

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

**SPECIAL EXCEPTION
AND
VARIANCE
4695**

DECISION

Application:	Department or Variety Store combined with a Food or Beverage Store, Tree Conservation Plan and Variances
Applicant:	Wise Living Trust/Dixie Dale, LLC/Maryland CVS Pharmacy, LLC
Opposition:	Dr. Delores Pittman
Hearing Date:	January 18, 2012
Hearing Examiner:	Maurene Epps Webb
Disposition:	Approval with Conditions

NATURE OF PROCEEDINGS

- (1) Special Exception 4695 is a request for permission to use approximately 2.216 acres of C-M (Miscellaneous Commercial) zoned land located at 8601 Martin Luther King, Fr. Highway in Landover, Maryland, for a Department or Variety Store combined with a Food and Beverage Store. The instant request is a joint application with VSE-4695, in which the Applicant requests a variance of varying amounts from a 50 foot setback requirement in order to construct the associated use. A Type II Tree Conservation Plan must also be approved for the use.
- (2) The Technical Staff recommended denial of the Application. (Exhibit 20) The Planning Board recommended approval of the application. (Exhibit 22)
- (3) Several citizens appeared in support of the Application at the hearing held by this Examiner. Dr. Delores Pittman appeared in opposition to the request.
- (4) At the close of the hearing the record was left open to submit further information regarding the need for alternative compliance and other information concerning the variance and a vote taken by an interested civic association. The last of these was received on March 19, 2012. This Examiner forwarded the revised TCP II to Staff for review and comment on February 8, 2012. (Exhibit 65(a)) Comment was not received and the record was, therefore, closed on May 2, 2012.

FINDINGS OF FACT

Subject Property

(1) The subject property is a corner lot that is a combination of parts of six (6) lots, two (2) parcels, and the platted, but undeveloped, Hayes Street. (Attachment to Exhibit 20, September 2, 2011, Memorandum from Kosack to Lockard) It has a varied topography with the center having the lowest topography, giving the site a “bowl” effect. (Exhibit 39) Since Applicant is proposing to create a new lot from these combined properties and to add more than 5,000 square feet of development, the property must be resubdivided. (Exhibit 20, p. 14)

(2) The property is substantially wooded. The subject property is improved with a 3,334-square foot commercial building that was constructed in the late 1960s, located close to its frontage on Ardwick-Ardmore Road, on Parcel A. (T. 29-30) The building is divided into several units, some of which are occupied with medical uses.¹

(3) The subject property is not exempt from the requirements of the Woodland and Wildlife Habitat Conservation Ordinance and a Tree Conservation Plan (TCP II-015-11) must be approved with the Application. (Exhibit 65(c)) A Natural Resources Inventory (NRI-032-10) has also been completed and approved for the site. (Exhibit 11) The site is not located within the Chesapeake Bay Critical Area Overlay Zone. (Exhibit 47)

Neighborhood and Surrounding Uses

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

- North and West - Across Martin Luther King, Jr. Highway (MD 704) is a gas station, auto-related uses, and warehouses in the I-I Zone
- South - Across Ardwick-Ardmore Road is a gas station in the C-M Zone and two (2) large churches in the C-M and C-O Zones.
- Northeast and East – Undeveloped land, auto-related/contractor businesses, and a single-family dwelling not used for residential purposes in the C-M Zone.

(Exhibit 20; T. 27-28)

(5) The neighborhood, as described by the Technical Staff, has the following boundaries:

¹ Doctor Pittman currently leases one of the units for her dental practice.

- North – Martin Luther King, Jr. Highway (MD 704) and the Capital Beltway (I-95/I-495)
- South – The municipal boundary of the City of Glenarden
- East – The Capital Beltway (I-95/I-495)
- West – Martin Luther King, Jr. Highway (MD 704)

Master Plan/General Plan

(6) The subject property lies within an area governed by the 2009 Subregion 4 Master Plan and Sectional Map Amendment. The Master Plan recommended commercial land uses for the subject property. The Sectional Map Amendment retained the property in the C-M Zone.

