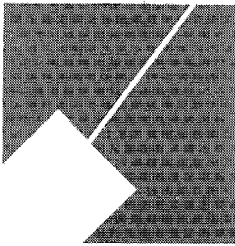


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**MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING**

THE MARYLAND-NATIONAL CAPITAL  
PARK AND PLANNING COMMISSION

8787 Georgia Avenue  
Silver Spring, Maryland 20910-3760  
301-495-4500, www.mncppc.org

**PB 7/20/2006**

**Item # 11**

**MEMORANDUM**

**DATE:** July 6, 2006  
**TO:** Montgomery County Board of Appeals  
**FROM:** Sandra Youla, AICP, HKIP (301-495-4624) *SY*  
for the Department of Park and Planning *RK*  
**VIA:** Rose Krasnow, Chief, Development Review, and  
Carlton Gilbert, Zoning Supervisor  
**REVIEW TYPE:** Parking Waiver from Requirements of 59-E-2.71  
Parking Waiver from Requirements of 59-E-2.72  
Special Exception for Drive-in Restaurant, per 59-G-2.16  
**APPLICANT:** DavCo Restaurants, Inc.  
**CASE NUMBER:** S-2664  
**REVIEW BASIS:** Chapter 59, Zoning Ordinance; Advisory to Board of Appeals  
**ZONE:** C-2 (General Commercial)  
**LOCATION:** 11030 Veirs Mill Road  
Silver Spring, MD 20902  
**MASTER PLAN:** Comprehensive Amendment to the Sector Plan for the Wheaton  
Central Business District and Vicinity (September 1990)  
**FILING DATE:** November 29, 2005  
**PLANNING BOARD:** July 20, 2006  
**PUBLIC HEARING:** July 28, 2006, 9:30 a.m. at the Hearing Examiner

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**STAFF RECOMMENDATION:**

**SPECIAL EXCEPTION:**

Staff recommends **DENIAL** of the proposed special exception, because, as discussed in the staff report and appendix, the application does not meet various general and specific requirements. In particular, the application a) is not consistent with the master plan, b) is incompatible with the surrounding area, c) will cause frequent turning movements across sidewalks and pedestrian ways, thereby disrupting pedestrian circulation within a concentration of retail activity, d) raises numerous transportation-related issues that have not been sufficiently resolved, and e) has non-inherent characteristics and effects sufficient to warrant denial.

**WAIVERS:**

Staff recommends **DENIAL** of the necessary parking waivers because, as discussed in the staff report, a) staff recommends denial of the entire special exception use, and b)

the requirements that are proposed to be waived are necessary to ensure compatibility with urban design objectives for the area and to allow the parking facility plan to meet one of the objectives of a parking facility plan, per 59-E-4.2, namely the protection of the welfare of those who use any adjoining land.

## **PROPOSAL AND BACKGROUND**

### **Introduction**

DavCo Restaurants, Inc., requests a special exception for a drive-in restaurant ("Wendy's") with drive-through lanes at 11030 Veirs Mill Road, Silver Spring on land zoned C-2 (General Commercial). The applicant also requests two parking waivers: from the requirements of 59-E-2.72 (Perimeter landscape area adjoining property other than a street right-of-way) and 59-E-2.71 (Landscape strip area adjacent to a street right-of-way). Although not noted in its letter dated June 26, 2006 to property owners, the applicant requires waivers not only of the widths of the pertinent landscape strips/areas, but also of the shade tree requirement of those landscape strips/areas.

The special exception site area ("the property") is located on the southwest side of Veirs Mill Road directly opposite the bus depot and Wheaton Metro station, in the western quadrant of the intersection formed by Veirs Mill Road and the vehicular entrance ("Mall Entrance Road") to Westfield Shoppingtown Wheaton (formerly known as Wheaton Mall). A nearby intersection to the southeast is Veirs Mill Road and Georgia Avenue, and to the northwest is Veirs Mill Road and Reedie Drive.

### **Property Description, Survey, and Sign Posting**

The property comprises all of Parcel 6 (Lot N621) (see subdivision plat known as Wheaton Plaza, recorded on 8/11/60 in Plat Book 66 in Plat No. 6037, MNCPPC No. 176-9) and a small portion of Parcel 9 (Lot N631) (see resubdivision plat known as Parcel 9 Wheaton Plaza, recorded 5/4/99 in Plat Book 193, Plat No. 21051, MNCPPC No. 608-84). The property contains 22,545 s.f., is almost rectangular in shape, and is flat. The property has a right-of-way frontage of approximately 165 feet along Veirs Mill Road, and 134 feet along Mall Entrance Road. The property was formerly occupied by a gas station, but has been cleared and is fenced and in the process of being remediated.

The applicant submitted a survey of Parcel 6 to staff on 2/10/2006. The survey was dated 6/24/2005, and contains notes about easements, covenants, and conditions affecting this parcel. The relevant portion of Parcel 9 also is shown, but it is unclear whether the title search and notes on the survey cover this area, and the Hearing Examiner may wish to ask the applicant to clarify this for the record.

