

**BEFORE THE MONTGOMERY COUNTY  
BOARD OF APPEALS**

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS  
Stella B. Werner Council Office Building  
Rockville, Maryland 20850  
(240) 777-6660**

**IN THE MATTER OF:**  
**Plamondon Enterprises, Inc.**  
Petitioner

Joseph Plamondon  
Chandra S. Beaufort  
Perry Berman  
Edward Papazian  
Joseph Cronyn  
For the Petition

Joseph A. Lynott, III, Esquire  
Attorney for Petitioner

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Board of Appeals Case No. S-2839  
(OZAH Case No. 12-29)

Before: Martin L. Grossman, Hearing Examiner

**HEARING EXAMINER’S REPORT AND RECOMMENDATION**

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## I. STATEMENT OF THE CASE

Petition No. S-2839, filed by Plamondon Enterprises, Inc. on February 23, 2012, seeks a special exception, pursuant to §59-G-2.16 of the Zoning Ordinance, to permit a fast-food, drive-through restaurant (a Roy Rogers) at the northwestern corner of the intersection of MD 198, Spencerville Road (now called “Old Columbia Pike” in this area) and Columbia Pike, US 29A (also known as Business US 29), in Burtonsville, Maryland.

The special exception site consists of a free-standing pad site, 16,413 square feet in size, located in the C-2 zoned portion of Burtonsville Towne Square, an existing shopping center. The shopping center occupies an area of about 26.23 acres in the C-2 (General Commercial) and R-C (Rural Cluster) Zones, and it is owned by Burtonsville Towne Square, LLC (Tax Account No. 05-03646404)<sup>1</sup>. Exhibit 4(a). The owner has provided written consent to the special exception application (Exhibit 17), and a portion of the lease to the premises is in the record as Exhibit 16.

The Planning Board approved the existing shopping center in July 2005 by virtue of Preliminary Plan 120041090 (Exhibit 9). It authorized 250,000 square feet of retail space, about half of which—127,500 square feet—is built and occupied. Exhibit 27, p. 5. The additional retail area proposed for the Roy Rogers (3,327 square feet) would bring the total retail area of the shopping center to about 131,000 square feet, less than the amount originally approved. Exhibit 27, p. 5.

On March 20, 2012, notice was issued scheduling the public hearing for July 30, 2012 (Exhibit 23). The hearing was advanced, with Petitioner’s consent (Exhibit 24), to June 29, 2012, by notice issued April 5, 2012.

Technical Staff at the Maryland-National Capital Parks and Planning Commission (M-NCPPC), in a memorandum dated June 8, 2012, recommended approval of the petition, with

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<sup>1</sup> The tax account number was incorrectly listed in the application (Exhibit 1(b)) as Tax Account No. 05-036464404. With the consent of Petitioner’s counsel (Exhibit 40), the Hearing Examiner corrected the Tax Account number on the application to No. 05-03646404.

conditions (Exhibit 27).<sup>2</sup> At the request of the Hearing Examiner (Exhibit 28), Staff supplemented its report with additional analysis regarding compliance with applicable development standards (Exhibit 31(a)) and proposed signage (Exhibit 31(b)). The Montgomery County Planning Board reviewed this case on June 21, 2012, and unanimously recommended approval of the petition with the same conditions recommended by Technical Staff, as summarized in its letter to the Board of Appeals dated June 26, 2012. Exhibit 34.

The public hearing in this case took place, as scheduled, on June 29, 2012. Five witnesses were called by Petitioner at the hearing. There were no opposition witnesses, and there has been no community participation of any kind in the case. At the end of the hearing, the record was held open for an additional 15 days as required by Board of Appeals Rule 7.2.6.a., because the Planning Board letter did not reach the record five days before the hearing.

The record closed, as scheduled, on July 16, 2012. As discussed more fully below, the Hearing Examiner finds that Petitioner has met all the standards for special exception it seeks, and the Hearing Examiner therefore recommends that the petition be approved, with conditions.

## **II. FACTUAL BACKGROUND**

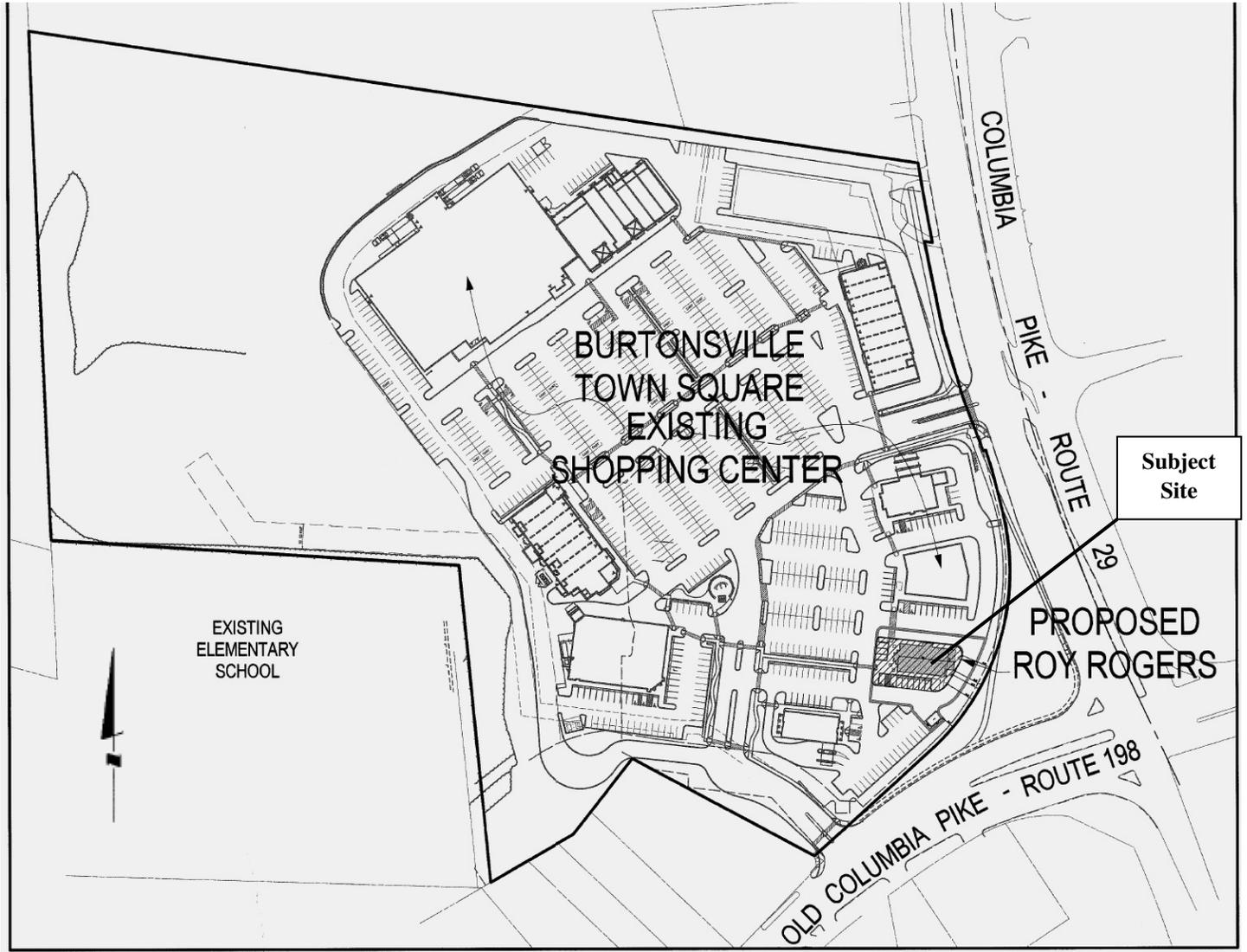
### **A. The Subject Property and Surrounding Neighborhood**

The subject property is located at the northwestern corner of the intersection of MD 198, Spencerville Road (now called “Old Columbia Pike” in this area) and (also known as Business US 29), in Burtonsville, Maryland. As previously noted, the special exception site consists of a free-standing pad site, 16,413 square feet in size, located in the C-2 zoned portion of the existing Burtonsville Towne Square shopping center.

The location of the special exception site is well shown on the cover sheet to the special exception site plan (Exhibit 4(a)), which is reproduced on the next page.

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<sup>2</sup> The Technical Staff report is frequently quoted and paraphrased herein.



The vacant pad site (Exhibit 14(a)), shown below, and other parts of the existing shopping center are depicted in photographs supplied by the Petitioner and Technical Staff (Exhibit 27, pp. 2-3):





Technical Staff describes the shopping center as follows (Exhibit 27, pp. 2-3):

Burtonsville Towne Square is a 26.259 acre property in the Burtonsville commercial district. It is located at the intersection of MD 198, now called Old Columbia Pike in this area, and Columbia Pike, the former US 29. The shopping center is about 1,000 feet east of the MD 198/US 29 interchange. It consists of three “nodes,” that surround a more central parking area. The nodes are in the north-central, northeastern and southwestern sections of the property. The north-central node is the largest, and is the site of the center’s anchor, a Giant Food store. To the east is a building housing several restaurants and a dry cleaning establishment. The third node includes a free-standing pharmacy and a building with several more restaurants and service businesses. The center’s relatively recent redevelopment is ongoing, and there are several spaces in the nodes that remain to be leased.

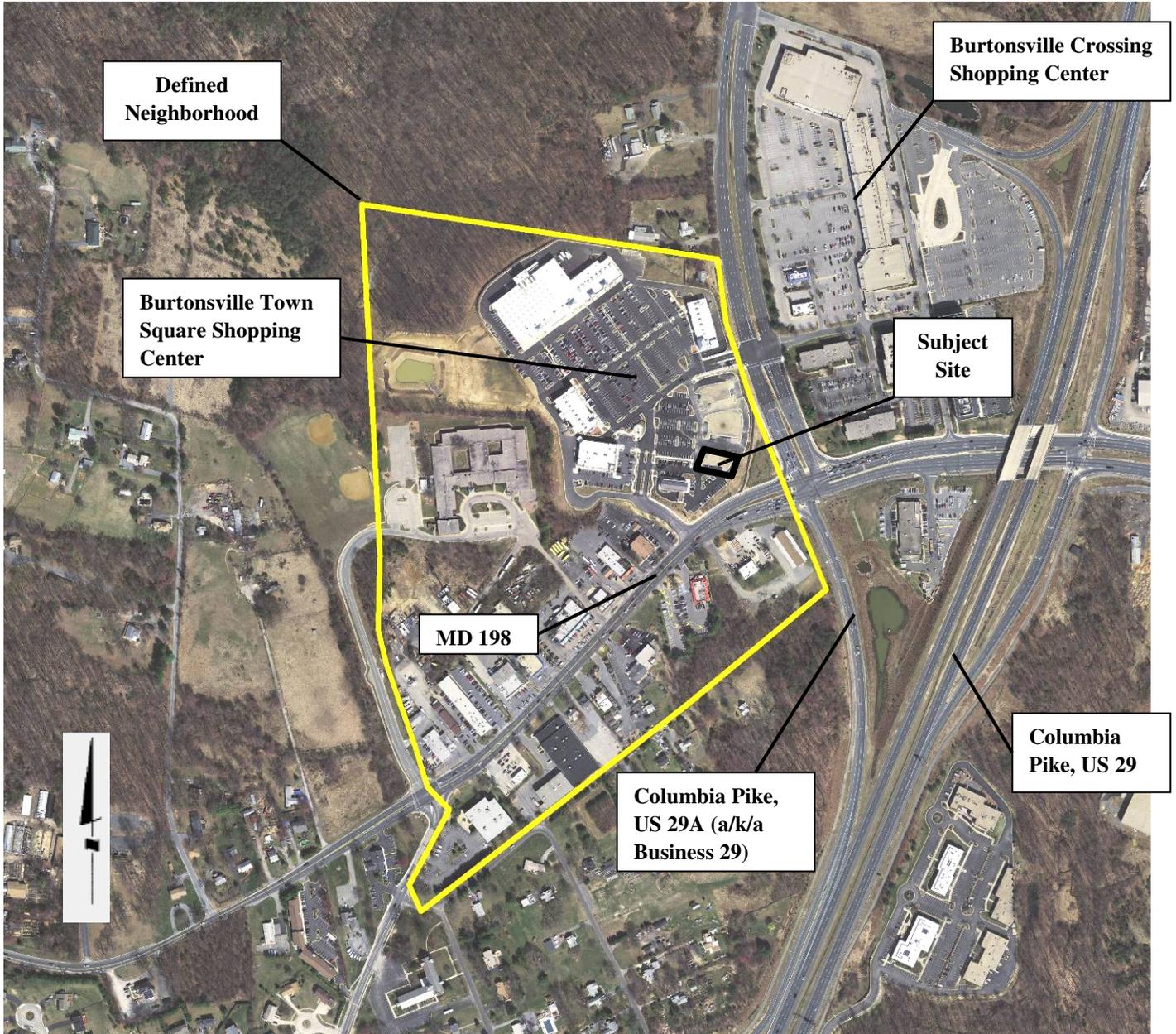
The center also includes four additional sites for free-standing buildings in the southeast portion of the property; one site houses a bank. Drive aisles and paved areas for parking have been constructed in this area. There are two main entrances to the center: one from Columbia Pike to the east and one from MD 198 to the south.