(7) The 2002 General Plan locates the subject property within the Developed Tier. As noted on p. 31 of said Plan, “[t]he vision for the Developed Tier is a network of sustainable, transit-supporting, mixed-use, pedestrian-oriented, medium to high-density neighborhoods.”

Applicant’s Proposal

(8) Applicant submitted several photos of the existing conditions on site. (Exhibits 34 and 37) It wishes to raze the outdated structure and construct a 13,000 square foot Department or Variety Store with a Food and Beverage Store; this use requires a special exception in the C-M Zone.

(9) Applicant’s witness, accepted as an expert in the area of land use planning, opined that the use satisfies the applicable provisions of the Zoning Ordinance, if a variance is granted. The subject property has direct frontage on, and will be accessed by, Martin Luther King Jr. Highway (MD 704), an arterial roadway, and Ardwick-Ardmore Road, a collector roadway. The building’s entrance will be located on the northwest corner of the building, fronting on both roads since it is anticipated that customers will be coming from both directions and need to see how to access the store. This area will be enhanced with special paving, benches, raised, planters, bicycle racks, and special lighting. (Exhibits 18(f) and 55) Seventy-two parking spaces are required, and provided. (Exhibit 47) Two (2) loading spaces are required, and provided. Applicant will construct an additional sidewalk along Martin Luther King, Jr. Highway (MD 704) for ease of pedestrian access. Applicant is providing over 50,000 square feet of green space – approximately 33.6 % of the site. (Exhibit 44; T. 47) A comprehensive sign package and exterior lighting plan were submitted into the record. (Exhibits 54 and 18(g)) If approved the use should add approximately 25 full time/part time jobs. (T. 59)

(10) The elevations and architectural details provided by Applicant indicate that the building materials will be a red brick veneer and a tan split-face concrete block, with the use of some tan exterior insulating finishing system (EIFS) around the top of the building and near the main entrance around the building mounted sign. The building will be compatible with development in the area and designed in an aesthetically pleasing manner. (Exhibit 18(h) and 43; T. 36)

(11) Applicant's witness, accepted as an expert in transportation planning, submitted a traffic impact study which concludes that the use will not adversely impact the transportation facilities in the area.² (Exhibit 9) The site will be accessed from two (2) driveways. The one from Martin Luther King, Jr. Highway (MD 704) will be right-in right-out, and the one from Ardwick-Ardmore Road will be a full access driveway. All of the signalized intersections within the study operate under acceptable levels. The intersections controlled by stop signs, however, operate above capacity during both peak hours. The expert concluded as follows:

Future Background Traffic Conditions: A composite of existing traffic, regional growth of 1% per year along MD 704 and traffic from other planned area developments was used to develop the background traffic forecasts. No major transportation system improvements have been planned within the study area based on the review of the *Prince George's County Capital Improvement Program (CIP) Fiscal Year 2010-2015* and *Maryland State Highway Administration (MD-SHA)'s Consolidated Transportation Program (CTP) Fiscal Year 2010-2015*. The background capacity analyses show that all signalized intersections within the study area would continue to operate at acceptable level-of-service conditions. This includes the intersection of MD 704 and Ardwick Ardmore Road directly adjacent to the subject property. The stop controlled approaches of unsignalized intersections would continue to operate above capacity, but the proposed use does not add to the left-turn movements currently operating above capacity. This includes the eastbound approach of Brightseat Road at its intersection with Ardwick Ardmore Road and the northbound and southbound approaches of Reed Street/Dellwood Court at its intersection with MD 704. These conditions are existing conditions related to the heavy traffic flows along MD 704 and Ardwick Ardmore Road.

