

HEARING EXAMINER'S REPORT AND RECOMMENDATION ON VARIANCE

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I. STATEMENT OF THE CASE

On September 25, 2018, Applicant FM Group Inc., d/b/a Francisco Landscaping, filed an application for a landscape contractor conditional use under §59.3.5.5 of the 2014 Zoning Ordinance, as amended in ZTA 18-09 (Ord. No. 18-49, eff. October 22, 2018). The use has been operating for 13 years without a proper permit on a 6.3 acre property located at 15400 Holly Grove Road, Silver Spring, Maryland, within the RE-2C Zone. Exhibit 40, p. 6. The conditional use site is unplatted, and is identified as Parcel P066 of the Snowden's Manor Subdivision on Tax Map JS41 (Tax Account No. 05-00278344). On the site is a 2,072 square foot dwelling unit, built in 1989, that the family has historically rented out to residential tenants. That dwelling unit is set back 40 feet and 6 inches from the nearest property line, and is therefore within the 50-foot setback required for a landscape contractor under Zoning Ordinance §59.3.5.5.B.2.

The Conditional Use application was accompanied by an application for a Variance, pursuant to Section 59.7.3.2 of the Zoning Ordinance, and a Resolution from the Board of Appeals, effective September 27, 2018, referring Variance Application A-6575 to OZAH for a hearing and recommendation (Exhibits 32 and 33). The Variance application seeks a variance of 9 feet, 7 inches (9.6 feet), from the setback required for a landscape contractor under Zoning Ordinance §59.3.5.5.B.2., because the current house location cannot meet the 50-foot setback requirement.

In accordance with the request of the Applicant (Exhibit 31) and pursuant to OZAH Zoning Rule 4.2(g), the Hearing Examiner, on December 7, 2018, ordered Conditional Use Application CU 19-04 and Variance Application A-6575 consolidated for purposes of OZAH's public hearing. Exhibit 36. The same Order gave notice of the OZAH hearing to be held on January 18, 2019.

On December 28, 2018, the Applicant filed a motion (Exhibit 39) to amend its application by revision numerous plans listed in Exhibits 39(a)-(q). These revisions have been reviewed by the Technical Staff of the Maryland-National Capital Park and Planning Commission (hereinafter

“Technical Staff”). The amendments to the Applicant’s plans included revisions to the Fire Access and Circulation Plan; the Stormwater Management Concept Plan; the Landscape Plan; the Lighting Plan; the Preliminary/Final Forest Conservation Plan; and updates to other plans.

Also on December 28, 2018, the Technical Staff issued a report recommending approval of the application, subject to 9 listed conditions (Exhibit 40, p. 2).

The Office of Zoning and Administrative Hearings (OZAH) issued a notice of the proposed amendments on January 3, 2019, giving until January 14, 2019, for any opposition to the proposed amendments to be filed. Exhibit 41.

The Applicant supplied 9 form letters signed by neighbors in support of the application (Exhibit 37(e)). On January 7, 2019, OZAH received a letter in opposition to the conditional use from a neighbor, Patricia Thomas, who lives at 15510 Holly Grove Road, Silver Spring, Maryland (Exhibit 43). Since that time, additional submissions in opposition have been filed by Ms. Thomas (Exhibit 58, 58(a) – (q)), 102, 112 and 119) and other neighbors (Exhibits 58(p), 86, 86(a)-(d), 87, 87(a)-(d), 89, 90, 97, 101, 102, 107 and 121). The Cloverly Civic Association also filed a detailed opposition at the hearing (Exhibit 91), responding to many of the findings of the Technical Staff.

On January 10, 2019, the Planning Board deferred consideration of the conditional use application until the Applicant considered potential amendments to the application. Because the Planning Board deferred action on the application when it met on January 10, 2019, the OZAH hearing previously scheduled for January 18, 2019, had to be removed from the calendar (Exhibit 44). Thereafter, on March 6, 2019, the Applicant moved to further amend its application with modified plans (Exhibits 45 and 45(a) – 45(n)). The Hearing Examiner issued a notice of the second proposed amendment on March 12, 2019, and the proposed amendments were unopposed. At the request of the Applicant (Exhibit 50), a new hearing date of June 7, 2019, was noticed on April 17, 2019 (Exhibit 54).

On May 6, 2019, Technical Staff issued a Supplemental Report, based on the amended application, and recommended approval of the conditional use, with 10 conditions (Exhibit 56).

On May 16, 2019, the Planning Board held another meeting to discuss the case. After hearing from the Applicant, the opposition and Technical Staff, the Planning Board voted unanimously (4-0) to recommend approval of the application, with one modified condition specifying a weight limit for trucks, and an added condition requiring the Applicant to establish a community liaison group to meet semi-annually with the local residents and report the results to OZAH within 30 days of each such meeting. The Planning Board concurred with the findings, conclusions and recommendations of the Technical Staff, as is reflected in the May 30, 2019 letter of its Chair (Exhibit 60). The Planning Board noted that it had also unanimously approved the associated Preliminary/Final Forest Conservation Plan (P/FFCP) CU 19-04, finding that the use on the property complies with Chapter 22A of the Montgomery County Code.

The Hearing Examiner convened the public hearing, as scheduled, on June 7, 2019. The Applicant called four witnesses and adopted the findings and analysis of the Technical Staff, as well as the recommended conditions of Staff, as amended by the Planning Board. Tr. 23. Six opposition witnesses testified. The hearing lasted all day, and since the Applicant had introduced an amended landscape plan and other exhibits, the record was held open to give Technical Staff and the opposition a chance to respond, and for additional briefing and submissions on questions which arose from the testimony at the hearing (Exhibits 93-95;108).

These questions included whether Holly Grove Road is actually wider in areas than 14 feet; whether the road has shoulders or other “pull-off” areas legitimately usable by the Applicant’s trucks; whether any other landscape contractor special exception or conditional use cases had been approved in Montgomery County on similarly narrow roadways; and what the widths are of the Applicant’s trucks, both with and without side-view mirrors.

Extensive additional filings were made by Technical Staff and the parties. The opposition filed photographic evidence of Applicant's trucks using the roadway, along with pedestrians and others (Exhibits 97; 102 and 107); the Applicant filed a response to the Hearing Examiner's question about other landscape contractor cases on narrow roadways (Exhibit 109) and his request for a list of the Applicant's truck widths (Exhibit 110); and Staff filed a response regarding the usable width of Holly Grove Road (Exhibit 111).

Because Technical Staff's response (Exhibit 111) to the Hearing Examiner's inquiry was filed on the last day the record was open (June 20, 2019), and Mr. Hughes' filing on June 18, 2018 (Exhibit 109) addressed road-width issues, in addition to his list of truck widths filed on June 20 (Exhibit 110), the Hearing Examiner entered an Order on June 21, 2019, reopening the record until July 1, 2019, to give the parties an opportunity to respond to those filings. Exhibit 113. On July 1, 2019, the Applicant responded to Technical Staff's comments on the road width (Exhibit 117), and the opposition replied with a number of filings (Exhibits 112, 117, 119 and 121).

The final exhibit in this case, Ms. Mauldin's Exhibit 121, contains some original research of the Maryland land records in this area, but because her diligent efforts are not subject to cross-examination at this late stage of the case (*i.e.*, the day before the record closed), the Hearing Examiner will not consider her recitation of what she found in this regard. However, the Hearing Examiner will consider two notable documents she attached to her filing because of their inherent reliability. The first is a copy of the plat for 15520 Holly Grove Road (the home of Ms. Jean Moore, who is Ms. Mauldin's mother (Exhibit 117(a) and Tr. 269-270)), clearly showing Holly Grove Road as a "14' Asph. Road." The other is an email from Michael Paylor, Division Chief of Traffic Engineering and Operations at the Montgomery County Department of Transportation (MCDOT), indicating that the County does not maintain the portion of Holly Grove Road that turns northwesterly from the end of Holly Grove Road's long run southwesterly from Norwood Road.

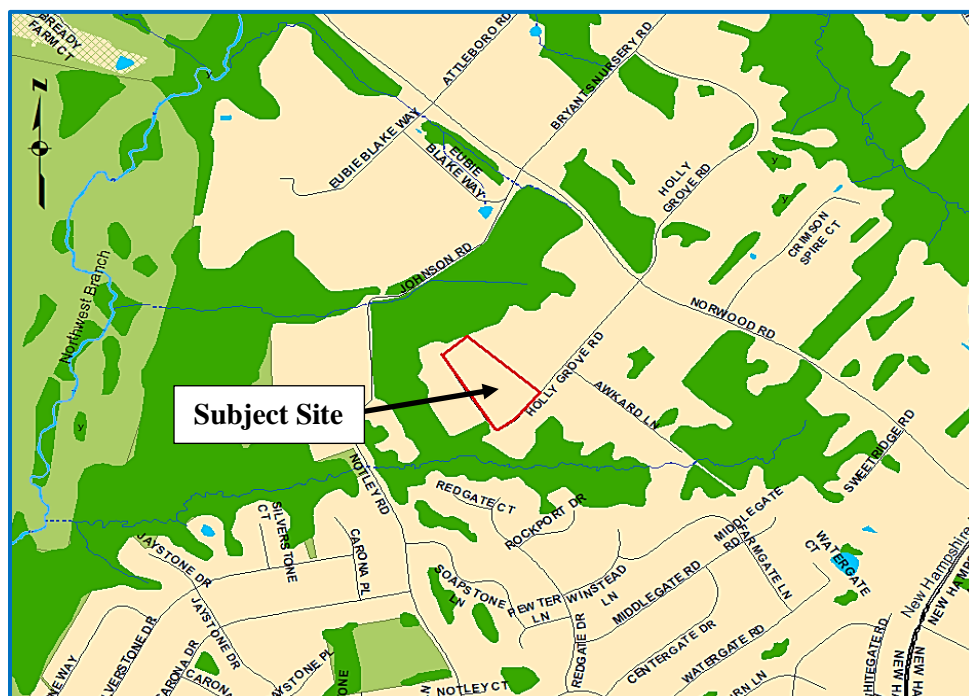
That northwesterly dead-end extension is known by some local residents as “Pumphrey Lane.”

This is a difficult and close case, but after careful consideration of the entire record, and for the reasons set forth in this Report and Decision, the Hearing denies the conditional use application. As further explained in Part V of this Report and Decision, the Hearing Examiner also finds that the application does not satisfy the standards for approval of the requested variance, and that the variance request is mooted by the denial of the conditional use. He has therefore recommended that the Board of Appeals deny the variance application.

II. FACTUAL BACKGROUND

A. Subject Property

As mentioned above, the subject site is located at 15400 Holly Grove Road in Silver Spring, Maryland, within the RE-2C Zone and subject to the 1997 Cloverly Master Plan. It is 6.18 acres in size, is unplatted, and is identified as Parcel P066 of the Snowden’s Manor Subdivision on Tax Map JS41. As noted by Technical Staff (Exhibit 40, p. 1), it is approximately 315 feet southwest of Awkard Lane and 1,250 feet southwest of the intersection of Holly Grove Road and Norwood Road. The site’s location is shown on the following Vicinity Map supplied by Staff (Exhibit 40, p. 3).



The property is well described by Technical Staff (Exhibit 40, p. 3):

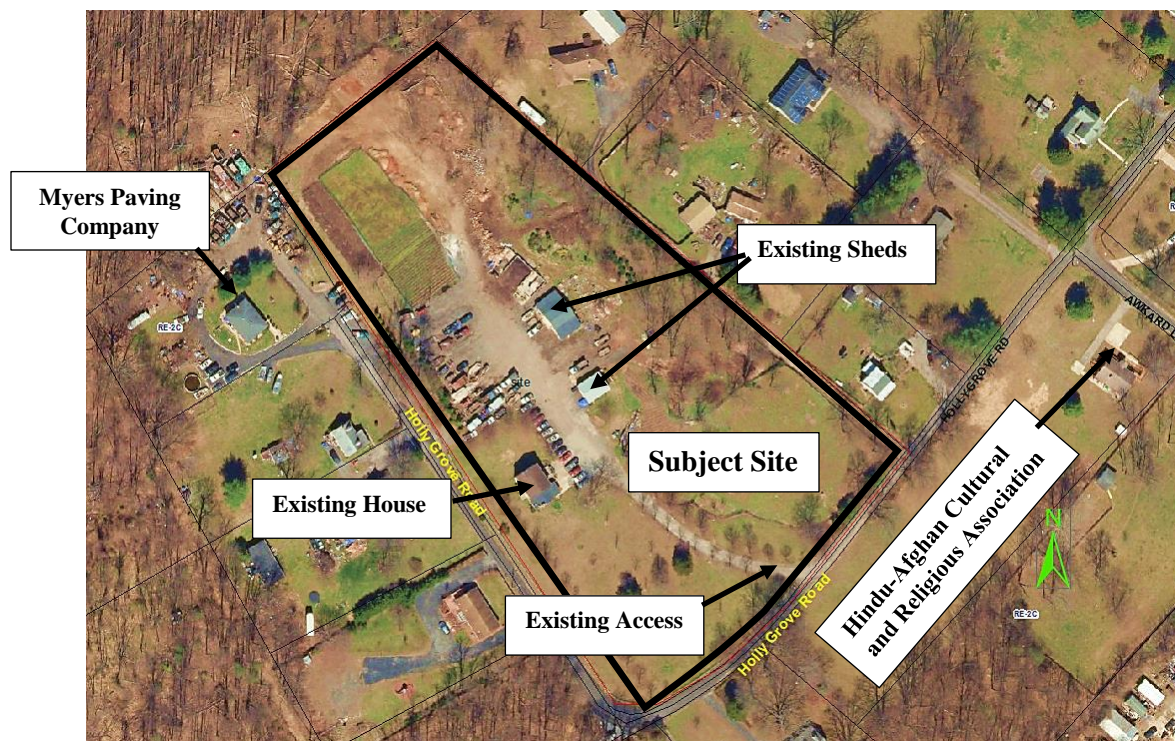
. . . The subject property is an elongated trapezoid, improved with a 2,072 square-foot dwelling, a 1,575 square-foot cinderblock storage building, and a 740 square-foot metal shed building.

