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PRACTICING IN MARYLAND AND
THE DISTRICT OF COLUMBIA

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OF COUNSEL

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July 24, 2003

VIA COURIER

Mr. Donald Spence, Chairman
Montgomery County Board of Appeals
County Council Office Building, 2nd Floor
100 Maryland Avenue
Rockville, Maryland 20850

**RE: Amendment to Modification Request
Special Exception S-2351-A
Mid Atlantic Petroleum Properties (MAPP), Petitioner**

Dear Chairman Spence:

The subject modification request filed April 8, 2003 has been consolidated for hearing purposes with a number of appeals filed by the Petitioner herein and the adjoining property owner, Brooke Venture, LLC and referred to the Office of Zoning and Administrative Hearings for hearing and recommendation. We requested a series of exterior and interior modifications which were listed on my letter to the Board of April 8, 2003 and accompanying site plan, landscape and lighting plans filed with the modification. Based on a meeting with staff of the planning commission and in response to comments of staff in their July 3, 2003 memorandum to the planning board, we are amending our original modification request. The following revised plans which illustrate the changes we are proposing are being submitted with this amendment:

1. Revised Special Exception Modification Site Plan (Exhibit A);
2. Revised Landscape and Lighting Plan (Exhibit B);
3. Elevations and plans of existing conditions (page 1 of Exhibit C), Existing Photometrics (page 2 of Exhibit C), Actual footcandle readings (page 3 of Exhibit C), and Photometric Study of Proposed Lighting (page 4 of Exhibit C); and
4. Cut Sheet of Lighting fixture (Exhibit D).

Mr. Donald Spence
July 24, 2003
Page 2

The following is a written description of the changes. For ease of reference, the text is excerpted from my letter of April 8, 2003, followed by a description of the changes in this amendment in bold print:

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.

Amendment: No change. See amendment after (2) below.

(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.

Amendment: This request, which was originally approved by the Board of Appeals on October 16, 2002, but which approval was later suspended, is being deleted. The proposed plan provides sufficient parking so that there is no need to designate the eight parallel spaces in front of the property along Middlebrook Road nor three of the existing spaces in front of the convenience store for office use. (Note: under the parking calculations, a total of 64 spaces are needed for the office and convenience store combined, and 65 spaces will be provided). In addition, in order to address the safety concerns of Planning Commission staff concerning the location of the thirty- six space parking area, the petitioner is proposing to add alternate pathway access from the proposed thirty-six space parking area to the office building. One alternate pedestrian access point will be a pathway from the parking lot along the rear (north) side of the property, outside of the dedicated car wash lane. The other alternate pedestrian access point will be installed on the southwest side of the parking area adjacent to the existing sign to link up with the existing sidewalk along Middlebrook Road. To prevent persons parking in the lot from cutting across the auto filling station drive area, shrubbery will be planted between the parking area and filling station drive areas and an electronic chain link fence (or similar gate type device) will be installed across the entry point to the parking area to prevent office use pedestrians from walking toward the fueling area. (See Exh. A). Appropriate directional signage will also be put in place within the parking area not to individually exceed the size of a professional sign.

(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.

Amendment: No change. It should be noted that in response to the request of Planning Commission staff, we contacted a representative of Sandy Spring Bank, who advised that they have been unable to locate the permit. The representative stated that it is possible that the bank's contractor did not seek a building permit, because the building was under construction at the time that the ATM machine was installed. In any event, in our special exception modification request, we are seeking the approval of the as-built facility, including the ATM machine. The site plan of the building shows the location of the existing ATM machine.

(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.

Amendment: Same request, except that Petitioner is deleting the request 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.

Amendment: The lighting and landscape plans have been revised (See Exh. B- Landscape and Lighting Plan, and Exh. C, Photometric Study) to address staff's concerns. The current lighting fixtures are to be modified by replacing the 320 watt lamps with 250 watt lamps. This will result in a decrease in lighting of approximately 60% (average footcandle under current photometric is 27.1 (page 2 of Exhibit C), average footcandle under proposed photometric study is 11.4 (page 4 of Exhibit C)). In addition, page 3 of Exhibit C shows that the actual current footcandle readings average 17.0 at the perimeter of the canopy, which is substantially less than the average of 27.1 on the current photometric study. Thus, it is expected that if the proposed plan is implemented, the actual footcandle readings at the perimeter of the canopy will be below 10 footcandles. We are requesting that the as-built canopy (with lighting changes) be approved (Exh. C, page 1). The as-built canopy measures 17'8" at the west low end, which is approximately one foot two inches higher from the 16'6" canopy approved in the original special exception. It should be noted that the ground under the canopy has a slight downward grade toward the east end of the property, so the elevation on the

Mr. Donald Spence
July 24, 2003
Page 4

eastern end of the canopy will be higher to maintain a horizontal plane. In addition, Petitioner will remove the existing 6' high sign near the southwest entrance to the property adjacent to Middlebrook Road in response to Staff's concerns.

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).

Amendment: No change.