Total Future Traffic Conditions: The proposed site would generate 19 (11 in and 8 out) AM peak hour trips, 75 (38 in and 37 out) PM peak hour trips and 58 (29 in and 29 out) Saturday peak hour trips. The total future capacity analyses show that all signalized intersections within the study area and the two proposed site driveways would operate with acceptable levels-of-service conditions. However, the two existing unsignalized intersections of Ardwick Ardmore Road and Brightseat Road and MD 704 and Reed Street that operate above capacity under existing and future background conditions would continue to operate above capacity in the total future traffic conditions. **The trips generated by proposed development would not add any traffic to the movements at these intersections operating above capacity. Adding the CVS site traffic to the study area network will not contribute any traffic to the left-turning movements from Reed Street/Dellwood Court to MD 704 or from Brightseat Road to Ardwick Ardmore Road that currently operate above capacity.**

2 The signalized intersections are MD 704 and Ardwick-Ardmore Road, and Ardwick-Ardmore Road and Preston Road. The unsignalized intersections are Ardwick-Ardmore Road and Brightseat Road, and MD 704 and Reed Street. (Exhibits 9 and 20)

Overall impact of Proposed Development: The trips generated by the proposed use will primarily be drawn from the existing traffic stream given that drive-thru pharmacy use is generally trips made for convenience, which results in a high level of pass-by traffic. This phenomenon is consistent with uses such as gas stations and convenience stores that generate trips from vehicles already on the roadways for other reasons.

The unsignalized intersections of Brightseat/Ardwick Ardmore Road and Reed Street/Dellwood Court MD 704 currently experiences delays for the left-turn movements from Reed Street/Dellwood Court to MD 704 and from Brightseat Road to Ardwick Ardmore Road due to the heavy through volumes along MD 704 and Ardwick Ardmore Road. The future operations of these unsignalized intersections are not a result of any conditions that the proposed CVS has caused, especially since the proposed development will not contribute to any traffic to the left-turning movement from Reed Street/Dellwood Court to MD 704 or from Brightseat Road to Ardwick Ardmore Road that currently operate above capacity. **Any future improvements implemented for these unsignalized intersections should be geared to address the heavy traffic flows currently using MD 704 and Ardwick Ardmore Road. The findings of this study conclude that the CVS-related traffic represents only 0.8% of the traffic on MD 704 and only 2% of the traffic on Ardwick Ardmore Road; and has no impact on turning movements currently above capacity.**

(Exhibit 9, pp. 17-18; Emphasis in original)

Landscape Manual

(12) An opaque 6-foot-high fence will be erected along the eastern property line, in compliance with the Landscape Manual. There was some controversy as to whether the neighboring owner of Lot 3 operates some type of commercial business on site or uses the building as a residence. The use changes the type of buffer required by the Landscape Manual. Applicant maintained that the owners of Lot 3 are operating a construction storage yard of some nature, evidenced by pictures taken on the site, conversations with the occupant of the site, and yellow page advertisements for the site. (Exhibit 64(a)-(c)) In an abundance of caution Applicant has also obtained a "Landscape and Buffer Easement Agreement" whereby Panagiotis and Garfallia Glekas (owners of Lot 3) has agreed to grant a perpetual landscape easement for the portion of Lot 3. Accordingly, one could find that all provisions of the Landscape Manual have been addressed in Applicant's Landscape Plan.

Zoning Variance

(13) For its building Applicant is providing an 85-foot setback from the northern boundary (along Martin Luther King, Jr. Highway (MD 704); 120-foot setback from the western boundary (along Ardwick-Ardmore Road); a 104-foot setback from the southern boundary; and a 25-foot setback from the eastern boundary (due to location of drive-thru drive aisle). For its parking area Applicant is providing a 14.5 foot setback from the northern boundary, a varying setback of 10-30 feet from the western boundary (along Ardwick- Ardmore Road); an 8-foot setback from the eastern boundary; and a 50-foot setback from the southern boundary. (Exhibit 42) Or, to put it in more succinct terms, Staff noted the

request is for “[a] maximum reduction of 36 feet to the north, 40 feet to the west, and 42 feet to the east” (Exhibit 20, p. 6) Pursuant to Section 27-348.02(a)(5) a 50-foot setback from all property lines is required for all buildings, structures and the parking area. The 7-foot-high retaining wall also lies within the requisite 50-foot setback. (T. 51)

