station is constructed and opened.

26. In addition, as a general matter, one cannot tell from the Examiner's "Necessity" findings and conclusions, par. 26 - 35, how it was decided that this applicant proved that its proposed station is necessary to the public in the surrounding area. That is, there is no articulation of the reasoning which leads from the evidence to the conclusion.

The testimony of various witnesses is summarized, par. 27 - 34, and then the Examiner concludes, par. 35, that the applicant met its burden of proof. No explanation is given for the unstated Examiner conclusion that the applicant's demand figures have an empirical basis, nor does the Examiner even discuss, let alone refute, the Kuhstoss and Daras testimony, which came from gas station owners with extensive personal knowledge of the very market area under consideration. It was not disputed (reasonably, as a factual matter) that the market area has five stations, not four, as the applicant argued; it was not disputed that Kuhstoss station sales have dropped precipitously in the last decade, even without the proposed Safeway station; and it could not be disputed that the five existing stations at full supply would by themselves meet the projected market area demand (even with the applicant's transient traffic capture theory, to increase its demand figures), without the applicant's new station.

Even if what the Examiner states in par. 26 - 35 might reasonably be supported by record evidence, those paragraphs do not explain how the evidence leads to a finding under § 27-358 (d) (1) favorable to the applicant.

27. But the statements in par. 26 - 35 are not at all well grounded in the evidence of record. The Examiner's findings and conclusions rely on unstated assumptions, they misstate (or misleadingly state) in at least one instance the testimony of a key witness, and they ignore contrary evidence in the record, evidence which the Examiner neither states nor refutes.

First, it is not accurate to suggest, as the Examiner does, that Dr. Valenza's testimony supported the applicant's case on necessity. The chief problem Dr. Valenza identified was the absence of data to support the applicant's transient traffic capture conclusions, and this flaw is fatal to the applicant's analysis. He also pointed out that local stations could supply much more gasoline than the applicant assumed. But the Examiner erroneously summarizes the Valenza testimony in a way which would indicate that his analysis and the applicant's data combine to yield a necessity finding favorable to the applicant.

Second, in the paragraphs following the misleading summary of Dr. Valenza's testimony, the Examiner tries but fails to cite record evidence in favor of the transient traffic capture theory. Par. 31-34. As noted above, neither Mr. Walker nor Mr. Guckert, qualified experts though they may be, had evidence to support any particular capture rate, within the market area generally or at the Safeway site in particular. Both assumed -- without proof -- that a 25% or 30% capture rate was reasonable.

Third, the average daily traffic figures given in par. 31, figures supplied by

Mr. Guckert, are not connected to the rest of the analysis. It is not explained how these figures constitute a factor leading to the conclusion that the proposed station is necessary to the public in the surrounding area.

Fourth, the 25% and 1.5 million gallon numbers at the beginning of par. 32 are assumptions, not proved facts, but the Examiner does not make that clear, or even acknowledge it. The 25% assumption is critical to the rest of the analysis in that paragraph, as is the 1.5 million gallon assumption. The 25% figure is suggested by the applicant as a reasonable figure for looking at a portion of market area demand, as to transient traffic. The 1.5 million gallon figure is based on an assumed demand of 6 million gallons, an assumption again relying on the transient traffic capture assumption. In short, the 1.5 million gallon demand number in par. 32 is founded entirely on applicant assumptions, not data proved in the record. And without the 1.5 million gallon number, the rest of the analysis in par. 32 is unsupported.

Fifth, the "80%/30%" conclusion in par. 33 is not at all supported by the Examiner's summary of facts about the Safeway Store and the Old Forte Village Shopping Center, and it is refuted by evidence from Dr. Valenza. There is no numerical analysis to show that the large size of the shopping center or the variety of services and products offered by Safeway leads to any particular capture rate. Indeed these facts do not show that even one local or transient trip would be "captured" by the new Safeway station.

