

Case No. S.E. 4477

Applicant: WaWa Inc.

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

ZONING ORDINANCE NO. 31 - 2008

AN ORDINANCE TO APPROVE A SPECIAL EXCEPTION,
WITH CONDITIONS, AFTER REMAND

WHEREAS, Application No. S.E. 4477 was filed for approval of a special exception for a gas station on property described as approximately 2.758 acres of land in the C-S-C Zone, in the southwest quadrant of the intersection of Baltimore Avenue (U.S. Route 1) and Rhode Island Avenue, in Beltsville; and

WHEREAS, on 10 February 2005, the Zoning Hearing Examiner issued a decision, Attachment D, approving the application, with conditions; and

WHEREAS, on 20 July 2005, the District Council approved Zoning Ordinance No. 7-2005, Attachment C, affirming the Examiner's decision and approving S.E. 4477, with conditions; and

WHEREAS, on 14 January 2008, the Circuit Court for Prince George's County entered an order remanding S.E. 4477 to the District Council to restate its findings and conclusions that the proposed gas station will be "necessary to the public in the surrounding area," as provided in § 27-358 (d) (1) of the Zoning Ordinance; and

WHEREAS, after remand, the Examiner on 2 July 2008 issued a second decision, Attachment B, approving S.E. 4477, with conditions and with additional findings and conclusions to demonstrate why the applicant meets the "necessary to the public" standard in § 27-358 (d) (1); and

WHEREAS, after receiving argument from the parties, the District Council has determined that S.E. 4477 should again be approved, with conditions, as recommended by the Examiner in the July 2008 decision; and

WHEREAS, as the basis for this action, the Council adopts its original decision of 20 July 2005, Attachment C, and the Examiner's decision after remand, filed 2 July 2008, Attachment B, as stated and supplemented in Attachment A, with all attachments incorporated herein; and

WHEREAS, to protect the neighborhood and adjacent properties, Application No. S.E. 4477 is reapproved with conditions.

NOW, THEREFORE, BE IT ORDAINED AND ENACTED:

Section 1. The Zoning Map for the Maryland-Washington Regional District in Prince George's County, Maryland is hereby amended to show a special exception, with conditions, on the property that is the subject of Application No. S.E. 4477. All development on the property shall meet the conditions stated below and conform to the final site plan filed in the record.

Section 2. Application No. S.E. 4477 is approved with the following conditions:

1. Before issuance of permits, the Special Exception site plan shall be amended, as follows:
 - a. The sloping height of the canopy should be shown as 22 feet, not 26.
 - b. Freestanding signs shall be monument style, with brick base, for both the Baltimore Avenue and Rhode Island Avenue entrances. Each sign base shall be of the same brick material as is used for the building. The monument signs shall be placed at or above the grade of the adjoining roadbed, shall stand no more than 6 feet high, and shall have facing with area no greater than 60 square feet.
2. No alcoholic beverages may be sold on the property.

3. Prior to the issuance of permits, the Applicant shall revise the Special Exception site plan, as follows:
 - a. Architectural elevations shall be submitted, to show design consistency with the Beltsville community generally, and specifically with the architectural style of the Beltsville Agricultural Research Center. The Examiner shall review this evidence, and approve or disapprove it, and the District Council shall have the right to review the elevations.
 - b. A Note shall be added to state the following: All proposed light fixtures shall be designed to meet "full cut-off" standards, as established by the Illuminating Engineering Society of North America (IESNA), to prevent emanation of direct light from the site.
 - c. A Note shall be added to state the following: The amplified sound system, required by the Maryland Department of the Environment, may be used only for emergencies and for communication between cashiers and gasoline pump patrons. The amplified sound system may not carry commercial announcements or broadcast music on the site.
4. An updated traffic impact analysis shall be submitted, for review by the District Council or its designee. If improvements for adjacent or nearby traffic facilities are necessary to reach Level of Service D, then the applicant shall construct the specific street or traffic improvements, or it shall enter into an appropriate agreement or funding arrangement, acceptable to the District Council or its designee, to commit to payment for a pro-rata share of the necessary facilities.

ORDERED this 17th day of November, 2008, by the following vote:

In Favor: Council Members Dean, Bland, Campos, Dernoga, Exum, Harrison, Knotts,
Olson, and Turner

Opposed:

Abstained:

Absent:

Vote: 9-0

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 _____
Samuel H. Dean, Chairman

ATTEST:

Redis C. Floyd
Clerk of the Council

ATTACHMENT A
FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The following are the findings and conclusions of the District Council for its decision, after remand, approving application No. S.E. 4477.

A. Council Decision of 20 July 2005: The District Council readopts the decision it made for this case in Zoning Ordinance No. 7-2005. Attachment C. There the Council concluded that the S.E. 4477 applicant had met the requirements in Zoning Ordinance §§ 27-317 and 27-358 for a special exception for a gas station.