(14) The land use planner explained that the topography of the site is unique in the area. It is bounded by two (2) major roadways and an unwilling seller (Lot 3). It has a 26-foot drop in the southeast corner, a 17-foot drop near Martin Luther King, Jr. Highway (MD 704), a 12-foot drop off of Ardwick-Ardmore Road, and numerous 2:1 slopes along the eastern and southern areas of the site. (Exhibit 38; T. 31) Thus, the property has “exceptional topography”. The antiquated lotting of the area makes it imperative for lots to be combined if any redevelopment is to occur. (Exhibit 46; T. 54) This, coupled with the topography, makes it difficult to develop absent the variances. If the variances were not granted Applicant would lose approximately an acre of developable area and would have virtually no parking and only a 7,700-square foot store- nearly half of the size requested. (Exhibit 45; T. 49-51) Accordingly, variances from the 50-foot setback are required. Approval of the variances would not impair the intent or purpose of the Master or General Plans since the District Council maintained the C-M zoning of the property and intended a commercial development thereof, despite the unusual lotting that exists as a result of the 1907 and 1970 plats of subdivision.

Tree Conservation

(15) Pursuant to the Woodland and Wildlife Habitat Conservation Ordinance, applications for a Special Exception must include a Type II Tree Conservation Plan or Letter of Exemption. (Prince George’s County Code, Section 25-119(a)(2)(B)). Applicant submitted a Type II Tree Conservation Plan for approval (TCP II-015-11), and amended it to address conditions proffered by the Planning Board. (Exhibits 22 and 65 (c); T. 73)

(16) Applicant also seeks a variance from Section 25-122(b)(1)(G) of this Ordinance for removal of specimen trees 1-6. This Section requires preservation of specimen trees, and/or their critical roots, unless a variance is approved. The criteria for granting these variances are found in Section 25-119(d), and provide as follows:

(d) Variances

(1) An applicant may request a variance from this Division as part of the review of a TCP where owing to special features of the site or other circumstances, implementation of this subtitle would result in unwarranted hardship to an applicant. To approve a variance, the approving authority shall find that:

- (A) Special conditions peculiar to the property have caused the unwarranted hardship;
- (B) Enforcement of these rules will deprive the applicant of rights commonly enjoyed by others in similar areas;
- (C) Granting the variance will not confer on the applicant a special privilege that would be denied to other applicants;

(D) The request is not based on conditions or circumstances which are the result of actions by the applicant;

(E) The request does not arise from a condition relating to land or building use, either permitted or nonconforming, on a neighboring property; and

(F) Granting of the variance will not adversely affect water quality.

(2) Notice of a request for a variance shall be given to the State of Maryland Department of Natural Resources within 15 days of receipt of a request for a variance.

(3) Variances shall be approved by the Planning Board, Zoning Hearing Examiner, and/or the District Council for all tree conservation plans that are associated with applications heard by them. The Planning Director may approve variances for tree conservation plans that are not associated with applications heard by the Planning Board, Zoning Hearing Examiner and/or the District Council. The Planning Director's decisions are appealable to the Planning Board.

(4) Variances granted under this Subtitle are not considered zoning variances.

(17) Applicant has provided sufficient justification for this variance, also. As noted, *supra*, the property has special topographic features with the perimeter containing areas of steep slopes and a low lying area in the interior (where the specimen trees are proposed for removal). The Applicant must fill some portions of the site and this would block oxygen and other nutrients to the trees slated for removal, making it impossible for them to survive. Preservation of the trees, on the other hand, would prevent development because the site could not be brought to a suitable grade. It is not uncommon to grant a variance under these conditions, and the topography of the land is something beyond the Applicant's control. Stormwater facilities are being provided on site, which will ensure that the variance will not adversely impact water quality. The topography is not related to land or building use on a neighboring property. Finally, Applicant did send the requisite notice of its intent to request this variance to the State Department of Natural Resources. (Exhibit 17, attachment to Exhibit 20, September 21, 2011, Memorandum from Shoulars to Lockard, Exhibit 59(a)-(b))

Agency Comments

(18) The Technical Staff noted that the tree conservation plan for the property revealed no encroachments into the regulated environmental features, and agreed that the Applicant's request for a variance for the removal of specimen trees should be granted. It also opined that the requested use would be in harmony with the purposes of the Zoning Ordinance, and would not substantially impair the Master or General Plans. The Transportation Planning Section opined "that the proposal ..., in consideration that the net trip generation is consistent with typical uses in the C-M Zone, would not pose unanticipated safety issues on adjacent roadways." (Attachment to Exhibit 20, June 23, 2011, Memorandum from Masog to Lockard, p. 4) It did recommend that certain conditions be imposed concerning a traffic signal warrant study, prior to the issuance of permits.