Other improvements on the property include gravel parking areas and driveways, material storage bins, a skid steer storage area, and two private garden areas. The property is currently used as a residence and a family owned landscape contractor's business.

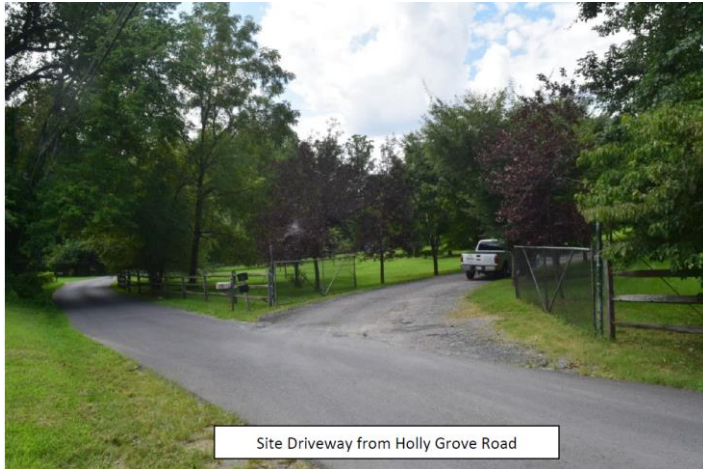
The property has two frontages on Holly Grove Road (southern and western property lines), a narrow local road that extends approximately 2,350 feet from its intersection with Norwood Road and wraps around the subject property before terminating at the northwest corner of the subject property. Primary access to the property is via a driveway from Holly Grove Road on the property's southern frontage. A second access on the property's western frontage along Holly Grove Road is not actively used, gated, and is kept locked.

The site slopes generally from north to west. It is located within the Johnson Road subwatershed of the Northwest Branch Watershed (Use Class IV). There are no streams, wetland areas, 100-year floodplains or highly erodible soils on the property. There are no rare, threatened or endangered species on the property. The property is not designated as historic.

Technical Staff also noted that there have been no previous approvals of special exceptions or conditional uses on the site (Exhibit 40, p. 5). The following aerial photograph provided by Staff (Exhibit 40, p. 4) shows the subject property and its immediate neighbors:

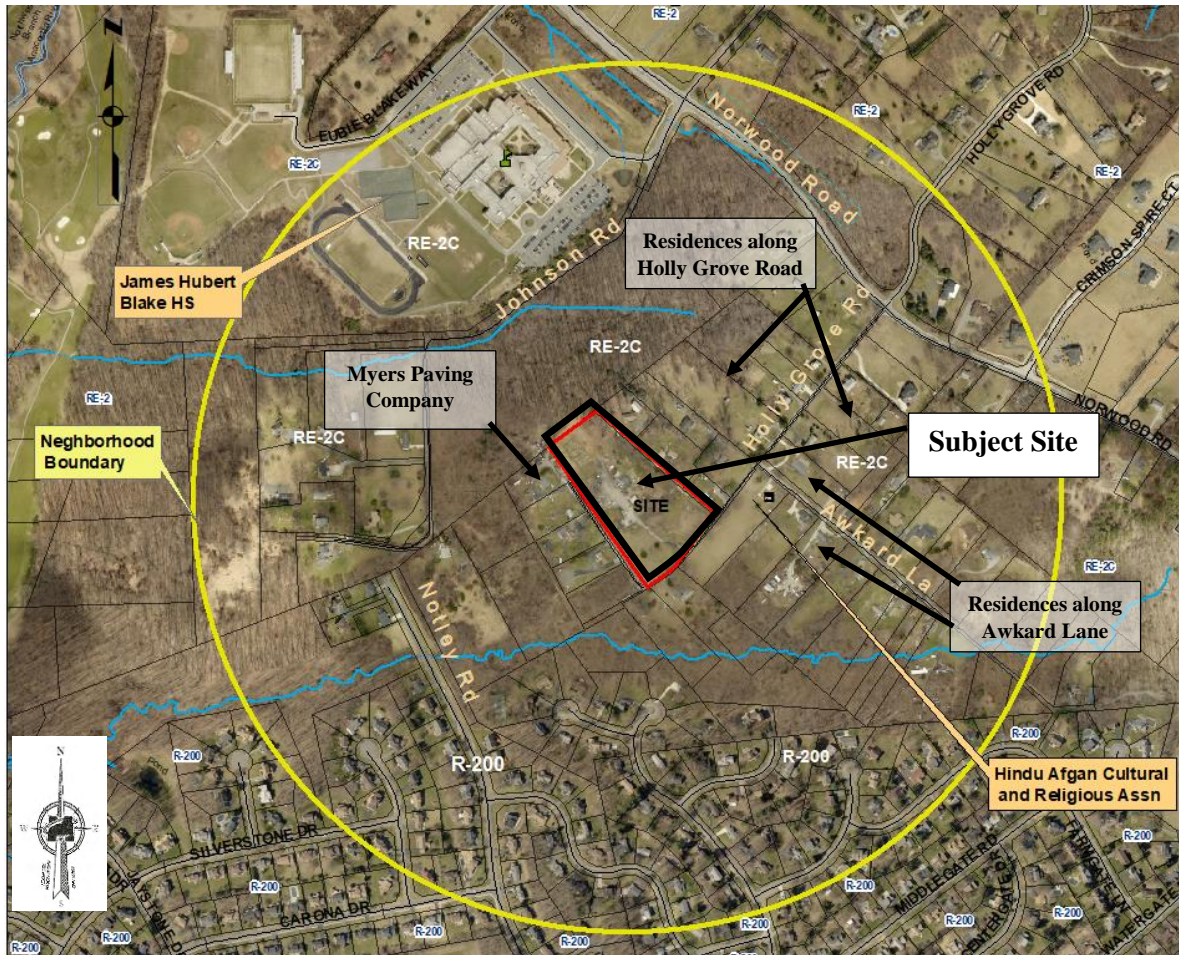


The Applicant supplied photographs of the property, including the southern frontage, site access, the existing dwelling located in the western portion of the property and the existing storage sheds (Exhibit 7), which are reproduced below:



B. Surrounding Area

For the purpose of determining the compatibility of the proposed use, it is necessary to delineate and characterize the “surrounding area” (*i.e.*, the area that will be most directly impacted by the proposed use). Staff defined the surrounding area as properties within a 2,000 foot radius of the subject property, shown in an aerial photo from the Technical Staff Report (Ex. 40, p. 5):



The Applicant agreed with Staff’s designation of the surrounding area. Tr. 24. The Hearing Examiner also accepts Staff’s recommended definition of the surrounding area, as it fairly includes the properties that would be most directly impacted by the proposed use. As described by Staff, the surrounding area is predominantly semi-rural with approximately 75 percent of the land in the RE-2C Zone, but there is denser residential development to the south.

The following is Staff's description of the defined neighborhood (Exhibit 40, pp. 4-5):

. . . Staff's definition of the surrounding area attempts to include developed and vacant residential properties within the RE-2C and R-200 Zones with proximity or direct access to Norwood Road, Holly Grove Road and Awkard Lane. The surrounding area is predominantly semi-rural with approximately 75 percent of the land in the RE-2C Zone. It is sparsely developed and contains several undeveloped and wooded parcels. The denser residential development is concentrated in the southern portion of the neighborhood (Stonegate Subdivision) consisting of single-family detached dwellings in the R-200 zone.

The subject property is surrounded by a 27-acre unimproved wooded property (rear, north), Holly Grove Road (west and south), and three residential properties (east). To the west and south directly across Holly Grove Road are residential properties and a house of worship, all located in the RE-2C Zone.

Staff also notes that there is one approved Conditional Use (Special Exception) within the defined neighborhood boundary. It was approved in 1970 as an animal boarding facility (CBA-2822) and amended in 1972 as S-142 to allow a kennel for dogs. According to Staff, that special exception doesn't appear to be currently active. Exhibit 40, p. 24.

In its Supplemental Report (Exhibit 56, pp. 7-8), Technical Staff further described the neighborhood:¹

There are approximately 20 homes, including the subject property, accessed from Holly Grove Road west of Norwood Road between the west side of Norwood Road and the main access to the subject property. The religious institution [Hindu Afghan Cultural and Religious Association] that has approximately 590 feet of frontage along the south side of Holly Grove Road is accessed from Awkard Lane.

Site distance is clear and straight between Norwood Road and the entrance to the subject property, which is a stretch of approximately 1,400 feet with varying width ranging between 24 feet and 14 feet, narrowing down as it gets closer to the subject property and before it turns into a bend at the southwest corner of the property. There are some pull off areas and some widened driveway accesses that serve as pull offs if a need arises.

Repeated site visits to the area by Staff disclose that there is very little, if any, pedestrian movement along the stretch of Holly Grove Road west of Norwood Road. Both the Applicant and the immediate neighbors report that currently, there is only one middle school student taking a school bus at a stop west of the intersection of

¹ Paragraph numbers have been omitted from the quotation.

Norwood Road and Holly Grove Road. However, this does not mean that the area is totally devoid of pedestrian traffic, nor would the number of children using the bus stop always remain the same. Given the crash data, which indicates no reported incidents in the past decade, the contractor business' current level of operation added to the traffic generated by other businesses in the area doesn't appear to cause an increased negative impact on the safety of residents in the area.

Moreover, the proposed hours of operation (Monday through Friday 6:00 a.m. to 7:00 p.m. and Saturday, 7:00 a.m. to 5 p.m.) are such that the vehicles from the contractor's business leave the property long before the pick-up time of the school buses and return to the property several hours after the drop off time for the school buses.

A 2.20-acre religious establishment [Hindu Afghan Cultural and Religious Association] is located across Holly Grove Road (west) from the subject site. The area also consists of an asphalt pavement business [Myers Paving Company], a nonconforming use located at 15301² Holy Grove Road confronting the subject property, and the subject landscape contractor business, which replaced an older contracting use in 2006, is among the larger business operators in the area. As noted, neither the previous operation nor the current landscape contractor business was approved as a conditional use. A site visit of the area as well as aerial photography reveal that many of the non-residential uses maintain trucks that travel on Holly Grove Road.

The area appears to contain several nonresidential uses of an unknown nature as well as recognized businesses that were previously established and have been in operation for several years. . . .

C. Proposed Use

The Applicant sets forth its proposal in its Statement of Justification (Exhibit 2, pp. 1-6):

Francisco Landscaping was founded in Montgomery County in 1997 by the Argueta family patriarch, Francisco Argueta. . . . Francisco Landscaping operates as a full scale landscape contractor and has done so on the subject property since the family purchased it in 2005. SDAT real property records show that legally it was purchased and owned solely by family matriarch, Mrs. Elba Argueta. . . . Today the family business not only does traditional commercial and residential landscaping, but they also offer fencing, gutter cleaning, firewood delivery and snow removal. Additionally they offer customers various stonework projects, such as patios, walkways, steps and gardens. To complete their full-service landscaping services, Francisco also provides driveway and tree services.

Francisco operates on a 12 month calendar. In the winter, when demand for landscaping services is low, Francisco provides snow plowing services and firewood

² The Hearing Examiner corrected the address of the Myers Paving Company to "15301 Holly Grove Road." Staff incorrectly listed that address as "14301 Holly Grove Road."

delivery for its customers and performs whatever other landscape tasks are possible with winter weather conditions.

* * *

Francisco Lawn and Landscaping Services, Inc. is a full-service lawn and landscape contractor that has been operating the County since 1997. The business landscape contracting yard at the subject site, 15400 Holly Grove Road, which they have owned since 2005 has two main branches of service:

- Residential and commercial landscaping and property maintenance
- Custom stonework and driveway services.

Technical Staff reported (Exhibit 56, pp. 8-9):³

. . . With respect to the subject site, the proposed Conditional Use application would subject the property to substantial landscaping, afforestation, an organized site design and a four percent of reduction in impervious area. In addition, the applicant has offered to rehabilitate a destabilized area on adjacent property located to the rear by extending the forest plantings. These proposed and required improvements bring the property within the current Johnson Road tributary impervious level of approximately 13.8 percent. They would also help to maintain the existing character and scale of development in the semi-rural residential community.

The subject landscape contractor business has been operating on the subject property for 13 years. Currently, the contractor business has 15 employees of which five are family members. Two of the family members rarely go to the property but, instead perform managerial duties from other locations. The Applicant agreed to Staff's recommendation to limit the number of employees to the current maximum level of 15.

The number of trucks and equipment are also restricted not to exceed those that are currently utilized to conduct the Applicant's business:⁴

- **10 trucks:** including 2 international dump trucks, 3 large trucks, 4 medium size trucks, 1 box truck
- **6 trailers:** 5 utility trailers and one carry-on trailer
- **1 Chipper**

As noted, 5 of the trucks are driven by family members.

