

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

**SPECIAL EXCEPTION
4778**

DECISION

| | |
|-------------------|--|
| Application: | Department or Variety Store |
| Applicant: | Fort Knox Upper Marlboro II, LLC. t/a Dollar General |
| Opposition: | None |
| Hearing Date: | December 14, 2016 |
| Hearing Examiner: | Maurene Epps McNeil |
| Disposition: | Approval with Conditions |

NATURE OF REQUEST

(1) Special Exception 4778 is a request for permission to use approximately 1.30 acres of land in the I-1 (Planned Industrial/Employment Park) Zone, located on the south side of Marlboro Pike (MD 725), approximately 1,000 feet west of its intersection with Robert S. Crain Highway (US 301), and identified as 15301 Marlboro Pike, Upper Marlboro, Maryland, for a Department/Variety Store with a 10,800-square-foot gross floor area. The subject property is located outside of the municipal boundaries of the Town of Upper Marlboro.

(2) The Technical Staff recommended approval with conditions. (Exhibit 17) The Planning Board chose not to hold a hearing and adopted Staff's recommendation as its own. (Exhibit 39)

(3) No one appeared in opposition to the instant request at the hearing held by this Examiner.

(4) At the conclusion of the final hearing the record was left open for additional submissions and review by Staff. The last of these was received on February 13, 2017 and the record was closed at that time.

FINDINGS OF FACT

Subject Property

- (1) The subject property is approximately 1.31 acres of a larger 4.93 acre parcel ("Lot 1"), and is currently unimproved.
- (2) The Applicant has entered into a lease agreement with Dollar General wherein Dollar General will operate its store on the 1.3 acres adjacent to Marlboro Pike (MD 725).
- (3) The subject property is exempt from the requirements of the Woodland and Wildlife Habitat Conservation Ordinance because there are less than 10,000 square feet of existing woodland and no previously approved tree conservation plans. (Exhibit 8) There will be no impact to any regulated environmental features. (Exhibit 17, p. 52) There is an approved Stormwater Management Concept Plan for the site. (Exhibit 11) The property does not lie within a Chesapeake Bay Critical Area Overlay Zone. (Exhibit 44(d))
- (4) Subsequent to the submission of the Application it was discovered that a master planned right-of-way, identified as P609, may or may not be located on the subject property in the future. As a result Applicant amended its Special Exception Site Plan by shifting the building, parking, etc., to the west to ensure the proper setback from the proposed right-of-way. (Exhibit 44(b); T. 6-9, 12-13)

Neighborhood/Surrounding Uses

- (5) The property is surrounded by the following uses:
 - North – Marlboro Pike (MD 725) and single-family detached dwellings in the M-X-T Zone
 - South – Warehousing and consolidated storage in the I-1 Zone
 - East – the 84 Lumber Company in the I-1 Zone
 - West – Single-family detached dwellings and a vehicle parking lot in the I-1 Zone
- (6) The Neighborhood is defined by the following boundaries:
 - North - Marlboro Pike (MD 725)
 - South - Pennsylvania Avenue (MD 4)
 - East - Robert S. Crain Highway (US 301)
 - West - Popes Creek Railroad right-of-way

Zoning History

(7) Staff provided the following history of the zoning approvals for the subject property:

In 2006, the entire 4.93-acre site was improved with a large tobacco warehouse. The property is the subject of Record Plat REP 208 @ 9, which was approved on August 22, 2005, known as the Marlboro Tobacco Market Lot 1.... At the time the record plat was approved, the site was developed with two large buildings. The gross floor area (GFA) of the existing building located on the site was 94,867 square feet. In 2006, a Detailed Site Plan (DSP-06013) was approved for the entire 4.93-acre site (including the subject property) to allow a 99,720-square-foot consolidated storage facility, with six separate buildings.... After the approval of the DSP, those buildings were razed. The storage facilities have not yet been constructed. The DSP remains valid due to extension bills enacted by the Prince George's County District Council. The applicant is required to file a revision of DSP-06013 to reflect the Dollar General Store with consolidated storage facility buildings. The applicant now proposes to develop part of the site for a department or variety store in the I-1 Zone....

