

Mark Levy, MIT-Montevideo, LLC \* BEFORE THE  
Petitioner \* PLANNING BOARD OF  
PLANNING BOARD CASE NO. 420 \* HOWARD COUNTY, MARYLAND

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**DECISION AND ORDER**

The Planning Board of Howard County, Maryland, held a public hearing on January 5, 2017, (and continued March 2 and June 1, 2017), in accordance with Section 121.1.H of the Howard County Zoning Regulations, to consider the petition of MIT-Montevideo, Petitioner, to approve an Optional Design Project, PB-420, for Royal Farms at Montevideo Crossing. The 4.04 acre site is located on Washington Boulevard between Montevideo Road<sup>1</sup> and Old Montevideo Road, in the First Election District of Howard County, Maryland. The site is identified as Montevideo Crossing, Parcel 'A' (Tax Map 43, Parcel 16) and is zoned B-1-CR (Business: Local District and Commercial Redevelopment Overlay District).

The notice of the public hearing was published and the subject property was posted in accordance with the Planning Board's requirements, as evidenced by certificates of publication and posting, all of which were made a part of the record of the case. Pursuant to the Planning Board's Rules of Procedure, the reports and official documents pertaining to the petition, including the Technical Staff Report of the Department of Planning and Zoning, Planning Board Hearing Case #420, Amended Fifth Edition of the Subdivision and Land Development Regulations, Howard County Zoning Regulations, Howard County General Plan (PlanHoward2030), Howard County Design Manual, Route 1 Manual, Adequate Public Facilities Ordinance, Forest Conservation Manual, and Landscape Manual were made part of the record in this case.

The Petitioner was represented by Sang Oh, Esq. Fuel Management LLC and Mr. Shahid Mahmood and Durge, LLC and Mr. Naresh Kumar appeared in opposition and were represented by Mr. James Parsons, Esq.

After careful evaluation of all the information presented, the Planning Board makes the following findings of fact and conclusions of law:

1. The Department of Planning and Zoning (DPZ) in its Technical Staff Report (TSR) recommended approval of the Optional Design Project (ODP), PB-420, subject to Conditions of Approval by the Planning Board. The Department of Planning and Zoning in its TSR found that the Planning Board must determine that the ODP will accomplish the purposes of the CR Overlay District, pursuant to Section 121.1.H.8 of the Howard County Zoning Regulations.

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<sup>1</sup> Montevideo Road will realign with Port Capital Drive under Capital Project J-4206-1A and existing Montevideo Road will be renamed to Old Montevideo Road. The D&O refers to the ultimate road names.

The CR Overlay District, pursuant to Section 121.1.A. of the HCZR is intended to promote the following:

- a. Redevelopment that benefits the surrounding residential and business areas by creating and enhancing well designed centers that help create a vibrant marketplace.
- b. The encouragement of the most favorable arrangement of building, parking, vehicle circulation, pedestrian circulation, public areas, landscaped areas and other site features based on the physical site characteristics and the character of the surrounding developments. This arrangement is subject to and required to meet the design standards of the Route 1 Manual.
- c. The provision of creative high-quality architectural and site design that minimizes isolated buildings or pad sites and presents a positive image along or near the U.S. Route 1 corridor.
- d. The development of a mixture of commercial land uses based on market conditions, the site characteristics, and the current or intended future character of the surrounding developments.
- e. The encouragement of projects which involve the assembly and redevelopment of the greatest number of adjoining properties, and the discouragement of smaller projects that obstruct the assembly and redevelopment of adjoining properties.

As to the purposes of the CR Overlay District, the Department of Planning and Zoning found:

The site complies with the Route 1 Manual design standards and Design Advisory Panel (DAP) recommendations for a well-designed center. The site is surrounded by commercial, industrial, and mixed-use residential development. Three former parcels were merged to create the site and roadway dedication for proposed Montevideo Road. The proposed road will redirect traffic to a major intersection and provide public road frontage for future redevelopment.

Royal Farms will be accessed by two public roads and sidewalks from Route 1 for easy access. The multi-purpose dispensers (MPD) are located behind Royal Farms convenience store to allow the building façade to align with CVS. Two-way undisrupted vehicular movement connects Montevideo Road with Old Montevideo Road and internal movement is directed by traffic signs. Sidewalks provide pedestrian access mid-way along Route 1, near the transit stop, and on Montevideo Road perpendicular to CVS entrance. Outdoor tables provide public dining areas for pedestrians. Landscaping complies with applicable regulations.

Royal Farms altered their standard building architecture trade dress to match the architecture of CVS to visually connect and minimize building isolation. Brick color will match,

siding will match the top band of CVS' exterior insulation and finishing system, and white trim board will correspond with CVS' peach colored EIFS.

Based on the Petitioner's presentation of the above information, the DPZ recommended approval of the ODP because it met the purposes of the CR Overlay District.

2. The Planning Board considered a Motion to Postpone by the opposition on the grounds that the TSR was posted after close of business, inadequate time to prepare, lack of Planning Board Rules of Procedures regarding newly adopted ODP, lack of information on whether the motor vehicle fueling facility is subject to Conditional Use criteria, the lack of a traffic report, and the proposal being inconsistent with the General Plan. The opposition's Motion to Postpone by letter dated January 3, 2017, was entered into the record.

The Planning Board unanimously denied the Motion to Postpone on the grounds that there was no evidence that any required notice or filing of the TSR was defective or untimely and on the grounds that all of the other reasons for postponement were contentions to be resolved in the decision on the merits rather than a basis for postponement.

