

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

SPECIAL EXCEPTION

4686

AND

ALTERNATIVE COMPLIANCE

AC-11028

DECISION

Application:	Expansion of Nonconforming Use (Eating and Drinking Establishment) and Alternative Compliance (AC-11028)
Applicant:	McDonald's Corp.
Opposition:	None
Hearing Date:	May 15, 2012
Hearing Examiner:	Maurene Epps Webb
Disposition:	Approval with Conditions

NATURE OF PROCEEDINGS

(1) Special Exception 4686 is a request for permission to expand an Eating or Drinking Establishment (formerly called Fast Food Restaurant) on approximately 1.07 acres of land in the C-S-C (Commercial Shopping Center) Zone, and to approve alternative compliance to a provision of the Landscape Manual. The property is located on the north side of University Boulevard, approximately 375 feet west of 24th Avenue, and identified as 2306 University Boulevard, Hyattsville, Maryland.

(2) There is no opposition to the Application. The Technical Staff and Planning Board recommended approval with the same three conditions. (Exhibits 13 & 29)

(3) At the close of the hearing, the record was left open to allow Applicant the opportunity to submit a Letter of Exemption from the Woodland Conservation Ordinance and copies of the Use and Occupancy permits issued for the site. (Exhibits 37(a)- (b) and 38 (a) – (d)). The Technical Staff was also allowed an opportunity to review the revised site plans. (Exhibit 39(a)) The last of these items was received on July 24, 2012, and the record was closed at that time.

FINDINGS OF FACT

(1) The subject property is an irregularly shaped lot which is improved with an existing 4,000 square foot McDonald's restaurant. Access to the subject property is from University

Boulevard via two (2) driveways. The existing McDonald's Restaurant has been on site since 1960-1961 and became a nonconforming use due to changes in the Zoning Ordinance. (Exhibit 13)

(2) The District Council approved Special Exception 3527 for an expansion of the existing McDonald's in 1984, and two (2) other Special Exceptions for a play area. Subsequent to this approval the District Council amended the Zoning Ordinance, changed the use to an "Eating or Drinking Establishment" and permitted it by right in the C-S-C Zone. However, a footnote was added that requires the instant Application. (See, Prince George's County Zoning Ordinance, Section 27- 461(b), Fn. 24, which provides in pertinent part as follows: "Any fast-food restaurant operating pursuant to an approved Special Exception as of the effective date of CB-49-2005 shall remain valid, be considered a legal use, and shall not be deemed a nonconforming use. Such fast food restaurants and their underlying special exceptions may be modified pursuant to the existing provisions relating to revisions or amendments to special exceptions generally and fast-food restaurants specifically as they exist in the Zoning Ordinance.")

Neighborhood/Surrounding Use

(3) The neighborhood is bounded on the northwest by a Potomac Electric Power Company ("PEPCO") transmission line, on the east by the Northwest Branch, and on the south by University Boulevard.

(4) The subject property is surrounded by the following uses:

- North - A shopping center in the C-S-C Zone and a PEPCO transmission line in the O-S Zone
- South - Across University Boulevard is a gas station, convenience store and Laundromat in the C-S-C Zone
- East - A shopping center in the C-S-C Zone
- West - A gas station in the C-S-C Zone

Master Plan and Sectional Map Amendment

(5) The subject property is located in an area identified in the 2002 General Plan as the Developed Tier and the proposed development is in conformance with the applicable policies of the Developed Tier. The Application is in conformance with the land use recommendations for retail commercial land uses set forth in the 1990 Master Plan for Langley Park-College Park-Greenbelt and Vicinity and Sectional Map Amendment for Planning Areas 65, 66 and 67. The Sectional Map Amendment retained the C-S-C Zone for the subject property.

(6) The subject property is not located within a Chesapeake Bay Critical Area Overlay Zone, nor within a 100- year floodplain. The property is exempt from the requirements of the Woodland and Wildlife Habitat Conservation Ordinance because there are no previously approved tree conservation plans for the site and because the property contains less than 10,000 square feet of woodland on-site. (Exhibit 37(b))

Applicant's Proposal

(7) The Applicant is proposing to raze the existing structure and construct a one-story, 4,372 square foot Fast Food Restaurant with a side-by-side drive-through window (two order stations side by side will queue into a single lane prior to payment and pick-up). The parking lot will be redesigned to provide better on-site circulation, and the number of access points to the site shall be reduced from two to one. (T. 8). There will be an 8-foot-tall masonry wall around the trash dumpster located in the northwest corner of the site. Applicant wishes to retain the existing freestanding sign that is only set back five (5) feet from the property line (and not the requisite ten (10) feet). The Planning Board has approved a Departure from Design Standards to allow the sign to remain. (Exhibit 30)

(8) Architectural details and elevations were submitted. (Exhibit 34 (i)) Applicant has provided a concrete pad with a "U-shaped" bicycle rack in the landscape island opposite the main entrance into the building. The Planning Board and Staff had requested that the rack be adjacent to the main entrance but Applicant's witness explained that it was moved slightly away to prevent any blockage of the handicap access ramp. (Exhibit 34, T. 14) Applicant intends to operate the restaurant twenty-four hours per day, seven days per week.

