

ABRAMS, WEST & STORM, P.C.

Attachment A

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April 8, 2003

Donald Spence, Chairman
Montgomery County Board of Appeals
100 Maryland Avenue, 2nd Floor
Rockville, Maryland 20850

**RE: Modifications Requested to Special Exception S-2351
(Mid Atlantic Petroleum Properties, LLC Petitioner)**

Dear Chairman Spence & Members of the Board:

In this letter, we are requesting a major modification to Special Exception (S-2351) which is an auto filling station, convenience store and accessory carwash use located at 12301 Middlebrook Road, Germantown, Maryland. By way of background, at the public hearing before the Board on January 22, 2003 on the appeals and complaints relating to the construction of an office building filed by Brooke Venture, LLC (Case Nos. A-5787 & A-5832), the appeal filed by my client Mid Atlantic Petroleum Properties, Inc. ("MAPP") (Case No. A-5794), and the special exception related to the property (S-2351), we requested a deferral of the hearing to allow MAPP an opportunity to file a request for modification to deal with the issues involved in the various appeals and further to correct any alleged violations of the auto filling station special exception after an inspection to be performed by DPS inspector Stanley N. Garber. The Board granted our request, and the hearing was deferred until April 23, 2003.

On January 24, 2003, Mr. Garber issued his report related to his inspection of the property. A copy of Mr. Garber's report is attached as Exhibit 1. We subsequently met with Mr. Garber to discuss the report and to plan a strategy to bring the property into compliance.

Of course, the primary issue in the appeals before the Board involves the parking requirements for the office building, including the parking in the special exception area designated for office use. We have developed a plan to resolve the parking issues, and we are submitting the plans with this request. In addition, we are requesting that the special exception for the automobile filling station, accessory convenience food and beverage store, and accessory carwash be modified to approve the as-built facility. After the special exception was granted, our client made adjustments during the build out in a good faith effort

to improve the appearance and customer friendliness of the facility. At the time the revised plans were

submitted to DPS, the address was apparently mistakenly listed in DPS' file as 12311 (instead of 12301) Middlebrook Road, so DPS did not recognize that the special exception applied to the property, and DPS approved the revised plans and issued a building permit.

Most, if not all of the changes in the as built plans reflect aesthetic improvements to the property, and rather than removing or destroying the improvements, we are seeking to have them approved by the Board. Thus, the purpose of the requested modification is two-fold: to address the parking issues, and to have the as-built facility approved. We understand that Mr. Garber has no objection to the requested changes to the special exception.

The enclosed materials support and explain the subject request for various modifications to S-2351.

Exterior Modifications Requested:

- (1) That the existing storm water management facilities (ie: a surface pond and facilities) be placed underground and that area of the parcel be devoted to thirty six (36) off-street parking spaces to support the two (2) level office building under construction on the non-special exception area portion of the subject parcel.
- (2) The eight (8) parking spaces parallel to Middlebrook Road requested in our prior modification request which was approved on October 16, 2002 and approval suspended due to the Brooke Venture's objections be approved for additional parking for the proposed office building and delete from petitioner's request the three (3) spaces requested for this purpose in front of the convenience store. (See Exh. A). These three spaces are no longer needed for office use because the plan provides sufficient parking for the office building elsewhere.
- (3) Approval of an existing ATM machine and small canopy over the ATM along the front wall of the convenience store building to the left of the main entrance. (See photo's - Exh. B). Note: Sandy Spring Bank obtained a building permit for this ATM from DPS.
- (4) Approval of the existing stone patio and fountain to the right of the building and the exit door from the building to the patio area. (See photo's -Exh. C). Petitioner would also request the right to place benches and/or tables and chairs on the

patio area for the use of patrons and/or employees.

- (5) Approval of a revised "as built" lighting and landscape plans. (See Exh. D & E) including approval of existing "as built" canopy, on-site lighting and plants.

Interior Modifications:

- (6) Modification of the interior floor plan to reflect as built condition as follows:

Total Floor Area – 2,583 sq. ft.

Customer Area & Customer Lounge	1,263 s.f.
Office Area	58 s.f.
Coolers	286 s.f.
Food Prep and Sales	464 s.f.
Cashier	177 s.f.
Rest Room	149 s.f.
Utility Room	118 s.f.
Storage Room	68 s.f.

(See: Floor plan, Exh. F attached hereto).

The Petitioner will demonstrate through the testimony of Carlos Horcasitas (representing the Petitioner), Carl Neuberg, architect and Paul Woodburn, planner and engineer, the modifications which are proposed and that the modifications will not substantially change the nature, character or intensity of the use or change the effect on traffic or the immediate neighborhood. No change in hours of operation or number of employees is requested.

