

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850

Case No. S-2568

PETITION OF IO LIMITED PARTNERSHIP, LLLP

OPINION OF THE BOARD
(Hearing held April 30, 2003)
(Effective date of Opinion: May 28, 2003)

Case No. S-2568 is the petition of IO Limited Partnership, LLLP ("Petitioner") for a special exception pursuant to Section 59-G-2.06 (Automobile Filling Stations) of the Zoning Ordinance to permit the construction and operation of an automobile filling station and accessory convenience store. The subject property (the "Subject Property") contains 1.285 acres of land (55,900 sq. ft.) known as Lot 1, Block A, Bowman Mill Subdivision, classified in the C-3 Zone.

Decision of the Board: Special Exception for an automobile filling station (and accessory convenience store) **GRANTED**, subject to conditions enumerated below.

Stanley D. Abrams, Esquire represented Petitioner and called as witnesses the following: Kenneth Colbert, an expert in civil engineering and site design; Phillip Perrine, an expert in land planning; Lee Cunningham, an expert in transportation planning and traffic engineering; James Geigerich, an expert in market analysis and Aris Mardirossian, a representative of the Petitioner.

No person or other party appeared in opposition.

EVIDENCE PRESENTED TO THE BOARD

1. The Petitioner is the owner of the subject property which is located at the southeast quadrant of the intersection of relocated MD Rt. 118 and Bowman Mill Drive in Germantown, Maryland. The subject property containing 1.285 acres of land known as Lot 1, Block A, Bowman Mill Subdivision is a square shape, relatively level, wooded lot located in the TC-6 analysis area of the 1989 Germantown & Vicinity Master Plan and is located approximately one mile southwest of the I-270 interchange with MD Rt. 118. The property has 257 ft of frontage on MD Rt. 118 and 249 feet of frontage on Bowman Mill Drive. The

property also abuts the proposed loop extension of Walter Johnson Road, (50 ft. R/W) which is currently dedicated, but unimproved and will be constructed by the Petitioner. Consequently the property is surrounded on three (3) sides by existing and planned roadways.

2. The subject property was recently reclassified to the C-3 (highway commercial) Zone under the optional method of application (Application G-788) by the District Council on October 1, 2002 (Exh. 9). As part of the approval of Local Map Amendment G-788 a schematic development plan was approved containing certain binding elements relating to development standards, certain prohibited uses and transportation impact mitigation. The subject property although subdivided will be required to obtain a modification to its approved preliminary plan of subdivision to implement the petitioned use.

3. The evidence reflects that the surrounding neighborhood is bounded on the northwest by MD Rt. 118, on the northeast by Wisteria Drive, on the southeast by a regional storm water management facility and on the south by a ridge line within the Germantown Historic District, across the CSX railroad line. The land use and zoning pattern of the neighborhood reflects a variety of uses classified in the O-M, C-T and R-200 Zones.

4. To the east of the subject property is the dedicated but unimproved portions of the Walter Johnson loop road and a large Verizon Telephone dial center which has recently received Board of Appeals approval for an expansion in size and additional parking area. Beyond the dial center is the existing paved portion of Walter Johnson Road (formerly old MD Rt. 118), a historic structure used for offices (the Pumphrey-Mateney House) as well as a veterinary clinic and medical office buildings also along Walter Johnson Road. To the south of the property is Bowman Mill Drive which functions as the access road to the adjacent MARC train parking lot and to Walter Johnson Road. Across Bowman Mill Drive is a large parking lot for the MARC commuter train, the CSX railroad track and thereafter the Germantown Historic District behind a heavy stand of trees. The closest home to the subject property is approximately 800 feet distant within the Germantown Historic District. There is no vehicular connection across the railroad track but there are a series of pedestrian cross overs. Testimony at the hearing further reflected that approximately 33% of the entire TC-6 planning area wherein the subject property is located is comprised of off street parking use and at full build out under the Master Plan will contain almost 50% off street parking use.

5. The Petitioner proposes to erect and operate an automobile filling station with ancillary convenience store. As reflected on the special exception plan (Exh. 4) and in the Petitioner's Operation Statement (Exh. 3) the development would include a convenience store containing 3,062 sq. ft. in size, six (6) multi-product dispensers on six (6) pump islands covered by a canopy and 25 parking spaces. The amended elevation drawings (Exh. 25) reflect a convenience store

building constructed of brick and stone with a peaked roof similar in design with buildings within the Germantown Town Center approximately 1-2 blocks to the northwest and compatible with the architecture within the Historic District and the Pumphrey-Matney House. Approximately 1,760 sq. ft. of building would be devoted to convenience food, beverage and customer service area. The remainder of the building would contain a cashier/sales area, storage and utility area, restroom, cooler space/storage and an office (Exh's.4 and 5). The facility would operate 24 hours a day, seven (7) days a week, operating on three (3) employee shifts of eight (8) hours per shift. One sales associate and one assistant manager would work each shift, with the station manager rotating among the shifts as necessary. Driveway access to the subject property would be by three (3) full movement locations, one (1) driveway entrance from Bowman Mill Drive and two (2) entrances from Walter Johnson Road.