(9) Applicant submitted a copy of its stormwater concept plan as well as the Stormwater Management Concept Approval from the Department of Public Works and Transportation. (Exhibits 7 and 34 (f)) It also has a Natural Resource Inventory Equivalency Letter due, in part, to the lack of regulated environmental features on site. (Exhibit 8)

(10) Applicant submitted a copy of the Use and Occupancy permits for the nonconforming use. (Exhibit 38 (a)-(d))

Alternative Compliance

(11) The subject property must satisfy Sections 4.2, 4.4, 4.7 and 4.9 of the Landscape Manual. The Site Plan has the requisite 10-foot-wide buffer adjacent to University Boulevard. However, Applicant has requested Alternative Compliance from Section 4.7, (Buffering Incompatible Uses), in order to reduce the size of the landscape buffer required along the northwestern property line abutting a PEPCO right-of-way, and to reduce the size

of the landscape buffer and plant materials required along the northern and eastern property lines. Near the PEPCO land, Applicant proposes to install a dumpster with an 8-foot tall brick enclosure set back approximately 12 feet from the northwestern property line, and a mix of new evergreen and shade trees, an existing tree, and shrubs. (T. 6) Applicant proposed to add 59 plant units in this area, ten more than required. The Alternative Compliance Committee recommended approval of the request for the property adjacent to the PEPCO right-of-way since “the dumpster enclosure will additional[ly] serve as a wall to mitigate any incompatibility between the subject development and the adjacent public utility”. (Attachment to Exhibit 13, 1/5/2012 Memorandum from Fields to Piret) The Planning Board approved a Departure from Design Standards that addressed the reduced bufferyard along the eastern and northern property lines, originally requested in its application for alternative compliance. (Exhibit 31; T. 11-12)

Agency Comment

(12) The Technical Staff recommended approval with conditions. (Exhibit 13) Applicant addressed each in its revised Site Plan; although as noted, *supra*, it did not place the bicycle rack in the exact location suggested. (Exhibit 34; T. 13-14)) Staff reviewed the revised Site Plan and noted that it “appears to address all of the conditions of approval set forth in the Technical Staff Report and Planning Board Resolution [and] the landscaping is consistent with the recommendation for AC-11028”. (Exhibit 39(a))

(13) The Transportation Planning Section noted that the expansion would result in 19 additional AM peak hour vehicular trips and 13 additional PM peak hour vehicular trips. Staff considered the likely impact to be negligible:

Given that the expansion is fairly minor in consideration of the use that already exists, the proposal would have a very minimal impact regarding the health, safety, or welfare of residents and workers in the area. Any net impact by enlarging the use is very likely offset by eliminating one of the existing curb cuts along MD 193, and concentrating all traffic entering and leaving the site at a single location.... Access and on-site circulation are acceptable....

(Attachment to Exhibit 13, September 22, 2011 Memorandum from Mazog to Lockard)

(14) The Planning Board recommended approval of the instant request with conditions. (Exhibit 29) It also approved companion departures (DSDS-669, DDS-611, and DPLS-361) (Exhibits 30, 31, and 32) These approvals validate an existing sign that is located five (5) feet from the University Boulevard (MD 193) right-of-way, reduces the number of required parking spaces from 76 to 53, allows the substandard landscape yard for the portions of the site adjacent to the shopping center, and reduces the drive aisle that connects to the loading spaces from 22-feet to 20-feet.

LAW APPLICABLE

(1) As stated in Footnote 24 of Section 27-461(b), the enlargement and reconstruction of this certified nonconforming use is permitted in the C-S-C Zone in accordance with the requirements of Section 27-384 of the Zoning Ordinance. All Special Exceptions must be found in compliance with the general criteria of Section 27-317 of the Zoning Ordinance.

(2) Section 27-317 provides as follows:

Sec. 27-317. Required findings.

- (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).
- (b) In addition to the above required findings, in a Chesapeake Bay Critical Area Overlay Zone, a Special Exception shall not be granted:
 - (1) where the existing lot coverage in the CBCA exceeds that allowed by this Subtitle, or
 - (2) where granting the Special Exception would result in a net increase in the existing lot coverage in the CBCA.