Several consistent design features are included in the center. Buildings use red brick and painted yellow or cream exteriors. Roof lines and building fronts vary to individualize businesses and there are distinctive treatments at building corners. The southern entrance to the center includes a small public plaza.

The shopping center property is in two zones. The eastern two-thirds, encompassing the developed portion of the center, are in the C-2 Zone. The remainder, a largely forested area, is in the RC Zone.

Technical Staff proposed to define the neighborhood as being essentially coextensive with the Burtonsville Towne Square shopping center on the north and east, but including the Burtonsville Elementary School on the southwestern side of the shopping center and the properties on both sides of MD 198 to the south and southwest of the site. As noted by Staff (Exhibit 27, p. 3), the area is almost entirely commercial or institutional in nature, with most of it, including the subject special exception site, in the C-2 Zone. The western portion of Burtonsville Towne Square is forested (outside of the shopping center). That area and the land occupied by Burtonsville Elementary School are in the R-C Zone. Technical Staff reports that there are two special exceptions in the neighborhood: S-783, for the McDonald’s Restaurant across Old Columbia Pike from Burtonsville Towne Square, and S-847, for a combined “7-11” convenience store and gas station next to the McDonald’s.

An aerial photo map supplied by Staff (Exhibit 27, p. 3) depicts the neighborhood as proposed by Staff and agreed to by Petitioner (Tr. 59-61):



Although the Hearing Examiner would have included the confronting properties to the east of US Route 29A in the neighborhood because they are within site and sound of the subject site, and will also be affected to some extent by additional traffic on Route 29A, the impact of the proposed special exception on those properties would be slight because they are themselves in a shopping center

(Burtonsville Crossing Shopping Center). Given these factors and the lack of any opposition to the neighborhood as defined by Technical Staff, the Hearing Examiner will accept that definition as well.

As Petitioner's land planner, Perry Berman, described the surrounding area, the largest abutting use is the Burtonsville Elementary School to the west of the property. Along the north side of Route 198, there are stores in the C-2 Zone in the process of being renovated. Across the road, on the south side of 198, at the intersection of Route 198 and Business Route 29, is the Bedding Barn, which is in a very prominent location. There are also a convenience gas station, a Seven Eleven, and a McDonald's. In addition, there are auto body shops and other restaurants, a Jerry's Sub and a veterinarian store. The only two special exceptions are on the south side of Route 198, one for the McDonalds and one for the convenience store. On the east side of Business 29, there is an office park made up of four office buildings, about three to four stories tall in the O-M Zone, and the large Burtonsville Crossing Shopping Center. Tr. 51-53.

As is evident from Petitioner's Neighborhood and Vicinity Map (Exhibit 36), the nearest residential development is to the west of the defined neighborhood, in the RE-1 Zone, and to the south of the defined neighborhood, in the R-200 Zone.

### **B. The Proposed Use**

The subject application seeks a special exception pursuant to Section 59-G-2.16 (Drive-in Restaurant) of the Zoning Ordinance to permit:

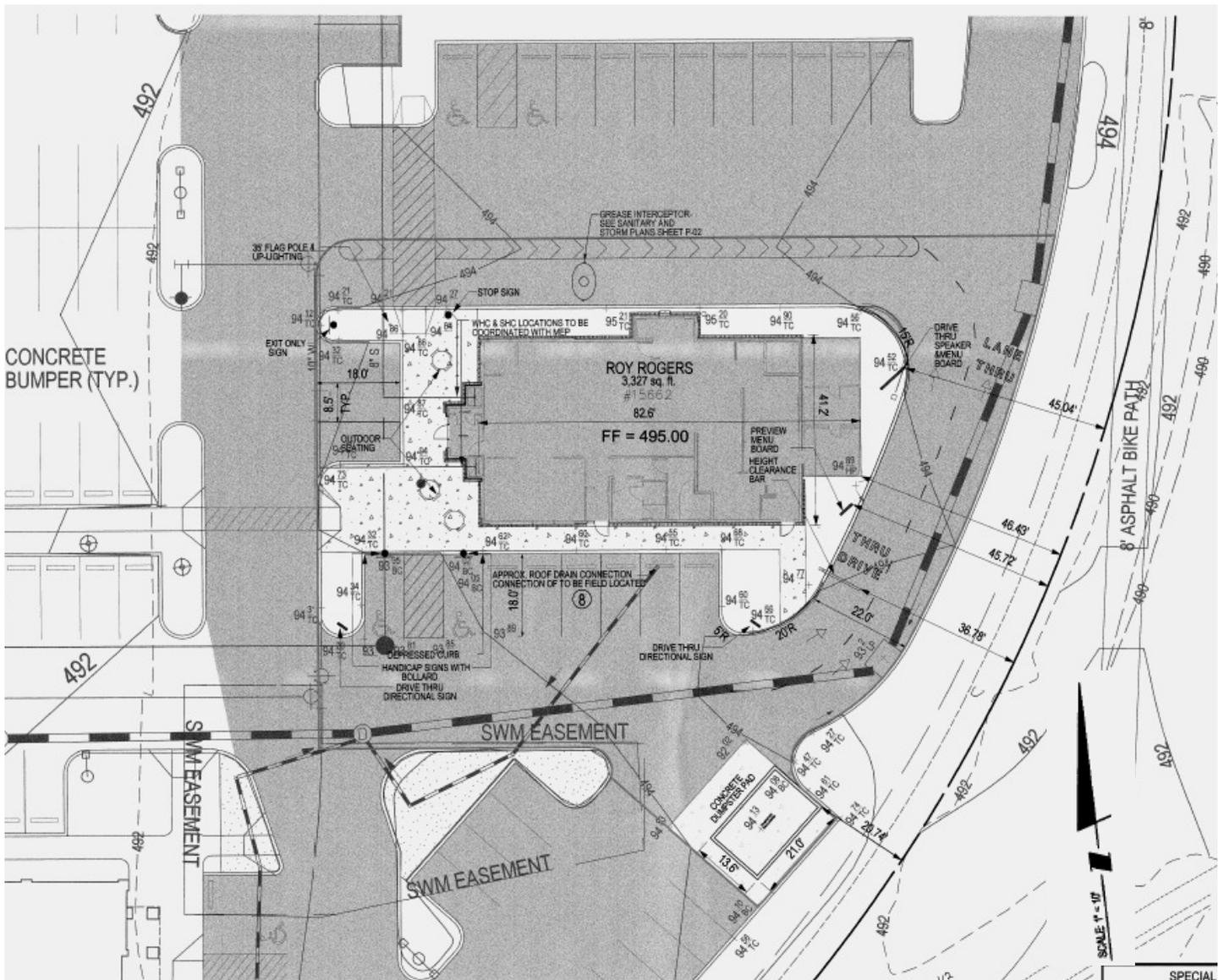
1. The construction and operation of a drive-in restaurant. The restaurant will be a one-story prototypical Roy Rogers restaurant with exterior elements consistent with those of the existing shopping center. The drive-in restaurant site within the shopping center is approximately 16,413 square feet, which will include the restaurant building, an outdoor seating area, a drive-thru lane and related menu board, 11 on-site parking spaces (plus 113 shared parking spaces nearby), a flag pole, and a trash dumpster area. The on-site trash receptacle will be screened by a three-sided brick enclosure. The building will provide eating accommodations for up to 62 people, together with a small patio that will provide seating for up to 12 persons.
2. The restaurant may be open seven days a week, 363 days out of the year, closing only on Thanksgiving and Christmas. Permitted hours of operation are Sunday through Thursday

from 6:00 a.m. to 10:00 p.m. and Friday and Saturday nights from 6:00 a.m. to 11 p.m.

3. The total number of employees will be between 25 and 40. Peak-hour shifts (11 a.m. to 2 p.m. and 5 p.m. to 7 p.m.) will have up to 15 employees. Non-peak hours will have up to 6 employees. A manager will be on site at all times.
4. Total interior floor area of 3,327 square feet (with about 1,300 square feet of indoor patron area). Tr. 88. There is also outdoor seating for 12 persons, which amounts to about 325 square feet of outdoor patron space.
5. Signage typical of a standard Roy Rogers restaurant.

The Site Plan, Elevations and Floor Plan:

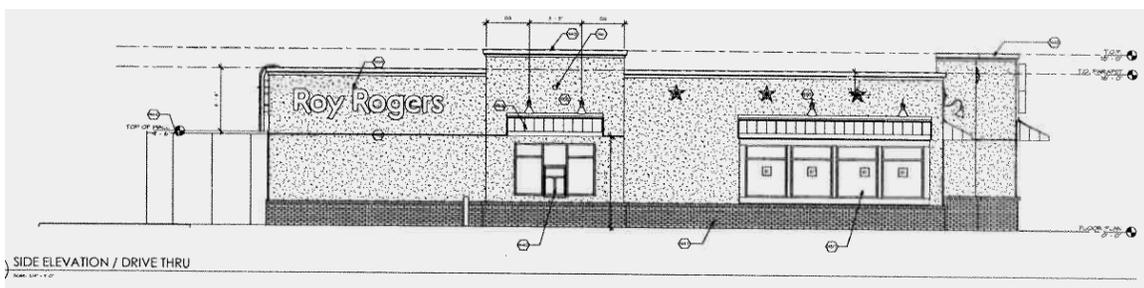
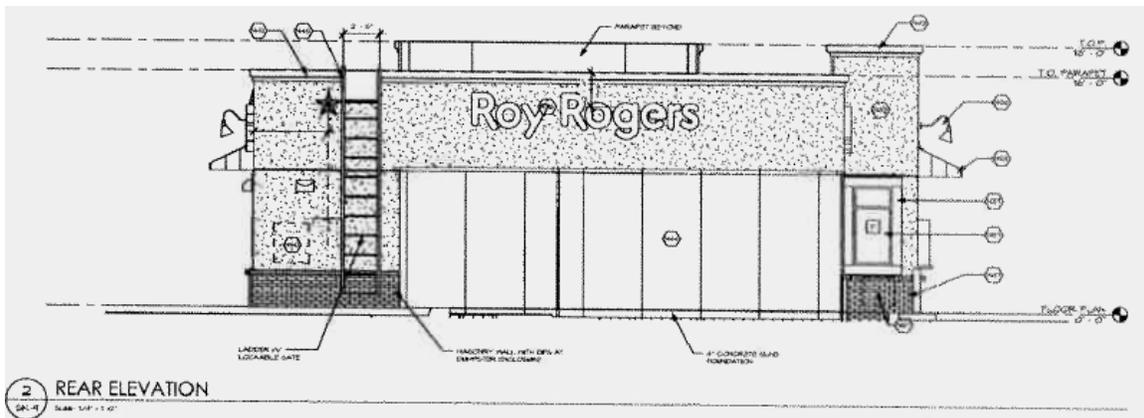
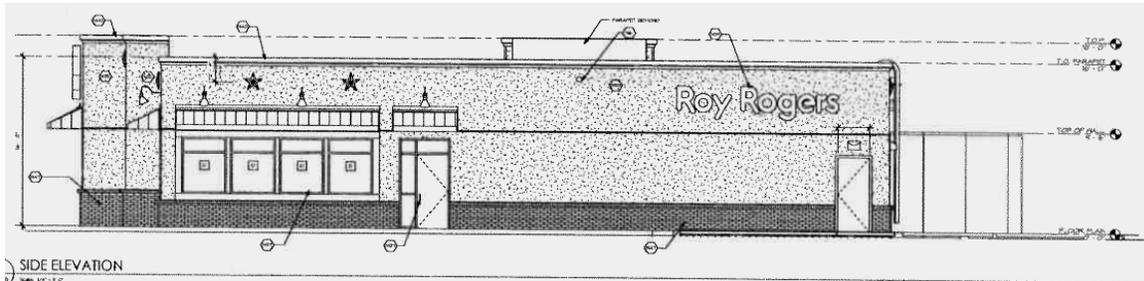
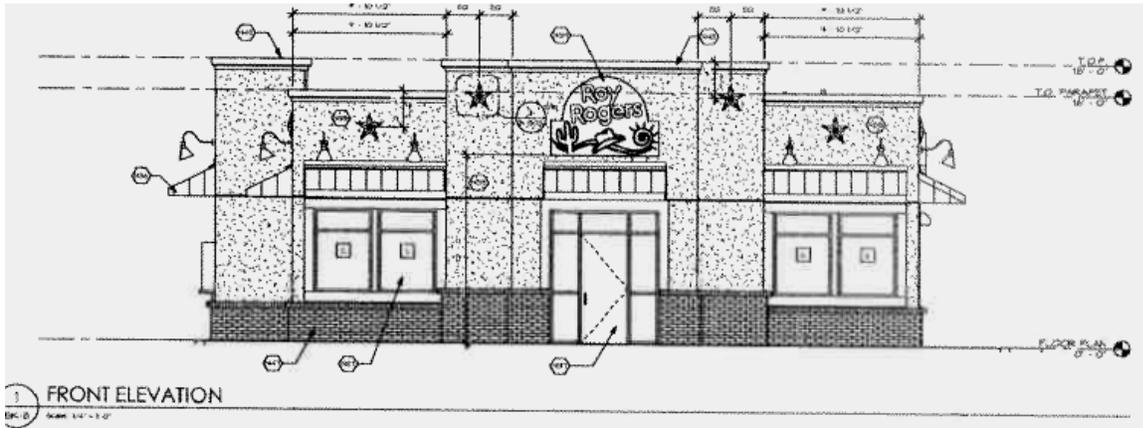
The site layout from the Site Plan (Exhibit 4(b)) is reproduced below:



As described by Petitioner's site planner, Chandra Beaufort, the special exception site has a boundary of 16,413 square feet. The Roy Rogers Restaurant is proposed in the center of the pad. It is 3,327 square feet, and it will have a finished floor elevation of 495 feet. The special exception area also contains 11 parking spaces, with two spaces being designated for accessible vehicles. There will be outdoor seating (three tables) for the patrons in the front of the restaurant. The western portion of the restaurant building is the front, facing away from the road. The main entrance of the building is on the west side of the building. There are also two entrances on the south side, one for patrons, one more for an employee entrance. The drive-through ordering is on the eastern side of the building and the pickup window is on the northern side of the building. People enter on the southwestern side, stop at the menu board, pull around, stop and then also stop again before entering back out to the main parking aisle. From there, they could go south or north. Tr. 33-36. The dumpster is located on the site, to the south of the rear corner of the restaurant. It will have brick on three sides and a wrought iron gate which is typical of the rest of the development of the shopping center. Tr. 37.

