

**BOARD OF APPEALS**

**August 2, 2023**

**County Administration Building, 100 W. Washington St., Meeting Room 2000, Hagerstown, at 6:00 p.m.**

**AGENDA**

**AP2023-029:** Circuit Court remanded to the Board of Appeals for further proceedings and a rehearing for AP2022-034 for the special exception to establish a general retail/merchandise store. The property is owned by George & Freada King, Parcel 14006443, the vacant lot beside 14413 McAfee Hill Road.-**The Board of Zoning Appeals found the DG Market to be functionally similar to a grocery store.**

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Pursuant to the Maryland Open Meetings Law, notice is hereby given that the deliberations of the Board of Zoning Appeals are open to the public. Furthermore, the Board, at its discretion, may render a decision as to some or all of the cases at the hearing described above or at a subsequent hearing, the date and time of which will be announced prior to the conclusion of the public hearing. Individuals requiring special accommodations are requested to contact Katie Rathvon at 240-313-2464 Voice, 240-313-2130 Voice/TDD no later than July 24, 2023. Any person desiring a stenographic transcript shall be responsible for supplying a competent stenographer.

The Board of Appeals reserves the right to vary the order in which the cases are called. Please take note of the Amended Rules of Procedure (Adopted July 5, 2006), Public Hearing, Section 4(d) which states:

Applicants shall have ten (10) minutes in which to present their request and may, upon request to and permission of the Board, receive an additional twenty (20) minutes for their presentation. Following the Applicant's case in chief, other individuals may receive three (3) minutes to testify, except in the circumstance where an individual is representing a group, in which case said individual shall be given eight (8) minutes to testify.

Those Applicants requesting the additional twenty (20) minutes shall have their case automatically moved to the end of the docket.

For extraordinary cause, the Board may extend any time period set forth herein, or otherwise modify or suspend these Rules, to uphold the spirit of the Ordinance and to do substantial justice.

Jay Miller, Chairman

Board of Zoning Appeals



WASHINGTON COUNTY BOARD OF ZONING APPEALS

747 Northern Avenue | Hagerstown, MD 21742-2723 | P:240.313.2430 | F:240.313.2431 | Hearing Impaired: 7-1-1

ZONING APPEAL

Property Owner: George & Freada King
14413 Mcafee Hill Road
Cascade MD 21719
Appellant: Outdoor Contractors Inc
14703 Indian Springs Road
Hancock MD 21750
Docket No: AP2023-029
Tax ID No: 14006443
Zoning: RV
RB Overlay: No
Zoning Overlay:
Filed Date: 06/15/2023
Hearing Date: 08/02/2023

Property Location: Vacant Lot Beside 14413 Mcafee Hill Road
Cascade, MD 21719

Description Of Appeal: Circuit Court remanded to the Board of Appeals for further proceedings and a rehearing for AP2022-034 for the special exception to establish a general retail/merchandise store.

Appellant's Legal Interest In Above Property: Owner: No
Contract to Rent/Lease: No
Lessee: No
Contract to Purchase: Yes
Other:

Previous Petition/Appeal Docket No(s): AP2022-034
Applicable Ordinance Sections: Washington County Zoning Ordinance Section: 3.3(1) P

Reason For Hardship:
If Appeal of Ruling, Date Of Ruling:
Ruling Official/Agency:

Existing Use: Vacant Lot
Proposed Use: Retail Store
Previous Use Ceased For At Least 6 Months:
Date Ceased:
Area Devoted To Non-Conforming Use - Existing:
Proposed:

I hereby affirm that all of the statements and information contained in or filed with this appeal are true and correct.

Emily Mowery
Appellant Signature

State Of Maryland, Washington County to-wit:

Sworn and subscribed before me this 11 day of July, 2023.

Kathryn B Rathvon
NOTARY PUBLIC
WASHINGTON COUNTY
MARYLAND
My Commission Expires November 07, 2025

[Signature]
Notary Public



WASHINGTON COUNTY BOARD OF ZONING APPEALS

747 Northern Avenue | Hagerstown, MD 21742-2723 | P. 240.313.2430 | F. 240.313.2431 | Hearing Impaired: 7-1-1

## AFFIDAVIT IN COMPLIANCE WITH SECTION 25.51(C)

Docket No: AP2023-029

State of Maryland Washington County, To Wit:

On 6/15/2023, before me the subscriber, a Notary of the public of the State and County aforesaid, personally appeared Outdoor Contractors Inc and made oath in due form of law as follows:

Outdoor Contractors Inc will post the zoning notice sign(s) given to me by the Zoning Administrator in accordance with Section 25.51(c) of the Washington County Zoning Ordinance for the above captioned Board of Appeals case, scheduled for public hearing on 08/02/2023, and that said sign(s) will be erected on the subject property in accordance with the required distances and positioning as set out in the attached posting instructions.