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On a site visit on 6/22/06, the sign announcing the special exception was posted.

### **Review Procedures**

The subject property comprises two recorded parcels, and since the application proposes only to extend parking but not any buildings across lot lines, the property will not need to go through resubdivision to combine the parcels.

The resubdivision plat for Parcel 9 contains a Note 8 that states:

the lots shown hereon are limited to uses and conditions as required for the plat of Wheaton Plaza recorded in Plat Book 66 Plat 6037. Any proposed changes in use will require further Planning Board Review.

Zoning staff asked subdivision staff whether the extension of parking onto a portion of Parcel 9 would therefore trigger the need for further Planning Board Review, per the language on the plat cited above. Subdivision staff responded in an email to staff dated 6/23/2006 as follows:

Since there are no previously approved conditions to reference and use to identify "uses", it is my determination that as long as the applicant demonstrates that both parcels will meet the 10% green space requirement after conversion of part of Parcel 9's landscaping to parking, the parcels remain in compliance with the plat, and there is no need for Planning Board review beyond the special exception.

In its revised statement of operations received by staff on 6/13/2006, the applicant's attorney states:

In order to construct the proposed improvements, DavCo will remove some overly mature plantings in a parcel located between the restaurant site and the Westfields Center. The Petitioner has confirmed that at the time the shopping center was constructed there was no greenspace requirement for the C-2 zone and that the trees to be removed will not adversely affect any approval or any requirement expected of the Westfields Shopping Center.

Zoning staff confirms that there were no greenspace requirements in the C-2 zone in the 1960's (at least up to 1968).

### **Neighborhood Description, Special Exceptions in the Vicinity**

The subject property is located within the area covered by the *Comprehensive Amendment to the Sector Plan for the Wheaton Central Business District and Vicinity*

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*(approved and adopted September 1990)*. The property also is within the Wheaton CBD Policy Area. However, the property is not within the Wheaton Retail Preservation Overlay Zone, which covers a portion of the Central Business District ("CBD") more or less to the north of Reddie Drive.

The property also is not within the Central Business District ("CBD") itself, but is immediately outside of it, with the CBD boundary running, in relevant part, along Veirs Mill Road. The bus depot and Metro Station opposite the subject site are within the CBD to the east of the boundary. Westfield Shoppingtown Wheaton and other properties, including the subject property are to the west of the CBD boundary.

For the purposes of this staff report, the neighborhood has been defined as the area bounded by Reddie Drive to the north; the mixed use properties fronting on the east side of Georgia Avenue between Reddie Drive and Veirs Mill Road; and the commercial properties fronting on the west side of Veirs Mill Road between Georgia Avenue to the south and Reddie Drive to the north. Within this area in the triangle of land bounded by Reddie Drive, Georgia Avenue, and Veirs Mill Road are a low-rise commercial building, the Wheaton Regional Services Building, and the Wheaton Metro Station and bus depot, all on land zoned CBD-2. Along the west side of Veirs Mill Road are commercial properties that include parking and the newly developed freestanding Bally's Health Club and parking just south of the subject site across Mall Entrance Road, the subject site, a parking garage adjacent to the subject site to the north that is connected to the bus depot by a footbridge over Veirs Mill Road, the parking garage's entrance drive and landscaping immediately abutting the subject site to the southwest, and Westfield Shoppingtown Wheaton further to the west of the subject site, all on land zoned C-2. Along the east side of Georgia Avenue are mixed uses including the newly developed five-story multi-family buildings, an older four-story office building, and the Metro Station and surface parking, all on land zoned CBD-3.

There have been two applications for special exceptions within the defined neighborhood, S-32 and S-546, but staff has no information on these old special exceptions, and they appear to no longer be in place. Consequently, there would be no adverse cumulative impact from the addition of the proposed special exception.

### **Veirs Mill Road, Mall Entrance Road, and Links to the Vehicular and Pedestrian Network**

The approach to Westfield Shoppingtown Wheaton from Georgia Avenue via Veirs Mill Road and Mall Entrance Road in the vicinity of the subject site has recently been reconfigured. Currently, the portion of Veirs Mill Road between Mall Entrance Road and Reddie Drive is a six-lane, two-way road, with a median and a seventh lane for turning movements. The portion of Veirs Mill Road between Georgia Avenue and Mall Entrance Road near the subject site is five lanes only, with a sixth lane for left-hand

turning movements in the northwest lanes. Veirs Mill Road is classified as a Major Highway, M-13, with a 120-foot right-of-way. Currently, less than the sixty feet from centerline is dedicated. If the subject property were subject to subdivision, the applicant would be required to show this dedication on their plans.

Mall Entrance Road in the vicinity of the subject site has two lanes in either direction and a median. The roadway, excluding sidewalks, is about 50 feet wide. The intersection of Veirs Mill Road and Mall Entrance Road is signalized. The intersection of Veirs Mill Road and Georgia Avenue is also signalized, and both northbound and southbound traffic on Georgia Avenue can turn onto Veirs Mill Road at this intersection

There are sidewalks on either side of Veirs Mill Road, and for most of their length these sidewalks are designed based on the Wheaton Streetscape requirements (as found in the *Wheaton Central Business District Road Code Design Standards*, issued by the Montgomery County Department of Housing and Community Development and Department of Transportation, April 1990). However, the sidewalks that abut the subject site on both Veirs Mill Road and Mall Entrance Road currently are not designed according to the Wheaton Streetscape requirements, and neither are the sidewalks that abut the Bally's site (south of the subject property) along both Veirs Mill Road and Mall Entrance Road.