Joseph Plamondon, the co-owner and Co-President of Petitioner Plamondon Enterprises, Inc, testified that the building proposed in this case is consistent with the prototypical Roy Rogers one-story building. Tr. 107. It accommodates 62 seats, with another dozen seats outside at umbrella tables. It is a wood frame, stick built building, with an "EIFS" system (*i.e.*, exterior insulated finish system), on the outside, which provides a beige stucco look. At the base of the building, there will be brick consistent with the other elements in the shopping center. There will be a red standing seam metal roof that is consistent with the prototype and a western theme which is consistent with the brand. The trim around any of the doors is a cedar trim. There will be gooseneck lights above the standing seam roof, with a galvanized finish, and then the signs depicted in other exhibits. Tr. 109-111.

The proposed building elevations are shown below (Exhibits 5(a) and (b)):



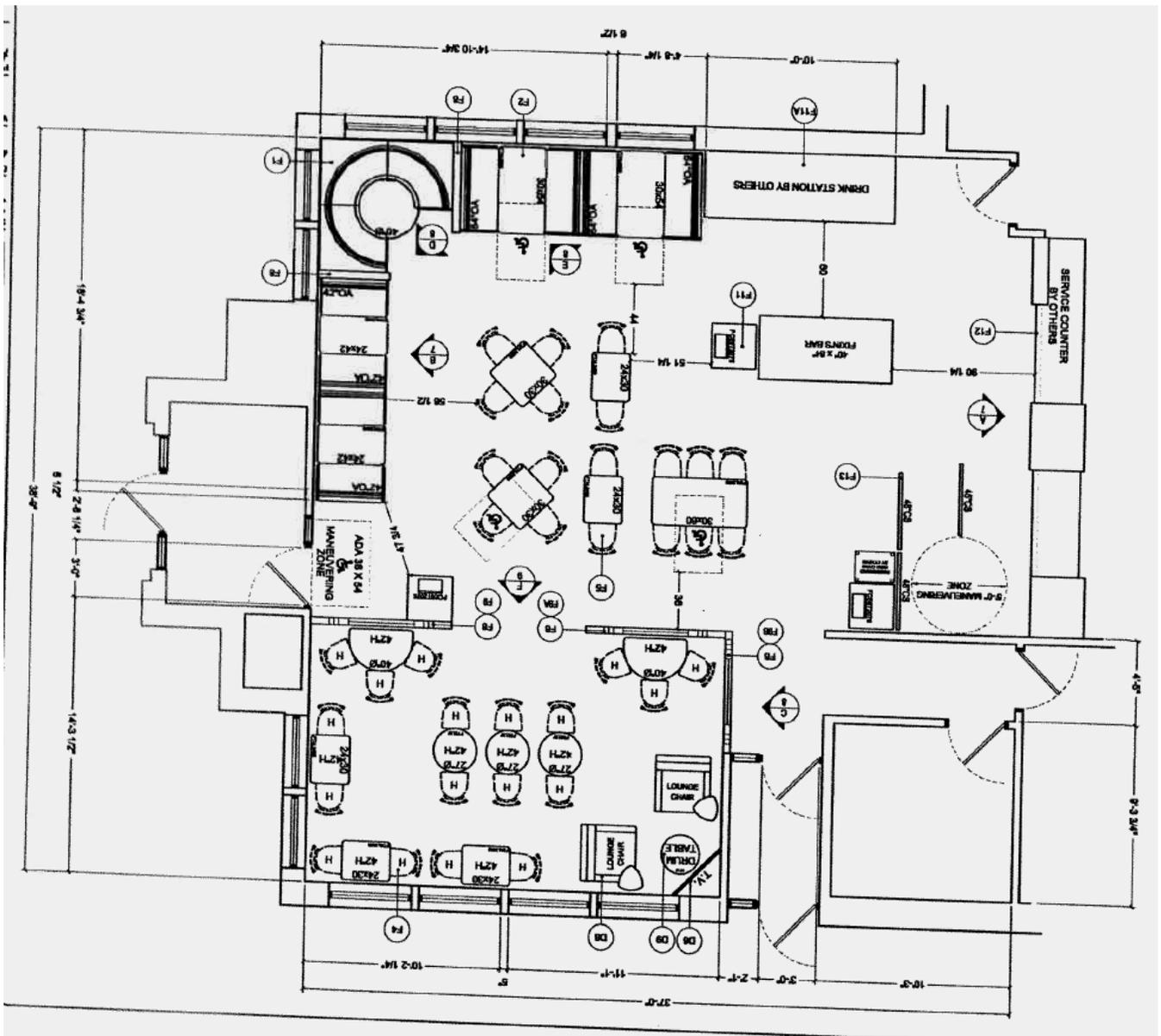
Petitioner also provided architect's renderings showing Petitioner's vision of the Roy Rogers restaurant, as it will appear when finished (Exhibits 15(a) –(d)):





Petitioner's land planner, Perry Berman, testified that the proposed building would fit in well with its surroundings. As noted by Mr. Berman, the use would not be a standalone special exception. It will be within a commercial shopping center, which itself is in a very large commercial area, and there is no nearby residential development. The lighting and circulation is part of the shopping center already. Mr. Berman concluded that the proposed use would not create any non-inherent adverse effects. Tr. 73-82. Technical Staff agreed that the proposed structure would be in harmony with the general character of the neighborhood. Exhibit 27, p. 10.

Exhibit 5(c), reproduced below, depicts the interior layout of the restaurant:<sup>3</sup>



There is a front service counter with a queuing area. The fixings bar is in the center, near the front sales counter and drink station. There are 62 seats, a variety of freestanding tables, as well as booths and some taller bar-type seating in a smaller room. There will be a plasma TV and a couple

<sup>3</sup> For some reason, the floor plan (Exhibit 5(c)) appears to have the west side of the restaurant (*i.e.*, the front) on the right side and the east side of the restaurant on the left. To be consistent with the other diagrams, the Hearing Examiner flipped the picture above to put the front on the left (west side) with north facing up.

of lounge chairs. Tr. 111-112. Petitioner's transportation planner, Edward Papazian, testified that there will be an indoor patron area of approximately 1,300 square feet. Tr. 88. Although he gave no figure for the outdoor patron area (nor did Technical Staff), the Hearing Examiner estimates the portion of the patio used for outdoor seating at about 325 square feet (*i.e.*, about 25% of the indoor patron area), based on the site layout (Exhibit 4(b)).

The restaurant has been designed to meet the sustainability requirements in connection with the landlord's LEED compliant efforts. Among other things, there will be no use of CFC refrigerants in the air conditioning, heating or refrigeration systems. There will be low flow faucets and waterless urinals, low emitting VOCs (volatile organic compounds) in paints, adhesives and the like. Compact fluorescent lighting or LED lighting will be used where appropriate, and the landscaping will be drought tolerant and will require no separate irrigation system. Tr. 112-113.

*The Patron Area and On-Site Parking:*

The size of the patron area (1300 square feet indoors and approximately 325 square feet outdoors) is significant because it is used to calculate the required parking. Zoning Ordinance §59-E-3.7 specifies that a restaurant must provide 25 parking spaces for each 1,000 square feet of indoor floor space devoted to patron use, and 15 parking spaces for each 1,000 square feet of outdoor floor space devoted to patron use.

The plan approved by Technical Staff and the Planning Board prior to the hearing mentioned only the overall indoor floor area of the building, which will be 3,327 square feet. Technical Staff apparently calculated the required parking using that figure, rather than the patron area, as specified in the Zoning Ordinance. Staff therefore concluded, "The ordinance requires 84 spaces for a 3,327 square foot restaurant; the necessary spaces can be found adjacent to the pad site and within the nearby parking field." Exhibit 31(a).<sup>4</sup> Although there are only 11 spaces immediately adjacent to the

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<sup>4</sup> Staff's figure of 84 parking spaces is undoubtedly derived from multiplying 3.327 x 25, which yields 83.175.

restaurant, there are 113 shared spaces in the parking field adjacent to the pad site, and the shopping center provides a total of 1,330 spaces. Technical Staff therefore concluded that the proposal meets the number of spaces required by the Zoning Ordinance, even though Staff made this calculation using overall indoor floor space rather than patron area.

The Hearing Examiner comes to the same conclusion applying the standards actually contained in Zoning Ordinance §59-E-3.7. The indoor patron area (of 1300 square feet) requires 33 parking spaces (1.3 x 25 spaces per 1,000 square feet of *indoor* patron area), as testified by Mr. Papazian, Petitioner's transportation planner. Tr. 88. Although he did not provide a figure for outdoor patron area, the Hearing Examiner estimated that space as about 325 square feet, which yields an additional parking space requirement of 5 additional spaces (.325 x 15 spaces per 1,000 square feet of *outdoor* patron area). Thus, the total number of required parking spaces would be 38 spaces (33 plus 5). Mr. Papazian testified that the combination of 11 parking spaces immediately adjacent to the restaurant and the 113 spaces that are located just west of the restaurant's pad site will provide sufficient parking for the use. Tr. 97-98. The Hearing Examiner agrees.

Landscaping:

Using a rendered landscape plan (Exhibit 37), Petitioner's site planner, Chandra Beaufort, described proposed landscaping for the project (Tr. 42-43):

The landscape plan for the proposed Roy Rogers consists mainly of accent landscaping. The proposed plant material include ornamental trees, crape myrtles. There are also arborvitaes for screening, mugho pine, yuccas, ground cover and then there are some small areas for annual planting on the, some of the parking islands. Another component of the landscape plan is decorative boulders which go along with the Roy Rogers theme branding and then also the existing landscaping of the shopping center does provide some screening along Route 29. . . . The plants . . . in the entire shopping center as well as the Roy Rogers are drought tolerant because the shopping center is trying for LEED Gold certification.

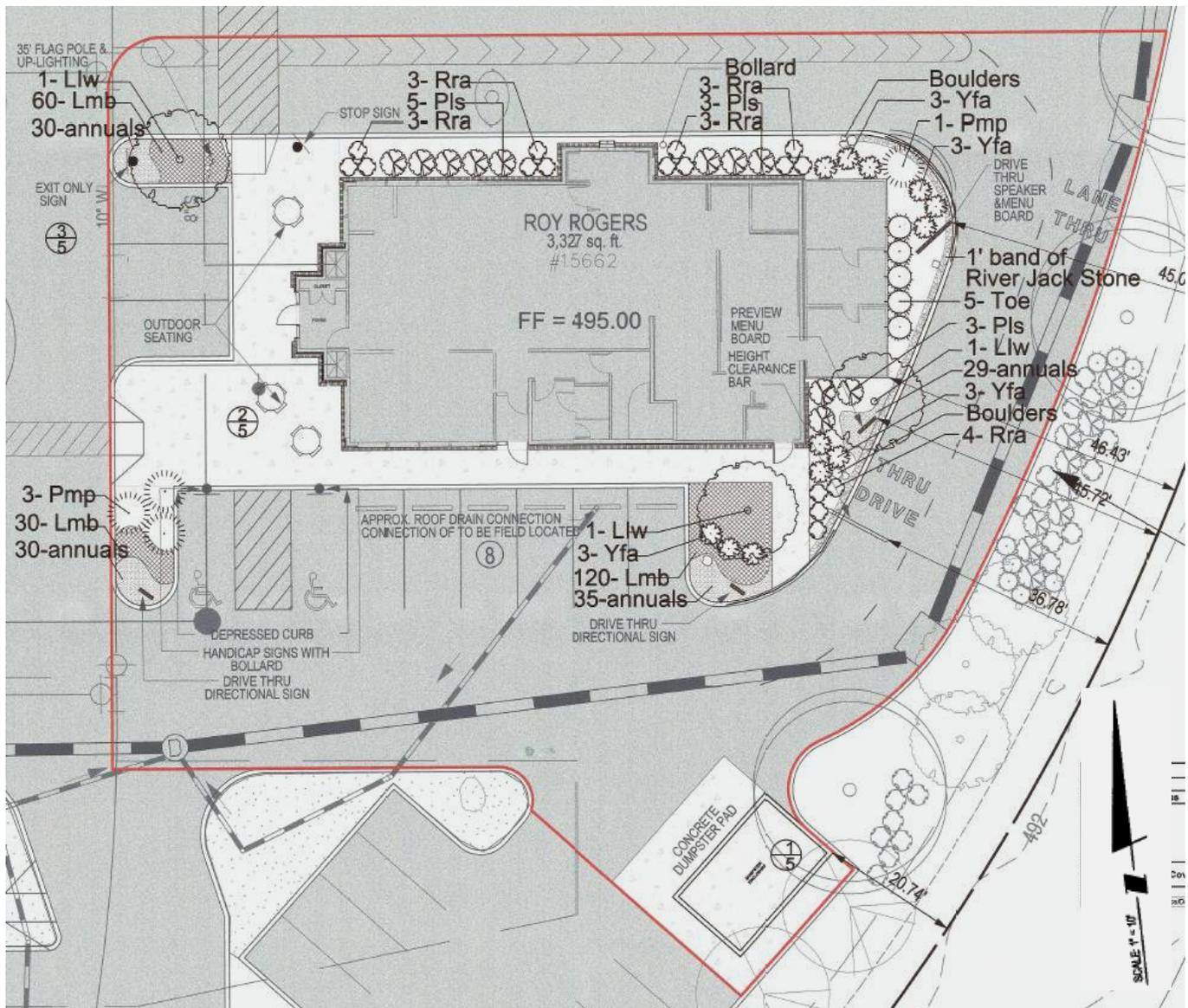
Petitioner's rendered Landscape Plan (Exhibit 37) is shown on the next page:



The formal Landscape Plan (Exhibit 7(a)) is reproduced below and on the following page:

INDIVIDUAL LOT PLANT LIST - ROY ROGERS						
TYPE	QUANTITY	Code	SCIENTIFIC NAME	COMMON NAME	HEIGHT/CAL.	B&B/CONT.
Ornamental Trees	3	Llw	Lagerstroemia indica 'White Chocolate'	White Crape Myrtle	8-10' ht.	B&B
Shrubs	4	Pmp	Pinus mugho 'Pumilo'	Mugho Pine	# 3 Cont.	
	8	Pls	Prunus laurocerasus 'Schipkaensis'	Schipka Cherry Laurel	30-36"	B&B
	16	Rra	Rosa x'Radtko' P.P. 16202	Double Knockout Rose	# 3 Cont.	
	5	Toe	Thuja occidentalis 'Emerald Green'	Emerald Green Aborvitae	4-5' ht.	B&B
	12	Yfa	Yucca filamentosa 'Adam's Needle'	Adam's Needle Yucca	# 2 Cont.	
Perennials/Ground Cover	124	Ann	Annuals	Annuals	per flat	
	210	Lmb	Liriope muscari 'Big Blue'	Big Blue Lilyturf	4"	

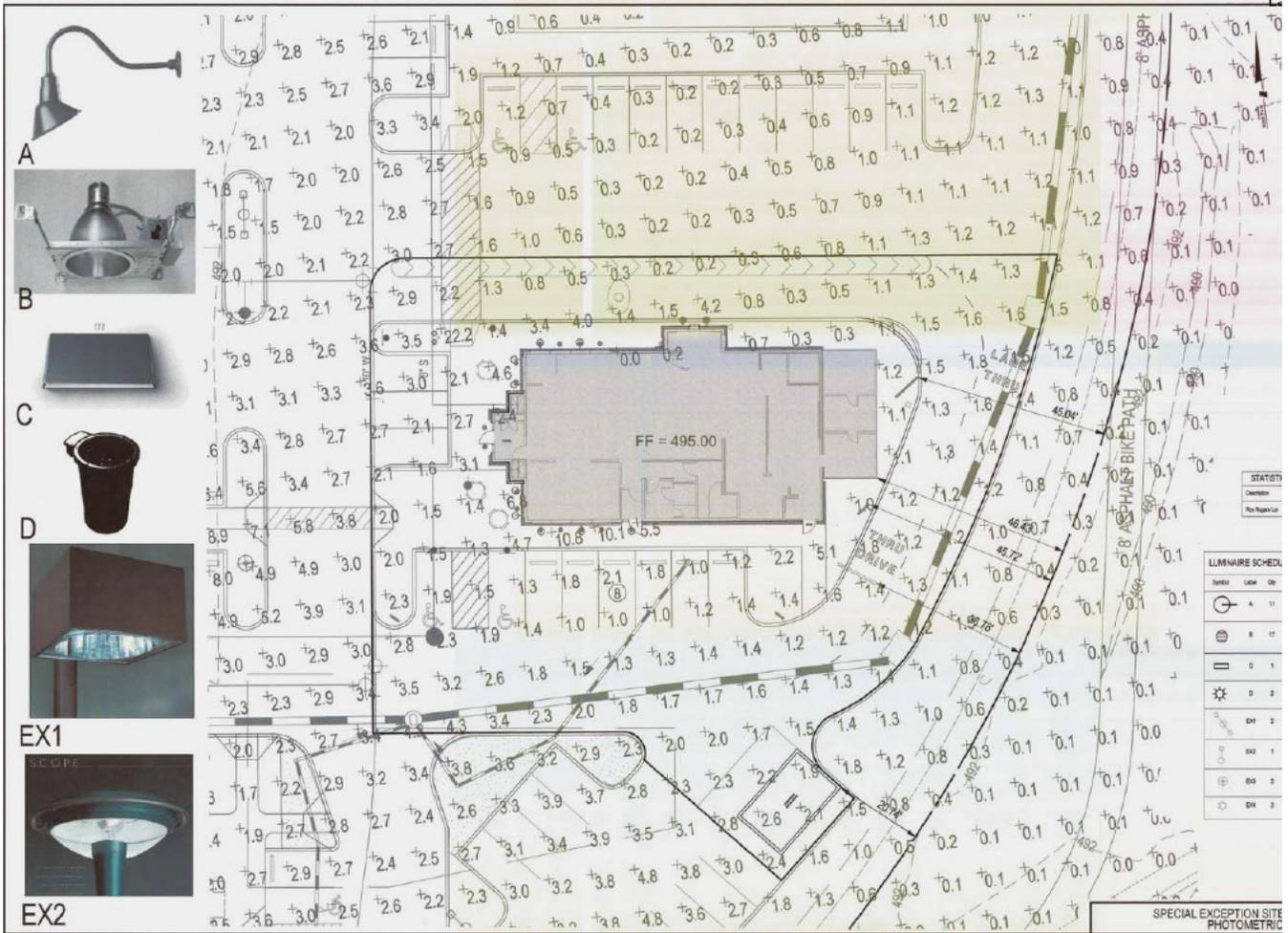
P:\13190001\11980100\Docs\Design\Roy Rogers Plant Schedule\_11-1219.xls



Lighting Plan and Details:

Much of the lighting is already part of the existing shopping center. Referring to the Photometric Plan (Exhibit 8), Ms. Beaufort described the proposed additional lighting as “adequate for safety,” but “will not promote excess glare.” Tr. 48. Ms. Beaufort noted that the site does not abut a residential zone, and there will be no glare into any residential zone.

The Photometric Plan (Exhibit 8) is shown on the next page:

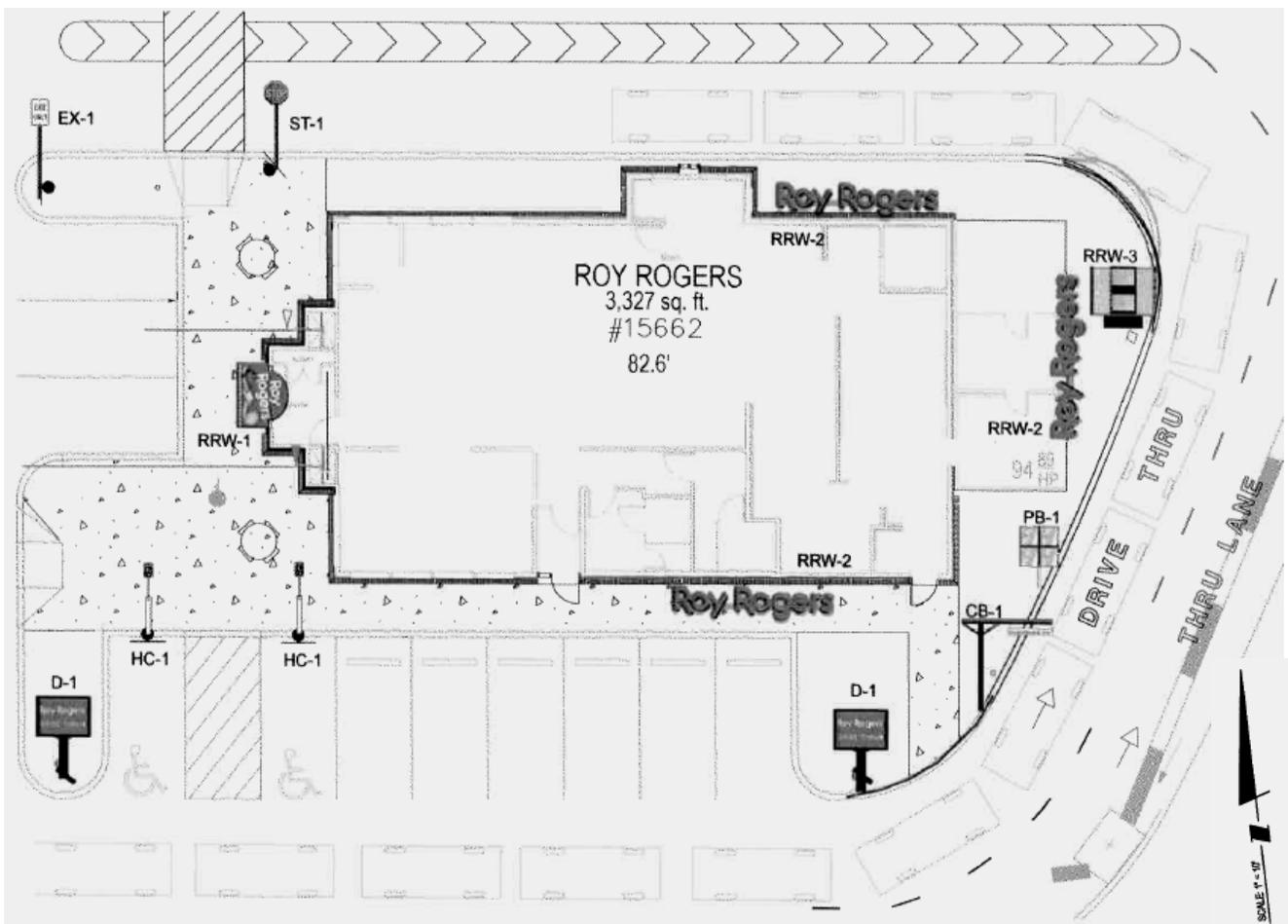


LUMINAIRE SCHEDULE						
Symbol	Label	Qty	Description	File	Lumens	LLF
	A	11	Gooseneck Lamp - Abolite Angled Reflector - 42 Watt Compact Fluorescent - LSI Industries	AC200-42-CFL- WHT-PG3.IES	3200	0.86
	B	17	Baffle Recessed Light - 23 Watt Compact Fluorescent - Spectrum Lighting	SG6V_12L_AR 6425GG(1).ies	1800	0.86
	C	1	Back Door Floor Light - 111 Mini Sconce - 42 Watt Compact Fluorescent - Gardco	111-MT-42F- BL.IES	3200	0.70
	D	2	Inground Light - 085000 HD - 250 Watt Metal Halide - BronzeLite	D6250eh.ies	17900	0.70
	EX1	2	Back to Back Shoebox - 400 Watt Metal Halide - Gardco	HPV19-500VF- 400LIES	44000	0.70
	EX2	1	Single Shoebox - 400 Watt Metal Halide - Gardco	HPV19-300VF- 400P.IES	44000	0.70
	EX3	3	Orca Post Top - 150 Watt Metal Halide - Gardco	CRP22-3VRF- 150P.IES	14500	0.70
	EX4	3	Shoebox	HPV19-300VF- 400P.IES	44000	0.70

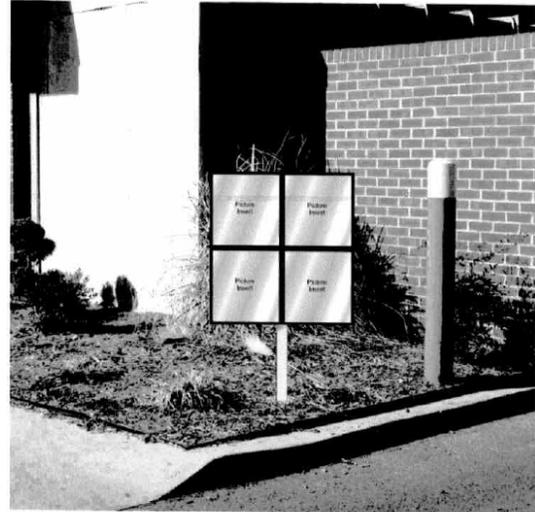
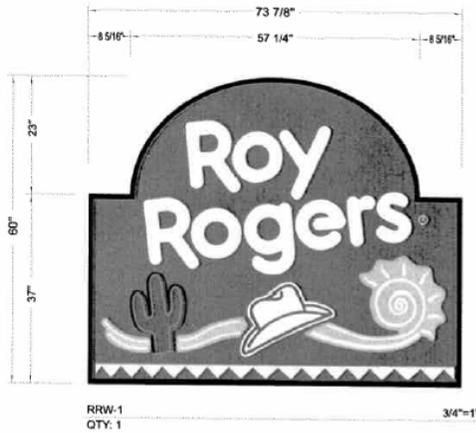
Although lighting readings from the photometric study exceed 0.1 footcandles at the property lines, that is permissible in this commercial zone, especially where none of the light will infiltrate into any nearby residential zones. There are no adjoining residential zones. In a commercial setting, such as this one, more light is better for pedestrian safety and for the sense of security it provides. The Hearing Examiner finds that the lighting proposed by Petitioner is appropriate to the site and will not adversely affect its surroundings.