The Petitioner will continue to abide by all conditions of the special exception approval to the extent that they are not affected or changed by the subject modification.

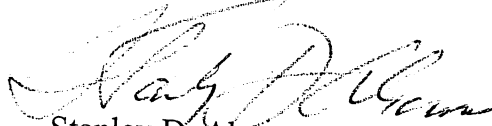
These modifications are submitted to address issues in the outstanding appeals to be heard by this Board on April 23, 2003 and the issues raised by the zoning inspector, Mr. Garber. If possible, we would request that these issues be considered at the hearing on April 23, 2003. If this cannot be done, in an effort to avoid a piecemeal resolution of this matter, we would request that the hearing set for April 23, 2003 be deferred until such time as the

Donald Spence
April 8, 2003
Page 4

issues in this request for modification may be considered by the Board along with the appeals currently pending.

Thank you for your consideration of this matter. If further information is required please advise.

Very truly yours,



Stanley D. Abrams

SDA:dw
Enclosures

Carlos Horcasitas
Esq.

Paul Woodburn

BOARD OF APPEALS
for
MONTGOMERY COUNTY

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Case No. S-235I

PETITION OF MID-ATLANTIC PETROLEUM PROPERTIES, LLC

By: Carlos Horcasitas
(Hearing held October 14, 1998)

Opinion of the Board

Effective date of Opinion: November 2, 1998

Case No. S-235I is the petition of Mid-Atlantic Petroleum Properties, LLC, for a special exception pursuant to Section 59-G-2.06 of the Zoning Ordinance to permit an automobile filling station and accessory convenience food and beverage store and accessory carwash.

The subject is Parcel E, Germantown Industrial Center, located on the north side of Middlebrook Road, west of Waring Station Road, Germantown, in the I-I Zone.

Decision of the Board: Special exception **GRANTED**, subject to conditions enumerated below.

PETITIONER'S CASE

Stanley Abrams, Esquire, represented the petitioner. He called Carlos Horcasitas, contract purchaser of the property; M. Lee Sutherland, land planning and site planning consultant; Lee Cunningham, land planning and transportation expert; James Geigerich, marketing expert; and Carl Neuberg, project architect, as witnesses. A rendered site plan (Exhibit No. 21) was accepted as the applicable site plan for the project since it contained additional landscaping and other modifications requested by Planning Commission staff. The record also contained exhibits in the form of an aerial photograph (Exhibit No. 23), photographs of the surrounding area (Exhibit Nos. 22A-C), a master plan map reflecting the neighborhood area boundaries (Exhibit No. 24), and various photographs of other service stations of the petitioner to reflect the appearance and character of building style and landscaping proposed for this site.

Witnesses explained that the petitioner is requesting a special exception for an automobile filling station which will contain six pump islands, each with two fueling positions, a canopy, a convenience food and beverage store, and a small accessory carwash located to the west of the store. The entire parcel contains 1.94 acres of land, zoned I-I; however, the special exception will apply to only 1.45 acres, depicted on the site plan, with the remaining area to be developed in a permitted use consistent with the I-I Zone.

The property is located on the north side of Middlebrook Road, which is presently under improvement within a 150' right-of-way. The site is vacant, relatively level except for a rise in elevation at the rear of the property and contains a stormwater management facility on the eastern half of the property, which currently serves two adjacent office buildings to the west and will serve the subject development as well.

The special exception proposal includes the construction of six pump islands, perpendicular to Middlebrook Road, all covered by a canopy, an accessory mini-mart behind the pump islands, a small carwash adjacent to the west side of the mini-mart, fifteen parking spaces and perimeter landscaping. Greenspace will occupy approximately 56% of the special exception area, and the floor area ratio (FAR) is .067. The convenience store, facing Middlebrook Road, will contain 2,810 sq.ft. in size, measuring approximately 70' x 40'. The customer service/sales area will contain 1,250 sq.ft., with the remaining 1,560 sq.ft. devoted to a small office, cooler and storage areas, a cashier area, restroom facilities and a utility room. The store's patron service area will display typical convenience store products, with a small food and beverage preparation and dispensing area.

A monument style identification sign will be located to the east of the easternmost driveway entrance. Signs will also be located on the face of the mini-mart, canopy and carwash. The signs will be lit, but they will not cast glare onto the roadways or adjacent residential properties. All lighting on site will be directed downward, and also will not cause glare into any adjacent areas.