Additional Witnesses

In addition to the witnesses identified in the April 8, 2003 letter of Petitioner's counsel, and the Supplemental Pre-Hearing Submission submitted by Petitioner on January 10, 2003, Petitioner will also present:

* Lee Cunningham - Transportation and Land Use Planner who will testify as to compatibility of the proposed modifications with adjacent development and the neighborhood character and the safety and efficiency of pedestrian and vehicular traffic on and off-site and the lack of any access problems or any adverse land use related impacts.

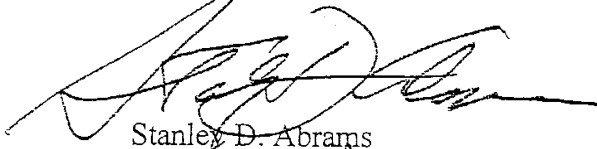
Mr. Donald Spence

July 24, 2003

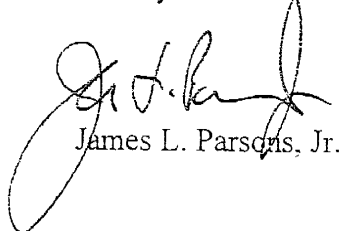
Page 5

A separate copy of this filing is being submitted to the Hearing Examiner, People's Counsel and Counsel for the opposition Brooke Venture, LLC. Should anything further be required please advise.

Very truly yours,



Stanley D. Abrams



James L. Parsqis, Jr.

cc: Francoise Carrier, Hearing Examiner
Martin Klauber, People's Counsel
Norman Knopf, Esq.
✓ Sue Edwards, AICP, Montgomery County Department of Park and Planning
Lee Cunningham
Abutting & Confronting Owners
MAPP, LLC

BOARD OF APPEALS
for
MONTGOMERY COUNTY

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100 Maryland Avenue
Rockville, Maryland 20850
(301) 217-6600

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.

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NORMAN G. KNOPF

September 12, 2003

VIA MESSENGER

Derick Berlage, Chairman
Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring, MD 20910

Re: Special Exception Modification S-2351 (Mid Atlantic Petroleum)

Dear Chairman Berlage:

Brooke Venture, LLC ("Brooke"), the owner of an office building next to the site of the requested special exception modifications, submits this letter in opposition. At the July 10, 2003 Planning Board hearing, Brooke opposed the requested modifications on the ground that the proposed additional parking would create unsafe pedestrian and vehicular circulation conditions on the site. Specifically, 36 new parking spaces are to be created on the eastern portion of the special exception site. The parking is to serve a new office building on the opposite side of the site, on the western edge just outside of the portion of the applicant's property designated for the special exception. Persons using the parking lot to access the building would have to walk a distance greater than a football field. The most direct walking route is through the driveways and parking areas of the existing gas station, car wash, convenience store and ATM. (See Attachment No. 1, prior opposition letter of Brooke, dated 7/2/03). Brooke was concerned that due to the unsafe conditions and distance, the proposed parking lot would not be used. Instead, persons visiting the applicant's building would use the parking lot of Brooke which is located in the immediate vicinity of the main entrance to the new office building. (See Attachment No. 1) The Planning Board was also troubled by the proposal and the applicant requested deferral to provide an opportunity to revise its proposal.

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The revisions consist of fencing the parking lot and an electrically controlled car gate in an attempt to deter pedestrians from taking the most direct route through the main activity areas of the gas station/car wash/convenience store/ATM to encourage use of newly designated and/or built pedestrian walkways. As a practical matter, all of the deficiencies of the original proposal are present in the revised proposal. The revisions do not prevent persons, after parking their car and leaving the enclosed gated parking lot

area, from walking to the office building by the shortest and most convenient route – i.e., through the principal activity areas of the gas station/car wash/convenience store/ATM. Thus, while the revisions theoretically change the original proposal, in fact, the unsafe conditions remain essentially the same. The seriousness of the unsafe conditions is noted in the comments of Malcolm Rivkin, Urban and Regional Planner, which are attached herein as **Attachments No. 2 and No. 3**. As noted by Mr. Rivkin, the dangerous conditions normally present by mixing pedestrians and vehicular traffic are exacerbated by the use of the site here – a convenience store and ATM. These are uses which are designed for quick vehicular operation. Further, the site is not located in a high density urban area so that drivers are not expecting to encounter pedestrians. Because the findings of safety required by the Code cannot be made, the Planning Board should recommend **denial**.

1. The Board of Appeals must find that the special exception modification “will not adversely affect the ... safety ... or general welfare of ... visitors, or workers in the area at the subject site” [§59-G-1.21(a)(8)].
2. The Board of Appeals must find that the special exception modification “use at the proposed location will not create a traffic hazard or traffic nuisance because of its location in relation to other buildings ... on or near the site and the traffic pattern from such buildings....” [§59-G-2.06(a)(2)].
3. The Board of Appeals must find that the special exception modification meets the provisions of the Code governing parking lots. Specifically, that “in addition to all required parking spaces and driveways, pedestrian walkways or sidewalks **shall** be provided in all off-street parking facilities where necessary for pedestrian safety.” [§59-E-2.42, emphasis added].