3. Mr. David Thompson with Benchmark Engineering, Inc., the project manager for this project, testified first on behalf of Petitioner. Mr. Thompson testified that he agreed with DPZ that the project complies with Section 121.1.A.2. of the Howard County Zoning Regulations (HCZR) and the Route 1 Manual design standards. Mr. Thompson testified to the favorable arrangement of the buildings, gas canopy and parking, the projects compliance with the DAP recommendation of "flipping" the locations of those uses, and the buildings architectural compatibility. Mr. Thompson added that the proposed placement of the building fronting on Route 1 was in compliance with the Route 1 Manual, and that the Petitioner agreed to this switch even though it was unique to their usual layout for gas station/convenience store uses. Mr. Thompson testified that the Petitioner lined up the proposed Royal Farms building and the CVS drug store building to have a unified front on Route 1. He also testified that the Petitioner changed the materials and colors of the Royal Farms building to match the CVS building so as to improve the aesthetics. He also indicated that the parking was broken up into several locations around the property to eliminate "the sea of parking" effect, and that this was in response to the Route 1 Manual's guidelines.

Petitioner introduced into the record the zoning map of the vicinity as Petitioner's exhibit #1 and Mr. Thompson testified that the subject property is zoned B-1-CR. Mr. Thompson testified to the favorable arrangement of pedestrian and vehicle circulation, including the location of proposed sidewalks and vehicular access along Route 1 and New Montevideo Road. He also testified that most of the traffic on the subject property would not be directly visible from Route 1 because it would be blocked by the building fronting on the road. Petitioner introduced into the record a color rendering of what the street trees would look like as Petitioner's exhibit #2 and fuel delivery truck turning template as Petitioner's exhibit #3. Mr. Thompson testified the color rendering was revised to adequately depict proposed landscaping along Route 1 and the fuel truck turning template shows how the fuel tanker maneuvers the site safely. Mr. Thompson testified to the most favorable arrangement of landscaping and its compliance with County requirements.

Mr. Thompson testified that the project complies with Section 121.1.A.3. of the HCZR by presenting a positive image along Route 1. Mr. Thompson testified that Royal Farms architecture will match the brick façade of CVS and the height of the gas canopy is less than that of the building.

Mr. Thompson testified that the project complies with Section 121.1.A.4. of the HCZR. Mr. Thompson testified that the County plans to downgrade Old Montevideo Road and make new Montevideo Road connect with Port Capital Drive to form a 4-way intersection. Mr. Thompson described that the area of Route 1 near the subject property as consisting mainly of M-2 uses to the east of Route 1 and residential uses to the west of Route 1. Mr. Thompson testified that over 2300 residential units had already been developed or would be developed in the CAC-CLI and R-MH Districts with the Howard Square, Blue Stream, and Village Towns developments. Mr. Thompson testified that gas stations are not permitted in any of the zoning districts in which the residential units are being developed and that the pharmacy, food and gas services were needed by the surrounding residential units.

Mr. Thompson testified that the project complies with the purpose statement of the CR zoning district and the site is very visible, with good access, and other advantages for furthering US Route 1 redevelopment and Howard County economic development. Mr. Thompson testified there are three mapped CR zoning districts along Route 1. Mr. Thompson testified that the CVS Pharmacy is permitted as a matter of right in the underlying B-1 zoning district and that the CR overlay district allows uses by a matter of right, if they meet the purpose of the CR district.

Petitioner introduced into the record the definition of “isolated” as Petitioner’s exhibit #4 and the definition of “pad site” as petitioner’s exhibit #5.<sup>2</sup> Mr. Thompson testified the project further complies with Section 121.1.A.3 of the HCZR and that the CVS and Royal Farms are not isolated or pad sites.

Mr. Thompson, on cross-examination, testified that the Royal Farms and CVS buildings are approximately 80 feet apart and that there will be eight MPDs under canopy.<sup>3</sup> Mr. Thompson testified that the project boundary is less than 500 feet from the Howard Square boundary and residents would cross Route 1 to walk to the site. The Planning Board, over the Petitioner’s objection, allowed the opposition to introduce into the record the Howard County Fueling Stations Task Force report as Protestant’s exhibit #1.<sup>4</sup> Mr. Thompson, on cross-examination, testified that he is not aware of market studies prepared for the case but that he personally believed there is a need for the use in the area.

Mr. Thompson, on redirect examination testified that he believes the portion of Howard Square at the closest northeast intersection is for commercial use. Mr. Thompson testified that the proposed MDPs and Howard Square residences are farther than 500 feet apart. Mr. Thompson

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<sup>2</sup> Terms not defined in the Zoning Regulations shall have the definition provided in any standard dictionary. Planning Board took official notice of all introduced terms.

<sup>3</sup> In response to an upheld objection, the opposition proffered that Royal Farms is a hyper-marketer of motor fuels.

<sup>4</sup> The admission was deemed information only and did not authorize application of the Conditional Use criteria.

testified that pedestrian connectivity is a main goal and consistent with the Route 1 Manual, including crossing Route 1.

Mr. Mark Levy, Development Manager for MIT-Montevideo, LLC, testified next for Petitioner. Mr. Levy testified that he is a local developer and his company assembled seven acres in May 2008 which were being used as a motel, a saloon and a liquor store, and sold three acres to the County for a future fire station and the future Montevideo Road right-of-way. He kept the remainder to redevelop. Mr. Levy testified about the industrial land uses on Montevideo Road, the purpose of realigning Montevideo Road to create a safer intersection, and the creation of Dorsey Run Road to alleviate truck traffic from Route 1. Mr. Levy testified that commercial development is proposed in Howard Square at the intersection of Route 1 and Port Capital Drive. Mr. Levy testified the redevelopment project will create a vibrant marketplace to meet the needs of local residents. Mr. Levy indicated that residents of the community, much of which he has developed, have indicated they need the services to be provided by the ODP.