The proposed plan is consistent with the Germantown Streetscape Plan. Shade trees are provided along the frontage of the property with both shade, ornamental and evergreen trees interspersed at points throughout the site. The site is lined on the northern perimeter by a proposed planting of white pines along an existing chain link fence. Stormwater management regulations prevent any extensive plantings within the eastern portion of the site containing the stormwater management basin and outflow areas. Along the western border of the site, adjacent to a parking lot for an existing office complex, shrubbery will also be planted.

Fifteen parking spaces are provided, as required by the Code, and are conveniently located adjacent to the front of the convenience store. The separation of the pump islands and the existing right-of-way, as well as the pump islands and the building, comply with all Code requirements and allow safe and convenient access. The pumps are located behind the front building line, as established by the ultimate master plan right-of-way.

A right-in, right-out access drive connects one point of access to Middlebrook Road, with a second point of access connecting to a driveway for the adjacent office complex just west of the subject property. Witnesses defined the neighborhood as a triangular shaped area, bounded by MD Rt. 118, Middlebrook Road and I-270, as more fully reflected on Exhibit No. 24. The property is located in the western portion of the neighborhood area. No other automobile filling stations are located along Middlebrook Road south of MD Rt. 118 to I-270. Surrounding uses are of a decidedly mixed character. To the north of the property is a federal government installation (i.e., U.S. Department of Energy) with an ancillary accessory point of access from Middlebrook Road, just opposite Waring Station Road. To the west of the subject property is land also zoned I-1, containing 2 office buildings, beyond which there exists a self-storage facility and townhouses. Across Middlebrook Road, which is currently being

improved to a 6-lane divided highway within a 150' right-of-way, there are the rear portions of garden apartments and townhouses on land elevated approximately 25' above Middlebrook Road. The current Germantown and Vicinity Master Plan recommends the I-I Zone for this property.

A traffic study was performed, using standard analysis guidelines recommended by MNCPPC. Five intersections were studied, including MD Rt. 118 at Aircraft Drive, Crystal Rock Drive and Middlebrook Road, as well as Middlebrook Road at Great Seneca Highway and at Waring Station Road. With current road improvements underway, all intersections will operate at acceptable levels of service after completion of this development, and the subject project will not adversely affect traffic operations in the vicinity of the site in terms of either circulation or safety considerations. The evidence further indicated that the subject site has subdivision approval for a 33,000 sq.ft. office building and that new trips generated by the proposed auto filling station facility will be less than new trips generated by the existing approved office development. However, this project will require revisions to an existing Adequate Public Facilities Ordinance Agreement executed at the time of the subdivision plan approval of the previous office project.

Space between pump islands, the building, the parking and landscaping is ample for vehicles to make whatever turns are necessary. Vehicles entering from Middlebrook Road, for example, can obtain gas and have room to either park at the convenience store and/or utilize the carwash and return safely to Middlebrook Road. The carwash has capacity for approximately 12 vehicles, and it is the opinion of this Board that the location of the carwash, as reflected on the site plan, is superior to placing the carwash behind the convenience store building. The drive aisles and the parking areas are more than adequate and promote good on-site circulation.

Stormwater management will be provided in connection with the existing stormwater management facility on site serving the 2 office building facilities to the west of this property. The details of the stormwater management plan and any revisions will be addressed thoroughly at the time of application for building permit.

Based upon a study prepared by James Geigerich in May 1998 (Exhibit No. 11), this witness discussed how the proposal meets a need for automobile filling stations in the primary market area, which he defined as including the Gunners Lake Village, Town Center and Churchill Village areas outlined in the Germantown Master Plan. Based upon significant existing commercial and residential development, as well as that proposed for the reasonably foreseeable future, and considering further, travel and consumer shopping patterns in this area, a public need was demonstrated for an additional automobile filling station, even given the presence of 5 other stations in the market area. The marketing consultant analyzed population, consumer expenditure, gallonage figures and other statistics by application of 5 separate methodologies, all of which have been previously accepted by this Board and all of which verified that there was an underserved need for an additional auto filling station to serve residents, workers and commuters in this area.

The automobile filling station will sell gasoline 24 hours per day, 7 days a week, and the convenience store will operate with the same hours, but will only be open for public access to the interior between 6:00 a.m. and Midnight. The carwash hours will be 8:00 a.m. to 8:00 p.m. daily, 7 days a week. Two employees, plus a manager, will work during each of 2 shifts between 7:00 a.m. and 11:00 p.m.; and, one employee will work the late shift, from 11:00 p.m. to 7:00 a.m.

FINDINGS OF THE MARYLAND NATIONAL CAPITAL
PARK & PLANNING COMMISSION

Both the Planning Board and its technical staff recommended approval with conditions (Exhibit Nos. 15 and 16).