There are numerous crosswalks in the vicinity of the subject site. Two crosswalks lead across Veirs Mill Road from the southernmost entrance of the transit center to the subject property and the Bally's site. A crosswalk over Veirs Mill Road connects the bus depot and Metro Station to the subject site at the signalized intersection. Two more crosswalks over Mall Entrance Road connect the subject property to the Bally's property to the south. Another crosswalk connects the subject site to the mall parking lots to the west and to a narrow sidewalk leading to the mall. There is no signal at this crosswalk.

Just north of the northern entrance to the bus depot is a pedestrian footbridge that leads over Veirs Mill Road from the Metro Station and bus depot to the parking garage abutting the subject site to the northwest. The footbridge must be accessed by elevator or stairway on either side of Veirs Mill Road. The footbridge leads to a pedestrian pathway through the parking garage to a stairway/elevator down to Mall Entrance Road, across either of two crosswalks, and onto sidewalks abutting the mall. The Metro Station itself is located under Georgia Avenue and is accessed via a tunnel that connects the bus depot on one side to Georgia Avenue to the parking area for the Metro Station on the other side of Georgia Avenue.

People apparently avoid the footbridge because they must use steps to access it, and instead cross over Veirs Mill Road illegally. The applicant has verbally informed staff that barriers will be put along Veirs Mill Road to discourage illegal crossings and

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encourage use of the footbridge, but no written stipulations have been submitted into the record.

People who wish to avoid the footbridge can exit the Metro Station tunnel and walk either diagonally across the bus depot on a marked crosswalk (currently fenced off in part) and then south along the sidewalk on the northeast side of Veirs Mill Road, or they can walk south on an interior sidewalk within the bus depot. In either case, they will arrive at the signalized, at-grade intersection and crosswalks leading across Veirs Mill Road to the subject site and environs.

There is also a paved walkway in the landscape area between the garage and the subject site, and this walkway leads from Veirs Mill Road to the driveway entrance for the garage.

### **Filing, Planning Board and Public Hearing Dates, Submissions**

The application was filed on 11/29/2005. The referral memo to internal review staff was dated 12/8/2005. A due date of 2/6/2006 was assigned for referral comments.

Transportation staff informed the applicant's traffic consultant on 1/26/2006 that new counts and a revised traffic study were needed, and after another discussion with zoning staff, transportation staff contacted the applicant for a firm date for receipt of the revised traffic study. The traffic consultant estimated that the revised study could be submitted by 2/14/2006. On 2/9/2006, the applicant's attorney requested postponement of the public hearing from 4/7/2006 to late June (6/30/2006), because it was clear that the revised traffic study would be received too late for a PB of 3/23/2006. The revised traffic study was received 3/13/2006.

Zoning and other review staff met with the applicant and its team on Friday, 2/10/2006. Numerous comments were given and requests for revised submissions and additional information made. Zoning staff did not receive any of the requested revisions (except the revised traffic study, which Transportation staff received), and planned to write a denial based in part on the applicant not meeting its burden of proof. The applicant's attorney requested a second meeting, which was held on Friday, 6/9/2006, at which time the applicant put forward some revised plans, which were discussed. The applicant's attorney requested a postponement of the PH to late July (7/30/2006) in order to allow the applicant time to submit revisions and avoid a denial based on missing information.

### **Details of Proposal**

Based on information provided in the revised statement of operations received by staff on 6/13/2006 as well as from other submissions, the applicant is proposing:

- A one-story drive-in restaurant of approximately 2,552 square feet of building area.
- A drive-through lane with three components – an order board position, a payment window, and a pickup window. Drive-through patrons must stop at each. The drive-through lane will have 4-5 spaces between the pickup window and the order board and 3 protected spaces beyond that point.
- Special design features to facilitate pedestrian movement to, into, and past the site because they assume a higher than normal level of pedestrian levels. These features include:
  - ADA compliance in terms of design and numbers of accessible spaces.
  - An upgraded street environment utilizing and enhancing the Wheaton Streetscape standards, including special sidewalk treatments including a variety of colors and textures; a masonry brick wall with contrasting column caps at a height adequate to partially screen vehicles on the site and to provide a suggestion of separation between the public and private realms; extension of the brick wall and sidewalk treatment onto private property by “wrapping the corner” and installing the same enhanced sidewalk features on the walkway leading from Veirs Mill road into the Westfields Shopping Center;
  - The relocation of the entrance to restaurant so that it is more visible from the street and from the Veirs Mill Road sidewalk. The front door is now located so that it faces the area of the site with the greatest amount of landscaping and the most extensive hardscape features.
  - Addition of a brick sidewalk along the street side of the building to allow better pedestrian movement from the lead walk and to avoid having the building immediately adjacent to the paved surfaces.
- Exterior of building made of brick with bands of masonry detailing, substantial glazing, a sculpting ABS fascia system, and accent lighting.
- Landscaping and lighting as specified on the revised landscape and lighting plan and photometric analysis received by staff on 6/14/06 (includes removal of certain plants and addition of others to supplement landscaping).
- A 3-sided brick-faced trash enclosure with board on board gates, in the western corner of the site, out of the way of parking or circulation.
- Special equipment to deal with oils and greases generated by the restaurant, including an underground grease interceptor, a tank within the building to collect cooking oils, an exterior hose connection on the tank, and a “shortening shuttle,” which is used by employees to periodically drain the tank through the hose into a 55 gallon drum stored in the trash enclosure area. The drums are then removed by Valley Protein, a recycling company.
- Hours of operation seven days a week from 6:00 a.m. to 1:30 a.m., with initial hours of operation from 10:00 a.m. to 2:00 a.m. (The use will initially not serve breakfast, but will eventually.)

