

STAFF REPORT AP 201700003 Boyd Tavern Market

APPELLANT: Tiger Fuel Company

In accordance with Section 34.3 of the Albemarle County Zoning Ordinance, Appellant Tiger Fuel Company appeals the zoning determination that the use proposed with the Boyd Tavern Market site development plan (SDP2017-09) requires a special use permit for water consumption exceeding 400 gallons of water per site acre per day (Attachment A). The administrative officer, a Principal Planner, was acting on behalf of the Zoning Administrator in making this decision.

BACKGROUND

The subject property (part of Parcel ID 09400-00-00-3900) is owned by Virginia Oil Company Inc and is located in the southwest quadrant of the intersection of Interstate 64 and Route 616 (Black Cat Road) near Boyd Tavern (Attachment B). The property is zoned Entrance Corridor Overlay (EC) and is further split-zoned, with Rural Areas (RA) zoning toward the rear of the parcel and Commercial 1 (C-1) zoning along Route 616 (see Attachment C). The portion zoned commercially, which consists of approximately 3.279 acres (based on a prior unappealed determination), is the subject of this appeal.

This property is outside of the Development Areas designated in the Albemarle County Comprehensive Plan, and is not within the jurisdictional area for public water or public sewer. Chapter 18-22 of the County Code establishes uses by right and by special use permit for the C-1 Commercial zoning district. Chapter 18-22.2.2 (11) requires a special use permit for *“uses by right not served by public water, involving water consumption exceeding four hundred (400) gallons per site acre per day...”* Only the land zoned to permit the use (the C-1 zoned property) is considered for the basis of water consumption. Based on this commercially zoned land area, the maximum by-right water consumption is 3.279 acres x 400 gallons = 1,311 gallons per day. The amount of acreage zoned commercially and total water consumption allowance based on that acreage were part of a determination letter (LOD 2017-012) dated April 19, 2017. That determination was not appealed and is a final decision.

Site Plan SDP2017-09 (Boyd Tavern Market) proposes a convenience store with fuel sales. The site plan (Attachment D) proposes a building measuring 3,739 square feet, with twelve (12) fuel pumps. A convenience store has previously been determined to be a permitted use within the C-1 Commercial zoning district (Attachment E).

Below is a chronology of actions relevant to this appeal.

- *SDP2017-09 Boyd Tavern Market initial site plan was submitted on February 6, 2017. This site plan was conditionally approved on May 10, 2017, based on a finding that a special use permit is required for water consumption prior to submittal of the final site plan.*
- *The applicant submitted additional information to staff. On October 9th, Francis MacCall, Principal Planner, rendered a determination that a special use permit is needed for the proposed use. This determination (Attachment A) is the subject of this appeal.*

BASIS FOR DETERMINATION

The by-right zoning use category limits the maximum water consumption per day to 1,311 gallons. Under the current Zoning Ordinance language, the limit is not a weekly or other periodic average; instead, it is a “per day” standard.

The appellant has provided several data sets in an attempt to show that the proposed water consumption will not exceed 1,311 gallons per day. After reviewing this data, the Administrative Officer, in consultation with the County Engineer, determined that a special use permit is required for the proposed use. In his determination, the Administrative Officer stated that there was enough uncertainty about the water consumption that he was not able to guarantee that the proposed use would not consume more than 1,311 gallons on any given day (Attachment A).

His determination letter further stated that restricting the water flow with mechanical measures had previously been determined to not be permissible to allow the by-right water consumption. This prior determination was made with the Re-Store N’ Station site in Crozet (SDP 2008-154). This prior determination by the Deputy Zoning Administrator, dated August 27, 2010, is now a final decision (see Attachment F).

Though zoning decisions are fact-specific, the facts in the Re-Store N’ Station case are almost identical to the Boyd Tavern Market site plan currently under appeal. Both properties are zoned for commercial use, are served by private well and septic; and are therefore subject to this same standard.

The similar aspects of the two site plans (Re-Store N’ Station and Boyd Tavern Market) include:

- Both are convenience stores;
- Both propose fuel sales (12 fuel dispensers for each);
- Both are located near interstate interchanges;
- Both propose similar retail building area: Re-Store N’ Station is 3,000 square feet and the Boyd Tavern Market proposes 3,739 square feet;

- Both propose some prepared food sales;
- Both are similar in land area: Boyd Tavern Market has 3.279 site acres and Re-Store N' Station had 4.06 site acres).

With Re-Store N' Station, the County previously determined that convenience store use on a similar-sized site is a use that exceeds 400 gallons per site acre per day, therefore requiring a special use permit. That decision, now finalized as a thing decided, serves as a precedent for staff. Staff cannot treat almost identically-situated applications for the same use differently.

Mechanical devices and deed restrictions are not actual changes in the use, and are best categorized as voluntary limitations or restrictions on water consumption. The County cannot change a use by special use permit into a by-right use by administratively agreeing to terms and conditions of operation that would be unique to a proposed project, but that are not otherwise required by the County's zoning regulations. Mechanical devices and deed restrictions are not requirements the County can impose on a by-right use.

However, such conditions could be imposed as part of a special use permit. In fact, the Re-Store N' Station sought and received approval of a special use permit for water consumption. Its proposal included mechanical devices restricting water flow as well as water conservation measures.

RESPONSE TO APPELLANT'S ARGUMENTS

- 1. Water consumption versus use** – Despite the appellant's claim, staff's determination is properly based on the water consumption, and not the water use of the proposed convenience store use.
- 2. Virginia Department of Health (VDH) Drainfield Sizing** –The Virginia Department of Health's approval of a septic field size is not dispositive of the County's separate determination of convenience store water consumption.
- 3. Assumption based on no traffic increase when Boyd Tavern Market is open** – In Appellant's Exhibit B (dated revised May 8), appellant's engineer, Justin Shimp, bases his water consumption projections on an assumption that traffic will not increase due to the market. Of course, the proposed market would exist precisely to generate customer traffic. In other words, the success of the appellant's business depends on its engineer being wrong. Because the amount of traffic is directly related to the numbers of people who visit the site, staff can't rely on the appellant's traffic assumptions.

CONCLUSION

Convenience store use on sites of this size has been determined to consume more than 400 gallons per site acre per day, thereby requiring a special use permit. This finding was established with the now final determination for Re-Store N' Station. There is no basis to reach a different conclusion for the almost identical Boyd Tavern Market application.

Mechanical devices and deed restrictions are not actual changes in the use, and are best categorized as voluntary limitations or restrictions on water consumption. The County cannot change a use by special use permit into a by-right use by administratively agreeing to terms and conditions of operation that would be unique to a proposed project, but that are not otherwise required by the County's zoning regulations.

The zoning determination was correct and should be upheld.

APPEAL

LIST OF ATTACHMENTS

<u>Attachment A</u>	Zoning Determination regarding Water Consumption dated October 9, 2017 by Francis H. MacCall, Principal Planner (LOD 2017-027)
<u>Attachment B</u>	Location Vicinity Map
<u>Attachment C</u>	Zoning Map
<u>Attachment D</u>	Site Plan SDP 2017-009 Boyd Tavern Market
<u>Attachment E</u>	Official Determination for Convenience Store in C-1, Commercial District dated May 30, 1996
<u>Attachment F</u>	Re Store-N' Station Water Consumption Determination dated August 27, 2010