

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

SPECIAL EXCEPTION

4673

ON REMAND

DECISION

Application:	Vehicle Parts or Tire Store with Installation Facilities and a Parking Lot located in a Residential Zone Serving a Use in a Commercial Zone
Applicant:	Africa Women's Health & Social Empowerment Assoc., LLC/The Tire Depot
Opposition:	None
Hearing Date:	September 21, 2011
Hearing Examiner:	Maurene Epps Webb
Disposition:	Approval with Condition

NATURE OF REQUEST

(1) Special Exception 4673 is a request for permission to use approximately 0.3049 acre of land (10,641 square feet) in the C-S-C (Commercial Shopping Center) Zone and R-55 (One-Family Detached Residential) Zone for a Vehicle Parts or Tire Store with installation facilities and to locate a parking lot for said use on residentially-zoned land. (There is a companion case – DDS -597 - that was not heard by this Examiner.) The subject property is located at the intersection of Scott Key Drive and Foster Street, east of Marlboro Pike, and is identified as 6208 Marlboro Pike, District Heights, Maryland.

(2) The Technical Staff, Planning Board, and the City of District Heights recommended approval with conditions at the initial hearing of the request, and this Examiner approved the Application.¹

(3) The District Council remanded the Application for the reasons noted below. No one appeared in opposition at the remand hearing held by this Examiner. At the conclusion of the hearing the record was left open to allow certain amendments to the Site Plan and to include the Planning Board's decision on the accompanying Departure case. (R. 34-35) The last of these items was received on October 28, 2011. Since the Planning Board decision referenced a revised Staff Report I included the latter in the record on November 7, 2011, and the record was closed at that time.

¹ The entire record of the prior proceeding in SE-4673 and the transcript thereof are adopted by reference and incorporated herein. Any reference to exhibits in the remand hearing will be prefaced by "R" to differentiate them from those admitted in the initial hearing. The transcript of the remand hearing will be prefaced by "Rem".

FINDINGS OF FACT

(1) The District Council's order of remand held, in pertinent part, as follows:

IT IS HEREBY ORDERED, after review of the administrative record, that Application No. S.E. 4673, for a special exception for a vehicle parts or tire store with installation facilities and a parking lot for the store in the R-55 Zone is:

REMANDED to the Zoning Hearing Examiner, to address the following issues, with additional evidence from staff and applicant.

1. The Examiner shall receive evidence and advise the District Council about the proposed use of the second floor of the building as a meeting place or auditorium. The applicant shall state to the Examiner and Council how the second floor is to be used, including all planned uses, and how those uses relate to the store on the first floor.

2. In her decision, the Examiner shall state whether all of the applicant's planned uses are permitted in the zone (C-S-C or R-55) and whether all planned and permitted uses will be compatible with the tire store use that is the subject of the application.

3. The Examiner shall also discuss the relationship, if any, between the location and use of the applicant's loading space and the uses planned for the second floor of the building.

4. The Examiner shall also advise whether the number and location of the parking spaces proposed by the applicant will be adequate for planned uses of the first and second floors of the building. Applicant and staff shall state in the record whether the number of spaces the applicant will provide are deemed to comply with current requirements because of grandfathering, i.e. because of prior uses of the subject property.

5. Applicant and staff shall respond to these questions:

(1) Is auditorium (social hall) use permitted on a special exception site used for a vehicle parts or tire store with installation?

(2) Is auditorium (social hall) use permitted on a special exception site used for a vehicle parts or tire store with installation that has an interior loading space?

(3) Will these uses adversely affect the health, safety or welfare of residents or workers in the area?

(4) Is parking adequate for vehicle parts or tire store with installation or in conjunction with the auditorium?

(a) Are 55 parking spaces grandfathered for the fire station and auditorium *public use* also grandfathered for their *proposed private use* vehicle parts or tire store with installation?

6. If any persons of record, or any person who wishes to become a person of record, wish to supplement the record on any issue concerning the proposed vehicle parts and tire store, with installation and adjacent parking, then the Examiner shall receive the additional evidence or argument and review it for the District Council.