The special exception area consists of approximately 1.30 acres of the overall 4.93-acre property. The Dollar General business includes the sale of general retail commercial goods (8,549 square feet) and a small portion (450 square feet) of refrigerated food items

The proposed retail store will be located along the subject property's Marlboro Pike (MD 725) frontage and will replace one of the large 73,020-square-foot consolidated storage building that was approved as part of DSP-06013. For this reason, a revision to the approved DSP is required.

(Exhibit 17, pp. 4, 5)

Master Plans/Sectional Map Amendment/General Plan

(8) The subject property lies within Planning Area 79/Upper Marlboro and Vicinity, an area discussed in the 2013 Subregion 6 Master Plan and Sectional Map Amendment ("SMA"). The Master Plan offered the following sustainability goals for economic development in Subregion 6:

- Work toward an economy that is healthy, diversified, and globally competitive, that enhances ecosystems rather than degrades them, that provides all citizens with ample opportunities for fulfilling work, and that increases the county's tax base.
- Preserve the current and future diversity of opportunities for economic development available in the Developing and Rural Tiers through strategic planning and clustering of industry, employment, and retail around existing development and transportation networks.

(2013 Subregion 6 Master Plan and Sectional Map Amendment, p. 145)

(9) The Master Plan also encouraged private investment in areas around Marlboro Pike (MD 725) west of US 301, since this primary access into the county seat "has a high degree of visibility" and "improvements to site and corridor design would significantly upgrade the appearance of the corridor, improve gateway image to the county seat, and help prime the area for future investment." (2013 Subregion 6 Master Plan and Sectional Map Amendment, p. 199)

(10) The SMA retained the property within the I-1 Zone.

(11) The 2014 General Plan ("Plan 2035") placed the property in the Established Communities. Established Communities "are most appropriate for context-sensitive infill and low-to medium-density development." (Plan 2035, p. 20) Staff opined that the instant request satisfies this vision for Established Communities since the subject property is located in an established industrial area. (Exhibit 17, p. 64)

(12) Almost the entirety of Lot 1 is mapped by the Green Infrastructure Plan as lying within the Regulated Areas due to an extensive area of 100-year floodplain on site. (Exhibits 17, p. 9 and 33) The Special Exception area "contains a small portion of the existing floodplain." (Exhibit 17, p. 12)

Applicant's Proposal

(13) Applicant is a Limited Liability Company in good standing with the State Department of Assessments and Taxation. (Exhibits 3(a) and (b))

(14) Applicant intends to construct a 10,800 square-foot Dollar General Store on 1.31 acres of a 4.93 acre lot (Lot 1). The Applicant is required to construct a total of 59 parking spaces, with three handicapped spaces, and has done so. (Exhibits 44(c) and (d))

(15) Applicant submitted a photometric lighting plan in recognition of the residential uses on the north side of Marlboro Pike. (Exhibits 44(e) and (g)) All exterior lighting

shall be designed in a manner that does not direct lighting onto the adjacent residential properties. (Exhibit 44(d))

(16) Mr. Richard Moran testified that Applicant intends to lease a portion of its site to Dollar General. It will then amend its Detailed Site Plan for the entire lot to construct its 34,000 square foot consolidated storage facility further away from the Marlboro Pike frontage. (T. 22-23, 52)

(17) Applicant prepared architectural renderings for the exterior of the proposed store. (Exhibit (44(b)) The building will have a height of 30 feet. It will have a red brick façade, and feature faux windows and awning on the right and left sides. There will be one 25-foot-tall, 50-square-foot pylon sign to the west of the site's frontage along Marlboro Pike. There will also be an 18' x 12' dumpster area on a concrete pad enclosed by a sight-tight fence. (Exhibits 44(c) and (d); T. 35)

(18) Michael Lenhart, accepted as an expert in the area of transportation planning and engineering, prepared a traffic impact analysis for the record (Exhibit 31), and testified in support of the Application. He concluded that the request would not negatively impact transportation facilities in the area, reasoning as follows:

[A] traffic impact analysis is not required ... for this special exception, however, state Highway Administration has stated that they would like a study in conjunction with the access permit process. So we obtained traffic counts along Maryland 725/Marlboro Pike in the vicinity of the site access, and conducted a traffic impact analysis that can be used for the State purposes. [For] [t]he site access we looked at growth along Marlboro Pike for the historical 10-year period using State Highway data[.] [T]he State Highway data shows that the growth has been flat, roughly zero percent over the past 10 years

It's 20 trips, 20 primary trips ... in the morning, and 37 in the evening The site would pass, even though an impact study is not required the site would pass that analysis if it were required; it passes the State Highway analysis; it has a fairly low trip generation, one that would not even require a traffic impact study if this were a normal application.... It would have no adverse impact; it has a very low trip generation, it satisfies all the standards, and would not cause any operational problems.

(T. 48-49, 51-52, 54 and 56)

(19) Mark Ferguson accepted as an expert in land use planning prepared a written land planning analysis (Exhibit 33), and testified in support of the request, reasoning as follows:

[T]he Master Plan pays ... particular attention to the improvement of the subject neighborhood.... [I]t explicitly seeks redevelopment; it explicitly seeks safety improvements to [MD] 725, which will be provided by the subject application in the form of the proposed road improvements, that will be curbs, that will be sidewalks, that will be limitation of the number of entrances to the subject property.... You may remember that the site was previously developed with tobacco warehouses ... which were demolished in about 2008. When those warehouses were in placed there was, the entire property was the access from 725, you could drive on the warehouse property from any point along the property's frontage without any restriction, so certainly the approval of the subject application will represent a significant improvement in safety, and in the appearance of the 725 corridor, both of which are sought in great detail, and in great stridency by the Master Plan....

[I]n the course of the development of the self-storage facility there is an approval to essentially regularize the limit of the flood plain on the site, you'll see on the Special Exception site plan the dashed blue line which shows an area of the flood plain actually extended up even into the middle of the Special Exception area, that will be filled, and then an area at the very rear of the total ... 4.9 acres will be excavated[.] [T]hat excavation will have a number of benefits, not just to provide for compensatory storage for the flood waters that would be [lost] by filling in the area, but that area is also adjacent to the wooded buffer that surrounds Depot pond, and so the removal of the previous impervious area that was associated with the tobacco warehouses will be an enhancement to the stream buffer. Eventually, because that property will be below the flood plain and will not be able to be developed after the compensatory storage is excavated, that will revegetate and eventually become a really functioning natural buffer to the stream system, and will be a really ... substantive improvement to the situation as well.

(T. 68-70)

(20) Applicant's representative noted that it accepts all conditions proposed by Staff.
(T. 37)

Agency Comment

(21) The Technical Staff found that the proposed use generally is consistent with the vision of the 2014 General Plan and conforms to the general land use recommendations of the 2013 Master Plan and SMA. It recommended approval, with conditions, reasoning as follows:

No major issues were identified in the referrals that were received for the subject application.... SHA noted that it grants conditional approval to the special exception plan at this time. SHA will require a traffic impact study in conjunction with the access permit process prior to issuance of a building and grading (fine/rough) permit to determine any off-site, site access, and/or frontage improvements as necessitated by this project....

There are no major issues associated with this application that would conflict with the general purposes of this Subtitle.... A special exception with a Dollar General store will, in fact, help guide orderly growth and fulfill a recognized need for business development with the Marlboro Pike (MD 725) corridor. The proposed Dollar General store will stimulate and encourage economic development activities which will create jobs and, therefore, promote employment and a broad protected tax base.... Since the proposed development will be on a pad site that is surrounded by commercial uses in the area, it will be in harmony with the purposes of [the Zoning Ordinance]. The development will not create an adverse impact on adjoining development....