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- Total of approximately 40 to 60 employees at this site, typical maximum shift (e.g. from 11:00 a.m. to 2:00 p.m.) of 20 employees, with a typical dinner shift of 15 employees, and staggered shift changes so that employees come and go at various times during the day.

## **ANALYSIS AND CONCLUSION**

### **Main Issue: Suitability of Location**

The main issue posed by this application is whether the subject site is a suitable location for a drive-in restaurant with drive-through lanes, given the high concentration of pedestrians in the area. The concentration of pedestrians is high because the site is located between a Metro Station and bus depot on one side and a major shopping mall and Metro parking garage on the other. The concentration is also high because the site is located immediately adjacent to a central business district, which by design is an area of mixed uses where walking is expected and indeed encouraged. Further, the existing pedestrian network and conditions ensure that there always will be pedestrians in the vicinity of the site. Finally, the proposed use itself will attract pedestrians, thereby increasing the number of pedestrians in the area.

In order to help resolve the main issue regarding location, zoning staff examined the regulatory framework for drive-in restaurants in the zoning ordinance. Drive-ins were created as a separate category in 1969, per Ord. 6-148 (ZTA F-339, adopted 4/9/69). The zoning text amendment and ordinance created a definition, allowed the use only in the C-1 and C-2 zone and only by special exception, and created specific requirements. The standards have remained mainly unchanged since then. The definition of a drive-in was and is as follows, per 59-A-2:

Drive-in restaurant: Any place or establishment merchandising or dispensing food or drink at which the customer is served:

- (a) While sitting in an automobile or other motor vehicle, or
- (b) Through an interior or exterior sales window, counter or serving area, and in which a substantial part of the food or drink merchandised and dispensed has been prepared and packaged so as to facilitate its consumption outside the structure in which the food or drink is dispensed.

Currently, drive-in restaurants may exist in various zones as follows:

*Single and Multi-family Residential – none.*

*R-MH (Mobile Home Development) -- none*

*Commercial –*



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C-T, O-M, C-O, C-P, H-M, Country Inn – none  
C-3 (Highway Commercial) (floating) – permitted  
C-1 (Convenient Commercial) – special exception  
C-2 (General Commercial) – special exception  
C-4 (Limited Commercial) – special exception  
C-6 (Low-density regional commercial) – special exception

Central Business District –  
CBD 0.5, CBD-R1, CBD-R2 – none  
CBD-1, CBD-2, CBD-3 – permitted/special exception (special exception if adjoining or confronting single-family residentially zoned land), but in no case may there be any drive-through lanes

Industrial Zones –  
I-1, I-2, I-3, I-4, R&D, LSC -- none

Planned Unit Development Zones (floating) (PD, TS, PN, PRC, MXN, MXPD, PCC) –  
Pedestrian-oriented local commercial facilities may be permitted with a compatibility finding.

Transit Station Development Area Zones (floating) --  
TS-R, TS-M -- none

Agricultural Zones (floating and Euclidean)  
Rural, RC, RDT, RNC, RS, LDRDZ – none

Residential Mixed Use Development Zones –  
RMX-1, RMX-2, RMX-3, RMX-TDR, RMX2-TDR, RMX3-TDR, RMX-2C, RMX-3C – none

Mineral Resource Recovery Zone -- none

Retail Preservation Zone for the Wheaton CBD (overlay zone) – none

There are two main points to note from the above. Firstly, the only place where drive-ins (and drive-ins with drive-through lanes) are permitted by right is the C-3 (Highway Commercial ) zone. The C-3 zone was created on 8/11/1970, right about the time of the passage of the zoning text amendment for drive-ins, and the appropriateness of this use for this zone is discussed in the legislative history for drive-ins. The intent of the C-3 zone is "...to provide...sites for commercial facilities which are related to the traveler and highway user..."(59-C4.360)

Secondly, in CBDs, drive-throughs may not exist at all, either as a permitted or special exception use.