FINDINGS OF THE BOARD

The Board finds that the proposed gasoline filling station, convenience store and accessory carwash meet both the general requirements for special exceptions contained in Section 59-G-1.21 of the zoning ordinance, as well as the specific requirements for the use found in Section 59-G-2.06. The petitioner's market consultant has presented convincing evidence that the subject market area is currently underserved by automobile filling stations, and therefore, a public need exists to serve residents, workers and commuters within this area.

The Board agrees that the market area is an area encompassing the Gunners Lake Village, Town Center and Churchill Village portions of the Germantown Master Plan. This market area is appropriate in its recognition of natural traffic, consumer shopping and commuter patterns identified in the evidence. This area contains significant existing residential and employee populations, including those within the Department of Energy, Middlebrook Tech Park and the I-270 Corporate Center. Major employment and resident population expansion is expected over the next 5 years.

The Board notes that petitioner's analysis establishes the relationship between existing and proposed population/employment centers and routes of travel. Using various statistical factors, the analysis further demonstrates, through the relationships between market demand, existing facilities and various travel and consumer patterns, that a public need exists for this automobile filling station. The Board further notes that the subject location is along a main access corridor from the west and northwest central Germantown area to I-270, a major commuter route. While 5 other stations are located in the trade area, they are focused adjacent to MD Rt. 118 to the north and east, while the subject station is oriented southwest of that area, away from the Germantown Town Center.

The Board finds that the proposed filling station meets the general requirements of Section 59-G-1.21 as follows:

1. The proposed use is a permissible special exception in the I-I Zone.
2. It complies with the standards and requirements contained in Section 59-G-2.06 as described below.
3. It will be consistent with the applicable master plan. The applicable master recommends employment use for this property, and indicates the necessity for complementary services.

4. The proposed special exception 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. The neighborhood character is mixed, containing large and small scale employment uses, the large U.S. Government Department of Energy facility, retail commercial and medium density residential uses in the form of garden apartments and townhouse developments. The new structures proposed for the automobile filling station and its level of activity, including traffic and parking, will not be out of character with this area. Furthermore, the use is separated from the closest residential uses, located to the south of this property, by the extensive right-of-way (150') for Middlebrook Road and considerable topographic differences associated with that residential area. The subject use blends well with the surrounding employment, industrial and governmental installation, and in terms of design and scale and the intensity and character of activity and traffic, is consistent with the levels associated with the surrounding nonresidential uses.

5. It will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood, and it will cause no objectionable noise, vibrations, fumes, odors, dust, glare or physical activity. The site and the uses thereon are located adjacent to a heavily traveled roadway, the effects of which are probably greater than the effects associated with the subject use. The equipment on site will prevent emissions of fumes, and there will be no automobile repair, and therefore, little noise or vibrations. Lighting will not glare onto adjacent properties, and will be directed downward into the site. Physical activity is essentially limited, and will be screened by extensive landscaped and treed areas. The presence of Middlebrook Road, and the extreme topographic differences associated with existing residential uses also decrease the potential for any detrimental impacts.

6. It will not, when evaluated in conjunction with existing and approved special exceptions in the neighboring one-family residential area, increase the number, intensity or scope of special exception uses sufficiently to affect the area adversely or alter its predominantly residential nature. Special exception uses in accord with the recommendations of a master or sector plan are deemed not to alter the nature of an area. Furthermore, the subject neighborhood is not predominantly residential in nature, but decidedly mixed in character, with a heavy element of employment, governmental and retail uses.

7. 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 subject use is a typical automobile filling station with ancillary convenience store and carwash, and there is no reason to believe that it will have an adverse effect on anyone in the area.

8. The use proposed will be served by adequate public services and facilities, including police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities. The subject property is already a part of an approved subdivision plan, but will require an amendment to any adequate public facilities agreement(s) associated with the previously approved preliminary plan for this property. The Board of Appeals has taken into account the Planning Board advice, as stated in its report and recommendation (Exhibit No. 16).

The Board notes that the property is served by public water and sewer and that stormwater management quantity and quality controls are currently being reviewed by the appropriate County departments. Based upon the evidence of record, roadway capacity is adequate and the subject use will not adversely impact the functioning or capacity of adjacent roadways and intersections.