(19) However, the Technical Staff ultimately recommended that the instant request be denied. (Exhibit 20) In particular, Staff believed the Applicant did not meet the standards for approval of a variance. (Exhibit 20, pp. 6-7) In reaching this conclusion Staff applied the stricter standard of “exceptional or undue hardship” rather than the “peculiar and unusual practical difficulties” standard found in Section 27-230 (a) of the Zoning Ordinance.

(20) The State Highway Administration (“SHA”) has indicated that it will allow Applicant access to the site from Martin Luther King, Jr. Highway (MD 704) if a deceleration lane is provided. SHA has also indicated that it “is satisfied with the traffic count data and level of service analyses provided....” (Attachment to Exhibit 20, August 3, 2011, Letter to Bowyer from Foster)

(21) The Planning Board recommended that the Application be approved. (Exhibit 22) It noted that if the variance were approved, the request satisfies all applicable criteria of the Zoning Ordinance once certain recommended conditions are addressed. The Planning Board recommended that the variance be approved, reasoning as follows:

The applicant contends that the subject property has an irregular shape and size as well as exceptional topographic and environmental issues which [preclude] them from meeting the 50-foot setback requirements. The applicant points to the fact that a property (Lot 3) and paper street (Hayes Street) to the northeast intrude into their property, giving it an irregular property line. This, in turn, precludes the applicant from meeting the 50-foot setback requirement in that area.

The applicant also points to topographic conditions on the site as justification, stating that the change in topography necessitates filing, grading, and the use of retaining walls. These walls constitute encroachments into the setback. In addition, the applicant notes that the antiquated and fragmented lotting pattern of the Dixie Dale Subdivision (platted more than 100 years ago as a residential subdivision with assumed frontages on Hayes Street and Brightseat Road) has resulted in the need for assembly of properties in order to develop in the C-M Zone. They are constrained to the west and south by MD 704 and Ardwick-Ardmore Road, respectively, and to the north and east by an uncooperative adjoining land owner (Lot 3).

The Planning Board concurs with the applicants arguments. The site has exceptional narrowness and irregular shape caused by the intrusion of Lot 3 and Hayes Street and has unique, bowl-like topographic conditions not experienced by other properties in the neighborhood. The unusual shape of the site is also a result of the antiquated lotting pattern, which has made development of this use in the C-M Zone impossible without consolidation of properties, as proposed by the applicant. All of these factors, collectively, contribute to a unique and extraordinary situation which necessitates the grant of the variance for development to take place....

The variance will not substantially impair the intent, purpose, or integrity of the 2009 *Approved Subregion 4 Master Plan and Sectional Map Amendment*, which recommends a commercial land use for the subject property. The use is a use permitted by special exception in the C-M Zone and is therefore presumed to be compatible with the surrounding area....

The variance being sought by the applicant is caused by unique circumstances not generally affecting other properties in the neighborhood which result in a peculiar and unusual practical difficulty to the

applicant. Granting the variance would not impair the recommendation of the master plan, rather, it would allow the recommendation to be followed. Because the applicant has met all three criteria for a variance, the Planning Board recommends the variance be approved....

(Exhibit 22, pp. 5-7)

(22) Applicant revised its plans to address all conditions recommended by the Planning Board. (Exhibits 47, 50, 53, 54, 55; T. 84-87)

Citizen Comments

(23) Several residents, including representatives of the Central Coalition of Prince George's County and the Ardmore Springdale Civic Association, testified in support of the Application. They stressed the need for an additional drug store in the area due to the high number of seniors and others residing nearby who must have prescriptions filled and the dearth of such stores.