Clearly, the regulatory scheme set out in the Zoning Ordinance indicates that drive-in restaurants with drive-throughs belong only in areas where there are few pedestrians. Indeed, the specific requirements of drive-in restaurants make this clear, per 59-G-2.16(b), which states:

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The use at the proposed location will not...cause frequent turning movements across sidewalks and pedestrian ways, thereby disrupting pedestrian circulation within a concentration of retail activity.

Zoning staff finds it quite obvious that the subject location will and does have many pedestrians, and transportation staff has confirmed that there are high pedestrian volumes at the crossings over Veirs Mill Road from the Metro Station and bus depot. Consequently, zoning staff finds that a drive-through at this location is inappropriate, incompatible with the surroundings, has non-inherent adverse effects sufficient to warrant denial (vehicular/pedestrian conflicts), and will, contrary to requirements, cause frequent turning movement across sidewalks and pedestrian ways, thereby disrupting pedestrian circulation within a concentration of retail activity.

### **Master Plan Conformance**

A memo dated 6/27/2006 from Community-Based Planning staff concludes that “the proposal is not consistent with the goals and objectives of the Wheaton Sector Plan.” CBP staff notes that the “intent of the Plan – to revitalize the entire Wheaton commercial core and create an attractive, pedestrian-oriented environment throughout the Wheaton CBD and Wheaton Plaza – does not support a suburban style drive-through fast food restaurant at this location.” The Plan includes urban design guidelines, and as discussed in the memo, Community-Based Planning staff finds that the proposal does not comport with them.

Zoning staff completely agrees with CBP staff – this use is inappropriate in type, would set a bad precedent, and is contrary to the intent of the Wheaton Sector Plan. Zoning staff recognizes that the applicant improved the design, but the revisions were insufficient to create the type of urban form that fits at this site. Staff would prefer to see a use where the building is pulled to the street, parking is off-site in a garage or at least in the rear, and, if possible, a greater FAR or density was achieved, since the use is located opposite a Metro Station.

### **Transportation Issues**

In an attached memo dated 6/29/2006, Transportation staff notes that:

the applicant has not sufficiently shown that the non-inherent effects of the special exception use on this site could be mitigated. Staff is also concerned as to whether or not the drive-through use in such close proximity to the Metrorail station satisfies compatibility requirements, but defers those findings to CBP staff. Staff has identified numerous improvements that could satisfy the required transportation-related findings. At this time, however, staff cannot make a

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positive finding that, if included as conditions supporting an approval, the improvements could all fit on the subject site.”

Transportation staff noted that for both weekday peak-hours in all traffic conditions, the CLV values do not exceed the congestion/CLV standard of 1,800 for the Wheaton CBD Policy Area at any of the three intersections. Transportation staff also noted that the pedestrian crossing times at the crosswalk from the bus depot to the subject site do not meet LATR guidelines. (DPWT feels the pedestrian crossing times are adequate.) DPWT also noted that there is inadequate storage capacity to accommodate projected northbound traffic volumes on MD 586 between MD 97 and the Metro Bus Access intersection.

Transportation staff studied potential pedestrian/vehicular conflicts and noted that there could be potential conflicts as frequently as 31% of the time. However, because no quantitative guidelines exist in the zoning code or professional guidelines to help staff determine an acceptable frequency of conflicts, transportation staff could not use the 31% as justification for a denial.

Zoning staff feels does not believe such a quantitative guideline is needed. Rather, it would seem clear that if the area has a high level of pedestrians, then the chances for conflicts will increase and the location becomes inappropriate for a for drive-in with drive-through lanes. During weekday peak hours studied in the traffic study, an average of 75 (a.m.) and 84 (p.m.) pedestrians crossed the nearby intersection to the corner where the subject site is located. Undoubtedly, if the Wendy's were located there, it would attract even more pedestrians.

### **Environmental Issues**

A memo dated 6/30/2006 is attached. Environmental staff recommended one condition, if the application is approved:

Prior to release of building permits, provide evidence of compliance with all federal and state Clean Water Act requirements for underground storage tank abandonment and/or removal.

Zoning staff notes that this evidence should be provided to the Hearing Examiner prior to the close of the record, in order to allow findings of public safety to be made.

### **Parking and Waivers**

A letter dated 6/26/2006 from the applicant's attorney to property owners is attached. The applicant requests a waiver from the landscape area/strip width requirements of 59-E-2.71 (10-foot wide landscape strip for parking facilities adjacent to a street right-of-

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way) and 59-E-2.72 (4-foot wide perimeter landscape strip). The applicant requests of 5.6 foot waiver of the 10-foot requirement of 59-E-2.71 and a complete waiver of the 4-foot perimeter landscape strip requirement, because the parking will be crossing a lot line onto the adjacent parcel. The applicant proposes to build a three-foot high masonry wall along the right-of-way, and the applicant proposes to remove some mature vegetation in the green area to the west of the site and supplement it with new plantings.