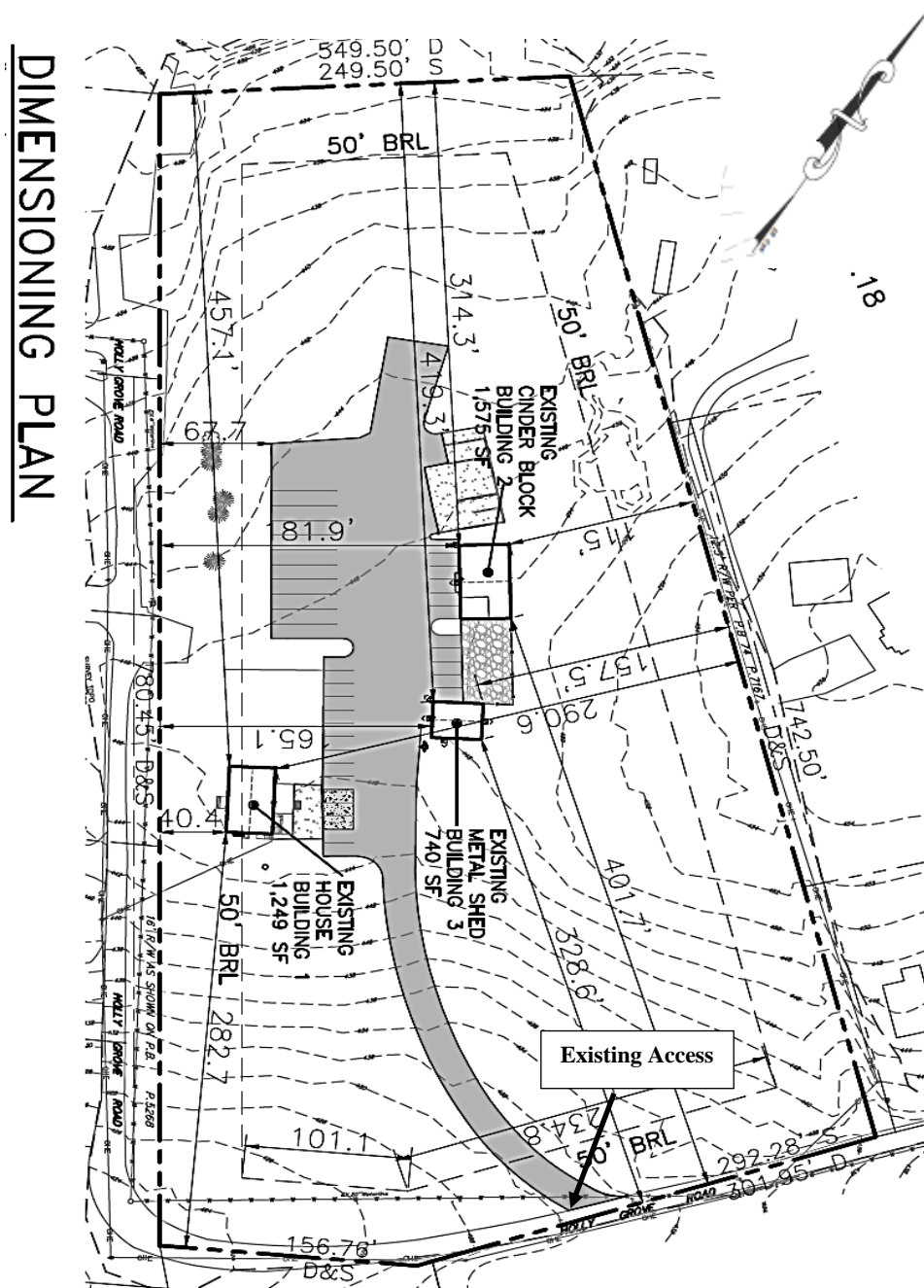
Staff had previously recommended Approval of the proposed Landscape use with conditions. Since January 10, 2019, the Applicant has revised the plans reducing the impervious area percentage by an additional two percent by eliminating 15 of the 45 originally proposed parking spaces, altering the fire access design and turn around area and making other minor layout adjustments. The Applicant also has added additional shades trees and understory plantings along the property's western boundary line and frontage on Holly Grove Road.

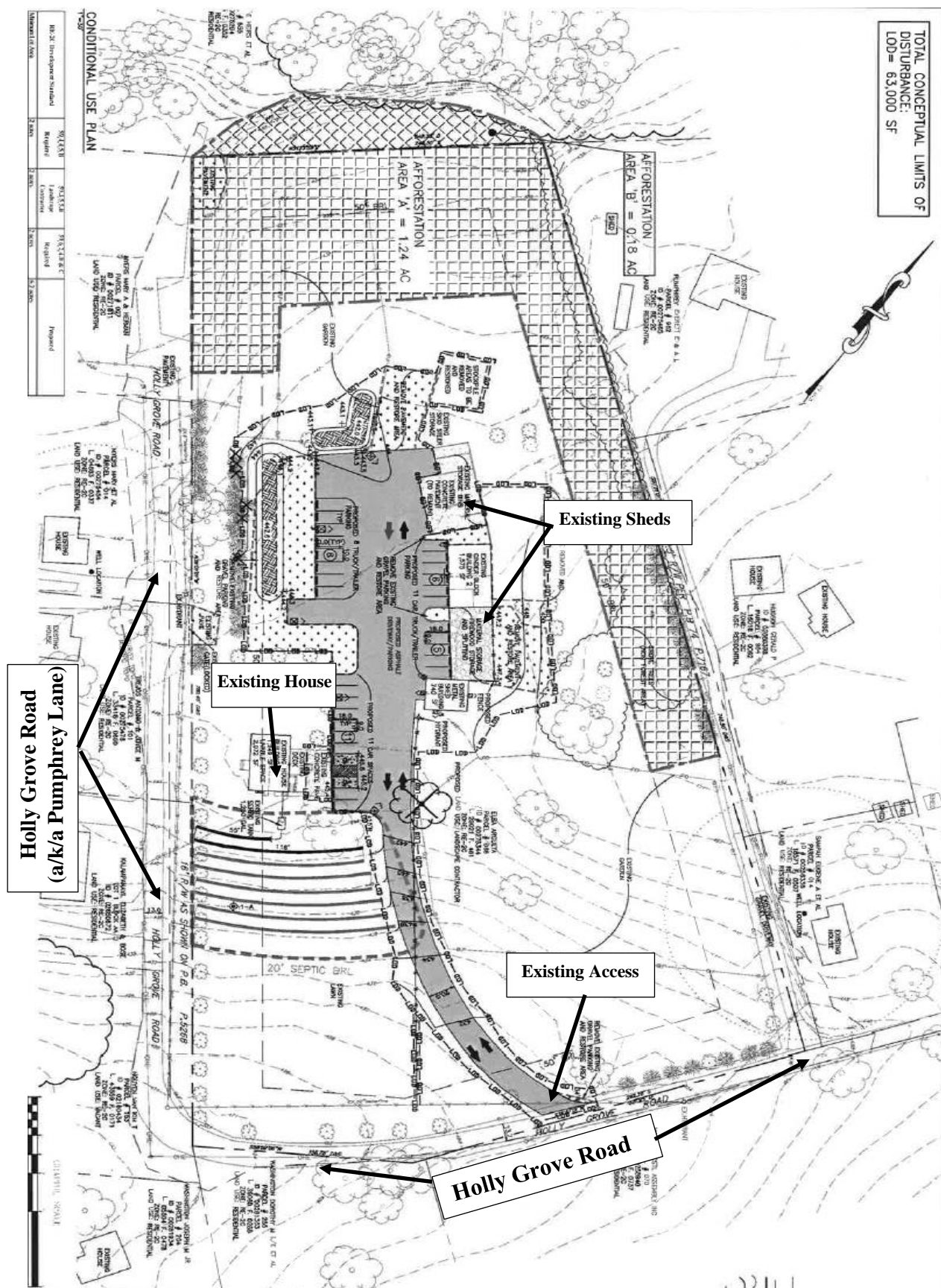
³ Paragraph numbers have been omitted from the quotation.

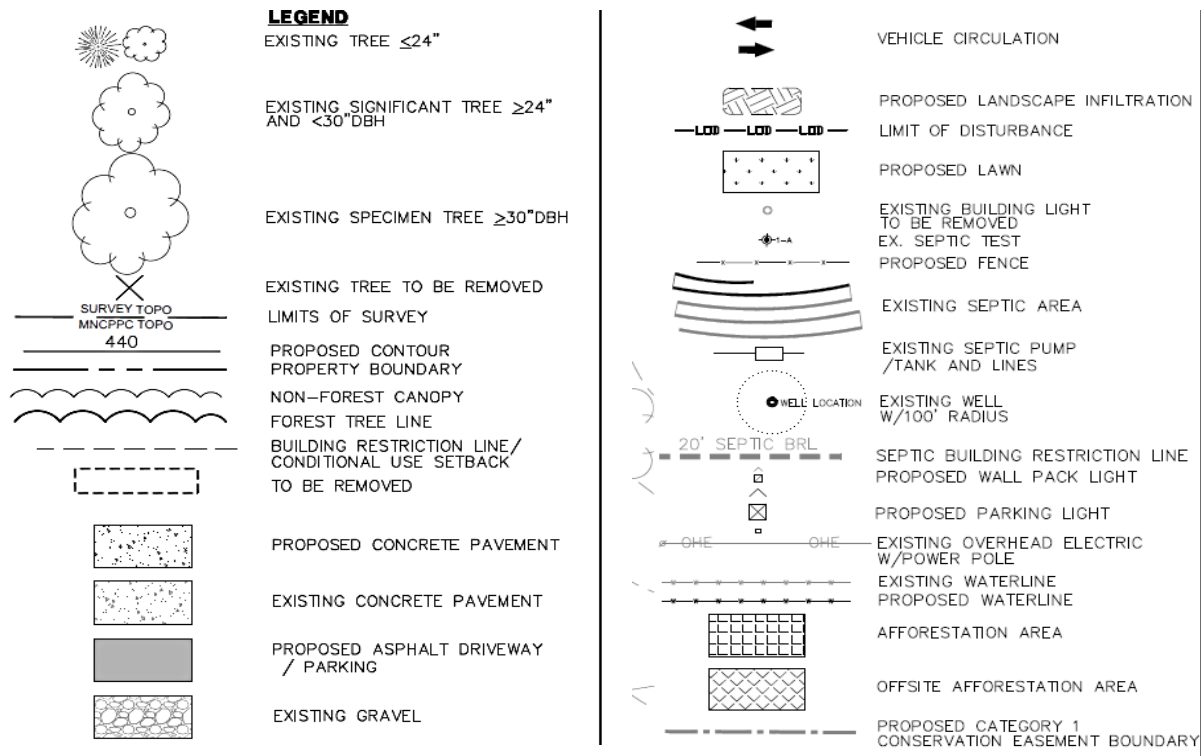
⁴ The description of the equipment was clarified at the hearing, in that there are also two "bobcats" on site. Tr. 155-157.

1. Conditional Use Site Plan, Site Access and On-Site Parking

The Applicant's amended conditional use site plan (Exhibit 45(e)) is shown below and on the following pages, beginning with the "Dimensioning Plan."







30. CONDITIONAL USE PLAN

1"=30'

LAND USE: RESIDENTIAL

RE-2C Development Standard	59.4.4.5.B Required	59.3.5.5.B Landscape Contractor	59.6.2.4.B & C Required	Proposed	
Minimum Lot Area	2 acres	2 acres	2 acres	6.2 acres	
Minimum Lot Width:					
· At street line	25'			449'	
· At building line	150'			335.9'	
Maximum Lot Coverage	25%			1.20%	
Minimum Principal Building Setback					
· Front	50	50'		282.7'	
· Side street	20	50'		40.4'*	
· Side	17	50'		290.6'	
· Sum of Sides	35			331'	
· Rear	35	50'		457.1'	
Accessory Building Setback				Cinderblock building 2	Metal Shed building 3
· Front	80'	50'		401.7'	328.6'
· Side Street	20'	50'		181.9'	165.1'
· Side	15'	50'		115'	157.5'
· Rear	10'	50'		314.3'	419.3'
Minimum Parking Set Back	50'			67.7'	
Height of Principal Building	50'			<50'	
Height of Accessory Building	50'	<50'		<50'	<50'
Minimum Spaces				Vehicle Spaces	
· Office			2.80 / 1,000 GFA	0	
· Tenant Dwelling			1.0 / Renter	5	
· Landscape Contractor - Employee (Onsite)			1.0 / Employee	1	
· Landscape Contractor - Employee (Field)			0.5 / Employee	^	
· Commercial Vehicles			1 / Vehicle	30	
Total				45	

* A variance is requested for the side setback

** 15 Trucks & 15 Trailers Maximum

Site Access:

Access to the site was described in the Applicant's Statement of Justification (Exhibit 2, pp. 6-7):

Holly Grove Road doglegs around this site and fronts the property both to the south and west. The road is classified in the Cloverly Master Plan as a "narrow (14 feet) asphalt road with no shoulder." (Cloverly Master Plan, page 58) There is little traffic, as it is primarily used only by residents. It is not recommended for rustic road classification. (Cloverly Master Plan, page 58) The road dead ends to the west of the property and cannot be used as a cut through to any other road.

The primary entrance for staff, equipment, and service vehicle is via the first driveway entrance on the eastern side of the property. The western entrance off of Holly Grove Road is gated and access is not typically used. This westerly Holly Grove Road entrance is rarely used for purposes of the operation of Francisco's in order to have less impact on six (6) residential neighbors along that area of Holly Grove Road. That entrance is primarily reserved for tenants of the house. However, they rarely use it as well.