Proposed Signage:

Petitioner proposes extensive signage for the site, consistent with signage for a typical Roy Rogers restaurant. The general location of the proposed signage is depicted in Exhibit 6(c), below:



The specific signs proposed are shown in Exhibits 6(d) –(i), portions of which are reproduced below:

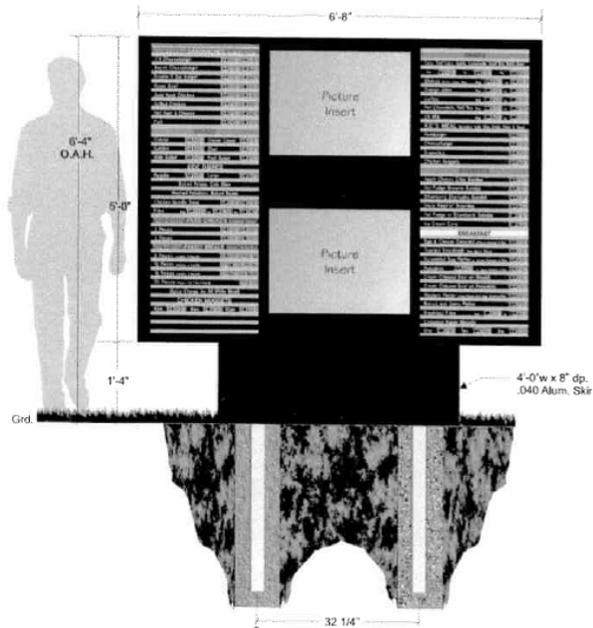


Preview Board Installed Elevation Scale: ~ 1/2"= 1'-0"

### Menu Board (Drive Thru)

This sign is intended to be installed in accordance with the requirements of Article 600 of the National Electrical Code and / or other applicable local codes. This includes proper grounding and bonding of the sign.

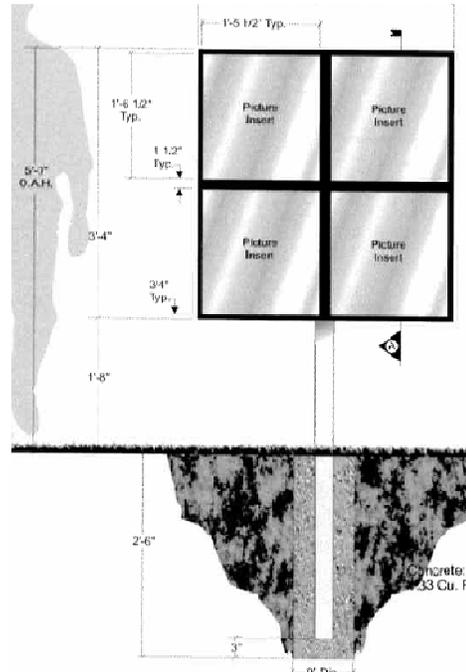
Elect  
"By



RRW-3  
Menu Board  
Sheet Metal Cabinet w/ Clear Acrylic Windows  
Internally Illuminated by Fluorescent Tubes  
Houses Two Images and Two Menuboard Panels

Complete w/ Speaker, Microphone & Exhaust Fans  
Finish: Painted Black  
Cabinet Size: 6'-8" x 5'-0"

Scale: 3/4"



Preview Board  
Scale: 1"= 1'-0"



There will be a painted pedestrian crosswalk and a stop sign, shown above, where it crosses a road, in an effort to prevent any conflict between pedestrian and vehicular circulation. According to Petitioner's land planner, Perry Berman, this is a typical layout for a quick-serve type restaurant. Tr. 64-66.

Mr. Berman indicated that more signs would be needed than permitted by the Zoning Ordinance, so a sign variance would likely be required. However, in his opinion, "these signs are what you would expect to see and. . . the signage issue is mitigated by the location of this site in a commercial area . . ." Tr. 66-70. In a supplemental report regarding signage (Exhibit 31(b)), Technical Staff did not mirror Mr. Berman's concern that a sign variance would be needed:

There are six free-standing signs: one at the drive aisle entrance, two traffic control signs at the drive aisle exit, one directing drivers to the drive through lane, one preview sign, showing available items, and one full menu sign, where orders are placed. There are two smaller free-standing signs denoting handicapped parking spaces. These signs total 60.25 square feet. None, however, is along a public street, and none is designed to be seen from the street.

There are four wall signs; three consist of the Roy Rogers logo and one is a graphic that includes the words Roy Rogers. These signs total 67 square feet and all are below the building's 18-foot height. Renderings supplied by the petitioner show these signs within 12 inches of the walls to which they are affixed. When measured on submitted drawings, these signs are approximately two feet in height. Only two of the four signs are on sides of the building with customer entrances; one is along the drive through pick-up wall and one is at the rear of the building. The restaurant's location, however, suggests that the logo should be visible from all sides of the building, which would require a total of four signs.

The signs are either indirectly lit from behind, in the case of the wall signs, lit from within the sign, in the case of menu signs, or not lit at all, in the case of the traffic control and parking signs. These methods result in an absence of glare. The signs do not resemble traffic signals, do not flash and are not near residences.

The total—127.25 square feet—is within the 800 square foot total that can be allocated to signs in commercial zones.

Even though Technical Staff did not indicate that a sign variance would be needed, given the testimony produced by Petitioner in this regard, the following condition is recommended in Part V of this report:

Sign permits must be obtained for the signs proposed by Petitioner (Exhibit 6), and a copy of the permits for the approved signs must be submitted to the Board of Appeals before the signs are posted. If required by the Department of Permitting Services, Petitioner must obtain sign variances for the proposed signs or amend the design of the proposed signs to have them conform with all applicable regulations. If the design is amended, a diagram showing the amended design must be filed with the Board.

Even if a sign variance is needed, the Hearing Examiner finds that the proposed signage would be compatible with its surroundings, given the location of the proposed restaurant in a shopping center, away from residential areas.

Staffing and Operations:

The restaurant will be open seven days a week, 363 days out of the year, closing only on Thanksgiving and Christmas. Typically, it will be open Sunday through Thursday from 6:00 a.m. to 10:00 p.m. and then Friday and Saturday nights until 11 o'clock. The plan would be to have somewhere between 25 and 40 associates. There would also be three to four managers managing the restaurant, one general manager and three assistant managers. All of those managers would be "serve safe certified," which is consistent with the Montgomery County requirements. The number of employees during peak meal periods, which is typically 11:00 to 2:00 over lunch and 5:00 to 7:00 over dinner, is 12 to 15 associates at that time; there may be up to six during nonpeak hours. Mr. Plamondon agreed to those limits as a condition of the special exception. Tr. 113-114.

According to Mr. Plamondon, most deliveries are made twice a week, overnight (while the store is closed, between midnight and 5:00 a.m.). They are called "key drop deliveries." Bread deliveries may be made during the day, several times a week, by a van. Trash is typically picked up twice a week, usually right after the restaurant opens, between 6:00 and 8:00 in the morning. Recyclables are picked up as well. There is a grease trap on the northern side of the restaurant, and the grease is picked up quarterly by a service. Tr. 114-116.

### **C. Master Plan**

The subject site is within the area covered by the 1997 Fairland Master Plan. The shopping center is identified as Area 35 in a diagram on page 68 of the Master Plan, and recommendations for Area 35 are discussed on pages 71-72 of the Master Plan.

Petitioner's land planner, Perry Berman, testified that the extensive renovation of the Burtonsville Town Square Shopping Center had been anticipated in the adopted Master Plan. Tr. 50-51. In his opinion, the proposed special exception will be consistent with the general plan and the applicable Master Plan for the area. Tr. 59-60. He fairly characterized the Fairland Master Plan as supporting the redevelopment of the shopping center and recommending that it be developed in a pedestrian friendly design with outdoor seating, streetscaping along store facades and a loop road. The Master Plan calls for connection of a series of local roads to connect the various properties. Tr. 55-57.

The Fairland area is undergoing a further review by the Park and Planning Commission in what is called the Burtonsville Crossroads Neighborhood Plan. Mr. Berman opined that this proposal is also consistent with the current directions of the draft Burtonsville Crossroads Plan. Hearings on that Plan have been held before the Planning Board's in work sessions. Tr. 55-57.

Chandra S. Beaufort, Petitioner's landscape architect and site planner, testified that the Master Plan recommended implementation of a pedestrian friendly component in conjunction with the shopping center. She feels that the proposed development of the shopping center will fully implement that pedestrian friendliness. According to Ms. Beaufort, the Roy Rogers pad will tie into the existing pedestrian connections on the north from the front of the Roy Rogers, and then into the existing pedestrian connections towards the shops on the west side of the shopping center. Tr. 36-37.

Technical Staff agreed that the proposal is consistent with the Fairland Master Plan (Exhibit 27, pp. 4-5):

The 1997 Fairland Master Plan . . . acknowledges plans to redevelop the center, indicating that the center's modernization would include outdoor seating, as well as streetscaping along storefronts and a recommended access loop road connecting US 29 and MD 198. The redeveloped center includes portions of the loop road and, as noted above, has used design techniques to create a consistent visual theme. The proposed restaurant is in keeping with those themes. It also has outdoor seating and clearly delineated areas for pedestrian crossings from existing parking blocks.

The Burtonsville Crossroads Neighborhood Plan, now in development, also discusses the center. The plan recommends the CRT zone at overall densities consistent with those in the C-2 Zone.

Moreover, the loop road called for by the Master Plan is also provided by the redevelopment of the shopping center. As stated by Technical Staff (Exhibit 27, p. 5):

. . . The one-way loop running south to north will serve the pad sites and is wide enough to accommodate drive-in traffic for the proposed restaurant and traffic bound for one of the other yet-to-be-constructed pad site uses. The restaurant drive-in lane runs counterclockwise around the building and connects to a north-south drive aisle that serves a central parking area and other parts of the center. No queuing will occur away from the immediate vicinity of the restaurant or on the center's internal drive aisles.

Based on this record, the Hearing Examiner finds that the proposed use is consistent with the goals and objectives of the Fairland Master Plan.

#### **D. Public Facilities**

The adequacy of public facilities is not an issue in this case because the site is a part of the larger shopping center which was approved by the Planning Board in July 2005 in Preliminary Plan 120041090 (Exhibit 9). According to Technical Staff, the public facilities for the remaining square footage at the center are deemed adequate until July 2018. As stated by Staff (Exhibit 27, p. 5):

The Planning Board approved Preliminary Plan 120041090 in July 2005. That plan included the pad site on which the proposed restaurant is to be located and made the necessary finding of adequate public facilities that covers this proposal. The original approval includes 250,000 square feet of retail space, about half of which—127,500 square feet—is built and occupied. The additional square footage proposed for the restaurant brings the total to about 131,000 square feet, less than the amount originally approved. Public facilities for the remaining square footage at the center are adequate until July 2018.

As further noted by Staff (Exhibit 27, p. 5):

The traffic study done as part of the preliminary plan evaluated the peak hour impacts of traffic generated by 250,000 square feet of retail space and an additional 10,000 square feet of office space. The retail square footage included the space to be occupied by the proposed restaurant. The resulting traffic analysis determined that, with intersection improvements to be funded by the shopping center owners, critical lane volumes at nearby intersections met the applicable standards. Local Area Transportation Review requirements have previously been satisfied and no further studies are needed.

This is the type of case covered by a recent amendment to Zoning Ordinance §59-G-1.21(a)(9)(B)(ii), which added a provision specifying that the Board of Appeals need not make an APFO determination when there is a currently valid determination of adequate public facilities for the site for an impact that is the same as or greater than the special exception's anticipated impact.

The preliminary plan approved in 2005 shows the pad site in the vicinity where the restaurant is proposed to be located. As pointed out by Ms. Beaufort, the preliminary plan took into account the potential for the addition of restaurants, requiring adequate parking, so that there would be flexibility for the future rental of the spaces. Tr. 27-30. The Hearing Examiner finds that the Roy Rogers restaurant that is now planned has been, in effect, covered by the findings of adequate public facilities made in conjunction with the approved preliminary plan.

### **E. Environment**

As previously noted, the western portion of Burtonsville Towne Square is forested (outside of the shopping center). Technical Staff reports, "A revised Final Forest Conservation Plan associated with the preliminary plan was approved for this property in November 2008. The pad site proposed for the restaurant is within the limits of disturbance approved with the Plan, which means that no further forest conservation approvals are needed." Exhibit 27, pp. 5-6. Neither Staff nor any other witness raised any environmental concerns in this case.

Given this evidence, the Hearing Examiner finds that there are no environmental issues warranting denial of this petition.