Mr. Levy, on cross-examination, testified that he did not know the location of 7255 Montevideo Road to confirm whether he developed the site as a gas station. On redirect examination, Mr. Levy testified that he received approval for a gas station at Montevideo Road and Dorsey Run Road, but it was never developed.

Mr. Levy testified that the intersection at Port Capital Drive and Montevideo Road will have all standard pedestrian crossings.

4. The opposition introduced into the record PlanHoward 2030 Policy 5.4 as Protestant's exhibit #2. Mr. Mahmood testified as an individual and on behalf of his corporation located at 7311 Washington Boulevard, approximately  $\frac{3}{4}$  miles from the site. Mr. Mahmood testified that he purchased his business and business property. Mr. Mahmood testified he is not selling fuel at full capacity.<sup>5</sup> Mr. Mahmood testified he was familiar with the General Plan and the Zoning Regulations for gasoline service stations on Route 1. Mr. Mahmood also testified to pedestrian deaths and traffic jams on Route 1.

Mr. Mahmood, on cross-examination, testified to his knowledge of the General Plan and why traffic jams occur on Route 1.

The opposition introduced into the record the opposition's statement, dated February 22, 2017, as Protestant's exhibit #3, and Petitioner introduced into the record his response, dated March 2, 2017, as Petitioner's exhibit #6.<sup>6</sup>

Mr. Chris Alleva testified that he is a consultant to the petroleum industry and introduced into the record his resume as Protestant's exhibit #4. Mr. Alleva testified about the surrounding residential communities and the fact that the nearest residences are within 500 feet of the site. Mr.

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<sup>5</sup> In response to an upheld objection, the opposition proffered that Mr. Mahmood's business was subject to the Conditional Use criteria and, if approved, Royal Farms will severely and adversely affect Mr. Mahmood's business.

<sup>6</sup>The opposition explained the opposition statement was not intended as a Motion to Dismiss.

Alleva testified to the 30,000 ADT traffic on Route 1 and concerns for pedestrian safety because of that traffic. Mr. Alleva introduced the *Baltimore Region Unified Planning Work Program for Transportation Planning* draft document as Protestant's exhibit #5 and testified to seven pedestrian deaths on Route 1 from July 1, 2015, through June 30, 2016. Mr. Alleva testified to other gas station convenience stores on Route 1 and that they are, with one exception, not near residential developments like the proposed development.<sup>7</sup> Mr. Alleva testified that Royal Farms is an active fueling business in the mid-Atlantic market and explained their business model was high volume retailer selling up to 500,000 gallons of gasoline per month. Mr. Alleva submitted the US 1 Corridor Improvement Strategy map as Protestant's exhibit #6<sup>8</sup>, to show major truck traffic routes in the Route 1 Corridor. Mr. Alleva testified that the use is not consistent with the Route 1 Manual because the high fuel sales emphasize heavy truck use., while Policy 5.4 of PlanHoward 2030 and the Route I Design Manual discouraged truck-oriented uses on Route 1. Mr. Alleva contended that the proposed use would generate more truck traffic along area roads, including Route 1.

Mr. Alleva testified that he is familiar with the CR zoning regulations and the definition of Optional Design Project, which indicates an ODP is equivalent to a Planned Unit Development (PUD). Mr. Alleva testified that PUD is not defined in the Zoning Ordinance. The opposition introduced into the record the definition of "Planned Unit Development" as Protestant's exhibit #7.<sup>9</sup>

Mr. Alleva testified that motor vehicle fueling uses are permitted in the CR zoning district as an integrated-design use. The opposition introduced into the record the definition of "integrate" as Protestant's exhibit #8. Mr. Alleva testified that the CVS is permitted as a matter of right in the B-1 zoning district and that the approved CVS is not integrated or a part of the ODP. Mr. Alleva testified that there was not a pre-submission community meeting for the Royal Farms.

Mr. Alleva testified that the project does not comply with Section 121.1.A.1. of the HCZR because the use is a gas station not a "center" and that the use does not create a "marketplace". The opposition introduced into the record the definition of "center" as Protestant's exhibit #9 and the definition of "marketplace" as Protestant's exhibit #10. Mr. Alleva testified the project is a strip development without multiple uses and is not an activity center, per the Route 1 Manual design guidelines.

Mr. Alleva testified that the project does not comply with Section 121.1.A.2. of the HCZR or the Route 1 Manual. The opposition introduced into the record the Route 1 Manual, Figure 2.3 as Protestant's exhibit #11 and Route 1 Manual Chapter 4 as Protestant's exhibit #12. Mr. Alleva testified the building and parking orientation does not promote pedestrian access and the project does not comply with the Route 1 Manual's preferred building types.

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<sup>7</sup> In response to an upheld objection, the opposition proffered that there are 8 gas stations within 1.5 mile radius and 11 within 2 miles.

<sup>8</sup> Petitioner objected to the piecemeal document. Planning Board entered the exhibit into the record subject to supplementing the document later.

<sup>9</sup> In response to an upheld objection, the opposition proffered that the project is not mixed use and not a PUD.

Mr. Alleva testified the project does not meet Section 121.1.A.3. of the HCZR because the ODP contains one isolated building and is setback from CVS and the Route 1 right-of-way.

Mr. Alleva testified the project does not meet Section 121.1.A.4 because the project is not a mixture of commercial land uses.