6. All major utilities are available to serve the petitioned use and reforestation requirements under the Forest Conservation Ordinance will be resolved as part of the modification of the previous subdivision plan approval for this property.

7. The proposed landscaping is reflected on Exhibit 5(c) and Exhibit 23 containing a mix of shade, ornamental and evergreen trees, shrubs and grasses. Lighting would consist of 20' high pole mounted lights for the parking area and drive isles; wall mounted fixtures illuminating building walls and sidewalks; and flush mounted down lights with flat lenses under the canopies. One monument sign is proposed as well as signage on the building and canopy (Exh. 5(b) and Exh. 25).

8. The primary market area is described in the need analysis (Exh. 11) and contains a substantial population base of approximately 47,797 people and significant employment base of over 14,760 employees. Based on the needs analysis and the testimony of the applicants expert witness substantial growth in resident and employee populations will be experienced through the year 2005. Based upon two methodologies involving consumer expenditures and vehicle derived fuel demand it is determined that an unfulfilled need exists in the subject market area. It is further noted that the evidence reflects that the subject location is adjacent to the MARC train station parking lot and would be the first station along the north bound lanes of MD Rt. 118, both conditions providing unique service opportunities to the consuming public.

9. Petitioners based upon the binding elements of the schematic development plan approved in Zoning Application (G-788) as well as information from the Montgomery County Planning Board Transportation Staff will be required to participate in intersection road improvements along with other development projects in the immediate vicinity. Various requirements involving these transportation improvements have already been imposed on several projects approved in the Germantown Town Center and surrounding environments.

10. The Maryland National Capital Park and Planning Commission technical staff in its Report and Recommendation dated April 18, 2003, recommended approval of the special exception with six conditions:

- i. The applicant shall be bound by all of its submitted statements and plans.
- ii. Approval of an amended preliminary plan of subdivision by the Montgomery County Planning Board in accordance with the subdivision regulations, Chapter 50 of the County Code.
- iii. Approval of an amended site plan by the Planning Board in accordance with the division 59-D-3 of the Zoning Ordinance. The site plan must address staff concerns regarding the provision of additional green space, improved opportunities for pedestrian access, and mitigation of lighting.
- iv. Approval of a final forest conservation plan prior to issuance of sediment and erosion control permits.
- v. Compliance with storm water and sediment control regulations of the Montgomery County Department of Permitting Services. The storm water management concept plan must be consistent with the final forest conservation plan.
- vi. Compliance with all county, state and federal technical standards and permitting requirements for underground fuel storage tanks.

10. The Montgomery County Planning Board, at its session on April 24, 2003, recommended approval of the special exception incorporating conditions #1, 2, 4, 5 & 6 recommended by its technical staff but deleted the recommendation for additional green space for improved opportunities for pedestrian access referenced in condition #3. The Planning Board revised condition #3 to state that the "site plan must address staff concerns regarding the mitigation of lighting." In addition, the Planning Board added a new condition, # 7, which states:

"7. Except as required for disabled customers or for customers to communicate with employees about emergencies, intercom boxes and external speakers are prohibited."

The Planning Board noted in its recommendation with reference to condition #3 that the Board found that the amount of green space proposed was adequate and no additional green space or buffer area was needed. Further, additional green space would require elimination of one of the two (2) proposed driveway entrances on Walter Johnson Road could compromise the safety of tanker trucks for accessing the site (Exh. 20).

FINDINGS OF THE BOARD

Based on the testimony and evidence of record, the Board finds that the proposed special exception for an automobile filling station (and accessory convenience store) meets the general requirements for special exception set forth in Sec. 59-G-1.21, neighborhood need requirements set forth in Sec. 50-G-1.24, as well as the specific requirements for the use contained in Sec. 59-G-2.06 of the Zoning Ordinance.