On-Site Parking:

The Applicant generally describes its parking facility in its Statement of Justification (Exhibit 2, p. 6):

Parking, as laid out on the drawings, will be provided for staff, the residence as well as the landscape operation trucks, trailers and equipment used for the day-to-day operation of the business. Parking is located in the rear yard, next to the residential structure. Staff parking is located near the residential structure, while storage parking is located along the western property line, closer to the equipment and supplies needed. Most employees carpool in two to four vehicles to reduce the number of parking spaces required each day.

Technical Staff discusses the numbers of parking spaces planned, and its recommendation to reduce those numbers to minimize impervious areas (Exhibit 40, pp. 8, 13-14):

The application proposes a total of 45 onsite surface parking spaces (including two van-accessible handicapped spaces) of which 20 are dedicated for trucks and trailers (double depth parking) and 31 are dedicated for employees and visitors.

* * *

In general, the application meets the applicable requirements of Article 59-6. The parking table in Section 59.6.2.4 requires a base minimum of .50 spaces per employee plus 1 space per each vehicle operated in connection with the landscape contractor use located within the Re-2c Zone. . .

The proposed total number of spaces is 17 more than the required 28 minimum parking spaces. As indicated earlier, staff recommends that the number of employees

remain at the current level of 15 including family members. Staff also recommends that there must be no more than 30 vehicle parking spaces, including parking for trailers associated with the business on the property. The use can adequately be served by a total of 30 spaces given the total number of trucks and trailers, the fact that some of the employees are using ride-share, and others travel directly to the work site. The Applicant's statement indicates that all the vehicles and trailers will be stored overnight on site in parking areas designated on the Conditional Use Site Plan, except the two vehicles of the family members managing the business.

Given the existing number of staff and vehicles, staff recommends that 15 of the proposed spaces, including some of the double depth parking spaces, be eliminated to further reduce the amount of impervious surface on the property.

In response, the Applicant reduced the number of parking spaces on site to the 30 recommended by Technical Staff. Exhibits 45 and 45(e). The number of trucks is also limited to those recommended by Staff (Exhibit 56, p. 9), and the staff on site would be limited to the current level of 15 (Exhibit 56, p. 9).

2. Site Landscaping, Lighting and Signage

a. Landscaping:

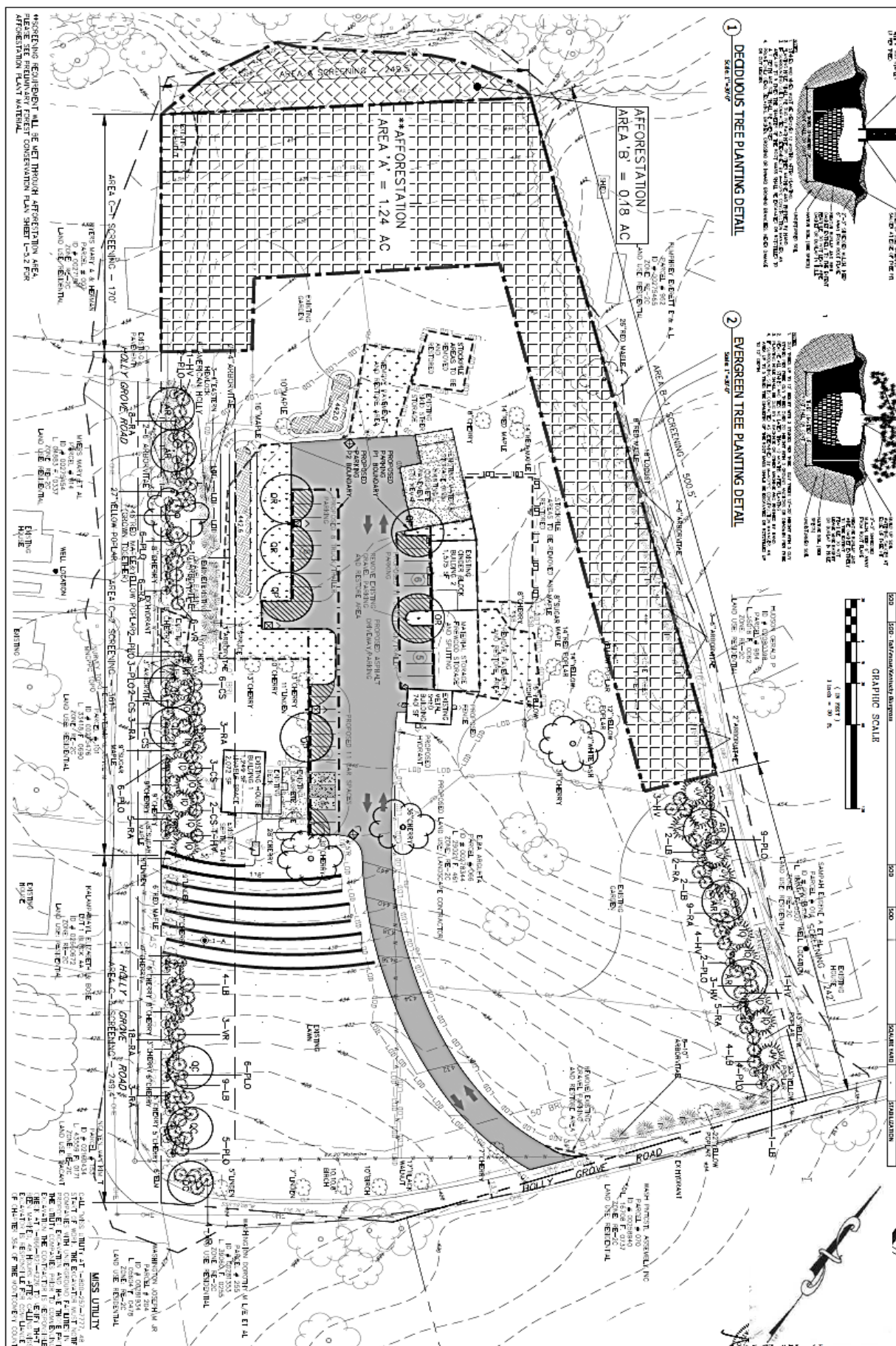
Responding to the concerns of citizens and the recommendations of Technical Staff, the Applicant revised its plans by eliminating 15 of the 45 originally proposed parking spaces, altering the fire access design and turn around area and by making other minor layout adjustments, thus reducing the impervious area percentage by an additional two percent (down to 13.8 percent). The Applicant also has added additional shades trees and understory plantings along the property's western boundary line and frontage on Holly Grove Road to further screen the operations from the neighbors with properties at 15317, 15315, 15311, 15307 and 15301 Holly Grove Road, as suggested by the Planning Board on January 10, 2019. Exhibit 56, p. 4. These changes are reflected in the final amended Landscape Plan (Exhibit 76), reproduced below:

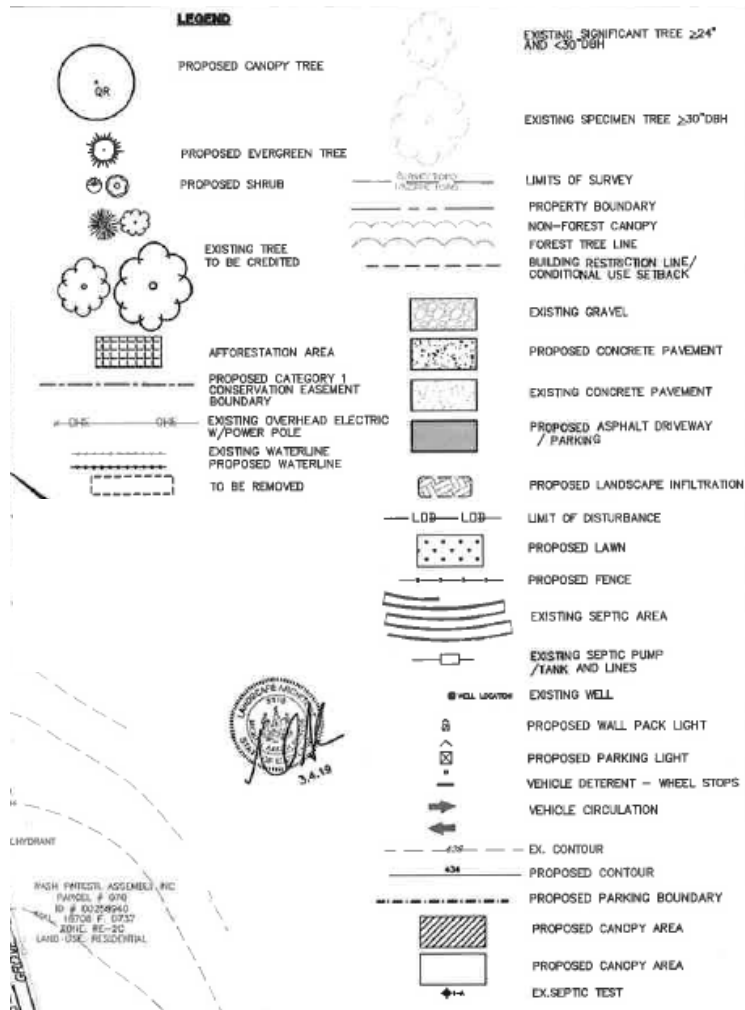
6.2.9. PARKING LOT REQUIREMENTS CALCULATION

TOTAL PROPOSED PARKING AREA P1	2,683 S.F.
TOTAL LANDSCAPED ISLANDS WITHIN PARKING AREA#1	260 S.F.
TOTAL LANDSCAPED ISLANDS COVERAGE WITHIN PARKING AREA#1	9.7%
TOTAL REQUIRED LANDSCAPED ISLANDS COVERAGE FOR PARKING	5.0%
TOTAL PROPOSED PARKING AREA P2	6,595 S.F.
TOTAL LANDSCAPED ISLANDS WITHIN PARKING AREA#2	690 S.F.
TOTAL LANDSCAPED ISLANDS COVERAGE WITHIN PARKING AREA#2	10.5%
TOTAL REQUIRED LANDSCAPED ISLANDS COVERAGE FOR PARKING	5.0%

6.2.9.CANOPY COVERAGE CALCULATION

TOTAL PROPOSED PARKING AREA P1	2,683 S.F.
TOTAL EXISTING AND PROPOSED CANOPY COVERAGE AREA WITHIN THE PARKING	890 S.F.
TOTAL EXISTING AND PROPOSED CANOPY COVERAGE (%)	33.2%
TOTAL REQUIRED CANOPY COVERAGE (%)	25.0%
TOTAL PROPOSED PARKING AREA P2	6,595 S.F.
TOTAL PROPOSED CANOPY COVERAGE AREA WITHIN THE PARKING	2,135 S.F.
TOTAL PROPOSED CANOPY COVERAGE (%)	32.4%
TOTAL REQUIRED CANOPY COVERAGE (%)	25.0%





6.4.3. GENERAL LANDSCAPING REQUIREMENTS

STANDARD	ZONING REQUIREMENT
CANOPY TREE SPREAD (MIN.)	30'
CANOPY TREE MATURE HEIGHT (MIN.)	40-70'
CANOPY TREE SIZE AT TIME OF PLANTING (MIN.)	2" CAL. OR 14' HEIGHT

NOTE

ALL DISTURBED AREAS MUST BE TOPSOILED PER THE MONTGOMERY COUNTY "STANDARDS AND SPECIFICATIONS FOR TOPSOIL", PRIOR TO FINAL VEGETATIVE REHABILITATION.

EXISTING CANOPY TREE TO BE CREDITED FOR PARKING		
BOTANICAL NAME	COMMON NAME	20-YR CANOPY DIAMETER
<i>Fraxinus americana</i>	Black Cherry	30'

6.5.3.C-7 SCREENING REQUIREMENTS

OPTION B SCREENING	ZONING REQUIREMENT	*AREA A (249.5 LF)	*AREA B-1 (500.5 LF)	AREA B-2 (242 LF)	*AREA C-1 (170 LF)	AREA C-2 (381 LF)	AREA C-3 (249.4 LF)
DEPTH (MIN.)	12'	>12'	>12'	>12'	>12'	>12'	>12'
CANOPY TREE (MIN. PER 100')	2	>2	>2	5	>2	8	5
UNDERSTORY OR EVERGREEN (MIN. PER 100')	4	>4	>4	6	>4	33	10
LARGE SHRUBS (MIN. PER 100')	8	>8	>8	20	>8	29	20
MEDIUM SHRUBS (MIN. PER 100')	12	>12	>12	30	>12	44	31

*50'DEPTH FOREST CONSERVATION EASEMENT

LANDSCAPE PLANTING PLAN SCHEDULE								
KEY	BOTANICAL NAME	COMMON NAME	SIZE	FORM	20-YR CANOPY DIAMETER	SPACING	QUANTITY	COMMENTS
CANOPY TREES:								
QP	<i>Quercus prinus</i>	Chestnut Oak	2" cal.	B&B	35'	AS SHOWN	3	
QR	<i>Quercus rubra</i>	Northern Red Oak	2" cal.	B&B	35'	AS SHOWN	3	
AR	<i>Acer rubrum</i>	Red Maple	2" cal.	B&B	48'	AS SHOWN	5	
QC	<i>Quercus coccinea</i>	Scarlet Oak	2" cal.	B&B	26'	AS SHOWN	5	
EVERGREEN TREES:								
IO	<i>Ilex opaca</i>	American Holly	6-8'	B&B	12'	AS SHOWN	12	SINGLE STEM
JV	<i>Juniperus virginiana</i>	Eastern Red Cedar	6-7'	B&B	10'	AS SHOWN	6	
LARGE SHRUBS:								
CS	<i>Cornus sericea 'Cardinal'</i>	Red-Twig Dogwood	3'-4' ht.	B&B		AS SHOWN	10	
HV	<i>Hamamelis virginiana</i>	Witch Hazel	3 gal.	Cont.		AS SHOWN	23	
LB	<i>Lindera Benzoin</i>	Spicebush	3 gal.	Cont.		AS SHOWN	22	
VR	<i>Viburnum rhytidophyllum</i>	Leatherleaf Viburnum	#3, 2'-2 1/2'	Cont.		AS SHOWN	13	
MEDIUM SHRUBS:								
PLO	<i>Prunus laurocerasus 'Otto Luyken'</i>	Otto Luyken Laurel	2'-2 1/2'	B&B		AS SHOWN	45	
RA	<i>Rhus Aromatica</i>	Fragrant Sumac	3 gal.	Cont.		AS SHOWN	62	
GRASSES, PERENNIALS AND GROUNDCOVERS:								
SOD	SOD - Tall Fescue/Kentucky Bluegrass		SOD	SOD		SQAURE YARD	-	STABILIZATION