Mr. Alleva testified the project does not meet Section 121.1.A.5. of the HCZR because the project is one use and not an assembly of uses. Mr. Alleva testified to a condominium plat reducing the parcel size below the required 3-acre minimum required by Section 121.1.H.1. of the HCZR. The opposition introduced into the record the approved CVS Site Development Plan #15-069 as Protestant's exhibit #13. Mr. Alleva testified to instances of DPZ not allowing "double-counting".<sup>10</sup> The opposition admitted the Condominium plat as Protestant's exhibit #14.

The opposition sought to introduce the Planning Board Policy Concerning Final Development Plans as Protestant's exhibit #15, but it was not admitted by the Planning Board based on irrelevancy.<sup>11</sup>

The opposition introduced into the record PlanHoward2030 Policy 10.6. Mr. Alleva testified that the project is not consistent with Policy 10.6 or Policy 5.4(b) because of its orientation to Route 1, its proximity to residential developments, and the strip center use.

Mr. Alleva testified he is familiar with spot zoning and the zoning history of the property.<sup>12</sup>

Mr. Alleva, on cross-examination, testified he is a consultant for this project in opposition to the gas station use. He also testified that his testimony that the site was 500 feet from the nearest residences was based on measuring from property line to property line and was not measured from the proposed gas pumps. Mr. Alleva did not contradict the fact that the recently adopted setback requirements for conditional use gasoline stations from residences were less than 500 feet. Mr. Alleva also acknowledged he had no objective evidence showing harm to residential uses being within 500 feet of gasoline service stations.

Mr. Alleva testified that he is involved with the Howard County Independent Business Association and their push for more stringent gasoline service station legislation. Mr. Alleva, in reference to Protestant's exhibit #5, testified that the scope of the study was the 14 mile stretch of Route 1 between Halethorpe and Laurel and that he could not say where the 7 pedestrian fatalities referenced in the study occurred or whether they occurred near the subject property. Mr. Alleva did not contradict that there were varying traffic patterns along Route 1 which might have contributed to the fatalities.

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<sup>10</sup> In response to an upheld objection, the opposition proffered that CVS is approved and DPZ policy is the land cannot be double counted.

<sup>11</sup> In response to an upheld objection, the opposition proffered that the Planning Board has imposed the Conditional Use criteria for projects in the NT zone.

<sup>12</sup> In response to an upheld objection, the opposition proffered that the zoning history shows the property was spot zoned for the gas station, which is not a permitted use in the underlying zone.

Mr. Alleva acknowledged that Royal Farms did not offer rapid fuel dispensers at its gas stations and that 18 wheel trucks would likely not often use a Royal Farms gas station for that reason. Mr. Alleava agreed that most truckers would continue to use Truckers Inn to re-fuel and that other gas stations were closer to Truckers Inn than the proposed site.

Mr. Alleva testified that he did not believe that the CVS pharmacy was part of the Optional Design Plan (ODP) because the SDP for CVS was previously approved. Mr. Alleva could not reference a provision in the HCZR to support his contention.<sup>13</sup> Mr. Alleva testified he could not contradict that that the CVS and Royal Farms pre-submission community meeting was held April 18, 2016.

Mr. Alleva acknowledged that the term “marketplace” was often used as a synonym for “the economy”.

Mr. Alleva testified to the CE, TOD and CAC zoning district requirements in the Route 1 Manual, to the creation of the CR zoning district after the adoption of the Route 1 Manual, and that all projects need to meet the general principles of the Route 1 Manual. Mr. Alleva testified that the proposed design of the project violated several provisions of the Route 1 Design Manual, including that parking should be in the rear, preferred building types of multi-story buildings, and that the proposed building was not located right next to the Route 1 right-of-way. Mr. Alleva did not dispute that the requirements in the Design Manual which he alleged were violated by Petitioner’s proposed design referenced the CE, TOD and CAC Zoning Districts but not the CR District. Mr. Alleva could not point to a reference to the CR District in the Route 1 Design Manual. Mr. Alleva acknowledged that the Summary Matrix in Appendix A of the Route 1 Design Manual contained an “other” category in terms of requirements and recommendations but that he did not believe the CR District was included within the “other” category.

Mr. Alleva did not contradict the testimony of Mr. Levy that the subject property was assembled from 3-4 properties owned by different owners.

Mr. Alleva testified that the Route 1 Manual was created to encourage redevelopment and investment into properties and that the proposed use will draw customers from other existing businesses.

Mr. Eugene Arthur Hoppa, Jr. testified as an individual and on behalf of his corporations, Fuel Management, Inc. and Fuel Management Building and Land, LLC; located at 7311 Washington Boulevard, approximately ¾ miles from the site. Mr. Hoppa testified that his gas station was subject to the Conditional Use criteria. Mr. Hoppa testified to his stations fuel capacity and business sales.<sup>14</sup> Mr. Hoppa testified that he is familiar with Royal Farms.<sup>15</sup> Mr. Hoppa

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<sup>13</sup> Petitioner requested the Planning Board take official notice that the ODP application is to develop the property as a CVS and Royal Farms.

<sup>14</sup> In response to an upheld objection, Mr. Parsons proffered that there are 8 gas stations within 1.5 mile radius and 11 within 2 miles.

<sup>15</sup> In response to an upheld objection, Mr. Parsons proffered that Royal Farms, if approved, will severely and adversely affect Mr. Hoppa’s business.



testified that the project does not meet the criteria because the area is not underserved by gas stations.

Mr. Hoppa, on cross-examination, testified that a gas station is a permitted use in the CR zoning district and competition is part of a vibrant marketplace. Mr. Hoppa testified that redevelopment, depending on the use, can have positive or negative impacts on surrounding residential and business areas.