Requirements of Sec. 59-G-1.21:

1. An automobile filling station is a permissible special exception in the C-3 Zone and the convenience store is an allowed accessory use.
2. The proposed special exception complies with the specific standards for an automobile filling station contained in Sec. 59-G-2.06.
3. The District Council in its review of local map amendment G-788 found the use to be in harmony with the Master Plan goals for the area, particularly when considered in light of existing development in the immediate area. The construction of Bowman Mill Drive after the adoption of the Germantown Plan and the enlargement of the MARC train parking lot changed the character of the subject property and surrounding area and therefore the proposed use would be in general harmony with the Master Plan goals for the area and its current character.
4. The use will be in harmony of the general character of the neighborhood considering population density, design, scale and bulk of the proposed structures and the intensity and character of activity, traffic and parking conditions. The convenience store building and canopy has been designed to be architecturally compatible with the neighborhood. There is adequate stacking and parking provided on site and there is more than generous retention of green space and provision of landscaping to ensure compatibility. Further, the use would be the only automobile filling station in the subject neighborhood.
5. The proposed special exception would not be detrimental to the use, peaceful enjoyment, economic value or development of the surrounding properties or the general neighborhood irrespective of any adverse effects the use might have elsewhere in the zone. Impacts from the use would be inherent with this use and the absence of any carwash and repair facilities, would have fewer impacts than generic automobile filling stations. The subject property would be surrounded on three (3) sides by roadways, is amply buffered from any adjacent historic sites or the Germantown

Historic District and is over 800 feet away from the nearest residence. The evidence further reflects that there would be no non-inherent adverse effects.

6. The special exception would not cause any objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity or any other adverse effects irrespective of any adverse effects the use might have elsewhere in the zone. To the extent that any of the foregoing effects are noticeable, they are inherent in the petitioned use. Physical activity is limited outdoors to the use of multi-product dispensers and all activity for the ancillary use is conducted within the convenience store building. The fumes and odors would be reduced with the use of vapor recovery nozzles and noise levels would be mitigated by the absence of any carwash or repair facilities and are essentially masked by traffic activity occurring on adjacent roadways. The lighting proposed would not spread and cause glare beyond the boundaries of the property and further, the evidence reflects that the level of lighting is consistent with or below the level of lighting in similar uses along MD Rt. 118 and falls within the range of recommended illumination levels for this use by the Illuminating Engineer Society of North American (IESNA) and therefore disagrees with the reduced illumination levels proposed for this property under the filling station canopy and access drive areas. The levels of light proposed would not adversely impact surrounding property and does not produce excessive sky glow as currently proposed. The Board does not see the necessity for a "skirt" to be installed around the perimeter of the canopy in view of the type of lighting fixtures proposed.
7. The proposed special exception will not increase the number of special exceptions in the area sufficiently to create an adverse impact or alter the nature of the area. There are no other automobile filling stations in the immediate neighborhood and a substantial portion of the neighborhood is currently devoted and will be devoted in the future to off street parking.
8. The proposed special exception will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area. The proposed use will provide a convenience and amenity to residents, workers and visitors to the area. Pedestrian and vehicular access would be safe, particularly with the retention of two access points onto Walter Johnson Road in accordance with the findings of the Planning Board. Further, access to and from MD Rt. 118 would be safe and convenient due to gaps in traffic offered by signalized intersections at MD Rt. 118 and Wisteria Drive and MD Rt. 118 and Dawson Farm Road.
9. The subject special exception would be subject to approval of a revised preliminary plan to reflect the change in use of property and be subject to adequate public facilities conditions and requirements. The evidence of

record however reflects the adequacy of public transportation facilities with public improvements to nearby critical intersections in which the applicant will have to participate with other developers in the area.

REQUIREMENTS OF SECTION 59-G-1.24.

The Board finds from a preponderance of the evidence of record that, for the public convenience and service, a neighborhood need exists for the automobile filling station use. The Board finds that there is an insufficient number of similar uses presently available to serve existing population concentrations in the neighborhood and general market area. The use at the proposed location will not result in a multiplicity or saturation of similar uses in the same general neighborhood of the proposed use. The Petitioner has utilized several methods commonly employed in this type of needs analysis and utilized industry wide data or historical sales trends at the county level to approximate likely sales potential at the subject site. The findings of the Petitioners' needs analysis reflects an unused demand for this type of use in this area and the applicants proposed use will in part serve this existing unmet demand. The location of the Petitioned use will likewise be a convenience to MARC train commuters in view of the location of the MARC parking lot and this location also is readily available to service northbound traffic along MD Rt. 118.

REQUIREMENTS OF SECTION 59-G-2.06.