(Exhibit 17, pp. 8-9)

(22) The Community Planning Division opined that “[t]here are no identified public facilities conditions or requirements on or adjacent to the subject property” (Exhibit 17, p. 64)

(23) The Subdivision Section reviewed the request, and provided the following comment:

The property is the subject of Record Plat REP 208 and 9, which was approved on August 22, 2005. The property is known as the Marlboro Tobacco Market, Lot 1. The plat was prepared in accordance with [S]ection 24-107(d) and Section 24-107(c)(7)(D) and indicates that the gross floor area of the existing building located on this site is 94,867 when the record plat was approved. The Detailed Site Plan is in substantial conformance with the Record Plat.

The Detailed Site Plan indicates that the total gross floor area is 99,720 square feet, which would not result in a requirement for a new preliminary plan because ten percent of the site area had been developed pursuant to building permits issued on or before 1991 and vested on the record plat. There are no other Subdivision issues at this time.

(Exhibit 17, p. 61)

(24) The Transportation Planning Section noted that the requested use would not result in an increase of vehicular trips – but would, rather, lead to a reduction of 3 A.M. and 9 P.M. peak hour trips “after accounting for pass-by trips along Marlboro Pike.”
(Exhibit 17, p. 61)

(25) The Environmental Planning Section provided the following comment concerning the regulated environmental features on site:

Alteration of the floodplain boundary had been previously approved by grading the site to a higher elevation, in the location of the proposed structures, and providing compensatory storage for the displacement. The current proposal also shows grade changes to maintain the base floor elevations above the floodplain and provides the required compensatory storage. DPIE approved the grade changes and compensatory storage with the Stormwater Concept Plan approval (Case #18406-2001-03).... All development will be located beyond the 75 ft. stream buffer.

The impacts to the floodplain are necessary to create a developable area in the site.

No further information concerning regulated environmental futures is needed at this time....

Based on the proposed limits of disturbance, the regulated environmental features have been preserved and/or restored to the fullest extent possible.

(Exhibit 17, p. 52)

(26) The Maryland State Highway Administration ("SHA") noted no objection to the request but, “will require a traffic impact study in conjunction with the access permit process, prior to the issuance of a building and grading... permit, to determine any off site, site access, and/or frontage improvements as necessitated by the project”
(Exhibit 17, p. 56)

(27) After the close of the hearing Applicant submitted a revised Site Plan that shifted the footprint of the building to accommodate the proposed right-of-way for P-609. (Exhibits 44(a)-(f)) Staff reviewed the revised Site Plan and provided comment. (Exhibit 45)

LAW APPLICABLE

(1) A Department/Variety Store is permitted by right in the I-1 Zone unless it does not meet the provisions of Section 27-473(b)(1)(E), footnote 10, which provides as follows:

Permitted use without requirement for Special Exception provided:

(A) The use is located within an industrial park which is adjacent to a Beltway interchange constructed after June, 2002;

(B) The parcel(s) is the subject of a Preliminary Plan of Subdivision that was approved pursuant to Subtitle 24 of this Code prior to June 30, 2004;

(C) A Detailed Site Plan shall be approved in accordance with Part 3, Division 9, of this Subtitle;

(D) The acreage of lots (used for commercial purposes) shall not exceed twenty-five percent (25%) of the acreage of lots used for industrial purposes in the industrial park;

(E) No more than two (2) fast-food restaurants shall be allowed in the industrial park;

(F) Motels are prohibited; and

(G) Hotel amenities shall include at a minimum a swimming pool, fitness center, room service, concierge service, parking, and restaurant(s) located within the building.

The subject property is not located adjacent to the Beltway, and a Special Exception is therefore required.

(2) Since a Special Exception is required, the Application must satisfy the following provisions of Section 27-317(a) of the Zoning Ordinance:

(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 2Tree 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.

Special Exception

(3) 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.

CONCLUSIONS OF LAW

(1) The general purposes of the Zoning Ordinance are found in Section 27-102. The instant Application satisfies the following purposes for the following reasons:

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

This purpose is furthered by allowing this infill development along an area of Marlboro Pike (MD 725) in need of improvement; by permitting a store to open in a neighborhood lacking this particular amenity; and by providing additional employment opportunities.