(3) Section 27-384 provides, in pertinent part, as follows:

- (a) 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:
 - (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).

• * * * *

(4) The request must also comport with the purposes of the C-S-C Zone found in Section 27-454(a) of the Zoning Ordinance. This Section provides as follows:

(a) **Purposes.**

- (1) The purposes of the C-S-C Zone are:
 - (A) To provide locations for predominantly retail commercial shopping facilities;

- (B) To provide locations for compatible institutional, recreational, and service uses;
- (C) To exclude uses incompatible with general retail shopping centers and institutions; and
- (D) For the C-S-C Zone to take the place of the C-1, C-2, C-C, and C-G Zones.

(5) The appropriate standard to be used in determining whether a requested Special Exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed and the particular location proposed would have any adverse effects above and beyond those inherently associated with such a Special Exception use irrespective of its location within the zone. Turner v. Hammond, 270 Md. 41, 54-55, 310 A.2d 543, 550-51 (1973); Deen v. Baltimore Gas & Electric Co., 240 Md. 317, 330-31; 214 A.2d 146, 153 (1965); Anderson v. Sawyer, 23 Md. App. 612, 617-18, 329 A.2d 716, 720, 724 (1974). Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319, 1331 (1981). See, Mossberg v. Montgomery County, 107 Md. App. 1, 666 A2d 1253 (1995).

CONCLUSIONS OF LAW

(1) The instant Application is in conformance with the following purposes of the Zoning Ordinance (found in Section 27-102):

To protect and promote the health, safety, morals, comfort, convenience, and welfare of the present and future inhabitants of the County;

The reconstruction of an outdated restaurant use at this location will promote the safety, comfort, convenience and welfare of the present and future inhabitants of the County by providing a use that would support the needs of the residents and traveling public in the area.

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

Among the goals of the General Plan for the Developed Tier are: (1) to strengthen existing neighborhoods; (2) to encourage appropriate infill/redevelopment; (3) to expand tree cover through the increased planting of trees and landscaping; (4) to renew/redevelop commercial strips. (2002 General Plan, pgs. 31-32) By allowing the reconstruction of a use at an existing, developed site, the approval of this Application would strengthen the existing neighborhood, and provide for redevelopment and commercial renewal. This proposal is, therefore, in conformance with the goals of the General Plan for the Developed Tier. It also implements the goals of the Master Plan which recommends retail commercial use at the site.

To promote the conservation, creation, and expansion of communities that will be developed with adequate public facilities and services;

Because this Application proposes the redevelopment of an existing site, approval of it would promote the conservation of an existing community and would not contribute to further strain on the existing public facilities and services.

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 result in orderly growth by eliminating the need for Applicant to construct the restaurant in a less suitable area of the County. Thus, establishing a modern, attractive business at this well-traveled location within the County is in harmony with this purpose of the Ordinance.

To provide adequate light, air, and privacy;

The subject restaurant will be in harmony with this purpose since 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 customers of the subject site and for its neighbors.

To promote the most beneficial relationship between the uses of land and buildings and protect landowners from adverse impacts of adjoining development;

The subject restaurant would be in harmony with this purpose once developed in accordance with the various principles that have been codified in the Zoning Ordinance to promote the beneficial relationships between land and buildings.

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

The subject restaurant would be in harmony with this purpose once developed in conformance with regulations established by the Zoning Ordinance, as well as other County Ordinances, which are intended to protect from fire, flood, panic and other dangers, (such as the floodplain regulations, stormwater management regulations, the fire prevention code, the building code, and the Tables of Permitted Uses for the various zones.)

To encourage economic development activities that provide desirable employment and a broad, protected tax base;

The subject restaurant would be in harmony with this purpose because it would be a local business operated principally for the benefit of residents of Prince George's County.

The business would contribute to the tax base of the County directly and through the employment provided to its workers.

To prevent the overcrowding of land;

The subject restaurant would be in harmony with this purpose once developed in accordance with various principles that have been codified in the Zoning Ordinance to ensure the prevention of overcrowding, including the provisions of the Table of Uses that provide for the compatibility of uses in the same zoning district, and provisions in the Regulations which restrict the amount of land that can be occupied by buildings and vehicular circulation areas.

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 subject restaurant would be in harmony with this purpose because it would be located on a site that has been previously developed in accordance with the regulations established by 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, and the separation of entrances from nearby intersections. Additionally, Staff has determined that the redeveloped use should result in 19 additional vehicular trips during the AM peak hours, and 13 during the PM peak hours. These minimal trips should not negatively impact the roads in the area of the subject property.

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. Additionally, the subject restaurant will promote the economic and social stability of the County by contributing to the tax base, by providing a needed service to the surrounding community, and by virtue of its location in the midst of compatible uses.