(19) Dr. Delores Pittman appeared in opposition to the request. She is a tenant in the commercial building presently on site. Dr. Pittman had no real objection with a CVS being constructed on site but was concerned that her landlord chose not to inform her:

My main objection is not the presence or the anticipated building of the CVS, my main objection is with the way that this was handled – primarily by Ms. Wise – because it was her sole obligation to inform her tenants of what was going on.

We are providing a valuable service to the community. Many of our patients live within walking distance of our office and we have not been afforded even the mildest of courtesies by way of notification or any assistance or discussion regarding the relocation of these two businesses.

(T. 19-20)

LAW APPLICABLE

(1) A Department or Variety Store and Food or Beverage Store is permitted by special exception in the C-M Zone in accordance with Section 27-348.02 of the Zoning Ordinance. Additionally, all special exceptions must meet the requirements of Section 27-317 of the Zoning Ordinance. Variances are permitted subject to Section 27-230 of the Zoning Ordinance.

(2) Section 27-230 (a) provides as follows:

(a) A variance may only be granted when the District Council, Zoning Hearing Examiner, Board of Appeals, or the Planning Board as applicable, finds that:

(1) A specific parcel of land has exceptional narrowness, shallowness, or shape, exceptional topographic conditions, or other extraordinary situations or conditions;

(2) The strict application of this Subtitle will result in peculiar and unusual practical difficulties to, or exceptional or undue hardship upon, the owner of the property; and

(3) The variance will not substantially impair the intent, purpose, or integrity of the General Plan or Master Plan.

(3) Section 27-317(a) provides as follows:³

(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.

(4) Section 27-348.02 provides as follows:

(a) Food and Beverage Stores and Department or Variety Stores permitted in the use tables by Special Exception (SE) in the C-S-C, C-M and C-R-C zones shall be subject to the following requirements:

(1) The site shall have frontage on and direct vehicular access to an existing arterial roadway, with no access to primary or secondary streets.

(2) The applicant shall demonstrate that local streets surrounding the site are adequate to accommodate the anticipated increase in traffic.

(3) The site shall contain pedestrian walkways within the parking lot to promote safety.

(4) The design of the parking and loading facilities shall ensure that commercial and customer traffic will be sufficiently separated and shall provide a separate customer loading area at the front of the store.

(5) All buildings, structures, off-street parking compounds, and loading areas shall be located at least:

(A) One hundred (100) feet from any adjoining land in a Residential Zone, or land proposed to be used for residential purposes on an approved Basic Plan for a Comprehensive Design Zone, approved Official Plan for an R-P-C Zone, or any approved Conceptual or Detailed Site Plan; and

(B) Fifty (50) feet from all other adjoining property lines and street lines.

(6) All perimeter areas of the site shall be buffered or screened, as required by the Landscape Manual; however, the Council may require additional buffering and screening if deemed necessary to protect surrounding properties.

(7) The building entrance and nearby sidewalks shall be enhanced with a combination of special paving, landscaping, raised planters, benches and special light fixtures.

³ The subject property does not lie within a Chesapeake Critical Area Overlay Zone; accordingly, Section 27-317(b) is inapplicable.

(8) The application shall include a comprehensive sign package and a comprehensive exterior lighting plan.

(9) The applicant shall use exterior architectural features to enhance the site's architectural compatibility with surrounding commercial and residential areas.

(10) Not less than thirty percent (30%) of the site shall be devoted to green area.

(5) The purposes of all commercial zones are set forth in Section 27-446(a). This Section provides as follows:

(a) The purposes of Commercial Zones are:

(1) To implement the general purposes of this Subtitle;

(2) To provide sufficient space and a choice of appropriate locations for a variety of commercial uses to supply the needs of the residents and businesses of the County for commercial goods and services;

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

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

(5) To improve traffic efficiency by maintaining the design capacities of streets, and to lessen the congestion on streets, particularly in residential areas;

(6) To promote the efficient and desirable use of land, in accordance with the purposes of the General Plan, Area Master Plans and this Subtitle;

(7) To increase the stability of commercial areas;

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

(9) To conserve the aggregate value of land and improvements in the County; and

(10) To enhance the economic base of the County.