Sign(s) will be posted on 07/18/2023 and will remain until after the above hearing date.

Outdoor Contractors Inc

Sworn and subscribed before me the day and year first above written.

**Kathryn B Rathvon**  
NOTARY PUBLIC  
WASHINGTON COUNTY  
MARYLAND  
MY COMMISSION EXPIRES NOVEMBER 07, 2025

Notary Public

Seal

My Commission Expires



WASHINGTON COUNTY BOARD OF ZONING APPEALS

747 Northern Avenue | Hagerstown, MD 21742-2723 | P: 240.313.2430 | F: 240.313.2431 | Hearing Impaired: 7-1-1

### ZONING APPEAL

<b>Property Owner:</b>	George & Freada King 14413 Mcafee Hill Road Cascade MD 21719	<b>Docket No:</b>	AP2023-029
<b>Appellant:</b>	Outdoor Contractors Inc 14703 Indian Springs Road Hancock MD 21750	<b>Tax ID No:</b>	14006443
		<b>Zoning:</b>	RV
		<b>RB Overlay:</b>	No
		<b>Zoning Overlay:</b>	
		<b>Filed Date:</b>	06/15/2023
		<b>Hearing Date:</b>	07/05/2023

**Property Location:** Vacant Lot Beside 14413 Mcafee Hill Road  
Cascade, MD 21719

**Description Of Appeal:** Circuit Court remanded to the Board of Appeals for further proceedings and a rehearing for AP2022-034 for the special exception to establish a general retail/merchandise store.

<b>Appellant's Legal Interest In Above Property:</b>	<b>Owner:</b> No	<b>Contract to Rent/Lease:</b> No
	<b>Lessee:</b> No	<b>Contract to Purchase:</b> Yes
	<b>Other:</b>	

**Previous Petition/Appeal Docket No(s):** AP2022-034

**Applicable Ordinance Sections:** Washington County Zoning Ordinance Section: 3.3(1) P

**Reason For Hardship:**

**If Appeal of Ruling, Date Of Ruling:**

**Ruling Official/Agency:**

**Existing Use:** Vacant Lot      **Proposed Use:** Retail Store

**Previous Use Ceased For At Least 6 Months:**      **Date Ceased:**

**Area Devoted To Non-Conforming Use -**  
**Existing:**  
**Proposed:**

I hereby affirm that all of the statements and information contained in or filed with this appeal are true and correct.

Appellant Signature

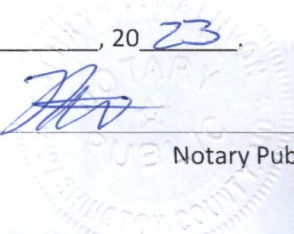
State Of Maryland, Washington County to-wit:

Sworn and subscribed before me this 15 day of June, 2023.

**Kathryn B Rathvon**  
 NOTARY PUBLIC  
 WASHINGTON COUNTY  
 MARYLAND  
 MY COMMISSION EXPIRES NOVEMBER 07, 2025

My Commission Expires

Notary Public





WASHINGTON COUNTY BOARD OF ZONING APPEALS

747 Northern Avenue | Hagerstown, MD 21742-2723 | P 240.313.2430 | F 240.313.2431 | Hearing Impaired: 7-1-1

## AFFIDAVIT IN COMPLIANCE WITH SECTION 25.51(C)

Docket No: AP2023-029

State of Maryland Washington County, To Wit:

On 6/15/2023, before me the subscriber, a Notary of the public of the State and County aforesaid, personally appeared Outdoor Contractors Inc and made oath in due form of law as follows:

Outdoor Contractors Inc will post the zoning notice sign(s) given to me by the Zoning Administrator in accordance with Section 25.51(c) of the Washington County Zoning Ordinance for the above captioned Board of Appeals case, scheduled for public hearing on 07/05/2023, and that said sign(s) will be erected on the subject property in accordance with the required distances and positioning as set out in the attached posting instructions.