1. The Board finds that the specific requirements for an automobile filling station as set forth in Sec. 59-G-2.06 of the Zoning Ordinance are satisfied as follows:
 - (a) The use will not constitute a nuisance because of noise, fumes, odors or physical activity at the location proposed. Vapor recovery nozzles will be utilized to minimize fumes and odors and noise levels and traffic activity will be masked by vehicular activity on the adjacent roadways. Physical activity outdoors is limited to the use of multi-product dispensers, and all other activity will be conducted within the convenience store building.
 - (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 the other sites, or by reason of its location near any pedestrian entrance or crossings to any public or private schools, parks, playground or hospital. Circulation onto and out of the site would be controlled in part by existing traffic signals at the intersection of MD Rt. 118 and Wisteria Drive to the north and MD

Rt. 118 and Dawson Farm Road to the south. Site distance is good and on-site circulation is safe and efficient particularly with the two (2) access points retained on Walter Johnson Road and the access point retained on Bowman Mill Drive. There are no schools, parks or playgrounds, hospitals or other places of public assembly that might be impacted in this area.

- (c) The proposed special exception at this location will not adversely affect nor retard the logical development of the general neighborhood or of the C-3 Zone in which the station is proposed, considering service required, population, character, density and number of similar uses. The evidence reflects that the District Council in its approval of local map amendment G-788 found the use to be in harmony with the Master Plan goals for the area, particularly when considering existing development in the immediate vicinity. The proposed station would enhance convenience to the local population for its automobile filling station needs. The proposed special exception will require no services beyond that which is already provided to the property and the population, character, density and number of similar uses will not be adversely impacted by the addition of this use.
- (d) The subject property does not abut residentially zoned property or institutional uses.
- (e) No signs, product displays, parked vehicles or other obstructions will adversely affect visibility at intersections or to points of access to and from the subject property. Further, there is ample room on-site for queuing of vehicles at the pump islands.
- (f) Lighting and illuminated signage on the subject property are arranged and at an illumination level which does not reflect or cause glare into any residential zone. The nearest residence is approximately 800 feet distant and large lighting standards on the MARC train parking lot have been in existence for some number of years without any detrimental impact.
- (g) The ingress and egress driveways for the subject property, being a corner lot, will be located at least 20 feet from the intersection of MD Rt. 118 and Bowman Mill Drive as well as Bowman Mill Drive and Walter Johnson Road and all driveways will not exceed 30 feet in width.
- (h) All multi-product dispensers (gasoline pumps) are located at least 10 feet behind the building line and would be located in conformance with the submitted site plan (Exh. 4). The driveway

entrances are at least 20 feet apart and perpendicular to the curb. No outdoor storage or similar activities are proposed.

- (i) No repair work is proposed in conjunction with the operations at this location.
- (j) No vehicles will be parked so as to overhang the public right-of-way.
- (k) The proposed special exception does not include a car wash facility.

Based on the Board's findings that this petition complies with all requirements, on a motion by Donna L. Barron, seconded by Louise L. Mayer, with Angelo M. Caputo, Allison Ishihara Fultz and Donald H. Spence, Jr., Chairman in agreement, the Board **GRANTS** the proposed special exception for an automobile filling station (and accessory convenience store) subject to the following conditions:

1. As required by Section 59-A-1.27, the holder of the special exception is bound by all of its exhibits of record and testimony, to the extent that such evidence and representations are identified in this opinion and except as altered by compliance with the following conditions.
2. The holder of the special exception must obtain approval of an amendment to preliminary plan of subdivision by the Montgomery County Planning Board in accordance with subdivision regulations, Chapter 50 of the Montgomery County Code.
3. Approval of an amended site plan by the Montgomery County Planning Board in accordance with Division 59-D-3 of the Zoning Ordinance. The lighting shall be implemented according to the illumination standards of the Petitioners photometric plan (Exh. 4(d)).
4. Approval of a final forest conservation plan prior to issuance of sediment and erosion control permits.
5. Compliance with storm water and sediment control regulations of the Montgomery County Department of Permitting Services. The storm water management concept plan must be consistent with the final forest conservation plan.
6. Compliance with all county, state and federal technical standards and permitting requirements for underground fuel storage tanks.
7. Except as required for disabled customers or for customers to

communicate with employees about emergencies, intercom boxes and external speakers are prohibited.

8. Signage will be subject to the requirements of the Montgomery County Sign Ordinance.

The Board adopted the following Resolution.

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland, that the Opinion stated above, be adopted as the Resolution required by law as its decision on the above entitled Petition as amended.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 28th day of May, 2003.

Katherine Freeman
Executive Secretary to the Board

NOTE:

See Section 59-A-4.53 of the Zoning Ordinance regarding the 24 months' period within which the special exception granted by the Board must be exercised.

See Section 59-A-3.2 of the Zoning Ordinance regarding Use and Occupancy Permit for a Special Exception.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.

See the Board's Rules of Procedures for information about the process for requesting reconsideration.