Mr. Naresh Kumar testified as an individual and on behalf of his business, Durge LLC (Waterloo Shell), located at 7894 Washington Boulevard, less than ¼ mile from the site. Mr. Kumar testified to his stations fuel capacity and business sales and that he is familiar with Royal Farms.<sup>16</sup>

Mr. Joe Duncan, 8850 Gorman Road, testified to the land use goals of the Route 1 Manual, including reducing strip development, not allowing most highway-orientated retail uses, and limiting truck-oriented uses and uses that require outdoor storage. Mr. Duncan testified that the CR overlay district must comply with the Route 1 Manual and promote commercial land use based on market conditions. Mr. Duncan testified to the abundance of competing gas stations.

5. The opposition requested Planning Board Chairman Phil Engelke recuse himself from the Planning Board decision since he is a member of the Design Advisory Panel, which made a previous recommendation of approval for this project. Chairman Phil Engelke denied his request and confirmed he would be unbiased as to the issues being presented.

6. On rebuttal, Mr. Glen Cook, Vice President of The Traffic Group, testified to the traffic report prepared in accordance with County regulations and that the results of the traffic study indicated that the development would not cause failing traffic conditions.

Mr. Cook, in reference to Protestant's exhibit #5, testified that the proposed development would not cause dangers to pedestrians. Mr. Cook testified that the scope of the study, the varying areas of the study, and that government funded studies are common. Mr. Cook indicated that 7 pedestrian fatalities over a 14 mile stretch of road is not unusual or alarming, and that the study had no indication of where the fatalities took place.

Mr. Cook testified that the developer of the subject property would construct sidewalks on the subject property and the developer and SHA would reconstruct the intersection to provide safety measures, including a new signal, for the increased pedestrian activity. Mr. Cook also testified that there is likely to be a bus stop on the subject property's side of Route 1.

Mr. Cook testified that the project is not a truck orientated development. He indicated that gas station/convenience stores are not designed to accommodate large trucks getting gas, and that

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<sup>16</sup> In response to an upheld objection, Mr. Parsons proffered that Mr. Kumar's business was subject to the Conditional Use criteria and, if approved, Royal Farms will severely and adversely affect Mr. Kumar's business.

it is likely only refueling tankers would access the site. Mr. Cook added that large trucks commonly use truck stops, not retail gas stations to get gas.

Mr. Cook testified that, as to the APFO traffic study, up to 60% of the traffic is pass-by traffic not new traffic and the development would generate about one additional car per traffic signal cycle.

Mr. Cook, on cross-examination, testified that he did not recall Mr. Mahmood's testimony regarding one traffic fatality occurring within one mile of the subject property. Mr. Cook indicated that while some pedestrian activity to the subject property, including children, could occur, most people would access the use via their cars. Mr. Cook testified that the traffic report did not address post-construction pedestrian activity.

The opposition introduced into the record a Howard County Times article *Howard County, state tackling Route 1 pedestrian safety* as Protestant's exhibit #17. Mr. Cook testified that he does not know the accuracy of the pedestrian fatality data stated in the article.

Mr. Cook, on redirect examination, testified that crosswalks, sidewalks, curb cuts and reconstructed intersections constructed to code would make Route 1 safer.

7. On surrebuttal, Mr. Alleva testified that the traffic study Mr. Cook referred to was not an exhibit in the Planning Board case although he did not dispute that it was submitted to DPZ as part of its review.

Mr. Alleva also testified that Protestant's Exhibit #17 showed that pedestrian safety was considered a chronic problem on Route 1 in Howard County, and that increased residential uses along Route 1 could increase pedestrian hazards.

Mr. Alleva also made reference to what was marked as Protestant's Exhibit # 18, although it is not clear whether that exhibit was actually ever entered into the record. Given the fact that the Petitioner did not object to this exhibit, the Board considers it, however irrelevant, as part of the record. This exhibit is a February 28, 2017 memo from the Office of Transportation Administrator Clive Graham to CAO Lonnie Robbins indicating that one of the purposes of then proposed Council Bill 20-2017 was to make the Department of Transportation a full member of the Subdivision Review Committee. Mr. Alleva indicated that the comments of the Office of Transportation on the subject proposal were confined to pedestrian concerns internal to the property rather than concerns as to pedestrian safety related to pedestrian travel to the subject property from nearby residential areas.

Mr. Alleva, on cross-examination, acknowledged that Protestant's Exhibit 17 made reference to area residents indicating that the community is requesting pedestrian improvements to help alleviate pedestrian fatalities along Route 1.

8. The Planning Board has the authority to review the Optional Design Project in accordance with the pertinent criteria set forth in Section 121.1.A of the Howard County Zoning Regulations. Before the evidence presented as to these criteria are examined in terms of its sufficiency and

persuasiveness, the Board will revisit the issue of what criteria is actually applicable and not applicable in terms of the Planning Board's decision-making on a Optional Design Project (ODP) application in the CR Overlay District.