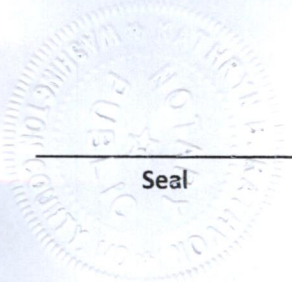
Sign(s) will be posted on 06/20/2023 and will remain until after the above hearing date.

Outdoor Contractors Inc

Sworn and subscribed before me the day and year first above written.

**Kathryn B Rathvon**  
NOTARY PUBLIC  
WASHINGTON COUNTY  
MARYLAND  
MY COMMISSION EXPIRES NOVEMBER 07, 2025

Notary Public



Seal

My Commission Expires

IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, MARYLAND

<p>IN THE MATTER OF ALLSION SEVERANCE, ET AL., PETITIONERS FOR JUDICIAL REVIEW OF THE DECISION OF THE BOARD OF APPEALS FOR WASHINGTON COUNTY IN THE CASE OF: AP2022-034</p>	<p>Case No.C-21-CV-22-000463</p>
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ORDER OF REMAND

This matter having come before the court on May 19, 2023, for an administrative appeal of the decision by the Board of Appeals for Washington County in Case No. AP-2022-034, all pleadings and arguments having been considered, on this 22nd day of March, 2023, by the Circuit Court for Washington County, Maryland, for the reasons stated on the record;

It is **FOUND** that the specific "Finding of Fact" on pages 1 through 3 of the November 23, 2022 Amended Opinion are supported by facts in the record;

It is further **FOUND** that Washington County Zoning Ordinance Section 5D.2 "Special Exceptions" governs the ultimate question before the Board of Appeals' in the instant decision, to wit:

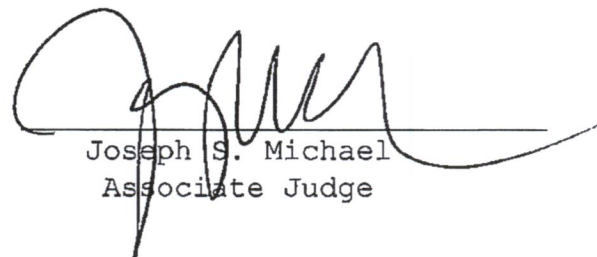
Section 5D.2 Special Exceptions

See the Table of Land Uses [Table No. 3.3(a)] and any other use the Board of Appeals finds is functionally similar to any permitted use or special exception listed in the Article. The Board of Appeals shall not grant any special exception that is inconsistent with the purpose set forth for this district.

It is further **FOUND** that the Board of Appeals' amended order dated November 23, 2022 contains no finding or reference whatsoever to which, if any, "permitted use or special exception" from the "Table of Land Uses [Table No. 3.3(a)]" the Board of Appeals found the applicant's use to be "functionally similar".

It is further **FOUND** that Section 5D.2 anticipates that an applicant's proposed use must be functionally similar to a single "permitted use or special exception [use]". Therefore, it is incumbent upon the applicant to designate which particularized "permitted use or special exception" the applicant intends its proposed use to be "functionally similar" in advance of any hearing. In this way, the Board of Appeals' can proceed in an orderly and logical fashion, and the Board of Appeals can make specific findings of fact on exactly how the proposed use is, or is not, functionally similar to the permitted use or special exception use designated by the Applicant.

It is **ORDERED**, that this matter is remanded to the Board of Appeals for Washington County for further proceedings and a rehearing consistent with this order.



Joseph S. Michael  
Associate Judge

cc: Michele Rosenfeld, Esq.  
James Stone, Esq.  
Kirk Downey, Esq.  
The Board of Appeals for Washington County

**KANE & STONE, P.A.**  
ATTORNEYS AT LAW  
28 WEST WASHINGTON STREET  
3<sup>RD</sup> FLOOR  
HAGERSTOWN, MARYLAND 21740

BRIAN A. KANE  
JAMES W. STONE

[www.kane-stone.com](http://www.kane-stone.com)

TELEPHONE (240) 513-4680  
FAX (240) 513-4681

July 5, 2023

Washington County Board of Zoning Appeals  
747 Northern Avenue  
Hagerstown, Maryland 21742

**Re: 14413 MacAfee Road, Cascade, MD - Special Exception Request  
Case No. AP2022-034**

Dear Board Members:

We represent Outdoor Contractors, Inc. (the “Applicant”) in connection with this matter.