Zoning staff notes that both the 59-E-2.71 and 59-E-2.72 contain not only width requirements for landscaping strips/areas, but also street tree requirements (one tree for every 40 feet of lot frontage or perimeter). No street trees or landscaping is shown in conjunction with the wall along the street right of way, and no street trees are shown within the sidewalk area, although street trees are required by the Wheaton Streetscape requirements. Additional landscaping is necessary to minimize environmental impacts, including for pedestrians along the street. Staff notes that there is very little green area in the general vicinity and a great deal of paving, especially at the mall, which has few if any street trees because it was built before such standards were in place. Excess paving can form urban heat islands, with negative environmental impacts. Staff finds the proposal insufficient, and does not support the waiver of the requirements of 59-E-2.71. Staff also does not support the waiver of 59-E-2.72, in part because the applicant has proposed to replant an insufficient number of trees (it appears as if four more could be added), and because staff feels that the entire use is too tight for the site and is the inappropriate urban form for this site.

The applicant proposes 23 parking spaces, including one van accessible space. The requirement for parking spaces for a restaurant is as follows:

25 parking spaces for each 1000 square feet of floor area, devoted to patron use within the establishment and 15 parking spaces for each 1000 square feet of ground area devoted to patron use on the property outside of the establishment. The base requirements may be reduced in accordance with the credit provision of Section 59-E-3.3.

The special exception site plan indicates under parking tabulation that the patron area within the building is 884 square feet, although no floor plans are provided to allow staff to check. The special exception site plan also indicates that 0 square feet of outdoor patron area is provided. If these numbers are correct, then 23 spaces are required, and 23 are provided. One van accessible handicapped space is required for every 25 parking spaces provided, and one is provided, with the required 96 inch wide access aisle.

### **Development Standards**

As noted, a revised special exception site plan was received by staff on 6/14/2006, but was not signed and sealed. The plan should be signed and sealed and resubmitted to the Hearing Examiner prior to the close of the record before the Hearing Examiner. According to the revised special exception site plan, the gross tract area for the subject property is 22,545 s.f. (18,750 s.f. Parcel 6; 3,795 s.f. for portion of Parcel 9). The application meets required development standards, as follows:

<b>DEVELOPMENT STANDARD C-2 ZONE</b>	<b>REQUIRED/ PERMITTED</b>	<b>PROVIDED</b> (per development standards table on revised s.e. site plan rec'd 6/14/2006)	<b>COMPLIANCE</b>
Building Height (59-C-4.351)	3 stories/ 42 feet max.	1 story/19'-3"	Yes, 1 story/approx.20 feet, per staff measurement from elevations rec'd by staff 6/14/2006
Floor Area (59-C-4.352)	1.5 FAR max. (18,750 s.f. x 1.5 = 28,125 s.f. GFA)	0.14 FAR of Lot (2552 s.f. GFA), 0.11 FAR of SE area	Yes, FAR is <1.5, per staff measurement from revised s.e. site plan rec'd 6/14/2006
Front Setback (59-C-4.353)	10 feet min.	43 Ft. approx.	Yes, per staff measurement from revised s.e. site plan rec'd 6/14/2006
Side and Rear (59-C-4.353)	0, but min. 3' if provided	Min. 15'	Yes, per staff measurement from revised s.e. site plan rec'd 6/14/2006
Green Area (59-C-4.354)	10% min. (2254.5 s.f.)	20% of lot (3750 s.f.), 23.9% of SE Area (5417 s.f.)	Yes, >10%, per staff measurement from revised s.e. site plan rec'd 6/14/2006

### **Needs Analysis**

The applicant must demonstrate county need for a drive-in restaurant, per 59-G-1.25. Research and Technology staff reviewed the submitted Needs Analysis, and concludes that the applicant has met its burden of proof to establish need, per an attached memo dated 1/26/2006.

### **Community Concerns**

Staff received only one letter on 3/23/2006 from a member of the community, and it is attached. The resident wrote to oppose the application, because she felt the flow of traffic at the "Bally entrance" to the mall was already quite poor, and a drive-in would worsen matters.

### **Landscape and Lighting Plans, Signage**

A revised landscape and lighting plan and separate photometric plan were received by staff on 6/14/2006. These plans were not signed and sealed. Signed and sealed plans must be resubmitted to the Hearing Examiner prior to the close of the public hearing. Staff finds that the submitted plans are inadequate for a number of reasons, as discussed in the following paragraphs.

Regarding landscaping, the applicant must show street trees in the right-of-way along Veirs Mill Road, per the Wheaton Streetscape requirements. Further, as noted, there is insufficient landscaping (including shade trees) provided in conjunction with the wall along Veirs Mill Road. Provision of sufficient shade trees along the wall may necessitate removal of a required parking space, and staff would not recommend any waiver for number of parking spaces. Finally, at least four additional trees should be planted the green area between the site and the mall, and the planting type should be changed from Eastern Red Cedar to Leland Cypress.