B. Examiner Decision of 2 July 2008: The District Council agrees with the conclusions reached by the Zoning Hearing Examiner in the second decision filed for this case, on 2 July 2008. As the Examiner explains, the proper standard for application of the “necessary to the public in the surrounding area” provision in § 27-358 (d) (1) is, in essence, whether the proposed gas station – on the subject property in that neighborhood, for the motoring public in that area – is “convenient, useful, appropriate, suitable, proper, or conducive” to providing fuel for automobiles. In this case, the applicant met the standard by defining a reasonable market area; demonstrating the approximate number of residents and workers to be served, and accounting for vehicles passing through the area; showing the total gasoline volumes being pumped by existing stations; and, ultimately proving on the record that there is unmet demand for fuel in the defined market area. The applicant made a reasonable case on this record, certainly sufficient to meet its burden of production.

C. Opposition Proofs and Argument: The record made by the opposition did not refute the applicant's proofs by evidence. The opposition argued only that the applicant's case was insufficient; it did not have expert testimony or analysis of its own.

The opposition – particularly Mr. Anvari, whose station is far north of the subject property, and who will not be able to see the proposed station from his property, after it is built – relies on dictum in *Brandywine Enterprises, Inc. v. County Council*, 117 Md.App. 525, 700 A.2d 1216 (1997), which concerned the necessity standard for rubble fill special exceptions. *Brandywine* suggests that the rubble fill ordinance there required proof that a new facility would be “necessary,” rather than “reasonably convenient or useful.”

The purposes of the two ordinances, for rubble fills and for gas stations, are not entirely similar. For rubble fills, the District Council has imposed a strict standard, “necessary to serve the projected growth in Prince George’s County,” because rubble fill facilities consume large land areas and leave those areas less able to sustain later development. Before the Council approves a rubble fill, it requires proof that the new disposal facilities are necessary to serve County growth, directly or indirectly. But for gas stations, the District Council’s chief concern is the prevention of station proliferation in one area, to the detriment of other businesses and other uses. Another legislative concern is that an over supply of stations in one area of the County may lead to failure and abandonment of stations in that area.

At Oral Argument, counsel for the opposition and counsel for the applicant agreed that *Brandywine* was too strict and that the standard in *Baltimore County Licensed Beverage Assoc., Inc. v. Kwon*, 135 Md.App. 178, 761 A.2d 1027 (2000), was too lenient. The Council believes that the standard cannot be the strict rubble fill “necessity.” However, the Council believes that the Examiner has properly identified the standard as being whether the

proposed gas station – on the subject property in that neighborhood, for the motoring public in that area – is “convenient, useful, appropriate, suitable, proper, or conducive.”

In this case, the opposition whose interest appears to reflect a motive to prevent the opening of a competitor gas station, rather than, for example, to balance land uses, prevent traffic congestion, or promote quality growth in the Route 1 corridor – did not present data or expert testimony to answer the applicant’s case. The opposition relies on arguments that the Zoning Ordinance requires strict necessity, not reasonable convenience or usefulness. The Council does not agree with that reading of § 27-358 (d) (1). Moreover, the opposition did not prove by evidence that the applicant’s market area is unreasonably or inaccurately defined or that the applicant’s demand estimates are wrong. The applicant gave full proofs on all issues concerning the necessity standard, and the opposition did not.

The District Council agrees with the opposition that Route 1 is already served by a number of gas stations in the applicant’s market area. As the technical staff memoranda in the record indicate, it is possible for existing stations, by increasing the amount of gasoline dispersed from the pumps they now have, to meet all demand stated in the applicant’s reports. In a similar case where existing stations could readily meet new fuel demand from the public, the technical staff’s analysis would be appropriate, and a new station would not be permitted. But here, on this record, with a full set of proofs from the applicant and a failure of proof by the opposition, the District Council must conclude that the applicant has met its burden.

Further, at Oral Argument, counsel for the opposition acknowledged that in ascertaining whether the application demonstrates “whether the proposed gas station – on the subject property in that neighborhood, for the motoring public in that area – is “convenient, useful, appropriate, suitable, proper, or conducive,” the facts include the

testimony of community residents as to their view of the “convenience,” “usefulness,” “appropriateness,” and “suitability” of the proposal. In this case, there is substantial evidence from community residents supporting the application. A number of local employers also provided evidence in support. This evidence suggests that the current stations do not provide the level of service desired by the community. The Council finds compelling this evidence of “convenience,” “usefulness,” “appropriateness,” and “suitability.”

The District Council does not agree that this case presents a factual setting or market similar to the one presented in S.E. 4436, as the opposition suggests. The opposition argues that the Council there, for a proposed station at Allentown Road and Branch Avenue, used a strict “necessary” standard, in denying that gas station special exception. But that application was not at all similar to the present one: the market data and analysis were quite different, there was more than one gas station a short distance from the subject property, on Allentown Road, that had excess capacity, and the proposed station was not in keeping with Council policies for new commercial development in the Branch Avenue corridor at that time.

For all of the reasons stated in the Council’s first decision, Attachment C, the Examiner’s decisions, Attachments B and D, and as restated above, the District Council concludes that Application No. S. E. 4477 should be approved.