(6) The specific purposes of the C-M Zone, set forth in Section 27-459, provides as follows:

(a) **Purposes.**

(1) The purposes of the C-M Zone are:

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

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

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

Special Exception

(7) 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.

Variance

(8) Applicant is requesting an “area variance”, since it is a variance from area, height, density, setback or similar regulations in the Zoning Ordinance. Anderson v. Board of Appeals, Town of Chesapeake Beach, 22 Md. App. 28, 322 A. 2d 220 (1974). As such, the proper standard to be applied is the less stringent “practical difficulties” standard found in Section 27-230 (a), rather than the “exceptional or undue hardship” standard mentioned therein. See, Montgomery County v. Rotwein, 169 Md. App. 716, 906 A.2d 959 (2006), and cases cited therein.

(9) The Rotwein Court reiterated the three (3) factors to apply in determining whether practical difficulties exist:

- 1) Whether compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome;
- 2) Whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners.
- 3) Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.

(*Id.*, 169 Md. App. At 729-730)

(10) Finally, in Alviani v. Dixon, 365 Md. 95, 775 A.2d 1234, (2001), the Court reiterated that a variance may be granted from special exception criteria provided there is no express language stating that a variance may not be granted. There is no express language in the Zoning Ordinance that would prevent a granting of the variance so long as the criteria in Section 27-230 are satisfied.

CONCLUSIONS OF LAW

(1) Section 27-317(a)(1) requires that the proposed use and site plan be in harmony with the general purposes of the Zoning Ordinance, found in Section 27-102 and with the specific purposes of the commercial zones and the C-M Zone, found in Sections 27-446(a) and 459(a). The Application is in harmony with the following general purposes of the Zoning Ordinance:

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

The proposal will provide a new, modern Department or Variety Store and Food and Beverage Store in a neighborhood in need of such uses. Thus, the Application will be a convenience to those who reside or work in the area.

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

The Master Plan recommended commercial land uses for the property. Accordingly, this purpose is met.

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

There is no indication that the use will negatively impact the public water and sewer services. Additionally, there will be no negative impact on the signalized intersections, and little additional impact on the unsignalized intersections.

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

The site is in conformance with the provisions of the Landscape Manual, and ample landscaping will assure that the use is attractively presented to the users and passerby, and that adjacent properties are protected.

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

The proposal will be constructed in accordance with all County, State and Federal regulations. The site is not located within a floodplain, and the building will be sprinklered in accordance with County regulations.

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

The proposal will provide a new commercial development and employment in support thereof. This will contribute toward a broad tax base and increase the value of the property.

(10) To prevent overcrowding of land;

The proposal does require variances from setback requirements. However, green area is proposed to be approximately 33 percent of the site.

(12) To insure the social and economic stability of all parts of the County;

The Application will provide for a Department or Variety Store in conjunction with a Food or Beverage Store that will provide a convenience for the residents and travelling public. This use will generate income and thereby contribute to the economic stability of the County.

(2) For similar reasons, the use meets the general purposes of the commercial zones, found in Section 27-446(a) of the Zoning Ordinance.

(3) The Application is also in conformance with the specific purposes of the C-M Zone, set forth in Section 459(a) of the Zoning Ordinance. A Department or Variety Store and Food and Beverage Store is a use which will not be disruptive to the harmonious development of retail shopping centers, and will operate well at the subject site. The use will have to be accessed from nonresidential streets. Finally, although the site is adjacent to other C-M zoned property there is no other cluster of such uses in the surrounding area. (Section 27-317 (a)(1))

(4) The requested use is in conformance with all applicable requirements and regulations of the Zoning Ordinance if the zoning variance is approved. (Section 27-317(a)(2))

(5) The proposed use will not substantially impair the integrity of the 2009 Approved Subregion 4 Master Plan or any other Master Plan or the General Plan. The Master Plan recognized a commercial use of the property. The addition of a Department or Variety Store and Food and Beverage Store fits in well with the surrounding commercial uses in this area. (Section 27-317(a)(3))

(6) The proposed use will not affect the health, safety or welfare of residents or workers in the area since there is additional green area, sufficient landscaping, sufficient parking, and the use will meet all safety requirements of the Zoning Ordinance. Moreover, the use provides a needed service for those within the area. (Section 27-317(a)(4))