(2) Mark Ferguson, accepted as an expert in the area of land use planning, testified at the remand hearing. He explained that the boundaries of the Special Exception for the Vehicle Parts and Tire Store were revised and limited to the first floor of the building

that formerly housed the fire station – a total of 4,849 square feet.² (Exhibit R-11(b)); Rem. T 4-5) He described the other changes made to the Site Plan in response to the Order of Remand:

BRUCE-WATSON - OK. Since the second floor is not part of the Applicant's Special Exception request, in your opinion is it subject to the Findings contained in Sec. 27-317 of the Zoning Ordinance?

FERGUSON - I believe that the Findings are directly applicable to the proposed Special Exception use and area, and it would only be applicable to the extent that the use would impact adversely the health, safety and welfare of that use as it would the surrounding general neighborhood.

BRUCE-WATSON - OK. Have changes been made to the Site Plan in response to issues raised by ...[the] Remand Order?

FERGUSON - We have made some minor changes to the Applicant's Site Plan – to some of the notes and to the parking schedule.... The principal [change] is to remove any reference to a social hall as a future use, which might occupy the second floor, and what we will propose at this time on the Special Exception Site Plan is office use for the second floor, which would have a much lower parking demand and no loading space demand.... [A]n office use is a permitted use in the C-S-C Zone....

The first order of the District Council was to direct the Examiner to receive evidence and advise the District Council about the proposed use of the second floor as a meeting place or auditorium. So, that meeting place use is no longer being proposed. So, the Applicant shall state to the Examiner and Council how the second floor is to be used as we note by office and how those uses relate to the store on the first floor. The second floor uses ... have been used previously as offices for the Fire Department on the northwestern part of the building as a social hall and finally as a dormitory for the firemen. They were sort of living quarters as well as a social hall, as well as offices, in the past. So, we're simply extending a prior use of offices now throughout the second floor.

The second direction from the District Council was to require the Examiner to state in her decision whether all of applicant's planned uses are permitted in the zone, whether C-S-C or R-55, and whether all planned and permitted uses will be compatible with the tire store use that is the subject of the application. As I mentioned before, offices are a permitted use in the C-S-C Zone in which they will be located. The use which is proposed for the R-55 Zone is for parking for an adjacent commercial use and that, of course, is permitted by Special Exception, which has been requested as part of this Application.

² The second floor consisting of 5,320 square feet, and 472 square feet of the ground floor used to access the second floor, were removed from the boundaries of the Special Exception.

And then the final question is one of compatibility. The tire store is a ... commercial use. I would say the installation character, which is before you, is more of a service use, which is presumably why the District Council would have changed the requirement to a Special Exception. But certainly with regards to the store use, offices and stores are ordinarily compatible – both are permitted uses in the C-S-C Zone.

The third order of the Council was that the Examiner should discuss the relationship, if any, between the location and use of the Applicant's loading space and the uses planned for the second floor of the building. The loading space had originally been proposed in an old incarnation of the plan as an exterior space to be located on the surface lot in the R-55 portion of the site.... [After a discussion with Staff], it was deemed more appropriate that the loading space be moved inside the building and then the nature of the Departure for Design Standards ... was revised to address the fact that the loading space is not tall enough for the Code requirement for a space that's located inside the building.... In this case, the use of that space will be an order of magnitude less frequent than the fire use and, of course, there won't be dwelling space above it, so the impact of that loading space will be minimal....

(Rem. T. 5-8)

(3) As discussed at the prior hearing, the R-55 zoned portion of the site is paved and has nine (9) existing parking spaces. (Exhibits R-11(b) and R-12) There is also one (1) handicapped space on the C-S-C zoned portion of the site on the northwestern corner of the site. Staff and Mr. Ferguson testified that 33 spaces are required; 15 for the instant use and 18 for some "nebulous" office use proposed on the second floor. (Rem. T. 22) The former fire station and associated banquet hall were constructed prior to any requirement in the Zoning Ordinance concerning parking, but 11 spaces were constructed since that period. (R-13) Accordingly Staff opines that parking on site is essentially "grandfathered" at the 45 spaces that are currently required of a fire station with banquet facilities minus the 11 existing spaces placed on the site prior to 1970 (a total of 34 spaces). Applicant believes it should be allowed to "grandfather the ten (10) spaces there now ³ plus the 45, for a total of 55 spaces. (Rem. T. 23) This discussion is not particularly germane to the instant requests but will become an issue when, and if, the second floor of the building is occupied. However, this Examiner agrees with Staff that the "grandfathered" spaces total 45, and ten (10) of these actually exist on site.