Regarding lighting, the applicant has provided insufficient information. Staff notes that the applicant should do the following:

- Provide more poles, and lower wattages.
- Provide a lower pole height (29' and 30' are too high) that is compatible with the neighborhood, to staff's satisfaction. Height must be specified and must include the mounting base. Design of mounting base must also be shown.
- Show location of all lighting types on photometric analysis, not just on landscape and lighting plan.
- Fix the lighting schedule on the photometric analysis to list all types of lighting and their specifications.
- Provide a cut sheet with photographs or drawings of the lighting fixtures.
- Extend photometric readings to the edge of the special exception boundary, and put the special exception boundary on all plans (site plan, landscape plan, photometric analysis).
- Provide lower levels of lighting along the side of the site facing the Metro parking garage, to staff's satisfaction and in accordance with IESNA Recommended Practice.
- Show lighting types, locations, and heights for properties in the vicinity, to allow staff to make compatibility determinations.
- Show lighting within right-of-way in accordance with the Wheaton Streetscape requirements.
- Provide full cut-off shield fixture housing.

No information was provided about freestanding signage, and the applicant should provide this information to the Hearing Examiner before the close of the record.

**CONCLUSION**

Staff recommends **DENIAL** of the proposed special exception, because, as discussed in the staff report and appendix, the application does not meet various general and specific requirements. In particular, the application a) is not consistent with the master plan, b) is incompatible with the surrounding area, which is urban rather than suburban in nature, c) will cause frequent turning movements across sidewalks and pedestrian ways, thereby disrupting pedestrian circulation within a concentration of retail activity, d) raises numerous transportation-related issues that have not been sufficiently resolved, and e) has non-inherent characteristics (a location within a redeveloping, highly urbanized pedestrian environment near a Metro Station) that would cause adverse effects sufficient to warrant denial.

Staff also recommends **DENIAL** of the necessary parking waivers because, as discussed in the staff report, a) staff recommends denial of the entire special exception use, and b) the requirements that are proposed to be waived are necessary to ensure compatibility with urban design objectives for the area and to allow the parking facility plan to meet one of the objectives of a parking facility plan, per 59-E-4.2, namely the protection of the welfare of those who use any adjoining land.

## APPENDICES

- Excerpt from the Montgomery County Zoning Ordinance (Chapter 59 of the Montgomery County Code), as it existed on and subsequent to May 6, 2002, *with staff annotation*
- Vicinity Maps (2)
- Wendy's Lease/Special Exception Area
- Wheaton Boundaries Plan (Overlay Zone, Sector Plan, Urban District, CBD, Parking District)
- Tax Map
- Plats (2)
- Zoning Map
- Pictometry Photos (2)
- Aerial Photo
- Rendering of Proposed Wendy's (looking west toward mall down Mall Access Road from Veirs Mill Road) (received by staff 6/9/2006)
- Site Plan (per submission received by staff 6/14/2006)
- Landscape and Lighting Plan (per submission received by staff 6/14/2006)
- Photometric Analysis (per submission received by staff 6/14/2006)
- Elevations (2) (per submission received by staff 6/14/2006)
- AASHTO SU-30 Truck Turning Radius (per submission received by staff 6/14/2006)
- Letter dated 6/26/2006 from Applicant's Attorney to Property Owners re: Requested Waivers
- Site Distance Evaluation (per submission received by staff 6/14/2006)
- Storm Water Management Concept Plan
- Letter dated 8/18/2006 from DPS re: Storm Water Management Concept
- Site Distance Evaluation (per submission received 1/10/06) (not yet approved by DPWT)
- Community-Based Planning Memo (dated 6/27/2006)
- Transportation Memo (dated 6/29/2006) with attachment from DPWT
- Environmental Memo (dated 6/30/2006)
- Research and Technology Memo re: Need Analysis (dated 1/26/2006)
- Letter from Citizen (Mary-Janet Casserly) dated 6/22/2006



**APPENDIX: EXCERPT FROM THE MONTGOMERY COUNTY ZONING ORDINANCE (CHAPTER 59 OF THE MONTGOMERY COUNTY CODE), as it existed on and subsequent to May 6, 2002, without staff annotation**

**ARTICLE 59-G. SPECIAL EXCEPTIONS, VARIANCES, AND NONCONFORMING USES.**

**DIVISION 59-G-1. SPECIAL EXCEPTIONS – AUTHORITY AND PROCEDURE.**

**Sec. 59-G-1.2. Conditions for granting.**

**59-G-1.2.1 Standard for evaluation.**

A special exception must not be granted without the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner, or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site. Non-inherent adverse effects, alone or in conjunction with inherent adverse effects, are a sufficient basis to deny a special exception.

*The inherent characteristics of a drive-in restaurant include a building to house the restaurant; vehicular entry and exit lanes and cars utilizing those lanes; either parking spaces where patrons are served food, or drive-through lanes where patrons pick-up food; deliveries and pick-ups associated with the use; employees; patrons (who arrive in cars); high levels of on-site activity including traffic; lighting sufficiently bright to allow for the outdoor activities (eating in car, picking up food in car); trash and noise levels commensurate with a use with exterior activities; trash receptacles; and activities associated with managing the fats, oils, and grease generated by types of food and cooking methods used. Non-inherent characteristics include location; pedestrian activity and levels at the site and in the vicinity of the site; pedestrian patronage of the use; scale; features of a non-drive-in eating and drinking establishment including indoor seating area for patrons and parking for those indoor patrons; construction and design materials; hours of operation (although drive-ins often have long hours of operation); and type and design of signage (although drive-ins often have large, bright signs so that the use is visible from the road); and features unique to the site.*