**F. County Need**

Since the Zoning Ordinance requires a showing of “County need,” to qualify for a “drive-in restaurant” special exception, Petitioner produced a market analysis (Exhibit 18) and testimony (Tr. 98-103) by Joseph Cronyn, an expert in the field. In his opinion, a need exists for the proposed use due to an insufficient number of similar uses presently serving the existing population concentrations, and the proposed use will not result in saturation of similar uses in the Burtonsville neighborhood. His analysis shows that there is room for at least two more quick service restaurants in this crossroads location. Tr. 101-103. His testimony is summarized on pages 13-14 of his “Analysis of Need” (Exhibit 18):

Lipman Frizzell & Mitchell concludes that a need exists for the proposed Roy Rogers drive-in restaurant use due to an insufficient number of similar uses presently serving existing population concentrations and that the proposed restaurant will not result in a multiplicity or saturation of similar uses in the Burtonsville neighborhood. Our reasoning process is as follows:

- Roy Rogers Restaurant - The Roy Rogers drive-in restaurant is located within the well planned Burtonsville Town Square shopping center. The subject offers quick food service for diners on-site as well as through its drive-through window. The restaurant and shopping center are located within the Burtonsville commercial district, which serves as the retail and commercial center for nearby areas of Montgomery County, served by a robust highway network carrying high volumes of traffic. While offering a variety of commercial uses, the district is currently home to only three drive-in restaurant uses (Burger King, Starbucks, McDonald’s) which might be considered in the same quick food service category as the subject.
- Demand for Drive-In Restaurants - LF&M finds that there is significant demand for drive-in restaurant facilities within the Burtonsville trade area (a 5-minute drive time geography) from resident households and from workers in the area. Based on standard research sources, we estimate total demand for quick service restaurants from residents and workers as follows:

\$6,463,015	Residential Household Demand
617,500	Worker Demand
\$7,080,515	Total Annual Demand

Total demand for drive-in restaurants in the Burtonsville trade area, then, is conservatively estimated in excess of \$7.0 million annually.

- Sales of Existing Restaurants - LF&M uses national sales statistics to estimate the sales performance of the three existing Burtonsville trade area drive-in restaurants as follows:

\$2,350,000	McDonald's
1,240,000	Burger King
952,000	Starbucks
\$4,542,000	Total Annual Sales

LF&M, therefore, estimates total sales by drive-in restaurants in the subject's Burtonsville trade area at approximately \$4.5 million annually.

- Demand/Supply Analysis - Comparing Burtonsville trade area demand for drive-in restaurants to the sales captured by existing restaurants in that category, LF&M finds there is unmet demand:

\$7,080,515	Total Annual Demand
-4,542,000	Total Annual Sales
\$2,538,515	Unmet Annual Demand

Unmet annual demand for drive-in restaurant services exceeds typical Roy Rogers restaurant sales performance of \$1.42 million. Indeed, the statistics indicate that sufficient capacity in the Burtonsville trade area exists to support at least two additional drive-in restaurants (including the subject).

Based on the above analysis, therefore, Lipman Frizzell & Mitchell finds that the proposed Roy Rogers drive-in restaurant meets a public need and does not represent a "saturation of similar uses" in its Burtonsville neighborhood.

Technical Staff stated that Mr. Cronyn's study "uses generally accepted market research techniques for determining the adequacy of product demand and its study area plausibly describes the broader area served by Burtonsville Town Square and its businesses." Exhibit 27, pp. 6-7.

There is no evidence to the contrary, and the Hearing Examiner therefore finds that a need exists for the proposed use due to an insufficient number of similar uses presently serving existing population concentrations in the County, and the use at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood. It should be noted that the case law defines "need" in the Zoning Ordinance, not as that which is absolutely necessary, but

rather as that which is “expedient, reasonably convenient and useful to the public.” *Lucky Stores, Inc. v. Board of Appeals of Montgomery County*, 270 Md. 513, 527-28, 312 A.2d 758, 766 (1973).

### **G. Community Response.**

There were no opposition witnesses, and there has been no community participation of any kind in the case.

### **III. SUMMARY OF THE HEARING**

Five witnesses were called by Petitioner at the hearing – Chandra S. Beaufort, a landscape architect and site planner; Perry Berman, a land planner; Edward Papazian, a traffic engineer; Joseph Cronyn, a market demand analyst; and Joseph Plamondon, Petitioner’s co-president. There were no opposition witnesses, and there was no community participation of any kind.

At the end of the hearing, the record was held open for an additional 15 days as required by Board of Appeals Rule 7.2.6.a., because the Planning Board letter did not reach the record five days before the hearing.

#### 1. Chandra S. Beaufort (Tr. 13-45):

Chandra S. Beaufort testified as an expert in landscape architecture and site planning. She was the site planner on the preliminary plan which was previously approved for the entire 26 acre Burtonsville Town Square Shopping Center, and she also prepared the forest conservation plan for the redevelopment of the shopping center.

Ms. Beaufort described the shopping center and the site (Tr. 19-23):

The parcel that contains or the lot that contains the shopping center is 25 acres. Sixteen of those acres and the development of the shopping center is in the C-2 zone. The remaining approximately 10 acres on the rear of the property is zoned RC, and besides the shopping center and the associated infrastructure with that shopping center, the site contains forest conservation areas of approximately five and a half acres, a storm water management pond that serves the development of the shopping center as well as a portion of drainage from the elementary school, and the swim pond is

approximately three acres. . . . the shopping center contains four nodes of development which surround a large central parking area.

The first node is a major anchor of the shopping center which is a giant grocery store as well as Montgomery County Liquor Store and a future Petco. . . . [T]he second node, moving clockwise around the site, was referred to as Building B during the planning process. It includes Dunkin Donuts, a dry cleaners, a pizza restaurant, and there are two spaces in the middle that are in the process of being leased. Continuing around the site, the next node are the pad sites of the shopping center which Roy Rogers' proposed pad is adjacent to an existing Capital One Bank, two pad sites that are currently vacant, and then the largest pad site, the CVS. The last node is referred to as Building A and that contains a nail salon, a hair cuttery, and an Asian Fusion restaurant and also two spaces that are vacant. . . . Our pad site is vacant as well.

The shopping center can be accessed from either Route 29A or from Route 198. The preliminary plan was approved in 2005 for 250,000 square feet of retail development in the shopping center (Exhibit 9), and approximately 130,000 square feet have been developed to date. The preliminary plan met the Adequate Public Facilities Ordinance (APFO) at that time, and the APFO is still adequate until 2018. The preliminary plan approved in 2005 shows the pad site in the vicinity where the restaurant is proposed to be located. It took into account a maximum of restaurants to provide adequate parking, so there would be flexibility for the future rental of the spaces. Ms. Beaufort opined that the Roy Rogers restaurant that is now planned has been, in effect, covered by the findings of adequate public facilities made in conjunction with the approved preliminary plan. Tr. 27-30.

According to Ms. Beaufort, the pad sites located at the front of the shopping center were “100 percent engineered with the infrastructure of the shopping center. The adjacent parking, the curbs, the lighting, the landscaping for the parking fields . . . [have] all been installed, and the pad site is vacant waiting for a building.” Tr. 32.

Using the site plan (Exhibit 4), Ms. Beaufort described the proposed restaurant. The special exception site plan has a boundary of 16,413 square feet. The Roy Rogers Restaurant is proposed in the center of the pad. It is 3,327 square feet, and it will have a finished floor elevation of 495 feet.

The special exception area also contains 11 parking spaces, with two spaces being designated for accessible vehicles. There will be outdoor seating (three tables) for the patrons in the front of the restaurant. The western portion of the restaurant building is the front, facing away from the road. The main entrance of the building is on the west side of the building. There are also two entrances on the south side, one for patrons, one more for an employee entrance. The drive-through ordering is on the eastern side of the building and the pickup window is on the northern side of the building. People enter on the southwestern side, stop at the menu board, pull around, stop and then also stop again before entering back out to the main parking aisle. From there, they could go south or north. Tr. 33-36. The dumpster is located on the site, to the south of the rear corner of the restaurant. It'll have brick on three sides and a wrought iron gate which is typical of the rest of the development of the shopping center. Tr. 37.

Ms. Beaufort further opined that the proposed restaurant would conform to the development standards set forth in the C-2 zone. The pad site identified was included in the area of the forest conservation plan approved for the preliminary plan and should not have any further forest conservation requirements. The site is not within a special protection area. Tr. 38-41.

Using a rendered landscape plan (Exhibit 37), Ms. Beaufort described proposed landscaping for the project (Tr. 42-43):

The landscape plan for the proposed Roy Rogers consists mainly of accent landscaping. The proposed plant material include ornamental trees, crape myrtles. There are also arborvitaes for screening, mugho pine, yuccas, ground cover and then there are some small areas for annual planting on the, some of the parking islands. Another component of the landscape plan is decorative boulders which go along with the Roy Rogers theme branding and then also the existing landscaping of the shopping center does provide some screening along Route 29. . . . The plants . . . in the entire shopping center as well as the Roy Rogers are drought tolerant because the shopping center is trying for LEED Gold certification.

Using the lighting plan (Exhibit 8), Ms. Beaufort described the proposed lighting as “adequate for safety,” but “will not promote excess glare.” Tr. 48. There will be no glare into any residential zone, nor does the site abut a residential zone.

Ms. Beaufort stated that the Master Plan recommended implementation of a pedestrian friendly component in conjunction with the shopping center, and an illustrative circulation plan was proposed at that time for the Burtonsville area. With the development of the shopping center, that pedestrian friendliness has been fully implemented. The Roy Rogers pad will tie into the existing pedestrian connections on the north to the front of the Roy Rogers, and then going to the west into the existing pedestrian connections towards the shops on the west side of the shopping center. Tr. 36-37.

2. Perry Berman (Tr. 46-82):

Perry Berman testified as an expert in land planning. He noted that the Town Square Shopping Center, where the site is located, is larger than the Burtonsville Crossing Shopping Center located across Business Route 29. According to Mr. Berman, efforts are being made to improve the commercial development in that area. He indicated that he concurred with Ms. Beaufort’s description of the layout of the shopping center, the improvements within the shopping center, and the ingress and egress to the site. Tr. 48-51.

Mr. Berman described the surrounding area: The largest abutting use is the Burtonsville Elementary School to the west of the property. Along the north side of 198, there are stores in the process of being renovated, and in fact, the current thoughts are to turn this into a row of restaurants. It's a general C-2 area. Across the road, across on the south side of 198, at the intersection of 198 and “Old 29,” is the Bedding Barn which is a very prominent location. Then there is a convenience gas station, a Seven Eleven, and a McDonald's. There are also auto body shops and other restaurants, Jerry’s Subs and a veterinarian store. The only two special exceptions are on this side, one is for the McDonalds and one for the convenience store. There is no residential development in that area. On

the east side of Business 29, there is an office park made up of four office buildings about three to four stories tall in the O-M Zone and the large Burtonsville Crossing shopping center. Tr. 51-53.

The northwest and west portion of the Town Square Shopping Center property is forested and is in the rural cluster (RC) Zone, which is subject to impervious caps and limitations. Tr. 54.

Mr. Berman further testified that the Fairland Master Plan identified this as area 35 on page 68 of the Master Plan. It supports the redevelopment of the shopping center and suggests that that shopping center be developed in a pedestrian friendly design with outdoor seating, streetscaping, soft facades and a loop road. The Master Plan calls for connection of a series of local roads to connect these various properties. This special exception is in keeping with the current Master Plan. The Fairland area is undergoing a further review by the Park and Planning Commission in what is called the Burtonsville Crossroads Master Plan. This proposal is consistent with the current directions of that draft Burtonsville Crossroads Master Plan. Hearings on that Plan have been held before the Planning Board's in work sessions. Tr. 55-57.

Mr. Berman agreed to the neighborhood definition proposed by Technical Staff, feeling that the small Roy Rogers site would have little impact on properties outside the shopping center. Tr. 59-61. According to Mr. Berman, the review of the preliminary plan covered all the impact issues that might be created by the proposed restaurant. Tr. 61-63.

Using the site plan (Exhibit 4(b)), Mr. Berman described the site itself. He noted that this building shares parking around it. That parking is in a shared common area, and so the building square footage has to be looked at in the context of the fact that the parking is outside this area and is being served by shared parking. In terms of pedestrian circulation, there will be a painted pedestrian crosswalk and a stop sign where it crosses a road, in an effort to prevent or cause any conflict. This is a typical layout for a quick serve type restaurant. People are trained to know that that there's a stop

sign there and that they need to be careful of crossing pedestrians. It's important to have a pedestrian link from the building to the activities north of the site. Tr. 64-66.

Mr. Berman testified as to the signage proposed for the site, as indicated in Exhibit 6(c). He noted that more signs would be needed than permitted by the Code, so a sign variance would likely be required. However, in his opinion, “these signs are what you would expect to see and . . . the signage issue is mitigated by the location of this site in a commercial area . . .” Tr. 66-70.

In Mr. Berman’s opinion the special exception is in accord with the preliminary plan approved by the Planning Board and meets the development standards of the C-2 zone. It is also an appropriate place for this kind of facility. Tr. 70-71.

Mr. Berman further testified that the proposal would meet the general and specific Zoning Ordinance standards for this special exception. For a number of reasons, the proposed use will not constitute a nuisance because of noise, illumination, fumes, odor, or physical activity in the proposed location. It's a very large commercial area. There's no residential development. The lighting and circulation is part of a shopping center already. It's not a standalone special exception. It's within a commercial shopping center. So, he sees this as no nuisance factor at all. Mr. Berman also concluded that the proposed use would not create any non-inherent adverse effects. Tr. 73-82.