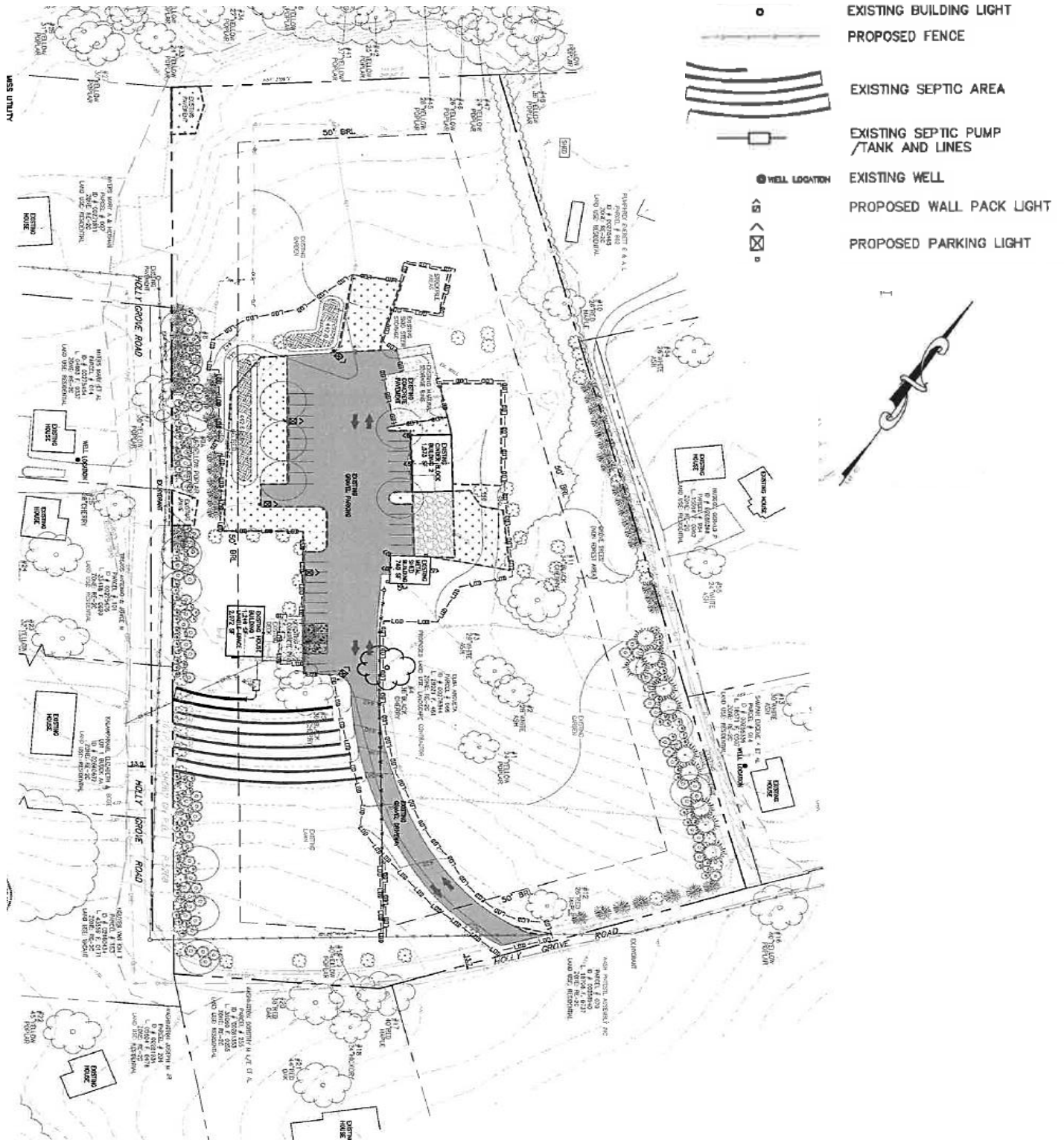
The Applicant also provided a rendered, illustrative Landscape Plan (Exhibit 80):








Technical Staff found the proposed landscaping, as amended, meets or exceeds the standards for parking lot landscape area, tree canopy coverage, perimeter planting and general landscaping requirements. Exhibit 40, pp. 17-18.

b. Lighting:

Lighting for the site is shown on the Lighting Plan (Exhibit 45(j)), reproduced below:



Symbol	Label	Quantity	Manufacturer	Catalog Number	Description	Lot #	Non-Sol Section	Fluorescence	Luminescence	Light Loss Factor	Wavelength	Emitting Wavelength
	Light	1	Lighting	Lighting fixture, 100W, 120V, 1000lm	Lighting fixture, 100W, 120V, 1000lm	1000	1	1000nm	1000nm	0.9	1000nm	1000nm
	Light	1	Lighting	Lighting fixture, 100W, 120V, 1000lm	Lighting fixture, 100W, 120V, 1000lm	1000	1	1000nm	1000nm	0.9	1000nm	1000nm

Status						
Description	Symbol	Ang	Max	Min	Max/Min	Avg/Min
PARKING SUMMARY		1.6 ft	6.7 ft	0.1 ft	870.1	18.0
PROPERTY LINE		0.0 ft	0.0 ft	0.0 ft	N/A	N/A
SPILL SUMMARY		0.2 ft	0.2 ft	0.0 ft	N/A	N/A

Notes:

1. Readings shown are based on a total LUF of 16 hrs shown at growth data references the extrapolated performance projections in a 250-milwatt based on 10,000 hrs of LED testing (per IESNA LM-80-08 and projected per IESNA TM-21-11).
2. Please refer to the "Plan View" for mounting heights.
3. Product information can be obtained at www.Holophane.com

OUTDOOR LIGHTING FOR A CONDITIONAL USE MUST BE DIRECTED, SHIELDED, OR SCREENED TO ENSURE THAT THE ILLUMINATION IS 0.1 FOOTCANDLES OR LESS AT ANY LOT LINE THAT ABUTS A LOT WITH A DETACHED HOUSE BUILDING TYPE, NOT LOCATED IN A COMMERCIAL/RESIDENTIAL OR EMPLOYMENT ZONE.



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Intended Use: City Street, Parking Lots, Campuses, Commercial Development, Plaza, Historic District, Village Squares, Residential Areas, Parks, Walkways, Boardwalk, Sidewalks

Features: Pole shaft is one piece, 6063 aluminum alloy. Heat-treated to a T6 temper. Pole base shall be 355 H 3035 aluminum alloy heat treated to a T6 temper after welding. Base shall be 2" x 4" minimum, corner and fasteners are included. Pole bases shall be provided as standard. Finish shall match pole non structural fasteners shall be zinc rich steel. The following are product attributes:

Anodized, painted or water brush finish. Painted poles shall be extra gross; powder paint.
Grounding provision shall be immediately accessible through hard pole. JIS 16 Stranded
Steel anchor bolts shall be per ASTM A307 or ASTM F 1554 - Grade 35 nut cap-
pin sized. Nuts and washers shall be per ASTM A307 or ASTM F 1554 - 1/2 x 3
inch size.

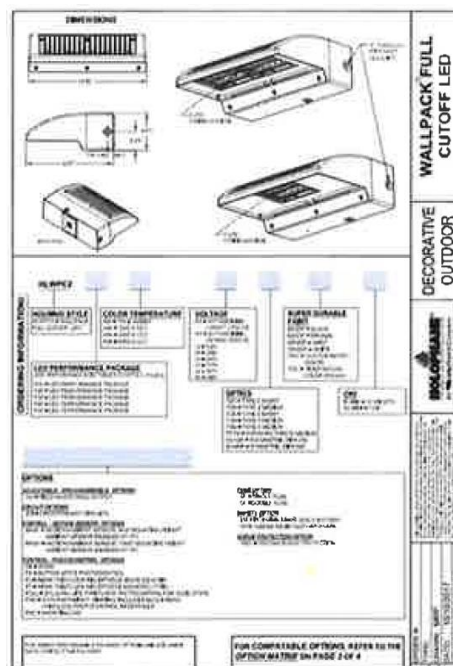
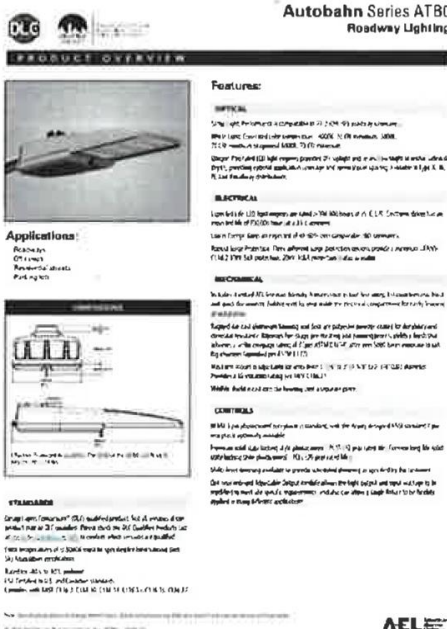
Unalugic Round Tapered Aluminum bolts shall be fabricated to meet AASHTO 1994 requirements. Welds conform to applicable AWS structural welding code.

When Festival Box is Ordered The Standard Location Is On The Same Side As Head Mode, and is 36" Above Gate Base.

Quasi-Periodic

Quasi-Periodic

- [illegible]



The Lighting Plan is adequate and safe for vehicular and employee movement. The proposed lighting serves multiple purposes, including illumination of the site entrance, visibility lighting in the employee parking areas and area lighting near the structures. A photometric study submitted with the Application shows measured lighting intensity across the entire property in foot-candles, the locations of lighting fixtures and the manufacturer's specifications on the proposed lighting fixtures. The Photometric Plan shows that the lighting will not cause glare on adjoining properties, nor will it exceed the 0.1 foot-candle standard at the side and rear property lines. The lighting, with no direct light or light glare, will not have a negative impact on neighboring properties.

c. Signage

Technical Staff recommended a condition specifying that “There will be no identification sign on the property.” The Applicant agreed to that condition, and it would have been imposed in this Report and Decision if the conditional use had been granted.

3. Operations

The Applicant sets forth its proposal in its Statement of Justification (Exhibit 2, pp. 1-6):

Francisco Landscaping was founded in Montgomery County in 1997 by the Argueta family patriarch, Francisco Argueta. . . . Thus, the current numbers of management and staff who are typically at the site and working in field operations now is a total of sixteen (16) (three (3) family management members and up to thirteen field staff members and a projected future growth of three (3) more field staff personnel, so a total of nineteen (19). Francisco Landscaping operates as a full scale landscape contractor and has done so on the subject property since the family purchased it in 2005. SDAT real property records show that legally it was purchased and owned solely by family matriarch, Mrs. Elba Argueta. . . . Today the family business not only does traditional commercial and residential landscaping, but they also offer fencing, gutter cleaning, firewood delivery and snow removal. Additionally they offer customers various stonework projects, such as patios, walkways, steps and gardens. To complete their full-service landscaping services, Francisco also provides driveway and tree services.

Francisco operates on a 12 month calendar. In the winter, when demand for landscaping services is low, Francisco provides snow plowing services and firewood delivery for its customers and performs whatever other landscape tasks are possible with winter weather conditions.

In addition to the landscape contracting materials and supplies, the subject site also includes two (2) private gardens, one near the front of the property and one at the rear. The family patriarch, Mr. Argueta grows corn, vegetables and similar plants each year. The goods from the gardens are not part of the landscape business and are not sold on site. In fact, the business does not and will not sell plant materials, garden supplies or equipment at the subject property. The family business does not operate an office at the subject property. The Holly Grove Road address serves more as a landscape yard as the family operators and its staff typically meet early each working day at the site for up to approximately one (1) hour to receive assignments and collect the necessary landscape equipment and vehicles for the day’s work. And at the end of each work day, the family operators and its staff meet on site to drop off the landscape equipment and vehicles, tidy up, and exit the property typically within thirty (30) plus minutes. Since the company business occurs at clients’ residences and businesses throughout the County, it operates as a modern mobile office business

operation where most of the company business management operations are conducted via smart phones, tablets, on site meetings and at public locations, including coffee shops and restaurants. Any additional back office related work is often done at the family residence also located in Montgomery County.

*

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A. Business Activities

Francisco Lawn and Landscaping Services, Inc. is a full-service lawn and landscape contractor that has been operating the County since 1997. The business landscape contracting yard at the subject site, 15400 Holly Grove Road, which they have owned since 2005 has two main branches of service:

- Residential and commercial landscaping and property maintenance
- Custom stonework and driveway services.

B. Staffing

There could be up to a total of up to ~~46~~ [15] employees operating out of this subject property, and three (3) family management members.⁵ Francisco's staff is primarily located at its' clients' properties providing services during the work day, besides the previously stated beginning and end of day visits to the landscape contracting yard on Holly Grove. The Holly Grove yard site is primarily used for their loading and field teams. The family owners also typically report to the Holly Grove Road site at the beginning and end of each work day and infrequently during daily operations.