(4) Finally, Mr. Ferguson opined that it would be permissible under the Zoning Ordinance to locate an additional permitted use within the building especially where the Special Exception use is confined to a portion of the site. (Rem. T. 17) Moreover, any permitted use that occupies the second floor would have its own, separate entrances – one in the front of the building from Marlboro Pike and the other off of the alley. (Rem. T. 17-18)

³ One (1) of the 11 existing spaces will be removed by Applicant in order to provide one (1) handicap space. (Rem. T. 34)

(5) Mr. Martin Achu, an owner of the property, testified that bulk delivery of tires on site occurs approximately every 4-6 weeks, although occasional delivery by an individual or tow truck occurs more often. (Rem. T. 25) He noted that the parking lot has never been full during the time that he has operated a tire store on the property, and that anyone delivering tires is there less than 30 minutes. Finally, although disappointed that he cannot use the upstairs for a social hall, he is “willing to do anything [he is] told to do or not do on that property.” (Rem. T. 27)

Agency and City Comments

(6) An inspector with the Department of Environmental Resources, Ronald Shane, testified as “staff” and not in opposition to the request. He wanted Applicant to ensure that an illegal shed on site will be removed, and that there will be no trailer parked on site to store tires. (Rem. T. 30-34)

(7) The Technical Staff submitted a revised Staff Report that addressed the issues remanded to it. (R-13) It continues to recommend approval of the Applications and the DDS.

(8) The City of District Heights sent a representative to the hearing who testified that the City is in favor of the request so long as Applicant complies with the law and the Site Plan submitted to the City. (Rem. T. 29)

(9) The Applicant also requested a Departure from Design Standards (DDS-597) to permit the requisite loading space to be located within 40 feet of residentially-zoned property, to be located in the interior of the facilities, and to reduce the height requirement for the internal loading area. The Planning Board approved the request. (Exhibit R-12) While the Special Exception is not strictly before it, the Planning Board did note that its recommendation of approval of that request has not changed, reasoning as follows:

With the proposed change in use for the second floor of the building ..., the Planning Board’s recommendation remains unchanged The Planning Board found that the proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area. In fact, the applicant’s proposal will improve the existing pedestrian and vehicle access at the intersection of Scott Key Drive and Marlboro Pike (MD 725). Currently, the Scott Key Drive intersection is offset from Marlboro Pike with no curb or sidewalk on Scott Key Drive. Specifically, the applicant’s proposal would extend curb and gutter from Foster Street down to Marlboro Pike. This new design will channelize traffic flow to a single, defined access point onto Marlboro Pike. The applicant is also proposing to extend the sidewalk down the new curb to provide a safe pedestrian connection from Foster Street down to Marlboro Pike. The applicant will cut back the existing guardrail on Marlboro Pike to allow for a wider and non-obstructed sidewalk area....[T]he applicant is proposing additional landscaping along the 111 feet of frontage of the rear parking lot to buffer the residential uses across Foster Street. Additional plant units are proposed to be incorporated along the west side of the building to further

breakup and soften the views of the existing concrete building. With the incorporation of the [above] ... , the overall appearance and safety of the property is significantly improved for the benefit of residents or workers in the area.

(Exhibit R-12, pp. 9-10)

LAW APPLICABLE

(1) A Vehicle Parts and Tire Store with Installation and a Parking Lot in a Residential Zone serving a Use in an adjacent Commercial Zone are permitted as Special Exception uses, respectively, in the C-S-C and R-55 Zones in accordance with Sections 27-317(a), 27-392 and 27-417.01 of the Zoning Ordinance.