*The non-inherent features of the subject application are its location between a Metro Station/bus depot and a mall in an urban area with many pedestrians and where pedestrian activity is sought and encouraged and pedestrian levels are high; and several additional features characteristic of a non-drive-in restaurant, namely an indoor seating area for patrons and on-site parking for such patrons.*

*Staff finds that the non-inherent features (specific location, high pedestrian levels in area, additional on-site traffic from eat-in patrons), in combination with inherent adverse effects (high vehicular activity) are sufficient to warrant denial in this case. The site location is simply inappropriate for a drive-in.*

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

A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:

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

*A drive-in is an allowable special exception use in the C-2 zone.*

- (2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

*The use does not comply with certain standards found in 59-G-2, and will not be compatible with nearby properties.*

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

*The use is not consistent with the master plan, as discussed in the staff report and in the attached memo from Community Based Planning staff.*

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

*The use will not be in harmony with the general character of the neighborhood. The neighborhood is urban in nature, and pedestrian activity is high. A drive-in is not suitable for pedestrian-oriented areas because of potential vehicular/pedestrian conflicts, and the design of a drive-in is suburban in nature (building pulled back from street and surrounded by parking) and contrary to the urban character that the master plan wishes to reinforce here.*

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

*The use will be detrimental to the development of surrounding properties in that it will set a bad precedent for the type of design and use that should exist in this urban area.*

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

*The use will cause inappropriate levels of vehicular activity for this site. Staff also notes that lighting should be reduced, as discussed in the staff report.*

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

*This area is not residential.*

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

*The site is being remediated. The applicant must provide proof from Maryland Department of the Environment before the close of the record in front of the Hearing Examiner that the site that has been sufficiently remediated so that public safety is not compromised. Staff also notes that the use is inappropriate in urban areas with high pedestrian levels because of potential vehicular/pedestrian conflicts, and finds that locating the use here poses an unacceptable risk of compromising public safety.*

- (9) Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.
  - (i) If the special exception use requires approval of a preliminary plan of subdivision the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.
  - (i) With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will not reduce the safety of vehicular or pedestrian traffic.

*The special exception property will not have to go through resubdivision. See discussion in staff report under "Review Procedures" for compliance with conditions of plat. Adequacy of public facilities was determined at time of subdivision. However, the attached memo from Transportation staff dated 6/29/06 notes that for both weekday peak hours in all traffic conditions, the CLV values do not exceed the congestion/CLV standard of 1,800 for the Wheaton CBD Policy Area at any of the three intersections. Transportation staff also notes that pedestrian crossing times do not meet the LATR guidelines, although DPWT contends that pedestrian crossing times are adequate. DPWT also notes that there is inadequate storage capacity to accommodate projected northbound traffic volumes on MD 586 between MD 97 and the Metro Bus Access intersection.*

- (b) Nothing in this Article relieves an applicant from complying with all requirements to obtain a building permit or any other approval required by law. The Board's finding of any facts regarding public facilities does not bind any other agency or department which approves or licenses the project.

*The applicant must so note.*

- (c) The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. This burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.

*The applicant must so note and must provide additions to the record as discussed and described in the staff report and attachments.*

**DIVISION 59-G-2. SPECIAL EXCEPTIONS—STANDARDS AND REQUIREMENTS.**

The uses listed in this Division, as shown on the index table below, may be allowed as special exceptions in any zone where they are so indicated, as provided in this Article, subject to the standards and requirements in this Division and the general conditions specified in Section 59-G-1.21.

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

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

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

*The use will not constitute a nuisance because of noise, fumes, or odors. The applicant must submit a revised lighting plan as discussed in the staff report. There is great potential for vehicular/pedestrian conflict at this location.*

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

*As discussed in the staff report, the use will cause frequent turning movements across sidewalks and pedestrian ways, thereby disrupting pedestrian circulation within a concentration of retail activity. The site is in an urban area across from a Metro station and bus depot and adjacent to a shopping mall, and pedestrian activity is encouraged and expected. Drive-ins with drive-through lanes have high levels of vehicular activity, and frequent turning movements across pedestrian ways are inevitable. Drive-ins are not suitable uses in urban areas where there are high levels of pedestrians.*

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

*This use will not preempt frontage and reduce visibility of an interior commercial area. However, DPWT has found there is inadequate storage capacity to accommodate projected northbound traffic volumes on MD 586 between MD 97 and the Metro Bus Access intersection. Therefore, the use will reduce accessibility to an interior commercial area, namely Westfield Shoppingtown.*

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

*This use does not abut a residential zone or institutional premises.*

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

*Applicant shall so note. Applicant has not provided any information about freestanding signage (height, location, design).*

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

*This use does not abut a residential zone. See staff report for comments on lighting.*

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

*The use so complies. See Transportation Memo for various comments about design improvements, including with respect to driveway width.*

(Legislative History: Ord. No. 10-32, § 18; Ord. No. 13-76, §1.)