C. Hours of Operation

Francisco's hours of operation will generally be from 6:00 AM up until 7:00 PM Monday thru Friday.

The field staff begins to arrive via car pools around 6:00 AM to receive their assignments for the day and to ready the vehicles for that day's work. The field staff typically departs around 7:00 AM and is off site until the end of the work day. Towards the end of the day the field staff and management usually return to the site between 4:00 PM and 6:00 PM. They then take 15 to 30 minutes to unload the vehicles, tidy up and then depart via carpools for their residences.

During the busiest times of the year, (March–early December), Petitioner will also operate on Saturdays but with fewer hours (7:00 AM – 5:00 PM).

The Applicant will have no retail sales, so it would be rare that a customer would visit the site. There will be little activity on-site during most of the day since as management and employees will be performing landscaping work at off-site locations. An exception to these hours/days of operations involves snow removal which must occur at days and times dictated by weather.

⁵ Technical Staff has recommended limiting the number of total staff (including family members) to 15 (Exhibit 40, p. 2). The Applicant agreed (Tr. 42), and the Hearing Examiner therefore crossed out the Applicant's suggestion of 16 employees and substituted the number 15 in the above quote. The number refers to those on site at any time.

[Another restriction on operations, recommended by the Planning Board, would limit the dates and times heavy trucks could carry mulch on the roadways, as follows:

“Semi-trucks, not higher than Gross Vehicle Weight Rating Class Seven, shall visit the subject property for mulch deliveries up to two times a week, between the hours of 10:00 am and 2:00 pm, during prime mulch season only, March 1 through April 30.]

D. Buildings

There are currently three (3) buildings on site, including the existing residential home and two existing sheds as shown on the drawing plan. There are no plans to expand the development on the site. The family has evaluated and is content with the size and scope of its operations and staffing due to the size of the management family of five (mom, dad adult daughter and two adult sons) and the business operations.

Technical Staff summarizes information in the Applicant’s Statement of Justification, and adds the following details (Exhibit 40, pp. 6-8):

Table 1: Breakdown of Employees

Employees	Current	Proposed
Owner and family administration	2	2
Field Crew (including 3 family members)	13	17*
Total	15	19

**Staff recommends that the total number of employees remain the same as the existing total number of employees.*

Hours of operation for the landscape contractor business are Monday through Friday 6:00 a.m. to 7:00 p.m. and Saturday, 7:00 a.m. to 5 p.m.

The justification statement indicates that the only landscaping material typically stored on the property is mulch. All other plant materials and supplies are picked up at nurseries and taken directly to the customer’s property for planting. At times firewood is also stored on site prior to delivery to customers. The plan shows an existing area assigned for bulk storage bins located on the northern portion of the property on the west side of the existing 1,575-square foot cinderblock storage building. The plan also shows materials, firewood storage and wood splitting area of approximately 1,850 square feet located on the east side of the existing cinderblock building. . . .

The Conditional Use proposes no new construction or expansion of buildings.

The Conditional Use Site Plan shows an existing septic system located on the western portion of the property. Staff asked the Applicant to provide documentary evidence

(Attachment C-1[to the Staff Report]) to establish adequacy of the septic system to accommodate the proposed use. The Applicant indicated that while a family member resides in the existing house, no part of the residence will be used as an office.

In a supplemental statement, the Applicant stated that upon approval of this application, at full capacity, the subject Conditional Use will have the following equipment and vehicles:

- **10 trucks:** including 2 international Dump trucks, 3 large trucks, 4 medium size trucks, 1 box truck
- **6 trailers:** 5 utility trailers and one carry-on trailer
- **1 Chipper**
- **[2 Bobcats]⁶**

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The Applicant described the number of vehicles and site access in its Statement of Justification (Exhibit 2, p. 6):

E. Cars, Trucks and Equipment⁶

Because of its size and operations, Francisco has a fleet of work vehicles that includes 6 dump trucks/box trucks and 4 smaller pickup trucks all under 25,000 lbs. in weight. Typically 3 of the pick-ups are used by the family management members and thus two will be driven off-site every night.

In addition, the Applicant will have up to 7-[6]⁶ flat bed or box trailers that will be used to transport equipment and plant materials to job sites as well as ~~1-crane truck⁶~~ and 2 bob cats. There is also equipment associated with snow plowing operations that will remain outside, except in the winter when it will be in operation.

All of these vehicles and trailers will be stored overnight on site in parking areas designated on the Site Plan, minus the 2 vehicles which the family management will drive home with them for the night.

D. Environmental Issues

1. Forest Conservation

Technical Staff found (Exhibit 40, pp. 18-19):

The Application meets the requirements of Chapter 22A of the Montgomery County Forest Conservation Law. A Natural Resource Inventory/Forest Stand Delineation (NRI/FSD) was approved for this Property on April 12, 2018.

⁶ At the hearing, the Applicant's attorney clarified that, in addition to the 10 trucks, 6 trailers and a chipper, the Applicant would have two "bobcats" on site. The Applicant has dropped the request for a 7th trailer and for a crane truck. Tr. 155-157. The cross-outs and bracketed additions in the quotations reflect these changes.

The Property currently has no forest, but the proposed Forest Conservation Plan provides for 1.24 acres of forest on-site located along the north and portions of the east and west boundaries of the property. A Final Forest Conservation Plan has been submitted for review and is recommended for approval as a separate action by the Planning Board as part of this Conditional Use Application. The Forest Conservation Plan review reveals that over a period of years, there has been a significant amount of off-site clearing that has resulted in the loss of approximately 6,500 square feet of forest. This area will be cleared of debris and re-stabilized as part of the forest planting proposed adjacent to this area

The Planning Board approved Forest Conservation Plan No. CU201904 on May 30, 2019 (Exhibit 75).

2. Imperviousness and Stormwater Runoff Control

Technical Staff also addressed issues of imperviousness and stormwater runoff in both its original Report (Exhibit 40, pp. 11-12, 25) and in its Supplemental Report (Exhibit 56, pp. 4, 8):

The 1997 Cloverly Master Plan defines the areas within the Upper Northwest Branch Watershed with RE-2 and RE-2C zoning as the Residential Wedge. This wedge area “should remain in the 10-15 percent impervious range, which is within the generally acceptable limits for the protection of cold-water stream systems in Maryland. Individual developments with high site-imperviousness should be discouraged.” The subject property is in the Johnson Road tributary of the Northwest Branch. The Johnson Road tributary currently has an impervious level of approximately 13.8 percent.

The impervious level of this site has increased incrementally over a period of years with the expansion of the landscaping business. The site’s current impervious level is approximately 18 percent. By formalizing and limiting the areas needed for vehicles, and in the process, providing stormwater management for those areas, the impervious level is reduced to approximately 16 percent. With the staff recommendation to reduce the parking areas, the impervious level will be further reduced to approximately 14.8 percent. The Johnson Road tributary will remain well below the 15% impervious goal in the Master Plan.

The proposal calls for removal of currently graveled areas and their conversion to lawn and green areas, reducing the size of impervious areas. With the additional landscaping and afforestation, the existing character and scale of development in the semi-rural residential community would not be negatively impacted by the continuation of the subject landscape contractor business at its current level of operation.

The Applicant’s amended plans would “Reduc[e] the impervious area percentage by an additional two percent over what was proposed in the original application by eliminating 15 of the

45 parking spaces originally proposed and altering the fire access design and turn around area and other minor layout design adjustments.” Exhibit 56, p. 4. As summarized by Staff (Exhibit 56, p. 8):

With respect to the subject site, the proposed Conditional Use application would subject the property to substantial landscaping, afforestation, an organized site design and a four percent [total] reduction in impervious area. In addition, the applicant has offered to rehabilitate a destabilized area on adjacent property located to the rear by extending the forest plantings. These proposed and required improvements bring the property within the current Johnson Road tributary impervious level of approximately 13.8 percent.

Technical Staff found the reduction in imperviousness to 13.8 percent to be sufficient in that it matches the impervious level of the Johnson Road tributary. It is also well within the 10-15 percent impervious level suggested for this area by the Cloverly Master Plan, which provides (MP, p. 22):

The ultimate subwatershed imperviousness levels should remain in the 10 to 15 percent range which is within the generally acceptable limits for the protection of cold water stream systems in Maryland. Individual developments with high site-imperviousness should be discouraged.

Quentin Remein, President of the Cloverly Citizen’s Association, opined that the proposed reduction of imperviousness on the site from the current level of 18 percent to 13.8 percent was insufficient, even if it comports with the current imperviousness level of the Johnson Road tributary and the 10 to 15 percent range recommended in the above-quoted Master Plan language. Tr. 330. He suggested in his testimony and his submission (Exhibit 91, p. 5) that “In the Upper Northwest Branch watershed, the Cloverly Master Plan discourages impervious levels above 10% which is the Maryland (Use Class IV) acceptable limit for the protection of cold water stream systems.”

Given the 10 to 15 percent acceptable imperviousness range recommended in the Master Plan and Technical Staff’s finding that a level of 13.8 percent was sufficient to match the imperviousness level of the Johnson Road tributary, the Hearing Examiner concludes that the proposed reduction in imperviousness to 13.8 per cent is sufficient to protect the environment.

Turning to the question of stormwater management, the Applicant's site design expert, Michael Norton, testified that the stormwater management planned for the site would employ Environmental Site Design standards and would reduce stormwater runoff onto neighboring land. Tr. 64-65.

The Applicant's stormwater management concept plan has been approved by the Department of Permitting services, which posted on its web site an Approved Storm Water Permit dated December 20, 2018 (Exhibit 40, p. 25):

Permit Number	284172	Type	Stormwater Concept
Application Date	08/29/2018	Approved Date	12/20/2018
Final Date		Status	Permit Issued
Work Type	Disturb	Site Address	15400 HOLLY GROVE RD SILVER SPRING, MD 20905
Value	\$0.00		
Subdivision	Colesville Outside	Lot/Block	N/A/N/A
Phase Name			

In sum, Technical Staff found that “[t]here are no unacceptable . . . environmental impacts associated with the Application provided that the recommended conditions are satisfied.” Exhibit 40, p. 31. Given this record, the Hearing Examiner agrees with Technical Staff.

E. Analysis of Community Concerns

The Applicant supplied nine form letters signed by neighbors in support of the application (Exhibit 37(e)). Some of those same neighbors subsequently signed opposition submissions (Exhibits 58(p), 87 and 90).

On January 7, 2019, OZAH received a letter in opposition to the conditional use from a neighbor, Patricia Thomas, who lives at 15510 Holly Grove Road, Silver Spring, Maryland (Exhibit 43). Since that time, additional submissions in opposition have been filed by Ms. Thomas (Exhibit 58, 58(a) – (q)), 102, 112 and 119) and other neighbors (Exhibits 58(p), 86, 86(a)-(d), 87, 87(a)-(d), 89, 90, 97, 101, 102, 107 and 121). The Cloverly Civic Association (hereinafter, “CCA”) also filed a detailed opposition at the hearing (Exhibit 91), responding to many of the

findings and conclusions of the Technical Staff. The theme of CCA's opposition is summed up in its cover letter to the Hearing Examiner:

The Cloverly Civic Association at its regular meeting on March 25, 2019 voted **unanimously** to recommend denial of the CU 19-04 FM Group, Inc. (d/b/a "Francisco Landscaping") Condition Use Application. . . . The primary purpose is to defend the principles of the Cloverly Master Plan. In no way are we opposed to the landscaper conditional use in Cloverly. There are many landscape contractors in our community and even members of our Civic Association that we welcome. But there are appropriate places for landscape contractors in Cloverly, and within a residential-like Holly Grove is not one of them.

The thrust of CCA's opposition is its argument that the proposed conditional use does not comport with the recommendations of the Cloverly Master Plan; that it would harm the environment because of its proposed level of imperviousness; that its commercial activity is not compatible with the residential neighborhood surrounding the subject site; and that its location on a narrow, tertiary road presents a safety risk to other users of the roadway.

1. The Basis for the Neighbors' Opposition

In her letter, Ms. Thomas stated the following reasons for opposing the application:

. . . [She is] deeply concerned about the misuse of the property which is inconsistent with the Cloverly Community Master Plan. The intent of the conditional application is disruptive to the community and raises serious concerns relating to imperviousness and impacts on the Johnson Road sub watershed of the Northwest Branch watershed, noise and air quality, traffic and safety.

* * *

The Francisco scope conditional use request sets a dangerous precedent for other neighborhoods in the county that are designated single family residential. The application goes above and beyond any such previous and existing uses by our residents and is inconsistent with the Cloverly Master Plan that is guided by the protection of the watersheds and reinforces the low-density, rural character and residential stability of our neighborhood.

On May 8, 2019, Ms. Thomas supplemented her opposition with a "pre-hearing statement," in which she argues against both the conditional use application and the variance request (Exhibit 58). She also attached Opposition petitions signed by a number of neighbors (Exhibit 58(p); photographs of the area (Exhibits 58(a)-(h)); photographs of Applicant's trucks (Exhibits 58(i)-

(o)); and a sound video of Applicant's trucks moving past her home at 6 AM (Exhibit 58(q), the audio portion of which she played at the hearing (Tr. 253, 356). The substance of Ms. Thomas's statement is quoted below, followed by her photographs:

Please accept this letter as pre-hearing statement regarding conditional use case No. CU-19-04 and variance case No. A-6575, application of FM Group, Inc. d/b/a Francisco Landscaping.