(7) The proposed use will not be detrimental to the use or development of the general neighborhood since there is sufficient landscaping and the building will be constructed in a manner that will improve the visual appearance of the site. (Section 27-317(a)(5))

(8) The property is not exempt from the Woodland and Wildlife Conservation Ordinance. Applicant has submitted a Type II Tree Conservation Plan (TCP II-15-11) that satisfies that Ordinance. (Section 27-317(a)(6))

(9) Staff noted that no environmental features will be impacted by the development. (Section 27-317(a)(7))

(10) The Site Plan satisfies the provisions found in Section 27-348.02 (a) concerning the use (with the exception of Section 27-348.02 (a)(5), discussed *infra*). The site has frontage on and direct vehicular access to an existing arterial roadway, Martin Luther King, Jr. Highway (MD 704) and does not access any primary or secondary street. Applicant has submitted a traffic analysis that indicates that the signalized intersections potentially impacted by the request will continue to operate at an acceptable level of service, and conditions applied to the approval will address the mitigation for the unsignalized intersections impacted. The Site Plan indicates the presence of marked pedestrian walkways within the northwestern side of the parking lot that connect to the sidewalk within the right-of-way for Ardwick-Ardmore Road. Two (2) loading spaces are provided to the rear of the building in the southeastern corner of the lot, sufficiently separated from traffic; there is also a customer loading space in front of the store. Applicant has buffered or screened all perimeter areas of the site, as required by the Landscape Manual. Applicant has revised its plan to show the special paving, raised planters, bollard light fixtures, bike rack and benches in the area of the main building entrance. The Application included a comprehensive sign package and a comprehensive exterior lighting plan. Architectural elevations were submitted that demonstrate compatibility with the surrounding area. Approximately 33% of the site shall be devoted to green area. (Section 27-348.02(a)(1),(2),(3),(4),(6),(7),(8),(9) and (10))

(11) The request does not satisfy the requirement in Section 27-348.02(a)(5) that all buildings, structures, off-street parking and loading areas be fifty (50) feet from all other adjoining property lines and street lines. Applicant has requested a variance from this provision. The variance is needed because practical difficulties would ensue if it were denied. In particular, the topography, the need for the retaining wall, and the inability to purchase land that juts into the subject property (Parcel 3) make it impossible to build the store and parking, or install the landscaping, absent the grant of the variance.

DISPOSITION

Special Exception 4695, Variance 4695, TCP II-15-11 and Variance to the Woodland and Wildlife Conservation Ordinance concerning six (6) specimen trees are APPROVED subject to the following conditions:

1. Prior to the issuance of any building permits the Site Plan shall be relabeled as the "Special Exception Site Plan"; and be submitted to the Office of the Zoning Hearing Examiner for approval and inclusion in the record.
2. At the time of building permit review, the Applicant shall submit an acceptable traffic signal warrant study to SHA for signalization at the intersection of MD 704 and Reed Street/Dellwood Avenue. The Applicant should utilize a new 12-hour count, and should analyze signal warrants under total future traffic as well as existing traffic at the direction of the operating agency. If a signal or other traffic control improvements are deemed warranted at that time, the Applicant shall bond the signal with the appropriate agency prior to the release of any building permits.
3. At the time of building permit review, the Applicant shall submit an acceptable traffic signal warrant study to DPW&T for signalization at the intersection of Ardwick- Ardmore Road and Brightseat Road. The Applicant should utilize a new 12-hour count, and should analyze signal warrants under total future traffic as well as existing traffic at the direction of the operating agency. If a signal or other traffic control improvements are deemed warranted at that time, the Applicant shall bond the signal with the appropriate agency prior to the issuance of any building permits.

(The Special Exception Site Plan is Exhibit 47. The Special Exception Landscape Plan is Exhibit 50. The comprehensive sign plan is Exhibit 54. The comprehensive lighting plans are Exhibits 18(g) and 54. The material and dimension labels for the retaining wall, opaque fence, and the details for the bike rack, benches and planters are depicted in Exhibit 18(f) and 55.)