The opposition did not confine themselves to the criteria for approval provided in Section 121.1.A. of the HCZR in contending that the Planning Board should deny the ODP application. The Planning Board is without authority to address any of the following concerns of the opposition as part of its review under the applicable criteria of Section 121.1.A of the Howard County Zoning Regulations and has rejected the legal arguments of the opposition on these contentions for the reasons stated below:

- a. That the motor vehicle fueling facility does not comply with the requirements pertaining to a Conditional Use applicable to motor vehicle fueling facilities. The opposition presented no evidence that the Zoning Regulations requires that ODP applications are required to meet the requirements of Section 131.0.O. of the HCZR. The opposition only indicated that this should be the case. The Planning Board only applies criteria and is not a policy-making body.
  - b. That the Optional Design Project is inconsistent with Policies 5.4 and 10.6 the General Plan. As with subsection a. above, this is not a criterion for the Planning Board to apply under Section 121.1.A. of the HCZR. While Section 16.202(b)(2) of the Howard County Code requires that "the zoning district boundaries and regulations shall be in accordance with a comprehensive zoning plan and shall be designed to (1) implement the policies and goals of the general plan. . .", it is not within the Planning Board's statutory authority to decide whether the CR District Regulations or the creation of CR Zone on the subject property meets the requirements of Section 16.202(b)(2). Section 16.202(b)(2) does not require that individual applications for ODPs be consistent with the General Plan as is required in other proposed plan approvals under the Planning Board's approval authority, i.e. CSP decisions in the PGCC District pursuant to Section 126.0.F.4.a. of the HCZR.
  - c. That the implementation of the Optional Design Project would constitute illegal spot zoning. Again, the Board finds that it is not given the authority to invalidate the CR zoning of the property based on the opposition's legal theories of what constitutes spot zoning. The Planning Board's sole statutory authority in this case is to apply the criteria of Section 121.1.A. as they relate to Petitioner's application
9. As to the actual applicable criteria in Sections 121.1.H.8. and A.1. through 5 of the HCZR, the Board finds:
- a. That it is persuaded, based on the testimony of Mr. Thompson and Mr. Levy and DPZ's Technical Staff Report, as provided in the Board's Findings of Fact 1 and 3, all of which the Board finds convincing, that the Optional Design Project promotes redevelopment that benefits the surrounding residential and business areas by creating and enhancing

well-designed centers that help create a vibrant marketplace pursuant to Section 121.1.A.1 of the HCZR.

The opposition did not dispute the fact the proposed gas station was a well-designed redevelopment which was an upgrade over the previous uses on the subject property. Instead the opposition contended, through the testimony of Mr. Alleva, as provided in Finding of Fact 4, that a gas station as a single use was not a “center” and did not “help to create a marketplace” based on dictionary definitions of “center” and “marketplace” it presented. The opposition similarly argued that because the gas station/convenience store was a single use, it could not meet the definition of Optional Design Project in Section 103.0. of the HCZR because a “Planned Unit Development” contemplated multiple uses, nor could it meet 121.1.E.’s requirement of the integration of uses. The opposition’s contentions in this regard were based on the underlying contention that the CVS Pharmacy could not be considered as part of the ODP because its SDP had been approved prior to this case because a pharmacy was a permitted use in the underlying B-1 District, and that therefore the gas station/convenience store use was a single use which could not be part of a center or create a marketplace or be part of a Planned Unit Development by itself. The opposition was unable to reference a section of the CR District Regulations to support this contention. In fact, the Board notes that DPZ and the Design Advisory Panel both evaluated the entire 4.04 acre, containing both the Royal Farms gas station/convenience store and the CVS pharmacy as one application, despite the fact that the CVS store was allowed to proceed in a parallel fashion as a permitted use in the B-1 District. The Board agrees with the interpretations of the HCZR DAP and DPZ in this regard. In addition, Section 121.1.A.1. of the HCZR provides that beneficial redevelopment may include “enhancing” presumably already existing centers. Therefore, the Board is unpersuaded by the opposition’s arguments on this issue and rejects them.

On a related issue, the Board also notes that the opposition contended that the area of the CVS pharmacy, approximately 1.75 acres in area is required to be deducted from the area of the overall 4.04 acre subject ODP property, so that the 3 acre minimum for ODPs with a gasoline service station proposed cannot be met pursuant to Section 121.1.H.1. For the same reasons as provided in the previous paragraph, the Board is unpersuaded by this argument and rejects it. The subject property is undivided, and the proposed gas station/convenience store and pharmacy are simply located on different pads delineated on a condominium plat not approved by the County according to Protestant’s Exhibit 14. DPZ determined that “as long as the CVS property is not subdivided from the second pad site, the three acre minimum will remain and the gas station can be processed separately with the CR Overlay.” (DPZ Project Management Communication in File on the application). The Board agrees with DPZ in this regard.

The opposition made two other arguments allegedly related to this criterion which the Board also rejects as inapplicable and/or unconvincing. First, the opposition contends that a proposed gas station in this location will not “benefit . . . surrounding business areas” because it will negatively impact other gasoline service stations located within ¼ to 1 and ½ miles from the subject property. The Board explicitly did not allow

testimony from several witnesses who owned gas stations in the vicinity regarding the alleged negative competitive effect the proposal's use would have on their existing gas station businesses. The Board notes that intentional protection of existing businesses from competition is not a criterion for decision-making in Section 121.1. of the HCZR and is not permitted as a basis for denying a zoning application by Maryland case law. The Board further finds that the effect on other businesses in terms of competition is not what was intended by the phrase "benefit. . . surrounding area business areas." Instead, the Board finds that this phrase in this criterion was intended to address whether redevelopment would create an overall benefit to businesses in the area in general by providing a "vibrant marketplace".

The opposition's second inapplicable and unconvincing argument pertaining to Section 121.1.A.1. concerns the purported increased danger to pedestrians by the location of a traffic generating gas station/convenience store, particularly as to truck traffic, due to the proximity of residential areas approximately 500 feet or more from the subject property and the improvement of area roads to accommodate additional traffic on already established truck routes. These concerns are outlined in Mr. Alleva's testimony as provided in Finding of Fact 4. The Board rejects these arguments as having any applicability to the phrase "benefits the surrounding residential. . . areas" in Section 121.1.A.1. for the same reasons as outlined in the previous paragraph with respect to business areas. Traffic congestion and safety are subjects addressed by the County agencies, including DPW and DPZ, through the subdivision and land development approval process, not by the Planning Board through the CR ODP process.