I join dozens of residents who oppose application CU-19-04 on the grounds that the proposed use does not satisfy the necessary findings for approval.

The applicant established an illegal landscaping company without the benefit of conditional use approval. The operation has proceeded in an insidious manner; growth has been gradual since 2006, including continuous additional activity since the application was initially filed in September, 2018 as well as subsequent to the January 3, 2019 Planning Board hearing. The applicant shifts responsibility for their lack of due diligenceto business conducted and statements by previous owners (alleged statements are hearsay), and what they were told by the real estate agents. In addition, lack of sophistication in property ownership/land use is offered as justification to ignore the law. The Argueta's lack of understanding and ill advisement by those who lack the authority to circumvent State/County regulations and processes is unacceptable. Moreover, FM Group, Inc., Francisco Landscaping has been in operation for 30 years. They know better, but chose to take advantage of the community.

A historically black neighborhood with roots dating back to the 1800's, Holly Grove is nestled in the residential wedge of Cloverly, designated RE2C. The residential wedge is located in the upper Northwest Branch watershed within the regular protection area. The tertiary narrow asphalt roadway is intended for local use. Traffic volume is consistent with a rustic road; the road has rustic features such as small open space areas. The road is 14' wide with no shoulder. An objective of the Cleverly Master Plan is to "reinforce the strength of residential areas and to enhance the quality of life."

There are inherent and non-inherent effects associated with the operation of Francisco Landscaping in the Holly Grove community. This intense commercial establishment does not conform to the Cleverly Master Plan and is not compatible within this particular neighborhood.

- There have been no previously approved conditional use applications at 15400 Holly Grove Road, or within the neighborhood.
- The applicant failed to include mulch deliveries via semi-trailer trucks and loading of mulch consistently operated throughout the day, including pre-dawn hours, used property in Holly Grove not included on the application and otherwise ignored community expressed concerns related to speed and noise. These are not minor lapses; and are indicative of the fact that the Argueta's

continually operate with no regard for process, or the welfare of the men, women and children who actually live in Holly Grove.

- The location and configuration of the property present non-inherent effects. Holly Grove Road is an extremely narrow, dead end public road that does not adequately support an operation the size of Francisco Landscaping (size of fleet, number of employees, deliveries). The intersection of Holly Grove Road at Norwood Road is a Montgomery County Public School Bus stop. High School students walk to and from Blake High School. Residents enjoy walking, jogging and biking on the rural road. The shape of the property at 15400 Holly Grove Road is elongated; while the area covers just over six acres, the concentration of business operations, including loading trucks, mulch, etc., occurs at the narrow portion of the land. Noise is a serious concern for neighbors whose property abuts 15400, particularly residents of 15301, 15311, 15301, 15410 and 15406 Holly Grove Road. In addition to excessive noise, dust and fumes from mulch delivery and loading presents health issues. (Mr. Hudson, who lives at 15410, is on oxygen). The Johnson Road sub-watershed abuts the applicant property to the north; effects on the canopy and terrain have not been examined. Storm water run-off remains a serious concern, particularly in low lying areas. The road declines sharply at the intersection at Awkard Lane and Holly Grove Road. Recently, the Asa Mai Hindu Temple, located at the Awkard Lane/Holly Grove Rd. intersection, significantly increased imperviousness in the neighborhood with the addition of paved parking.
- Relative to the presumption of compatibility, the existence of Francisco Landscaping at 15400 Holly Grove Road, is detrimental to property values, creates a higher potential for pedestrian and vehicular accidents and poses deleterious health and welfare effects on those of us who live in the community.

Consistent with Cloverly Master Plan Land Use objectives, existing landscaping companies are located on major dual lane roadways within the commercial and agricultural zones (i.e. New Hampshire Avenue, Norwood Road, Layhill Road, Norbeck Road, Rt. 198). Approving the Francisco Landscaping operation within a designated single family, residential neighborhood, on an extremely narrow -dead end road, does not support the interests of public safety, health and welfare of the residents. In 1987, the Montgomery County Board of Appeals denied a special exception for a landscaping operation in the RE-2C Zone (Case No. S-1312, Horticultural Nursery located on Norwood Road). The Board concluded that the intensity and character of the activity would adversely affect and alter the predominately residential character of the neighborhood, and would be detrimental to the use, peaceful enjoyment of the surrounding properties and will cause objectionable noise and physical activity. While the configuration of Norwood Road and surrounding properties has significantly changed since 1987, Holly Grove Road to the south of Norwood Road has not.

Enclosed is visual evidence supporting my statement. Please consider the abiding goal of the Cloverly Master Plan designed to preserve scenic, historic characteristics of certain roads while making them safe. Thank you.

The opposition petition (Exhibits 58(p), 87 and 90), signed by numerous neighbors, contained the following statement:

We, the signers of this petition, strongly oppose the conditional use application for Francisco Landscaping to operate a landscape business at 15400 Holly Grove Road. This 6.18 acre parcel is located 1,250 feet southwest of the intersection of Norwood and Holly Grove Road and 315 feet southwest from the intersection of Holly Grove Road and Awkard Lane. A business of this magnitude is inconsistent with the Cloverly Master Plan in the RE-2C zone. There have been no previously approved conditional uses in this designated single family residential neighborhood. Further, this use raises environmental concerns with respect to imperviousness within the Johnson Road sub-watershed of the Northwest Branch watershed, as well as noise and air quality concerns. Holly Grove Road is a narrow, rural roadway that is not designed nor intended for large volumes of industrial trucks, trailers and equipment.

We urge the Montgomery County Planning Board and Montgomery County Council to reject this conditional use request and enforce the Cloverly Master Plan that is guided by the protection of watersheds, and reinforcement of the low-density rural neighborhood character and residential stability of the community.

Ms. Thomas and other neighbors testified at the OZAH hearing in opposition to the proposed conditional use (Patricia Thomas, Judy Mauldin, Mary Hemingway, Charleen Moore, Ola Theresa Myers and Carolyn Awkard). Three Neighbors – Patricia Thomas, Judy Mauldin and Mary Hemingway – filed post-hearing submissions.

Finally, one neighbor, Mary Hemingway, submitted an opposition to the Applicant's variance request (Exhibit 101), and testified accordingly (Tr. 306-319). The issues surrounding the variance request will be addressed in Part V of this Report, but in this part of the Report, we address the issues raised in opposition to the conditional use application – allegedly non-inherent adverse impacts on imperviousness, the watershed, noise, air quality, traffic safety relating to the narrowness of Holly Grove Road, Master Plan compliance, commercialization of a residential community, compatibility, and property values.

2. Legal Standard for Analyzing the Issues Raised by the Opposition

At the outset, we must recognize that the decision on a zoning application “is not a plebiscite,” and the Hearing Examiner must evaluate this case based on the evidence, not on a

nose-count of those for and against. *Rockville Fuel v. Board of Appeals*, 257 Md. 183, 192, 262 A.2d 499, 504 (1970). It is not the Hearing Examiner's function to determine which position is more popular, but rather to assess the Applicant's proposal against the specific criteria established by the Zoning Ordinance. Unsupported dislike and fear of a project is not evidence. *Id.*, 257 Md. at 193.

On the other hand, where there is evidence of unusual site conditions or extensive testimony about the use's impacts on the neighbors, that evidence must be weighed against the Applicant's evidence, and it is the Applicant that "has the burden of proof by a preponderance of the evidence on all questions of fact." Zoning Ordinance §59.7.1.1. The Hearing Examiner must base his decision on conditions at the particular site involved, and not on the fact that some better conditions might be available for this type of use elsewhere in the County. This standard, as established by the courts, "requires that the adverse effect "inherent" in a proposed use be determined without recourse to a comparative geographic analysis. *People's Counsel v. Loyola*, 406 Md. 54, 105, 956 A.2d 166,197 (2008).

The Hearing Examiner will address the various concerns raised by the neighbors, but his main focus is on the unusual site condition of site access being limited to a single, narrow, dead end road shared by numerous residents living along Holly Grove Road and Awkard Lane, all of whom must use Holly Grove for access to their own homes.

In many ways, this a very close case. If we were considering just the changes proposed to the current landscaping operation, then the proposed changes alone would not have significant adverse impacts on the community. In fact, the additional screening, stormwater management and reduced imperviousness would be positive effects.

However, this case should not be considered in that fashion just because the landscape contractor has been operating on the site for 13 years. It was operating for that period without the

required conditional use, and while that fact is not counted against the Applicant in evaluating this application, it also cannot create an advantage for the Applicant. Rather, we must evaluate this application as if the entire operation is first being proposed for this site now.

Considering this application as a proposal for a new use on the site, we must determine whether it would be compatible with the surrounding residential neighborhood and would comport with all the Zoning Ordinance standards for a conditional use. Landscape contractors are expected to make some noise, create some traffic and have other effects on the neighborhood. Those expected effects are inherent in the type of use, and cannot, without more, be the basis for denial of this application. Zoning Ordinance §59.7.3.1.E.1.g.

On the other hand, because of operational or specific site conditions, some landscape contractors may have greater impacts on a neighborhood than are typically expected for this type of use. Those kinds of effects are considered non-inherent impacts and they can serve as the basis for denial of the application. Zoning Ordinance §59.7.3.1.E.1.g. and *Montgomery County v. Butler*, 417 Md. 271, 9 A.3d 824 (2010). As the court stated in *Butler*, 417 Md. at 308, 9 A. 3d at 846:

To be sure, considering that the County Code plainly allows landscape contractors to locate in residential areas in the RDT zone by special exception, such a special exception application cannot be denied simply because the lot upon which the proposed use will be located is adjacent to residences. The denial of the application, however, was supported by substantial evidence that the narrowness of Butler's lot, the configuration of the commercial enterprise activities and installations on the lot, and the proximity of the commercial activities to adjacent properties were sufficient non-inherent adverse effects to persuade the Board to deny the application.

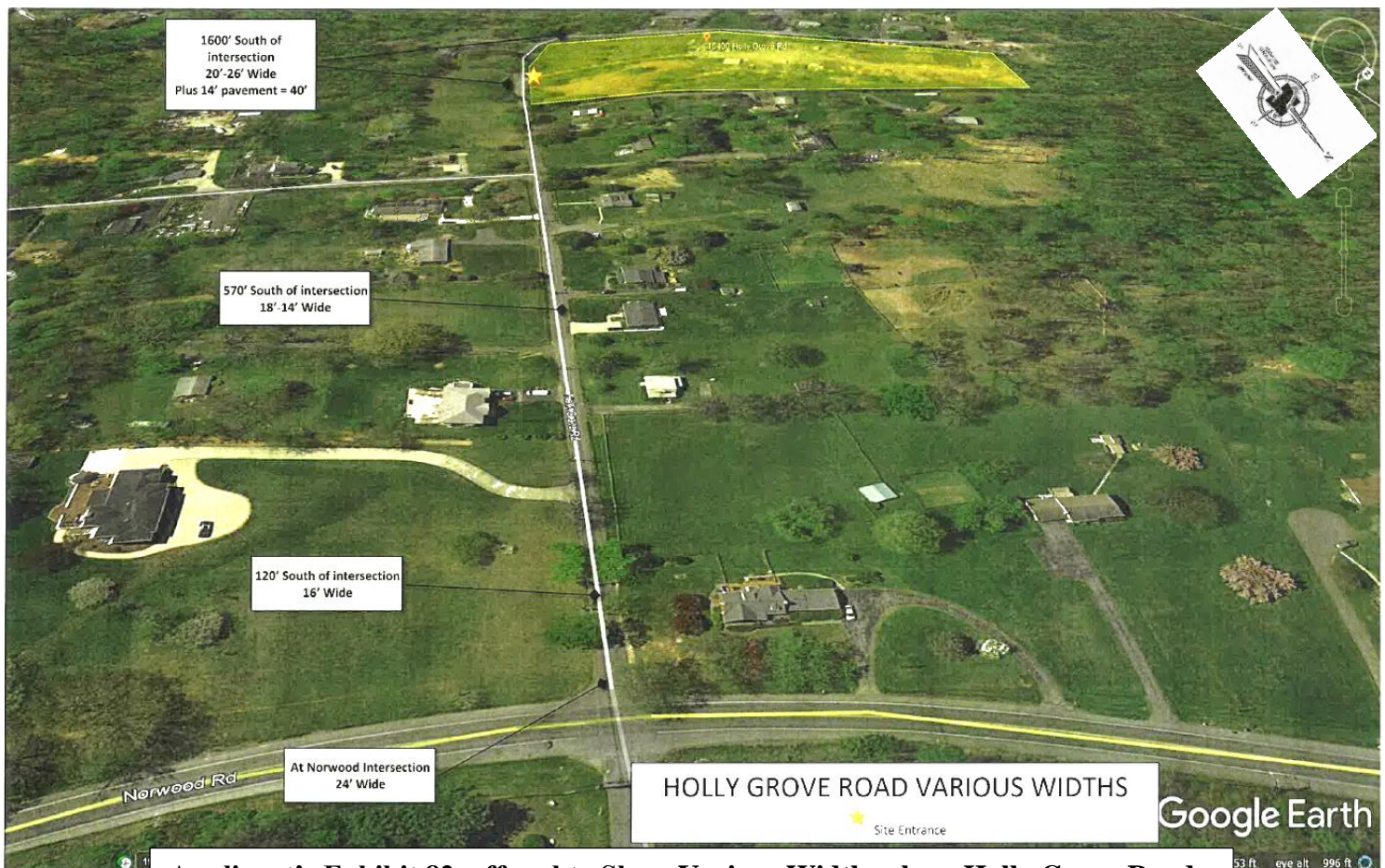
We turn now to the concerns raised about traffic safety on the narrow Holly Grove Road.