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;

As the subject restaurant will be located on a developed site, it will have minimal additional impact to the natural features in the County. The use will not itself generate noise or air pollution, and the use will be in compliance with the County's Woodland

Conservation policies in that it will be exempt by virtue of its size and developed condition from the requirement to have a Tree Conservation Plan. No steep slopes or scenic vistas will be affected.

(Section 27-317(a)(1))

(6) The instant Application is also in conformance with the general purposes of commercial zones, and the specific purposes of the C-S-C Zone (found in Sections 27-446 (a) and 27-454 (a)(1), respectively) for the foregoing reasons, and since the use is a commercial/retail use that is compatible with the surrounding shopping center and other commercial uses. (Section 27-317(a)(1))

(7) Commercial uses such as Eating and Drinking Establishments are presumed compatible with other Commercial uses provided the established setbacks, lot coverage, landscaping, minimum acreage, traffic and parking improvements and all other regulations can be met. The instant Application is in compliance with the regulations and requirements of the Zoning Ordinance and no variances are required. The Planning Board has granted the Departures needed. Alternative Compliance is requested, and, if approved, the Application will be in compliance with the Landscape Manual. There is no evidence to support a finding that this presumption of compatibility has been rebutted and that this Application is not in concert with purposes of the Zoning Ordinance. (Section 27-317(a)(2))

(8) The proposed use will not substantially impair the integrity of the 1990 Master Plan for Langley Park-College Park-Greenbelt and Vicinity and is consistent with the 2002 General Plan's development policies for the Developed Tier, as noted above. (Section 27-317(a)(3))

(9) The proposed use renovates and slightly expands an existing McDonald's that has operated successfully in the area for over fifty (50) years. It will be improved by the addition of the side-by-side drive-through facilities for its patrons. It will be attractively designed and landscaped. There will be few additional vehicular trips in the area as a result of the expansion. Accordingly, the request will not adversely affect the health, safety or welfare of residents or workers in the area. (Section 27-317(a)(4))

(10) The proposed development and use is compatible with the use and development of adjacent properties and the general neighborhood as it is surrounded by a strip shopping center, a gas station, a convenience store, a Laundromat, and a PEPCO line. (Section 27-317(a)(5)) The subject property is exempt from the requirements of the Woodland and Wildlife Preservation Ordinance as the gross tract area is less than 40,000 square feet and there are less than 10,000 square feet of existing woodland. (Section 27-317(a)(6)) There are no regulated environmental features on site. (Section 27-317 (a)(7)). Finally, the property does not lie within a Chesapeake Bay Critical Area Overlay Zone. (Section 27-317(b))

(11) The certified nonconforming McDonald's is being reconstructed. Accordingly, the applicable provisions of Section 27-384 must be met. The request satisfies these provisions since the lot is as it was at the time it became nonconforming in 1984 – a lot owned by McDonald's. (Section 27-384 (a)(3)(A)) The Nonconforming Use has been in continuous existence. (Section 27-384 (a)(3)(B)) The requirements of Part 11 of the Zoning Ordinance (the Parking regulations) will be met, since the Planning Board has approved the requested Departures. (Section 27-384 (a)(3)(C)) Applicant intends to receive a building permit for the reconstruction within one (1) year of the approval of this request. (Section 27-384 (a)(3)(D)) The Site Plan meets all regulations concerning commercial zones, and Applicant is not requesting any variances. (Section 27-384 (a)(5)) Applicant has included copies of the Use and Occupancy permit for the nonconforming use. (Section 27-384(b))

(12) The proposal does not comply with the requirements of Section 4.7 of the Landscape Manual along the northern property line. However, the property only abuts a PEPCO transmission line at this location, not a residential or commercial use. Applicant is providing an attractive masonry fence around the trash receptacle, additional plants, and a fence in this area. Accordingly, I would approve Applicant's Alternative Compliance application AC-11028.

DISPOSITION

Special Exception 4686 and Alternative Compliance AC-11028 are Approved subject to the following conditions:

- (1) All development shall be in compliance with the Special Exception Site Plan, the Special Exception Landscape Plan and details, the Trash Corral Detail, the Sign Details and the Color Elevations. These items are Exhibit 34 (a) and (c)-(i) in this record.
- (2) Prior to the issuance of permits Applicant shall revise Note 3 on the Special Exception Site Plan (Exhibit 34 (c)) to reflect 4,372 square feet, as shown on the plan itself. Applicant shall also outline the boundaries of the Special Exception area in red, as required by the Zoning Ordinance. The revised Site Plan shall be submitted to the Office of the Zoning Hearing Examiner for review and inclusion in the record.