The County Council has made the policy decision that a gas station is permitted in the CR District based on the meeting of specified criteria, and traffic safety is not one of those criteria. In any case, the Board was not convinced that a gas station at this location would cause any significant harm to pedestrian safety in the area for several reasons as brought out in the testimony of Mr. Alleva, on cross-examination and surrebuttal, as provided in Findings of Fact 4 and 7, and the testimony of Mr. Cook on Petitioner's rebuttal, as provided in Finding of Fact 6, all of which the Board found persuasive. These reasons include the fact that it was established that large 18 wheeler trucks rarely use Royal Farms gas stations for fueling because they do not offer high speed fueling like truck stops do, that 60 per cent of traffic on Route 1 is pass-by traffic not generated traffic, that there is no evidence that any of the 7 fatalities in one year along the 14 mile stretch of Route 1 in Howard County was any closer than one mile from the subject property, that most people travel by car instead of by foot generally, especially in this area, and that the development would include and/or generate improvements such as sidewalk construction, intersection improvements, including signaling for pedestrians, and improved crosswalks, which would help to improve pedestrian safety in the area.

- b. That it is persuaded, based on the testimony of Mr. Thompson and DPZ's Technical Staff Report, as provided in the Board's Findings of Fact 1 and 3, all of which the Board finds convincing, that the Optional Design Project complies with the Route 1 Manual design standards and encourages the most favorable arrangement of building, parking, vehicle circulation, pedestrian circulation, public areas, landscaped areas, and

other site features based on the physical site characteristics and the character of the surrounding developments pursuant to Section 121.1.A.2. of the HCZR.

The opposition did not challenge much of the Petitioner's presentation or DPZ's TSR as to the favorable design of the proposed gas station/convenience store in terms of favorable arrangement of the building, parking, vehicle circulation, pedestrian circulation, public areas, landscaped areas and other site features. Instead, the opposition contended that various aspects of the proposed design of the site did not meet various provisions of the Route 1 Design Manual based on the evidence presented as outlined in Finding of Fact 4. However, the Board finds that the opposition could not show how the provisions of the Route 1 Design Manual to which they referred were made applicable to the CR District. The opposition presented no credible evidence that the proposed design of the site did not meet "other" category for streetscape and site design as provided in Appendix A of the Route 1 Design Manual. To the contrary, Petitioner demonstrated that it responded favorably to the design input from both DPZ and DAP to maximize compliance with the general design principles of the Route 1 Design Manual.

- c. That it is persuaded, based on the testimony of Mr. Thompson and DPZ's Technical Staff Report, as provided in the Board's Findings of Fact 1 and 3, all of which the Board finds convincing, that the proposed development provides a creative high-quality architectural and site design that minimizes isolated buildings or pad sites and presents a positive image along or near the U.S. Route 1 corridor pursuant to Section 121.1.A.3 of the HCZR.

The opposition's challenge to the Petitioner's presentation on this criterion was limited to its previous contention that the proposed development could not show that it minimized isolated buildings or pad sites because the gas station/convenience store was a single use. For the same reasons articulated with respect to Section 121.1.A.1 above, the Board rejects this argument since the gas station/convenience store was combined with and can be evaluated with the CVS pharmacy in this ODP. As such, the Board finds that the combination of uses does minimize isolated buildings or pad sites.

- d. That it is persuaded, based on the testimony of Mr. Thompson and DPZ's Technical Staff Report, as provided in the Board's Findings of Fact 1 and 3, all of which the Board finds convincing, that the proposed development provides a mixture of commercial land uses based on market conditions, the site characteristics, and the current or intended future character of the surrounding developments pursuant to Section 121.1.A.4. of the HCZR.

The opposition's challenge to the Petitioner's presentation on this criterion was limited to its previous contention that the development could not show that it proposed a mixture of commercial land uses because the gas station/convenience store was a single use. For the same reasons articulated with respect to Section 121.1.A.1. and 3. above, the Board rejects this argument since the gas station/convenience store was combined

with and can be evaluated with the CVS pharmacy in this ODP. As such, the Board finds that the development is a mixture of commercial land uses.

- e. That it is persuaded, based on the testimony of Mr. Levy and DPZ's Technical Staff Report, as provided in the Board's Findings of Fact 1 and 3, all of which the Board finds convincing, that the proposed development involves the assembly and redevelopment of the greatest number of adjoining properties, and the discouragement of smaller projects that obstruct the assembly and redevelopment of adjoining properties pursuant to Section 121.1.A.5. of the HCZR.

The opposition did not dispute that the proposed development involved the assembly and redevelopment of 3-4 smaller properties.

10. Because a motor vehicle fueling facility is proposed in this ODP, the Board finds that this use is creatively integrated into the project's architectural and site design for the reasons stated in the testimony of Mr. Thompson and DPZ's Technical Staff Report, as provided in the Board's Findings of Fact 1, 3 and 9 pursuant to Section 121.1.E. of the HCZR.

### CONCLUSIONS OF LAW

1. Petitioner, as one seeking the Planning Board's approval of its proposed Optional Design Project (ODP) in the CR Overlay District, pursuant to Sections 121.1.H.8. and 121.1.A.1. through 5. of the HCZR, has the burden of demonstrating that the ODP will accomplish the purposes of the CR Overlay District.

2. Because a motor vehicle fueling facility use is involved in this case, Petitioner also has the burden of demonstrating that this use is creatively integrated into the project's architectural and site design.