The distance of the parking lot from the office building, and the unsafe ingress and egress for pedestrians, as noted above, means that vehicles of persons using the office building will be parked in the parking lot of Brooke, conveniently located in the immediate vicinity of the main entrance of the applicant’s office building. The applicant’s taking over Brooke’s parking spaces obviously adversely impacts Brooke’s property. Because of this adverse impact, another express requirement of the Code cannot be satisfied, requiring denial of the special exception modifications. Section 59-G-1.21(a)(5) requires a finding that the special exception modification “will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties....” No such finding can be made.

II

The applicant's situation is one of its own making. As applicant's attorney, Mr. Abrams, conceded during the prior Planning Board hearing, the preliminary plan of subdivision for this property (Plan No. 1-94075, the site is designated lot 3 on the preliminary plan, but subsequently designated Parcel E), provides for a 33,000 square foot building with 95 parking spaces on that lot to accommodate the building. See **Attachment No. 4**. The area for parking and other improvements was somewhat limited due to the location of the storm water management pond on this lot which was to serve this lot and the two other lots that were part of the subdivision. The storm water management pond was to be built by the applicant. The applicant's purchase price for the property was reduced in consideration of these conditions.

In lieu of constructing a 33,000 square foot office building, the applicant applied to the Board of Appeals to designate and use most (but not all) of the lot for a special exception gas station/car wash/convenience store (the ATM was added subsequently without Board of Appeals approval). Plans filed with the Board of Appeals also showed proposed development on that portion of the lot which was not within the area designated for the special exception. The proposed development consisted of a 6,500 square foot building to house a dry cleaning plant, a use permitted in this industrial zone. Because of the small size of the building, there was sufficient room on the lot next to the building, outside the special exception portion, for the required parking. (See **Attachment No. 1**). Several years after obtaining the Board of Appeals approval for the special exception, the applicant abandoned the proposal for a dry cleaning plant, and instead proposed an office building much larger in size -- 18,000 square feet. Because of the building's size, there was insufficient room on applicant's property to provide the parking required by the Code.

Applicant contended that a covenant with Brooke permitted it to use parking spaces on Brooke's property to satisfy the parking requirements for development on the applicant's property. Brooke advised the applicant that the terms of the covenant did not permit limiting the uses and development potential of Brooke's property to allow the applicant to develop its property by placing on Brooke's property the parking spaces required by the Code. Nevertheless, the applicant applied for and received a building permit from DPS relying on the parking on Brooke's property. Brooke timely appealed the validity of the building permit to the Board of Appeals. That appeal, and other related appeals, as well as the requested special exception modifications, all will be heard by the Hearing Examiner on October 2, 2003. In the interim, applicant continued to construct the 18,000 square foot office building and now appears to seek special consideration since the building has been completed. The law is clear that applicant is entitled to no special consideration. It has proceeded to build at its own risk. Even the fact that the building is now completed does not entitle the applicant's proposals to any special treatment. City of Hagerstown v. Long Meadow Shopping Center, 264 Md. 481, 287 A.2d 242, 250 (1972).

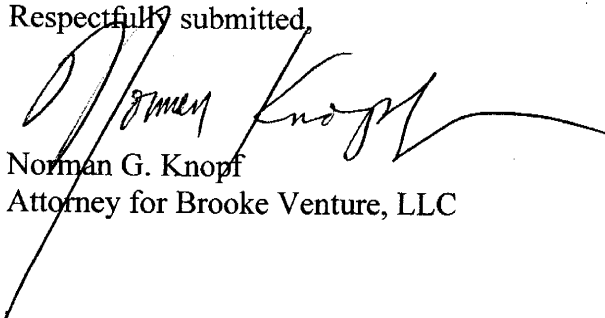
We submit that if the site were totally unimproved and the applicant requested a special exception with the parking lot located as it is now proposed, there is no question but that this Board would have recommended denial. The fact that the applicant proceeded to build, hoping the special exception modification would be granted (and building permit held valid), does not and should not result in this Board being forced to make a recommendation different than it would have made if the building had not been constructed. Special equitable consideration is particularly inappropriate given the history of the applicant's violations of conditions set forth by the Board of Appeals in its original grant of the special exception. (See Notice of Violation of DPS and Planning Board Staff Reports).

III

Finally, we note that there are a number of alternatives available to the applicant to provide parking for the building on the special exception site which would not create such unsafe conditions. For example, the car wash building could be removed entirely or relocated to over the storm water management pond. The existing car wash building area could be used for the office building parking. Similarly, the area behind the convenience store and present location of the car wash, as well as the patio area no longer used as part of the special exception, are all available to provide additional parking. Apparently, the applicant has not even explored such opportunities.

For the above-stated reasons, we urge the Planning Board to recommend **denial**.

Respectfully submitted,


Norman G. Knopf
Attorney for Brooke Venture, LLC

/attachments (4)

cc: Françoise M. Carrier, Director
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