### 3. Edward Papazian (Tr. 83-98):

Edward Papazian testified as an expert in traffic engineering and transportation planning. Mr. Papazian prepared a traffic statement in the record as Exhibit 19. He explained that around 2004/2005, the Route 29 bypass was constructed and opened which bypasses the core of the Burtonsville area and is a freeway running north/south, designated as US 29. That roadway has a grade separated interchange with the existing Maryland Route 198 that runs generally east/west in the area. The old US 29 has been alternatively referred to as old US 29, 29A, and in the parlance of the county's master plan, as B29. Tr. 85-86.

Mr. Papazian also addressed the parking requirement. He stated that the county Zoning Ordinance calls for 25 parking spaces for every 1,000 square feet of “patron area” within a restaurant. He believes that Technical Staff, in concluding that 84 spaces were required for a restaurant of 3,327 square feet, may have neglected to adjust the square footage figure to represent only the patron area. The actual patron area here is expected to be about 1,300 square feet. That's about 40 percent of the total square footage. Applying the 25 per 1,000 square foot figure to the 1,300 square feet of patron area, results in a requirement of about 33 parking spaces, which Mr. Papazian thinks is a lot more realistic for a facility such as this. Tr. 88. In his opinion, the parking will be sufficient to satisfy the needs of the use. The parking immediately adjacent to the restaurant and the 113 spaces that are located west of the property of the restaurant will provide sufficient parking. Tr. 97-98.

Mr. Papazian further testified that this project satisfies the requirements of the county's adequate public facilities ordinance. It satisfies its local area transportation review, also referred to as the LATR test, and is not subject to the policy area mobility review, PAMR, since the resulting total trip generation for the Burtonsville Town Square will be within the overall trip generation of the approved shopping center. This proposed restaurant is within the overall square footage, within the overall envelope, and therefore the trip envelope of the approved Burtonsville Town Square. There are no further LATR requirements or PAMR study report requirements as part of this application because of the prior and existing preliminary plan approval. Tr. 89-90.

This project will also be consistent with the creation of a “loop road” around the commercial properties that are located along the north side of Maryland 198. Access has also been improved by a previous traffic light installation on Route 29A. Tr. 91-93.

Mr. Papazian further testified that there are 11 parking spaces immediately adjacent to the restaurant and another 113 parking spaces in the area, in the parking field in the front of (*i.e.*, on the west side of) the pad site locations. This provides the opportunity for safe vehicle and pedestrian

access into the proposed restaurant as indicated previously. There will be a painted crosswalk that runs north/south along the north edge of the restaurant. There will also be a pedestrian crosswalk that connects to the west edge of the restaurant from the parking area that serves the pad site area. So, there will be a clear delineation of where pedestrians are to cross both north/south and east/west from within the pad site area of the shopping center. In his opinion, this proposed setup will be safe for both pedestrian and vehicular traffic. Tr. 93-94.

There is also a drive through lane which provides stacking for nine vehicles. In Mr. Papazian's opinion, that is ample for the needs of this proposed restaurant. Mr. Papazian also opined that there will be no adverse impact by the traffic generated by this proposed restaurant on the external roadways and on the access points. The vehicle connections to the external roadway system will be safe and adequate. In addition, along the east edge of the restaurant, is a bypass lane so the drivers can continue past the drive through lane and continue north into the other pad sites and ultimately be able to connect with the rest of the retail center. Tr. 95-96.

#### 4. Joseph Cronyn (Tr. 98-103):

Joseph Cronyn testified as an expert in market and needs analysis. He opined that the market will ultimately determine the need for this or other quick service restaurants. His study of the market is in the record as Exhibit 18. He testified that his analysis demonstrates that the petitioners are completely logical in proposing a restaurant at this location.

In Mr. Cronyn's professional judgment, there is plenty of demand available, and in particular, there is not an oversubscription of such uses in this commercial crossroads area which draws from a fairly broad geographic market area of approximately two miles in every direction, and so there is plenty of demand. Tr. 101.

According to Mr. Cronyn, there is a supply of three existing quick service restaurants within the crossroads area, and they are meeting part of that demand but certainly not all the demand that's

available to this location. His analysis shows that there is room for at least two more quick service restaurants in this crossroads location. The basis for his opinion is set forth in his written report. Tr. 101-102. In Mr. Cronyn's opinion, a need exists for this drive-in use due to an insufficient number of similar uses presently serving the population concentrations in this area, and the drive-in use at this location will not result in a multiplicity or a saturation of similar uses. It is his judgment that this restaurant will far from saturate demand for this type of use in this area. Tr. 102-103.

5. Joseph Plamondon (Tr. 103-118):

Joseph Plamondon testified that he is the co-owner and Co-President of Plamondon Companies. His business owns and operates Roy Rogers restaurants and some Marriott Hotels. It is headquartered in Frederick, Maryland. There are 49 Roy Rogers Restaurants located in seven states. Twenty of the 49 are owned by his company. Twenty-nine are franchised units. Tr. 103-105.

Mr. Plamondon testified that the building proposed in this case is consistent with the Roy Rogers prototype. Tr. 107. He described the food service and indicated that the site would provide great circulation, great access and great visibility. Tr. 108. Using the exterior elevation drawings of the prototypical Roy Rogers restaurant (Exhibits 15(a) –(d)), Mr. Plamondon described the proposed 3,300-square foot building, one story tall. It accommodates 62 seats, with another dozen seats outside at umbrella tables. It's a wood frame, stick built building, with an "EIFS" system (*i.e.*, exterior insulated finish system), on the outside. That's kind of a beige stucco look. At the base of the building, there will be brick consistent with the other elements in the shopping center. There will be a red standing seam metal roof that is consistent with the prototype and a sort of a western theme which is consistent with the brand. The trim around any of the doors is a cedar trim. There will be gooseneck lights above the standing seam roof, with a galvanized finish, and then the signs depicted in other exhibits. Tr. 109-111.

Exhibit 5(c) depicts the interior layout of the restaurant. To the left of that document is the front service counter with a queuing area. The famous fixing's bar is in the center near the front sales counter and drink station, 62 seats, a variety of freestanding tables, as well as booths and some taller bar-type seating in the smaller room in the upper right hand corner of that exhibit. There will be a plasma TV and a couple of lounge chairs. Tr. 111-112.

The restaurant has been designed to meet the sustainability requirements in connection with the landlord's LEED compliant efforts. So, among other things there's no use of CFC refrigerants in the air conditioning or heating or refrigeration systems. There will be low flow faucets and waterless urinals as an example, low emitting VOCs (volatile organic compounds), in paints and adhesives and the like. Compact fluorescent lighting or LED lighting will be used where appropriate, and the landscaping will be drought tolerant and will require no separate irrigation system. Tr. 112-113.

The restaurant will be open seven days a week, 363 days out of the year, closing only on Thanksgiving and Christmas. Typically, it will be open Sunday through Thursday from 6:00 a.m. to 10:00 p.m. and then Friday and Saturday nights until 11 o'clock. The plan would be to have somewhere between 25 and 40 associates. There would also be three to four managers managing the restaurant, one general manager and three assistant managers. All of those managers would be "serve safe certified," which is consistent with the Montgomery County requirements. The number of employees during peak meal periods, which is typically 11:00 to 2:00 over lunch and 5:00 to 7:00 over dinner, is 12 to 15 associates at that time, and then maybe six or so during nonpeak hours. Mr. Plamondon agreed to that as a condition of the special exception. Tr. 113-114.

According to Mr. Plamondon, most deliveries are made twice a week, overnight (while the store is closed, between midnight and 5:00 a.m.). They're called "key drop deliveries." Bread deliveries may be made during the day, several times a week by a van. Trash is typically picked up twice a week, very early in the morning, typically right after the restaurant opens, between 6:00 and

8:00 in the morning. Recyclables are picked up as well. There is a grease trap on the northern side of the restaurant, and that's picked up quarterly by a service. Tr. 114-116.

Mr. Lynott added that “the three conditions recommended by the staff are acceptable as well as the additional conditions that the Hearing Examiner just mentioned.” Tr. 118.

#### **IV. FINDINGS AND CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Based on the testimony and evidence of record, the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

##### **A. Standard for Evaluation**

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by

unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a drive-in restaurant. Characteristics of the proposed drive-in restaurant use that are consistent with the “necessarily associated” characteristics of drive-in restaurant uses will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with drive-in restaurant uses, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff determined that the physical and operational characteristics necessarily associated with a drive-in restaurant include (Exhibit 27, p. 7):

- (1) the building in which the use is located;
- (2) trips to and from the restaurant;
- (3) a circulation system for the drive-in component;
- (4) parking for patrons dining in the restaurant;
- (5) varied hours of operation;
- (6) noise or odors associated with the restaurant; and
- (7) lighting.

Technical Staff concluded that “The proposed restaurant has no physical or operational characteristics unique to drive-in restaurants generally or unusual for the site. There are no inherent or non-inherent effects that warrant denying the petition.” Exhibit 27, p. 7. Staff noted that because the proposed restaurant is located in an already-operating shopping center, which itself requires buildings, generates trips, provides vehicular circulation systems and parking, is open at various times

and generates noises and odors, the levels of those activities associated with this proposal are not consequential and, in any case, are occurring in an area whose zoning anticipates and allows uses that create these activities and their impacts. The impact of inherent uses on the “general neighborhood,” therefore, is not adverse.

Petitioner’s land planner, Perry Berman, testified that the proposal would meet the general and specific Zoning Ordinance standards for this special exception. In his opinion, the proposed use will not constitute a nuisance because of noise, illumination, fumes, odor, or physical activity in the proposed location. He noted that the site is in a very large commercial area with no nearby residential development. The lighting and circulation are part of a shopping center already. Mr. Berman thus concluded that the proposed use would not create any non-inherent adverse effects. Tr. 73-82.

The Hearing Examiner also agrees with Technical Staff and Mr. Berman. The proposed use will have no non-inherent adverse effects.

### **B. General Conditions**

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff reports, the other exhibits and the testimony of the Petitioner’s witnesses provide ample evidence that the general standards would be satisfied in this case.

#### **Sec. 59-G-1.21. General conditions.**

**§5-G-1.21(a)** -*A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

*(1) Is a permissible special exception in the zone.*

Conclusion: A drive-in restaurant use is a permissible special exception in the C-2 Zone, pursuant to Code § 59-C-4.2(d).

*(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special*

*exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.16 for a drive-in restaurant use, as outlined in Part IV. C, below.

- (3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The property is located within the area covered by the Fairland Master Plan, as approved and adopted in 1997. For all the reasons discussed at length in Part II. C. of this report, the Hearing Examiner finds that the planned use is consistent with the applicable Master Plan.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The proposed use will be in harmony with the general character of the neighborhood because it will be a commercial use in a commercial zone and will be designed to reflect the streetscape features recommended in the Master Plan. The proposed use will generate additional traffic and parking, as discussed in Parts II. B and D of this report, but that additional traffic and parking has already been contemplated and approved as part of Preliminary Plan 120041090 (Exhibit 9), which was finalized by the Planning Board in July 2005. As stated by Technical Staff (Exhibit 27, p. 10):

This proposal would occupy a part of the shopping center designed for several free-standing commercial buildings of approximately the same size, scale and bulk, which will result in a consistent visual atmosphere. The intensity and character of activity are similar to other commercial establishments in the center, which includes several restaurants. It uses existing vehicular circulation and parking systems, which were initially designed to support free-standing structures.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The Hearing Examiner concludes that the proposed use will not be detrimental to the peaceful enjoyment, economic value or development of surrounding properties at the site. As noted by Technical Staff (Exhibit 27, p. 10), “The general neighborhood for this site is commercial or institutional in character; . . . The proposed restaurant will not affect development of other pad sites at the shopping center, or other properties in the Burtonsville commercial district. The owner of the shopping center has endorsed this proposed use in the center.”

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Given its location and the nature of the proposed use, no objectionable noise, vibrations or dust will be generated. As observed by Technical Staff (Exhibit 27, p. 10), “The proposed restaurant will cause noise, vibrations, fumes, odors, dust, illumination, glare and physical activities at levels expected from commercial retail activities in a commercial zone. Users of commercial retail services in a zone designated for those uses should reasonably expect these impacts to occur. The proposed restaurant does not cause disproportionate amounts of any of these impacts.” Trash dumpsters are enclosed, and trash pickups are being scheduled during off peak

hours. Cooking oil will be recycled and hauled off site. Tr. 114-116. Based on the record, the Hearing Examiner finds that Petitioner will be compliant with this section.

*(7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: The site is not in a residential zone, and it is surrounded with commercially developed properties, so this section is of questionable applicability. Moreover, the proposed use is consistent with the applicable Master Plan, so by definition, it will not alter the nature of the area. Technical Staff has identified two approved special exception uses in the vicinity of the subject property: S-783, for the McDonald's Restaurant across Maryland Route 198 from Burtonsville Towne Square, and S-847, for a combined "7-11" convenience store and gas station next to the McDonald's. Exhibit 27, p. 4. Technical Staff concluded, as does the Hearing Examiner, that the proposed special exception will have no adverse effect on any one-family residential area. Exhibit 27, p. 11.