**Procedural Background.**

On July 13, 2022, the Applicant applied for a special exception to establish a general retail/merchandise store on the subject Property, specifically a Dollar General Market. The Application was based on the premise that the proposed use was functionally similar to an amalgam of uses that are either principal permitted or special exception uses in the Rural Village (“RV”) District. After a hearing, the Board decided to grant the special exception. The Board issued an Opinion dated September 30, 2022 and an Amended Opinion dated November 23, 2022 granting the special exception.

Allison Severance and others (the “Opponents”) appealed the Board’s decision to the Circuit Court for Washington County, Maryland. After the hearing, by Order of Remand dated May 23, 2023, the Court vacated and remanded the case to the Board for further proceedings consistent with its Order. Significantly, the Court found that the findings of fact on pages 1 through 3 of Board’s Amended Opinion were supported by facts in the record. The Court further found, however, that the Amended Opinion made no finding as to which permitted or special use the Applicant’s proposed use was functionally similar. The Court further found that the Washington County Zoning Ordinance (the “Ordinance”) required the Applicant to designate a single principal permitted or special exception use for its functionally similar premise. This, in turn, requires the Applicant to somewhat narrow the grounds upon which its Application is based.



**Amendment to Application.**

Pursuant to the Court's May 23, 2023 Order, the Applicant amends its Application to state that its proposed use of the Property is functionally similar to a grocery store, which is an enumerated special exception in the RV District.

**Meaning of the Term "Grocery Store".**

The Ordinance lists grocery stores as one of the enumerated special exception in the RV District (Ordinance, § 3.3, Table 3.3(1)), but does not define the term itself. Therefore, this term should be given its common and ordinary meaning. The following common usage definitions are instructive:

- a store that sells food and household supplies; supermarket (Merriam Webster Dictionary)
- a store that sells food and small things that are often needed in the home (Cambridge Dictionary)
- a store that sells food and household supplies; supermarket (Britannica Dictionary)

All of these definitions contemplate that the term "grocery store" entails the sale of goods other than just food products, and none of these definitions are size-specific.

**Functional Similarity to a Grocery Store.**

There is already substantial evidence in the record to support the Applicant's contention that its proposed use of the Property is functionally similar to a grocery store. The evidence from the August 31, 2023 hearing demonstrates that the Applicant proposes to develop the Property as a Dollar General Market, a specialty type of Dollar General Store that emphasizes grocery and other market items. About one-third of the store's sales area will be devoted to fresh produce, vegetables, dairy and food products, candy and other grocery items (See Exhibit A - depiction of a typical Dollar General Market interior).

The store also will offer household supplies, some clothing, hardware, non-prescription healthcare products, pet food and supplies, personal care goods, and garden supplies. For the most part, these are the kinds of product categories that one would typically find in any grocery store.

For these reasons, the Applicant respectively contends that the proposed Dollar General Market is functionally similar to a grocery store. The Applicant therefore respectfully requests that


Board of Zoning Appeals  
July 5, 2023

Page 3 of 3

this Board adopt the Applicant's proposed supplemental findings of fact (see Exhibit B) and grant the requested special exception on that basis.

Respectfully Submitted,

KANE & STONE, P.A.

A handwritten signature in blue ink, appearing to read "James W. Stone", is written over a horizontal line.

James W. Stone

Attorneys for Outdoor Contractors, Inc.

cc: Michele Rosenfeld  
Kirk Downey



Exhibit A





DG market

**PROPOSED SUPPLEMENTAL FINDINGS OF FACT**

15. A grocery store, within the meaning of the Zoning Ordinance, is a store that sells food and household supplies.
16. The proposed Dollar General Market to be established on the subject Property would include the sale of fresh produce, vegetables, dairy and food products, candy and other grocery items, household supplies, some clothing, hardware, non-prescription healthcare products, pet food and supplies, personal care goods, and garden supplies.
17. For the most part, these product categories are found in a typical grocery store.
18. The Board therefore finds that the proposed Dollar General Market to be established at the subject Property is functionally similar to a grocery store.

## Rathvon, Kathryn B.

---

**From:** James W. Stone <JStone@kane-stone.com>  
**Sent:** Tuesday, July 4, 2023 3:39 PM  
**To:** Rathvon, Kathryn B.  
**Cc:** Michele Rosenfeld; Downey, Kirk  
**Subject:** Case No. AP2022-034 - Special Exception Request  
**Attachments:** 2023-07-05 Applicant's Hearing Submission (signed).pdf

[You don't often get email from jstone@kane-stone.com. Learn why this is important at <https://aka.ms/LearnAboutSenderIdentification> ]

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Any claims of being a County official or employee should be disregarded.