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

The request furthers relevant provisions of applicable plans. The 2014 General Plan encourages such infill development, and the 2013 Master Plan specifically urged private development to improve the properties along Marlboro Pike (MD 725).

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

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.

Staff and Applicant's transportation planner noted that the request, if approved, would lead to a reduction of vehicular trips along Marlboro Pike during both morning and evening peak hours. Staff also noted that no other (non-traffic related) public facilities will be impacted by the Application. Accordingly, these purposes are satisfied.

To guide the orderly growth and development of the County, while recognizing the needs of agriculture, housing, industry, and business

This purpose is furthered since the infill development will bring a department store to an area of the County that experiences a dearth of such uses.

To encourage economic development activities that provide desirable employment and a broadly protected tax base

To ensure the social and economic stability of all parts of the County.

Approval of the Application will meet these purposes since the store will encourage shopping and employ individuals, thereby increasing the County's tax base. (Section 27-317(a)(1))

(2) The use is presumed to meet the purposes of the I-1 Zone since the District Council permits it upon approval of the Special Exception Application. (Section 27-317(a)(1))

(3) Once the conditions are satisfied the use will be in conformance with all the applicable requirements of the Zoning Ordinance. There is no need for a variance or departure. (Section 27-317(a)(2))

(4) As noted, *supra*, the request will not substantially impair the integrity of any approved Master Plan, Functional Master Plan or the General Plan. The Subregion 6 Master Plan encouraged investment in the area where the use will be located and encouraged additional employment opportunities. The 2014 General Plan encouraged context sensitive infill development such as that proposed herein. No Functional Master Plan is adversely affected by the Application's Approval. (Section 27-317(a)(3))

(5) The proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area, nor will it be detrimental to the use or development of adjacent properties or the general neighborhood. The use will be located on a vacant lot surrounded by a few residences, warehousing, consolidated storage and the 84 Lumber Company. As proposed, this infill development will improve the aesthetics of the area, offer a much needed amenity, and provide additional jobs. There was no opposition to the request, nor evidence that any adverse impact would result if approved. (Section 27-317(a)(4) and (5))

(6) The site is exempt from the requirements of the Woodland and Wildlife Habitat Conservation Ordinance. (Section 27-317(a)(6))

(7) As noted, *supra*, the site will be developed in a manner that preserves and/or restores the regulated environmental feature on site to the fullest extent possible. (Section 27-317(a)(7))

(8) The subject property does not lie within a Chesapeake Bay Critical Area Overlay Zone. (Section 27-317(b))

(9) The use proposed is not incompatible with existing uses, properties or persons within the neighborhood, and indeed is presumed compatible therewith. Since 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", it would be proper to grant the request. (Brandywine Enterprises, Inc. v. County Council, 117 Md. App. 525, 530 (1997) (citing Shultz v. Pritts))

DISPOSITION

Special Exception 4778 is APPROVED with the following conditions:

- (1) Prior to the issuance of Permits, the Special Exception Site Plan shall be revised to outline the boundaries of the subject property in red.
- (2) Prior to the issuance of permits, notes on the Special Exception Site Plan shall be revised as follows:
 - (a) Revise Note 5 to match the acreage shown on top of Exhibit 44(c) (1.31 acres)
 - (b) Revise Note 13 on Exhibit 44(d) to show both the required setbacks and those provided on site.
 - (c) Revise Note 30 to delete "Architectural Plans" and insert "Architectural Elevations" and to add "Materials used shall also conform with those shown on the Architectural Elevations".
- (3) The revised Special Exception Site Plans shall be submitted to the Office of the Zoning Hearing Examiner for approval and inclusion in the record.
- (4) Detailed Site Plan #06013 shall be revised to include the department or variety store, as well as the future planting area for Section 4.7 incompatible use buffer yard located to the west of the subject property outside of the Special Exception boundaries.

[Note: The Special Exception Site Plan and Site Notes, Landscape Plan and Notes, Photometric Lighting Plan, and Architectural Elevations are Exhibits 44(b) – (h)]