*(8) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: For the reasons set forth in answer to previous sections, the evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

*(9) Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: As discussed in Part II. D. of this report, the adequacy of public facilities is not an issue in this case because the site is a part of the larger shopping center which was approved by the Planning Board in July 2005 in Preliminary Plan 120041090 (Exhibit 9). According to Technical Staff, the public facilities for the remaining square footage at the center are deemed adequate until July 2018. As stated by Staff (Exhibit 27, p.p. 11-12):

The proposed special exception does not require further subdivision because it is located on a free-standing site in the existing center. The Planning Board found that public facilities serving Burtonsville Towne Square were adequate when it approved Preliminary Plan 120041090 in 2005. That preliminary plan included square footage associated with the proposed restaurant, so the impact on public facilities of this proposal has been previously addressed. Public facilities for the remaining square footage at the center are adequate until July 2018.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception:*
  - (i) *does not require approval of a new preliminary plan of subdivision; and*
  - (ii) *the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception's impact;**then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

Conclusion: According to Technical Staff, the special exception sought in this case will not require approval of a new preliminary plan of subdivision because the proposed use will be located on a free-standing site in the existing shopping center already subject to Preliminary Plan 120041090. Exhibit 27, pp. 11-12. Although no new subdivision is

required, neither the Board of Appeals nor the Hearing Examiner is required to determine the adequacy of public facilities since the situation falls within the exception referenced above in category (9)(B)(ii) – *i.e.*, the determination of adequate public facilities for the site is currently valid for an impact that is the same as or greater than the special exception’s impact.

- (C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Technical Staff noted that the proposed restaurant is not directly on a public road, and existing access from public roads “meets standards for approving preliminary plans of subdivision.” Exhibit 27, p. 12. Edward Papazian, Petitioner’s traffic engineer, testified that, in his opinion, the proposed use will be safe for both pedestrian and vehicular traffic. Tr. 93-94. The Hearing Examiner finds that the evidence supports the conclusion that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic.

### **C. Specific Standards**

The testimony and the exhibits of record, including the Technical Staff reports, provide sufficient evidence that the specific standards required by Section 59-G-2.16 are satisfied in this case, as described below.

#### **Sec. 59-G-2.16. Drive-in restaurants.**

*A drive-in restaurant may be allowed, upon a finding, in addition to findings required in division 59-G-1, that:*

- (a) *The use will not constitute a nuisance because of noise, illumination, fumes, odors or physical activity in the location proposed.*

Conclusion: For the reasons discussed in response to §59-G-1.21(a)(6) in Part IV. B. of this report, the proposed use will not constitute a nuisance because of noise, illumination, fumes, odors or physical activity in the location proposed.

*(b) The use at the proposed location will not create a traffic hazard or traffic nuisance because of its location in relation to similar uses, necessity of turning movements in relation to its access to public roads and intersections, or its location in relation to other buildings or proposed buildings on or near the site and the traffic patterns from such buildings or cause frequent turning movements across sidewalks and pedestrian ways, thereby disrupting pedestrian circulation within a concentration of retail activity.*

Conclusion: As discussed on the previous page of this report, Petitioner's traffic engineer testified that the proposed use will be safe for both pedestrian and vehicular traffic. Tr. 93-94.

Technical Staff reached the same conclusion (Exhibit 27, p. 8):

The proposed restaurant . . . uses the center's existing access drives to reach the nearest public roads. The center has created a single vehicular circulation system for three free-standing pad sites in the southeast portion of the property and uses a one-way drive aisle to reach all three sites. The drive-in lane for the proposed restaurant is accommodated within the existing circulation system and will have signs and pavement markings to direct patrons to the lane. Pedestrian crossings of the drive aisles are limited and are both marked and lighted.

Considering the entire record in this case, the Hearing Examiner finds that the use at the proposed location will not create a traffic hazard or traffic nuisance for any of the reasons set forth in this section.

*(c) The use of the proposed location will not preempt frontage on any highway or public road in such manner so as to substantially reduce the visibility and accessibility of an interior commercial area zoned or proposed for commercial use which is oriented to the same highway or public road.*

Conclusion: Technical Staff reports "The proposed restaurant . . . is one of three sites specifically designed for maximum visibility from . . . [the public roads]. The location does not

impede visibility of main access roads to the center and does not limit travelers' views of the entire center." Exhibit 27, p. 8. There is no evidence to the contrary, and the Hearing Examiner so finds.

*(d) When such use abuts a residential zone or institutional premises not recommended for reclassification to commercial or industrial zone on an adopted master plan and is not effectively screened by a natural terrain feature, the use shall be screened by a solid wall or a substantial, sightly, solid fence, not less than 5 feet in height, together with a 3-foot wide planting strip on the outside of such wall or fence, planted in shrubs and evergreens 3 feet high at the time of original planting and which shall be maintained in good condition. Location, maintenance, vehicle sight distance provisions, advertising and parking areas pertaining to screening shall be as provided for in the requirements contained in article 59-E.*

Conclusion: This section is not applicable because the use itself does not abut a residential zone or an institutional use. It is located within an existing shopping center, and it is thus completely surrounded by commercial uses in the C-2 Zone.

*(e) Product displays, parked vehicles and other obstructions which adversely affect visibility at intersections or at entrances and exits to and from, such use are prohibited.*

Conclusion: As stated by Technical Staff (Exhibit 27, p. 9), "The proposed restaurant is not directly on a public road, nor is it near the main entrances to the shopping center. Access from internal drive aisles is not impeded by parking spaces, signs, displays or seating areas." The Hearing Examiner finds that the proposed use will not have product displays, parked vehicles or other obstructions which adversely affect visibility at intersections or at entrances and exits to and from the use.

*(f) Lighting is not to reflect or cause glare into any residential zone.*

Conclusion: The proposed lighting will not reflect or cause glare into any residential zone, as the subject site is not adjacent to a residential zone.

- (g) *When such use occupies a corner lot, the ingress or egress driveways shall be located at least 20 feet from the intersection of the front and side street lines of the lot, as defined in section 59-A-2.1, and such driveways shall not exceed 25 feet in width; provided, that in areas where no master plan of highways has been adopted, the street line shall be considered to be at least 60 feet from the centerline of any abutting street or highway.*

Conclusion: As stated by Technical Staff (Exhibit 27, p. 9), “The main access roads for Burtonsville Town Square meet these standards; there is no direct access to the proposed restaurant from a public street.” Petitioner’s land planner testified that if this site is considered a “corner lot,” it is compliant with this section. Tr. 76-77. The Hearing Examiner so finds.

#### **D. Additional Applicable Standards**

##### **59-G-1.23. General development standards.**

- (a) *Development Standards. Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: Petitioner’s site planner, Chandra Beaufort, testified that the proposed restaurant would conform to the development standards set forth in the C-2 zone. Tr. 38-41. Technical Staff agrees, as demonstrated by the following matrix from the supplemental Technical Staff report (Exhibit 31(a), p. 1):

<b>Standard (C-2 Zone)</b>	<b>Required</b>	<b>Proposed</b>
Building height	42 feet	18 feet
Floor Area	1.5 FAR	0.003 FAR
Setbacks	10 feet (front building line)	37 feet
	50 feet (side)	700 feet to north property line; 600 feet to west property line
Green Area	10 percent	Lot provides 33 percent

- (b) *Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: As noted in Part II. B. of this report (at pp. 15-16), Petitioner will provide 11 on-site parking spaces, and there are 113 nearby shared parking spaces in the shopping center. Technical Staff found that the amount of available parking complied with Article 59-E. Exhibit 31(a), p. 1. Mr. Papazian, Petitioner's transportation planner, testified that the combination of 11 parking spaces immediately adjacent to the restaurant and the 113 spaces that are located just west of the restaurant's pad site will provide sufficient parking for the use. Tr. 97-98. Although the Hearing Examiner calculated parking differently from Technical Staff and Mr. Papazian, he also finds that parking will be sufficient and statutorily compliant.

(c) *Minimum frontage* \* \* \*

Conclusion: Not applicable to this special exception.

(d) *Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: As noted by Technical Staff (Exhibit 31(a), p. 2), "the proposed special exception is part of an approved subdivision with a final forest conservation plan. There are no additional forest conservation requirements for this proposal." The Hearing Examiner so finds. Compliance with the approved preliminary plan and its associated forest conservation plan is a recommended condition of the special exception.

(e) *Water quality plan. If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board,*

*unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: Not applicable. A water quality plan is not required since the site is not in a Special Protection Area.

*(f) Signs. The display of a sign must comply with Article 59-F.*

Conclusion: Proposed signage, depicted in Exhibits 6(c) –(i), was discussed at length in Part II. B. of this report (at pp. 20-24). Petitioner’s witnesses indicated that, although the proposed signs were standard for this type of facility, a sign variance may be needed. Tr. 64-70. In a supplemental report regarding signage (Exhibit 31(b)), Technical Staff did not indicate that a sign variance would be needed; however, given the testimony produced by Petitioner in this regard, the following condition is recommended in Part V of this report:

Sign permits must be obtained for the signs proposed by Petitioner (Exhibit 6), and a copy of the permits for the approved signs must be submitted to the Board of Appeals before the signs are posted. If required by the Department of Permitting Services, Petitioner must obtain sign variances for the proposed signs or amend the design of the proposed signs to have them conform with all applicable regulations. If the design is amended, a diagram showing the amended design must be filed with the Board.

Even if a sign variance is needed, the Hearing Examiner finds that the proposed signage would be compatible with its surroundings, given the location of the proposed restaurant in a shopping center away from residential areas. The Hearing Examiner finds that the signage proposed thus far is consistent with the type of use proposed, and compliance with Article 59-F can be achieved by obtaining the required permits and sign variances if needed.

*(g) Building compatibility in residential zones. . . .*

Conclusion: Not applicable. The site is not in a residential zone.

(h) *Lighting in residential zones. All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

(1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*

(2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: The site is not in a residential zone, nor does it produce any light that will intrude into a residential zone.

**59-G-1.25. County need.**

*In addition to the findings of Article 59-G, the following special exceptions may only be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that a need exists for the proposed use due to an insufficient number of similar uses presently serving existing population concentrations in the County, and the uses at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood:*

(1) *Eating and drinking establishments—Drive-in restaurant.*

Conclusion: Since the Zoning Ordinance requires a showing of “County need,” to qualify for a “drive-in restaurant” special exception, Petitioner produced a market analysis (Exhibit 18) by Joseph Cronyn, an expert in the field. For all the reasons discussed in Part II. F. of this report, the Hearing Examiner finds that a need exists for the proposed use due to an insufficient number of similar uses presently serving existing population concentrations in the County, and the use at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood.

**59-G-1.26. Exterior appearance in residential zones.**

\* \* \*

Conclusion: Not applicable. The site is not in a residential zone.

Based on the testimony and evidence of record, I conclude that the drive-in restaurant use proposed by Petitioner, as conditioned below, meets the specific and general requirements for the special exception, and that the Petition should be granted, subject to the conditions set forth in Part V of this report.

## **V. RECOMMENDATION**

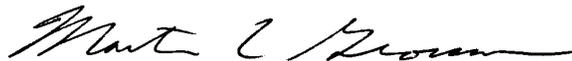
Based on the foregoing analysis, I recommend that Petition No. S-2839, seeking a special exception for a fast-food, drive-in restaurant (a Roy Rogers) at the northwestern corner of the intersection of MD 198 and Columbia Pike, US 29A, on a free-standing pad site of 16,413 square feet in the Burtonsville Towne Square shopping center, in Burtonsville, be GRANTED, with the following conditions:

1. Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and representations of counsel identified in this report.
2. Petitioner must limit development on the property to a drive-in restaurant with 3,327 square-feet of floor area. Physical improvements must be consistent with those shown on submitted plans.
3. Petitioner must conform to relevant conditions associated with Preliminary Plan 120041090 for the Burtonsville Towne Square shopping center, and the Forest Conservation Plan approved in conjunction therewith.
4. Petitioner must provide 11 parking spaces on site, with access to 113 shared parking spaces on shopping center property adjacent to the site.
5. The restaurant may have up to 40 employees, and during peak-hour shifts (11 a.m. to 2 p.m. and 5 p.m. to 7 p.m.) may have up to 15 employees on site. Non-peak hours may have up to 6 employees on site. A manager must be on site at all times.

6. The restaurant may be open seven days a week, 363 days out of the year, closing only on Thanksgiving and Christmas. Permitted hours of operation are Sunday through Thursday from 6:00 a.m. to 10:00 p.m. and Friday and Saturday nights from 6:00 a.m. to 11 p.m.
7. Sign permits must be obtained for the signs proposed by Petitioner (Exhibit 6), and a copy of the permits for the approved signs must be submitted to the Board of Appeals before the signs are posted. If required by the Department of Permitting Services, Petitioner must obtain sign variances for the proposed signs or amend the design of the proposed signs to have them conform with all applicable regulations. If the design is amended, a diagram showing the amended design must be filed with the Board.
8. Petitioner shall keep dumpsters and outdoor storage areas for waste, fats, oils and grease covered and located so as not to impact upon the storm drain inlets.
9. Deliveries, trash pickup and recycling pickup must be scheduled outside of the peak traffic hours of 6:30 to 9:30 a.m. and 4:00 to 7:00 p.m.
10. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: August 9, 2012

Respectfully submitted,



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Martin L. Grossman  
Hearing Examiner