Kathryn Rathvon  
Washington County Zoning Department

Dear Ms. Rathvon:

We represent Outdoor Contractors Inc. in connection with the above-captioned appeal. Attached is the Applicant (Appellant) submission for the July 5, 2023 hearing.

Sincerely,

James W. Stone  
KANE & STONE, P.A.  
28 West Washington Street  
3rd Floor  
Hagerstown, Maryland 21740  
(240) 513-4680  
(240) 513-4681 (fax)  
JStone@kane-stone.com

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**BEFORE THE BOARD OF APPEALS  
FOR WASHINGTON COUNTY, MARYLAND**

\*

**OUTDOOR CONTRACTORS, INC.**      \*      **Appeal No.: AP2023-029**

**Appellant**      \*

\*

\*      \*      \*      \*      \*      \*      \*      \*      \*      \*      \*      \*

**OPINION**

Outdoor Contractors, Inc. (hereinafter “Appellant”) requests a special exception to establish a general retail/merchandise store at the subject property. The subject property is known as the vacant lot beside 14413 McAfee Hill Road, Cascade, Maryland and identified as the parcel bearing Tax ID No. 14006443 and is zoned Rural Village. The Board of Appeals (the “Board”) previously held public hearings on August 31, 2022 and November 16, 2022 in AP2022-034. The Board held a public hearing in this matter on August 2, 2023.<sup>1</sup> Appellant was represented by counsel, James W. Stone, Esq. and the opposition, namely, Danielle and Dylan Durning, and Roy and Dollie Sanders were represented by Michele McDaniel Rosenfield, Esq.

This appeal was heard pursuant to Article 25 of the Zoning Ordinance for Washington County and upon proper notice to the parties and general public as required.<sup>2</sup>

**Findings of Fact**

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<sup>1</sup> The instant case was assigned a new appeal case number for purposes of processing as a result of the Order of Remand.

<sup>2</sup> When the original case was heard in 2022, Board member John Cohill was present to hear and decide the appeal. On June 30, 2023, Mr. Cohill resigned upon the expiration of his term, and his vacant seat has not yet been filled. Board member Tracie Felker took part in this hearing and decision, along with the members who were present for the prior hearings.



Based upon the testimony given, all information and evidence presented, and upon a study of the specific property involved and the neighborhood in which it is located, the Board makes the following findings of fact:

1. The subject property is known as vacant lot beside 14413 McAfee Hill Road, Cascade, Maryland, and identified as the parcel bearing Tax ID No. 14006443 on the Tax Maps of Washington County. The subject property is zoned Rural Village.

2. The subject property consists of approximate 3.02 acres of unimproved property located directly across from Fort Ritchie and the American Legion Post 239.

3. Applicant is the contract purchaser and proposed developer of the subject property and makes this request with authority of the owners.

4. Applicant intends to subdivide the property creating a 2.18-acre parcel on which it will construct a Dollar General.

5. The proposed Dollar General will be approximately 12,480 square feet, with one-third of the interior retail space dedicated to fresh produce and market items. The store will operate seven (7) days per week, opening at 8:00 a.m. and closing at either 9:00 or 10:00 p.m.

6. The proposed Dollar General will receive periodic tractor trailer deliveries with loading and unloading to occur along the side of the building. It will be necessary for trucks to pull into the parking lot and back into the loading area.

7. Applicant modified its concept plan to move the access point along McAfee Hill Road so they could meet the required sight distance of 335 feet looking to the southwest. The sight distance looking to the northeast is 565 feet.

8. The immediate surrounding area consists of Fort Ritchie, American Legion Post 239, Sanders Market which serves as a neighborhood grocery store, the Handi Mart providing gas and convenience shopping, and the Chocolate Tavern.

9. There are three (3) other Dollar General stores within a five-mile radius of

the subject property. The closest store is approximately 1.7 miles away.

10. Pursuant to State Highway Administration records, the intersection of McAfee Hill Road and Cascade Road operates at a low level "A" and as a result, no additional traffic studies were necessary for the proposed project.