3. There is sufficient evidence in the record as identified in the Board's Findings of Fact above, for the Board to conclude that the Petitioner has met its burden of demonstrating that it has satisfied the above-cited criteria for approval.

4. For the reason stated in the above Findings of Fact, the Board concludes that Petitioner has conclusively established through the evidence in the record that the following criteria for approval have been met by its proposal:

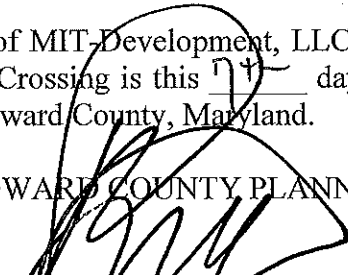
- a. The redevelopment benefits the surrounding residential and business areas by creating and enhancing well-designed centers that help create a vibrant marketplace;
- b. The redevelopment encourages the most favorable arrangement of building, parking, vehicle circulation, pedestrian circulation, public areas, landscaped areas and other site features based on the physical site characteristics and the character of the surrounding developments. This arrangement is subject to and required to meet the design standards of the Route 1 Manual;

- c. The redevelopment provides creative high-quality architectural and site design that minimizes isolated buildings or pad sites and presents a positive image along or near the U.S. Route 1 corridor;
- d. The redevelopment develops a mixture of commercial land uses based on market conditions, the site characteristics, and the current or intended future character of the surrounding properties;
- e. The redevelopment involves the assembly and redevelopment of the greatest number of adjoining properties, and does not obstruct the assembly and redevelopment of adjoining properties; and
- f. The motor vehicle fueling facility use is creatively integrated into the project's architectural and site design.

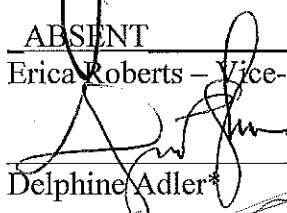
5. The proposed Optional Design Project, PB-420, satisfies the purpose criteria for the CR zoning district, according to Section 121.1.H of the Howard County Zoning Regulations, for the reasons stated in the above Findings of Fact and in the Department of Planning and Zoning Technical Staff Report, which the Board finds persuasive and which it adopts as its own in this decision.


For the foregoing reasons, the petition of MIT-Development, LLC, for approval of an Optional Design Project, PB-420, Montevideo Crossing is this 7<sup>th</sup> day of September, 2017 APPROVED by the Planning Board of Howard County, Maryland.

HOWARD COUNTY PLANNING BOARD

  
 Phil Engelke – Chairperson

ABSENT  
 Erica Roberts – Vice-Chairperson

  
 Delphine Adler\*

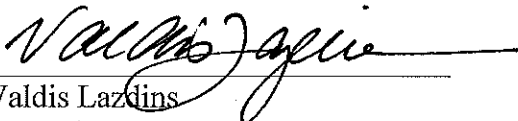
  
 Ed Coleman

*\*Delphine Adler, who was absent during portions of the hearings on this matter, certifies that, prior to participating in this decision, she has listened to a recording of the portion of the hearing for which she was not present and has reviewed all of the evidence submitted for the portion of the hearing for which she was not present.*

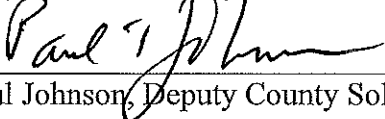


PB Case No. 420

ATTEST:

  
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 Valdis Lazdins  
 Executive Secretary

REVIEWED FOR LEGAL SUFFICIENCY BY:  
 HOWARD COUNTY OFFICE OF LAW  
 Gary W. Kuc, County Solicitor

  
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 Paul Johnson, Deputy County Solicitor

LIST OF PETITIONER’S EXHIBITS:

- Applicant’s Exhibit #1 – Zoning Map
- Applicant’s Exhibit #2 – Rendering Perspective
- Applicant’s Exhibit #3 – Turning Template WB-53 Fuel Delivery Truck
- Applicant’s Exhibit #4 – Definition of “Isolated”
- Applicant’s Exhibit #5 – Definition of “Pad Site”
- Applicant’s Exhibit #6 – Mr. Oh’s letter dated March 2, 2017

LIST OF OPPOSITION’S EXHIBITS:

- Protestant’s Exhibit #1 – Fueling Stations Task Force
- Protestant’s Exhibit #2 – Route 1 Manual, Policy 5.4
- Protestant’s Exhibit #3 – Mr. Parsons’ letter dated February 22, 2017
- Protestant’s Exhibit #4 – Christopher J. Alleva Resume
- Protestant’s Exhibit #5 – Unified Planning Work Program for Transportation Planning
- Protestant’s Exhibit #6 – US 1 Corridor Improvement Strategy
- Protestant’s Exhibit #7 – Definition of “Planned Unit Development”
- Protestant’s Exhibit #8 – Definition of “Integrate”
- Protestant’s Exhibit #9 – Definition of “Center”
- Protestant’s Exhibit #10 – Definition of “Marketplace”
- Protestant’s Exhibit #11 – Route 1 Manual, Figure 2.3
- Protestant’s Exhibit #12 – Route 1 Manual, Chapter 4
- Protestant’s Exhibit #13 – Site Plan #15-069
- Protestant’s Exhibit #14 – Condominium Plat
- Protestant’s Exhibit #15 – Howard County Planning Board Policy Concerning FDP

Criteria

- Protestant’s Exhibit #16 – Route 1 Manual, Policy 10.6
- Protestant’s Exhibit #17 – Howard County Times article
- Protestant’s Exhibit #18 – Howard County Internal Memorandum – Testimony on CB