Sixth, a rise in demand for gasoline in the sales area in the last several years, as stated in par. 34, does not show necessity for another gas station. That is, the fact that sales have risen 20% in the last six or seven years, since 1997, has no logical bearing by itself on the necessity inquiry. At best it is a factor to consider, together with other data. If sales in 1997 were substantially below the potential sales capacity of existing stations, then a 20% sales increase would not indicate a necessity for another station. A decrease in sales might indicate no necessity for a new station, but an increase does not show that a new station is needed.

Seventh, though the Examiner concedes in par. 35 that a capture rate is "admittedly difficult to quantify," she does not acknowledge, as the record shows, that there is actually no record evidence at all to support the 30% figure which she finds "reasonable." Thus the additional demand of 1.4 million gallons, the applicant's projection, also has no evidentiary support.

Eighth, as noted above, the question the Examiner should be addressing is necessity of a new gas station to the surrounding area public, not supply, capacity, transient traffic, capture, and demand. Even if it is true that there will be an additional demand of 1.4 million gallons per year in the future, as the applicant argued, it does not follow that the existing stations cannot meet that demand, nor does it follow that the public will suffer in any way from the absence of a new station.

Ninth, as noted above, testimony from station owners Kuhstoss and Daras and from area resident Krueger contained substantial evidence contrary to the applicant's presentation. But the Examiner neither acknowledged nor refuted their testimony, to the effect that existing gas stations within one mile of the subject site could supply all gasoline needed in the area, for the present.

Tenth, the Examiner did not recognize the substantial evidence submitted by Dr. Valenza, particularly in his June 2 memorandum, Exhibit 46, evidence which tended to show that a new station was not necessary in the market area.

The Examiner's necessity analysis in par. 26 - 35 is a mere summary of the applicant's case, without more. Even without the opposition evidence, the applicant did not meet the burden of proof under § 27-358 (d) (1). And the staff and the opposition presented substantial additional evidence to show that the proposed gas station is not necessary to the public in the surrounding area.

OTHER ZONING ORDINANCE REQUIREMENTS

28. Section 27-317 (a) (1): This section requires proof of harmony with Zoning Ordinance purposes. Because this applicant could not and did not show that the proposed gas station is necessary to the public in the surrounding area, its use is not in harmony with Zoning Ordinance purposes. Gas stations are not intended for any retail commercial zone anywhere, and, as here, approval of a gas station where it is not

necessary to the public in the surrounding area does not accord with the purposes of the Ordinance.

29. Section 27-317 (a) (2): This section requires a demonstration of compliance with Zoning Ordinance requirements. Because the proposed special exception use, the gas station, is not necessary to the public in the surrounding area (or, has not been proved to be necessary), the use does not meet a central Zoning Ordinance requirement.

30. Section 27-317 (a) (4): This section requires proof that a proposed special exception use will not adversely affect the “health, safety, or welfare” of area residents or workers. Because approval of the proposed gas station will lead to a proliferation of stations, an excess number, in the area surrounding the subject property, and because it is presumed in the Ordinance that an oversupply of gasoline outlets in an area will cause adverse effects – noise, traffic congestion, safety hazards, odors, unpleasant visual effects, and the like – which are inconsistent with the health, safety, and welfare of area residents and workers, the applicant did not meet this requirement.

31. Section 27-317 (a) (5): This section calls for proof that a proposed special exception use will not be detrimental to the use or development of adjacent properties or the general neighborhood. Under the Zoning Ordinance, it is presumed that a gas station which is not necessary to the surrounding area public will be a burden on nearby properties and will be a detriment to area development. Approval of too many

new stations may lead to abandonment of old ones, for example. This applicant did not meet the requirements of § 27-317 (a) (5).

CONCLUSION

32. Because the applicant did not prove that the proposed gas station is necessary to the public in the surrounding area, as required by Section 27-358 (d) (1); because the station will be located in a predominantly rural area and will be inconsistent with sound development of that area; because the applicant did not (except for subsections (a) (3) and (a) (6)) meet the general Zoning Ordinance special exception requirements in § 27-317 (a); and for the reasons stated by the Technical Staff, in its report and in memoranda in the record, the District Council must deny Application No. S.E. 4448.