The proposed special exception also meets the specific requirements of Section 59-G-2.06 for an automobile filling station as follows:

1. The use will not constitute a nuisance because of noise, fumes, odors or physical activity in the location proposed, as described in Number 5 above.
2. 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 or intersections, or its location in relation to other buildings or proposed building on or near the site and the traffic pattern from such buildings, or by reason of its location near a vehicular or pedestrian entrance or crossing to a public or private school, park, playground or hospital, or other public use or place of public assembly. It is not located near the entrance to any of the uses mentioned. Furthermore, the entrances, exits and on-site circulation patterns are safe and adequate and will create no nuisance or hazard. The site is located on a recently improved 6-lane divided roadway, which contains well-defined turning facilities and traffic patterns. The proposed filling station will operate safely within those patterns.
3. The use at the proposed location will not adversely affect nor retard the logical development of the general neighborhood or of the industrial or commercial zone in which the station is proposed, considering service required, population, character, density and number of similar uses. The use is recommended in the Germantown Master Plan, and it is compatible with other uses in the general neighborhood.
4. When such use abuts a residential zone or institutional premises not recommended for reclassification to commercial or industrial 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 substantial, solid fence, not less than 5' in height, together with a 3' planting strip on the outside of such wall or fence planted in shrubs and evergreens. Location, maintenance, vehicle sight distance provisions and advertising pertaining to screening shall be as provided for in Article 59-E. The subject property abuts the U.S. Department of Energy property which, while zoned residential, is essentially an office/employment use. Sufficient landscaping and screening exists along the perimeters of the subject property, and the multi-family/townhouse area to the south is effectively screened by natural terrain and proposed landscaping along Middlebrook Road.
5. Signs, product displays, parked vehicles and other obstructions which adversely affect visibility at intersections or to station driveways shall be prohibited. The plans and evidence of record reflect that visibility will not be affected by any of these factors.
6. Lighting, including permitted illumination signs, shall be arranged so as not to reflect or cause glare into any residential zone. The lighting and signage plans, and the testimony of witnesses with respect to these plans, indicate compliance with this requirement.

7. 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 30' 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 40' from the center line of any abutting street or highway. The subject property is not a corner lot, but the application otherwise complies with the requirements of this provision.

8. Gasoline pumps or other service appliances shall be located on the lot at least 10' behind the building line; and all service storage or similar activities in connection with such use shall be conducted entirely within the building. There shall be at least 20' between driveways on each street, and all driveways shall be perpendicular to the curb or street line. The site plan confirms that all service appliances and driveways comply with these requirements.

9. Vehicles shall not be parked so as to overhand the public right-of-way. The site plan confirms that all designated parking areas comply with these requirements.

10. In the I-I Zone, an automobile filling station use may, pursuant to footnote 21 contained in Section 59-C-5.2 of the zoning ordinance, permit a carwash with up to 2 bays as an accessory use. An accessory carwash is proposed for the subject site and its location depicted on the site plan is safe, efficient and will not produce any adverse effects upon adjacent properties. This carwash has a stacking capacity of approximately 12 vehicles, and it is the Board's opinion that the location, as depicted on the site plan, is more appropriate than concealing the location of the carwash either behind the building or further back from the adjacent frontage of the convenience store building.

Accordingly, the Board grants that the special exception to permit an automobile filling station with an accessory convenience store and carwash, subject to the following conditions:

1. Petitioner is bound by all of its testimony and exhibits of record, the testimony of its witnesses and representations of its attorneys, to the extent that such evidence and representations are identified in the Board's opinion.

2. Construction must be in accordance with the plans entered into the record as Exhibit No. 13 and as updated and modified by the rendered site plan, Exhibit No. 21. Petitioner's accessory carwash building and stacking area shall be in the location reflected on these exhibits.

3. Revision to the existing Adequate Public Facilities Agreement associated with the previously approved preliminary plan for this property.

4. Petitioner must submit a landscape, lighting and signage plan to Technical Staff at MNCPPC for review and approval. One copy of the approved plan must be submitted to the Zoning Supervisor, Department of Permitting Services, and one copy submitted to the Board for its records. Petitioner must obtain a permit for any signs from the Department of Permitting Services.

5. Approval of access permits by the Montgomery County Department of Public Works and Transportation and/or the Maryland State Highway Administration.

6. In the event that the special exception is transferred, the new holder must notify the Board of the transfer of ownership.

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.

On a motion by Donna L. Barron, seconded by Angelo M. Caputo, with Louise L. Mayer, Wendell M. Holloway, and Susan W. Turnbull, Chair, in agreement, the Board adopted the foregoing Resolution by unanimous vote.

I do hereby certify that the foregoing Opinion was officially entered in the Opinion Book of the County Board of Appeals this 2nd day of November, 1998.



Katherine Freeman
Acting Executive Secretary to the Board

NOTE: See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four months' period within which the right granted by the Board for a special exception must be exercised.

See Section 59-A-3.2 of the Zoning Ordinance regarding Use and Occupancy Permits 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.