11. The proposed building will be situated with a setback of 68 feet at the northwest corner and 99 feet at the northeast corner to the rear. Applicant also plans to plant a row of trees as additional screening and buffer for the neighboring properties.

12. Appellant and Dollar General have the ability to limit lighting after hours, including turning the signage and building lights off. Appellant also maintains the ability to further limit use of the lighting in the lease with Dollar General.

13. The proposed Dollar General will result in approximately 38 new traffic trips during morning peak hours and 55 new traffic trips during evening peak hours.

14. It is estimated that residential property immediately adjacent to a Dollar General would lose between 5% and 10% of its market value because of the Dollar General's operation.

15. Dollar General is attempting to rebrand some of its stores DG Markets to offer more fresh foods, produce and market-type items in an effort to provide local and neighborhood retail options.

16. The DG Market plan includes dedicating approximately one-third (1/3) of the retail sales area to fresh produce, dairy products, baked goods and food grocery items. The remainder of the sales area is reserved for household products, non-prescription medications and first aid products, personal care items, cleaning products and pet care products.

### **Procedural History**

This case originated with an application for a special exception to the Board of Appeals in June 2022.<sup>3</sup> On August 31, 2022, the Board held a public hearing and subsequently issued its written decision granting the special exception on September 30, 2022. On October 28, 2022, the opposition timely noted an appeal to the Circuit Court for Washington County, Maryland, Case No. C-21-CV-22-463. In addition, the opposition also submitted a request to reconsider to the Board. The Board subsequently held a public hearing on November 16, 2022 to render a decision on the request for reconsideration submitted by the opposition in this case which is the subject of a separate opinion. In so doing, the Board voted unanimously that this Amended Opinion be issued to correct two (2) typographical errors. Following a hearing on May 19, 2023, the Circuit Court, Honorable Joseph S. Michael presiding, issued an Opinion remanding the case to the Board for further proceedings. This matter was subsequently processed for a new hearing and originally scheduled for the Board's regular meeting on July 5, 2023. On August 2, 2023, the Board held a public hearing pursuant to the Circuit Court's Order of Remand and deliberated in open session at the close of the evidence.

### **Rationale**

On remand, the Board is guided by the direction provided in the Circuit Court's Opinion:

...the Board of Appeals' amended order dated November 23, 2022 contains no finding or reference whatsoever to which, if any, "permitted use or special exception" from the "Table of Land Uses [Table No. 3.3(a)]" the Board of Appeals found the applicant's use to be "functionally similar".

(Order of Remand, page 2). The Court then added:

---

<sup>3</sup> AP2022-034.

.....it is incumbent upon the applicant to designate the particularized “permitted use or special exception” the applicant intends its proposed use to be “functionally similar” in advance of any hearing. In this way, the Board of Appeals can proceed in an orderly and logical fashion, and the Board of Appeals can make specific findings of fact on exactly how the proposed use is, or is not, functionally similar to the permitted use or special exception use designated by Appellant.

(Order of Remand, page 2). From the clear language of the opinion, the Applicant was to identify a use or uses to which the proposed use was functionally similar, and the Board was tasked with conducting a hearing to make factual findings and determine whether the proposed use is functionally similar for purposes of the special exception request. The Board heard from Appellant’s witnesses and several witnesses who opposed the project, and then undertook a detailed analysis of the evidence and criteria.

#### *Functionally Similar Use*

Before undertaking any special exception analysis, the Board must first determine whether the proposed use is functionally similar to a permitted or special exception use in the zoning district. Pursuant to Section 5D.2 of the Ordinance, special exception uses in the Rural Village zoning district include those indicated in the Table of Land Uses, “and any other use the Board of Appeals finds is functionally similar to any permitted use or special exception listed in the Article.” Appellant asserts that the proposed DG Market is similar to a grocery store, which is a use permitted by special exception in the Rural Village zoning district. See Table of Land Uses 3.3(1).

The Zoning Ordinance does not define a “grocery store”, thus we are left to consider the common and ordinary meaning. Merriam Webster Dictionary defines a grocery store as “a store that sells food and household supplies; supermarket.” The Cambridge Dictionary defines a grocery store as, “a store that sells food and small things that are often needed in the home.” The Britannica Dictionary defines a grocery store as, “a store that sells food and household supplies; supermarket.” Appellant provided

testimony that the proposed use will sell fresh produce, prepackaged meats, dairy, bread, an assortment of packaged food items, household products, pet food, personal care products, non-prescription medications, and cleaning supplies among other items. Appellant asserted that all such items are things you can find in a grocery store such as Martins or Weis Markets.