(2) Section 27-317(a) provides 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.

(3) Section 27-392(a) of the Zoning Ordinance governs the request for a parking lot on residentially zoned property to serve a use in an adjacent commercial zone. This Section provides as follows:

(a) A parking lot which serves a use in an adjacent commercial or industrial zone may be permitted, subject to the following:

- (1) The land proposed for the lot shall either immediately adjoin, or be directly across the street from, the commercially or industrially zoned land to be served;
- (2) The parking lot shall contain not more than one hundred (100) parking spaces, or twenty percent (20%) of the minimum number of spaces required by Part 11, whichever is less;
- (3) The parking lot shall be necessary in order to comply with the minimum requirements of Part 11; and
- (4) The District Council may require additional landscaping and screening to protect adjacent properties against intrusion.

(4) Section 27-417.01 provides as follows:

(a) A vehicle parts and tire store, including installation facilities, may be permitted, subject to the following:

- (1) All sales and installation operations shall be conducted within a wholly enclosed building, with no outdoor storage;
- (2) Installation activity on any motor vehicle shall be completed within forty-eight (48) hours or less. No vehicle may be stored on the property for longer than this period; and
- (3) The demolition or junking of motor vehicles is prohibited.

(5) 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) As noted, *supra*, the District Council asked that this Examiner review additional information when it remanded the requests. After review, I adopt the conclusions of law made in SE-4673, as amended by the following additional conclusions.

(2) Applicant revised its Application to delete the second floor of the building from its request. That floor has its own entrances and Applicant has proffered and amended its Site Plan to reflect, that it will be developed in the future with an office use, not as a meeting place or auditorium. The future use will be one permitted in the C-S-C Zone, as is the requested Vehicle Parts or Tire Store with Installation. Accordingly, the District Council has made a legislative presumption that the uses are compatible.

(3) Section 27-578 of the Zoning Ordinance permits interior loading spaces but requires certain height and setback dimensions. Applicant requested, and the Planning Board approved, a reduction in the height and setback requirements. (R-14). In doing

so, the Planning Board noted that “having an interior loading space located in the same building with a tire installation facility is necessary in order to alleviate circumstances that are unique to the site.” (R-14, p. 9) There is access to the second floor near, but not through, the loading space. Given the minimal use of the loading space, and the need for an interior loading space, I can find that it will not negatively impact a permitted use of the second floor.

(4) The revised Site Plan raised concerns for me in approving the accompanying Special Exception for the Parking Lot. Section 27-392(a) provides that the parking lot must be necessary to serve a use in an adjacent commercial zone. This implies that the approving body is aware of the use that is to be served and believes the parking would be necessary for said use. Since the only use before me is the Vehicle Parts or Tire Store with Installation, I find that the Parking Lot can be approved but solely for the Vehicle Parts or Tire Store with Installation. My decision is bolstered by the fact that there are only nine (9) spaces in this parking lot. The parking regulations in the Zoning Ordinance do grant Applicant a “grandfathering” of the number of parking spaces that would be required on site for a fire station with an associated social hall (45 spaces). However, that language has to be read in conjunction with the special exception language which includes a finding that the parking not adversely impact the health, safety or welfare of residents/workers in the area. Nine (9) spaces will work for the Special Exception Use – but I have no idea what any other use may be and whether those few spaces divided between two uses would harm the surrounding residents/workers. Accordingly, any use of the second floor will have to secure parking somewhere other than the parking lot approved herein.

DISPOSITION

Special Exception 4673 is APPROVED, subject to the following condition:

1. Prior to the issuance of a Use and Occupancy Permit Applicant shall revise the Special Exception Site and Landscape Plan to include a Note that states that the parking lot is approved to serve the Vehicle Parts or Tire Store with Installation Facilities only, and the Revised Special Exception Site and Landscape Plan shall be submitted to the Office of the Zoning Hearing Examiner for approval and inclusion in the record.

(Note: The Special Exception Site and Landscape Plan is Exhibit R-11(b))