The opposition contends that the proposed use is nothing like a grocery store. Multiple witnesses testified that the absence of a deli, the limited produce available and the area dedicated to non-food products undermine any notion that DG Market is a grocery store. They also argued that the small scale of produce and food grocery items being offered by the proposed use rendered it more like a local convenience store than a grocery store. Moreover, the opposition referred to Dollar General's classification in business and SEC filings, because they do not identify as a grocery store for those purposes.

Although the Board acknowledges the concerns raised by local residents and the opposition, it is not persuaded by their arguments. The question is not whether the proposed use *is* a grocery store, it is whether the proposed use is *similar to* a grocery store. The evidence presented, and acknowledged by the opposition, was that the DG Market will be providing much of the same products as a grocery store, just on a smaller scale. It is noteworthy, that neither the Zoning Ordinance, nor the dictionary definitions include any language about the requisite size for a grocery store. Based on the testimony and evidence, the Board finds that the proposed DG Market will offer those items that are also offered in grocery stores, including produce, bake goods and food items packaged for retail sale and therefore the proposed store is functionally similar to a grocery store.

#### ***Special Exception***

The Board has authority to grant a special exception pursuant to Section 25.2(b) of

the Zoning Ordinance for Washington County, Maryland. A special exception is defined as “a grant of a specific use that would not be appropriate generally or without restriction; and shall be based upon a finding that the use conforms to the plan and is compatible with the existing neighborhood.” Article 28A. In addition, Section 25.6 sets forth the limitations, guides, and standards in exercise of the board’s duties and provides:

Where in these regulations certain powers are conferred upon the Board or the approval of the Board is required before a permit may be issued, or the Board is called upon to decide certain issues, the Board shall study the specific property involved, as well as the neighborhood, and consider all testimony and data submitted, and shall hear any person desiring to speak for or against the issuance of the permit. However, the application for a permit shall not be approved where the Board finds the proposed building, addition, extension of building or use, sign, use or change of use would adversely affect the public health, safety, security, morals or general welfare, or would result in dangerous traffic conditions, or would jeopardize the lives or property of people living in the neighborhood. In deciding such matters, the Board shall consider any other information germane to the case and shall give consideration to the following, as applicable:

- (a) The number of people residing or working in the immediate area concerned.
- (b) The orderly growth of a community.
- (c) Traffic conditions and facilities
- (d) The effect of such use upon the peaceful enjoyment of people in their homes.
- (e) The conservation of property values.
- (f) The effect of odors, dust, gas, smoke, fumes, vibrations, glare and noise upon the use of surrounding property values.
- (g) The most appropriate use of the land and structure.
- (h) Decision of the courts.
- (i) The purpose of these regulations as set forth herein.
- (j) Type and kind of structures in the vicinity where public gatherings may be held, such as schools, churches, and the like.

For the reasons set forth herein, the Board concludes that the special exception should be granted.

There are three (3) residential properties directly adjacent to the subject property, for which there would be some impact from the proposed retail use. Beyond that there are few homes and even fewer workplaces near the subject property. The number of

people who live and/or work in the area is relatively low compared to other locations in the zoning district.

In terms of the orderly growth of the community, the subject property is currently zoned Rural Village and is situated at the corner of an intersection. It is located conveniently for nearby residents and for traffic passing through the area. Appellants have redesigned the concept to accommodate traffic conditions, to include adequate buffering and to ensure the least amount of impact on surrounding properties. The proposed store will offer goods and services that are vital to small towns and rural living. The Board finds that the proposed use is consistent with the orderly growth of the community.

The opposition came to the hearing prepared to raise the inadequate sight distance and concerns for traffic conditions that would be created by the proposed use. However, Appellant's witnesses acknowledged that the original concept design needed to be revised and presented the Board with a revised entrance and sight distance measurements. The revisions resulted in sight distances that complied with both state and county requirements. Appellant's traffic engineer testified that the intersection of McAfee Hill Road and Cascade Road currently operates a low-level A and therefore would remain at an acceptable rating even after the project was completed. He also testified that the State Highway Administration was not requesting further traffic studies at this time, based on the current level of operation and the proposed use. Given the nature of the zoning district, there is likely to be an impact from increased customer traffic and some impact from delivery trucks, no matter where such a retail use were located. Appellant has addressed those issues and remains receptive to further design solutions during the site plan review process.

Appellant proposes to operate a Dollar General Store for the sale of groceries, retail and convenience items. There is no doubt that there will be some impact on the adjacent

properties, given their proximity to the use. However, in terms of the surrounding area, there are few homes close enough to be directly impacted by the proposed use. Appellants indicated their hours of operation and demonstrated a willingness to turn off lighting at the property when the store was not in operation. Appellant has re-designed the entrance and traffic flow within the property to better accommodate deliveries and customer traffic. When compared to the list of uses that would be principally permitted at the subject property, the impact of the proposed store is similar but not any greater. The Board finds that except for the adjacent property owners, there is no evidence that the proposed use will disrupt the peaceful enjoyment of people in their homes in the surrounding area.

There were several opposition witnesses who raised a concern for property values and the opposition presented testimony from a Certified Residential Appraiser. Mr. Bentson testified that it was his opinion it would be reasonable to expect a five percent (5%) to ten percent (10%) loss of value when compared to similar properties that were not affected by the proposed project. He testified further that the proposed Dollar General Store would have the same negative impact on property values as a 7-11 Convenience Store or a liquor store. Mr. Bentson also acknowledged that the impact to value would be similar regardless of the location in the zoning district. It is this last part that is particularly important to the Board's analysis. It is not surprising that a commercial use such as the one proposed would have some impact on adjacent residential property values. However, the real question is whether the impact is unique to this location, and therefore greater, as compared to other locations in the zoning district. The Board finds that impact is no greater at the subject property than it would be at another location within the district.

The proposed use is not likely to create any odors, dust, gas, smoke, fumes, vibrations, or glare beyond what is already generated in the immediate area. There is



likely to be some increase in noise and light from operation and from traffic, but only to the closest neighboring properties. Moreover, Appellant provided testimony that adequate buffering and site enhancements could be utilized to minimize any such additional noise or light. Appellant was also willing to accept limitations on the use of lighting after hours at the subject property.

The Board finds that the proposed use is an appropriate use of land and/or structure. The Board recognizes there may be other more appropriate uses for the property, but the proposed use is permitted by special exception. There is an inherent appropriateness to such use as deemed by the Board of County Commissioners, subject to review of the criteria to evaluate the impact on surrounding properties.

Notwithstanding the analysis pursuant to *Schultz v. Pritts* and the related appellate opinions, there are no judicial decisions directly affecting the subject property. During the hearing, reference was made to the Board's decision in another case, finding that a proposed Dollar General Store is functionally and substantially similar to the other special exception uses in the Rural Village zoning district.

The proposed project is consistent with the orderly growth of the community. There is no evidence that it will create dangerous traffic or other safety concerns within the surrounding area. The proposed use has adequate buffering and screening to shield adjacent property owners and does not require any variances for setback requirements. Thus, the proposed project can be completed and still maintain the other requirements of the Ordinance. The Board finds that the proposed use is consistent with the purpose and vision of the Ordinance.

There are no schools or churches in close proximity to the subject property. There is no evidence to suggest that the proposed use will have an effect on gatherings at any such locations in the surrounding area.

Having considered the testimony and evidence presented and having further

considered the criteria set forth in the Ordinance, the Board finds that the proposed use at the subject property will have no greater “adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.” *Schultz v. Pritts*, 291 Md. 1, 15 (1981). For all these reasons, we conclude that this appeal meets the criteria for a special exception, and Appellant’s request should be granted.

Accordingly, the request for a special exception to establish a general retail/merchandise store at the subject property is GRANTED, by a vote of 4-1.<sup>4</sup> The application is granted upon the following conditions:

1. That the proposed use be consistent with the testimony and evidence presented herein;
2. That the design of the building incorporate downward facing lighting;
3. That arborvitae have a minimum height of six (6) feet; and
4. That signage be limited to the building façade.

BOARD OF APPEALS

By: Jay Miller, Chair

**Date Issued: August 31, 2023**

Notice of Appeal Rights

Any party aggrieved by a final order of the Authority in a contested case, whether such decision is affirmative or negative in form, is entitled to file a petition for judicial review of that order to the Circuit Court for Washington County within thirty (30) days of the date of the order.

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<sup>4</sup> Board Member Tracie Felker was the lone dissenting vote. She had replaced former Board member John Cohill who had been the lone dissenting vote at the original hearing.