3. The Narrowness of Holly Grove Road and Traffic Safety

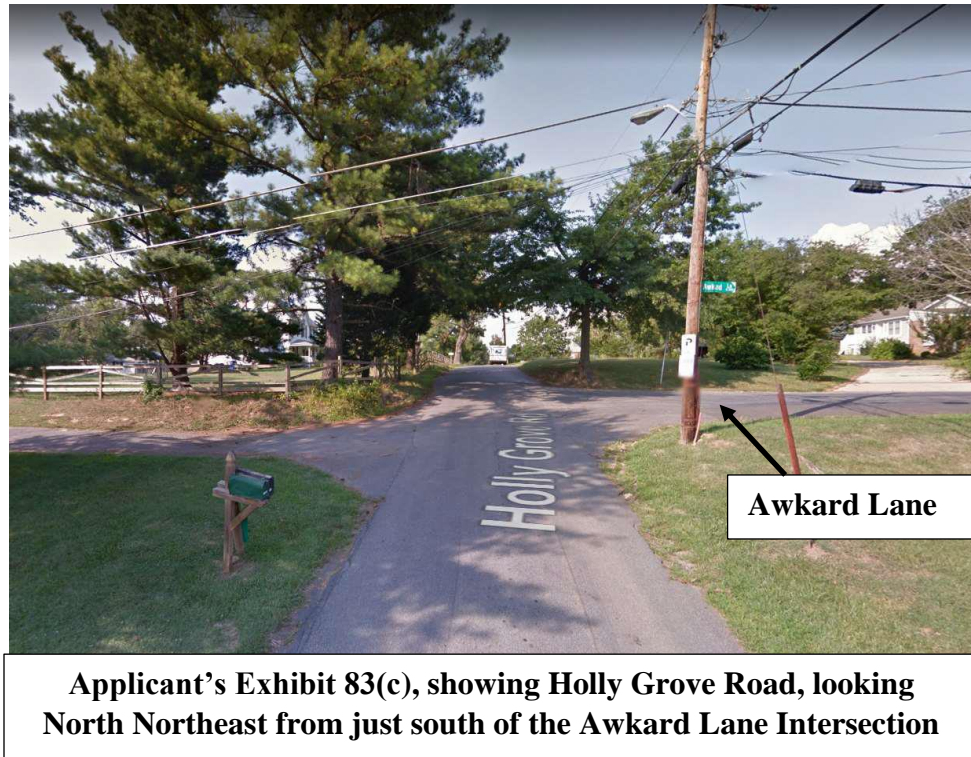
The subject site's only access is from Holly Grove Road, which is described in the 1997 Cloverly Master Plan as “. . . a narrow (14 feet) asphalt road with no shoulder extending approximately 2,000 feet south of Norwood Road.” (MP, p. 58). As stated by Applicant's transportation expert, Shahriar Etemadi, the roadway is actually a “prescriptive right-of-way,”

which means “. . . each property owner on each side of the road owns the land to the center of the road it is a right-of-way that is not owned by government, but government is using it as a road and maintains it.” Tr. 304-305.

The Applicant presented testimony and photographic evidence in an effort to show that Holly Grove Road, which is only 14 feet wide along most of its run from the site to Norwood Road, has a low volume of traffic and stretches that are wider than 14 feet, especially if one considers grassy areas to the sides of the road (Testimony of the Applicant’s transportation expert, Shahriar Etemadi (Tr. 179-223); Exhibits 37(a) and 37(b)(i)-(v); and Exhibits 40 (Attachment C, Second Document), 82, 83(a)-(e), 109 and 110). Applicant’s aerial photo allegedly showing “Holly Grove Road Various Widths” (Exhibit 82) is reproduced below, followed by Applicant’s photo of Holly Grove Road, looking north northeast from just south of Awkard Lane (Exhibit 83(c)):



Applicant’s Exhibit 82, offered to Show Various Widths along Holly Grove Road



Applicant's contention regarding varying road widths is, to a large degree, supported by Technical Staff's June 20, 2019 response (Exhibit 111) to the Hearing Examiner's inquiry. Staff indicated that while there are no shoulders along Holly Grove Road, the width of the paved area widens in some spots and that there are grassy areas running adjacent to the pavement that serve as pull-off areas. Deeds examined by Staff of some properties along Holly Grove Road indicate that Holly Grove Road is 20 feet wide (though obviously it is not paved along the entire width).

The opposition hotly disputes the assertion that Holly Grove Road has a shoulder or has legally usable pull-off areas. *See* the testimony offered by Ms. Thomas (Tr. 240-261) and Ms. Mauldin (Tr. 261-292). Their point was well summed up by Ms. Thomas (Tr. 241):

I would submit to you that there are flaws in the reports from Park and Planning and from the traffic report that we just heard. They visited our community on two occasions. One in the summer and one in the fall. It does not really provide an opportunity to really paint the picture of what is occurring in terms of traffic and pedestrian use in Holly Grove. Again, the road is narrow. It's -- for the most part, it's 14 feet wide. These reference to pull offs are driveways on people's property. It's a narrow road with no shoulder. It's a dead end road. And again, residents on Awkard Lane also need to access Holly Grove to get out of the community. There is

absolutely, significant particularly this time of year, pedestrian use. Children, again, are walking to the bus stop at the intersection of Norwood Road and Holly Grove Road. And there are a number of children in the neighborhood. And hopefully there will continue to be children in the neighborhood as it grows.

Ms. Thomas noted that the Applicant's traffic expert, Shahriar Etemadi, visited the neighborhood only twice,⁷ while she observes the activities in the neighborhood every day and therefore has a better sense of the safety issues posed by the Applicant's truck traffic, including danger to pedestrians. Tr. 247-249.

Ms. Mauldin testified that the landscape contractor use has “. . . a negative effect on the neighborhood and the community in terms of the ability for the reasonable use, for us to use and enjoy the road . . .” Tr. 264. She also complained of noise, traffic safety and “the nuisance of it all. . .” Ms. Mauldin further testified that Mr. Etemadi's description of Holly Grove Road was inaccurate (Tr. 275-276):

I'm looking at November 8, 2018, and in the report, where it states that “Holly Grove is provided with excellent, and then more sufficient sight distance clearance at its intersection with Norwood Road and other intersecting made along its length, and at least a seven-foot grass shoulder is provided on each side of the road.” That doesn't exist. And in my pictures it will show that the grass is actually lawns. And there is absolutely no shoulder whatsoever. . . . So you could see that . . . the trucks are wider than eight feet. . . . Again, the road is pretty much consistently 14 feet, and when you're widening it, again, you're going into other people's property, or the apron of a driveway.

The plat for 15520 Holly Grove Road (the home of Ms. Mauldin's mother, Ms. Jean Moore), shows Holly Grove Road as a “14' Asph. Road.” Exhibit 121. Ms. Mauldin's chief concern is summed on Tr. 279-280, “And so just to have to navigate and compete with these trucks, it worries me to death. And so that is a safety issue that greatly concerns me. . . . And there are other people that are just as active in using the road. And so they are competing with very large trucks, not just commercial trucks, but again, even sometimes the deliveries.” She also testified that, in an email exchange between members of the Planning Department Staff, 5 crashes were

⁷ Mr. Etemadi admitted that he had been to the subject site only twice. Tr. 189-190.

noted involving Holly Grove Road. Tr. 283-285. The Hearing Examiner located the December 6, 2018 email exchange in Attachment D to Technical Staff's initial report (Exhibit 40). Although 5 crashes were mentioned in the email sent at 11:06 AM, a follow-up email sent at 1:00 PM on the same date reveals that "there are not crashes on the segments [of Holly Grove Road] south of Norwood." Since the segment of Holly Grove Road that concerns us is the one south of Norwood Road, the Hearing Examiner does not consider the data about the referenced 5 crashes to be relevant evidence in this case. It is relevant that there have been no crashes reported in the last 10 years along the segment of Holly Grove Road south of Norwood Road; however, this information is not dispositive of the safety issue on the road. The question before the Hearing Examiner is whether he should approve a use that appears from the photos, the evidence of truck widths and the testimony of neighbors, to present a danger to the neighbors of future accidents along Holly Grove Road, or at the very least, an undue burden on the neighbors' usage of that shared roadway.

One neighbor, Charleen Moore, testified that there is a significant grade differential on Holly Grove Road which affects visibility and (Tr. 101-103):

vehicles . . . coming out of Awkard Lane, or even going, you know, further south on Holly Grove, you have to be extraordinarily cautious, because cars and vehicles occupy the center of the road. It's not a two-lane road.

Her testimony is supported by the observations of Ms. Thomas, who indicated that when she exits her driveway at 15510 Holly Grove Road (approximately 570 feet south of Norwood Road), she "cannot see traffic approaching the hill heading north." Exhibit 119.

In addition, Ms. Mauldin promised at the hearing that she would produce photographs showing conditions on Holly Grove Road, including views of pedestrians and joggers actually using the road. Tr. 262. She did so, filing 80 photographs, which are incorporated into Exhibit 97(a). Some of them, showing bicyclists and pedestrians (Exhibits 97(a)(24), 97(a)(28) and 97(a)(30)) are reproduced below, along with pictures supplied by Ms. Thomas and incorporated

into Exhibit 58(c), 58(e) and 58(h). The point is that Holly Grove Road is, in fact, used by pedestrians, and it cannot be disputed that the only vehicular access for the homes along Holy Grove Road and Awkard Lane is by using Holly Grove Road.



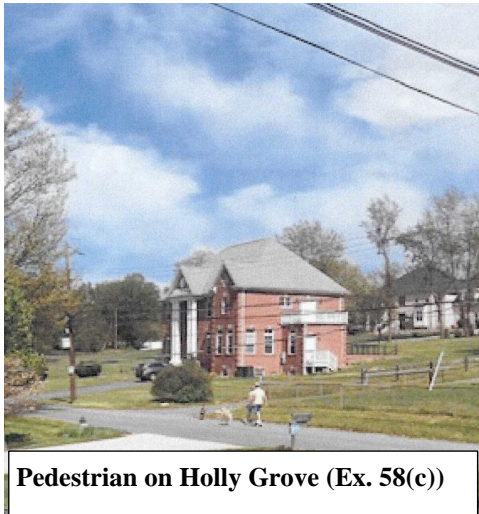
Bicyclists on Holly Grove (Ex. 97(a)(24))



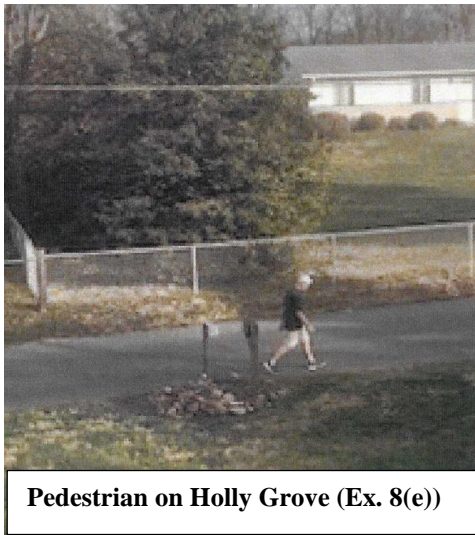
Pedestrians on Holly Grove (Ex. 97(a)(28))



Pedestrians on Holly Grove (Ex. 97(a)(30))



Pedestrian on Holly Grove (Ex. 58(c))



Pedestrian on Holly Grove (Ex. 8(e))



Pedestrians on Holly Grove (Ex. 58(h))

Technical Staff found, and the Hearing Examiner agrees, that “the fact that the [subject] property fronts on and is accessed from a local road with a paved width of about 14 feet . . . [is] a non-inherent characteristic.” Exhibit 40, p. 28. Although Staff concluded that “this non-inherent characteristic does not rise to a level that warrants a denial” (Exhibit 40, p. 28), the Hearing Examiner disagrees with that assessment based on all the evidence and testimony in this case, some of which postdated Staff’s evaluation.

Technical Staff confirmed that there are approximately 20 homes, including the subject property, accessed from Holly Grove Road southwest of Norwood Road between the southwest side of Norwood Road and the main access to the subject property. Exhibit 56, pp. 7-8. However, Staff concluded that the Applicant's ongoing business "doesn't appear to cause an increased negative impact on the safety of residents in the area," based on sight distances, the existence of some pull-off areas along the road, the relative infrequency of traffic (vehicular or pedestrian), the timing of traffic produced by the Applicant's business and the absence of reported accidents in the last 10 years, Exhibit 56, pp. 7-8.

We realize that the only expert evidence in this case (Technical Staff's evaluation and the testimony of the Applicant's transportation expert, Shahriar Etemadi) concluded that the Applicant's conditional use could operate safely on the existing roads. As stated by Mr. Etemadi (Tr. 186), "I have concluded that this road provides for a safe and efficient operation of traffic. . ."

Technical Staff recognized the concerns expressed by the opposition in its Supplemental Report (Exhibit 56, p. 6): "Truck traffic and the danger that it poses to residents and children, and unregulated time of arrivals of delivery trucks are concerns expressed by the neighbors." However, the only condition Staff recommended adding in its Supplemental Report would have addressed noise concerns, but not safety and inconvenience issues, by limiting the arrival times of semi-trucks delivering mulch to between the hours of 10:00 am and 2:00 pm, during prime mulch season. The Planning Board recommended putting a specific weight limit on those mulch-carrying trucks, but neither Staff's proposed condition, nor the Planning Board's recommended version, would really address the traffic safety and inconvenience concerns raised by the community.

Although the Hearing Examiner respects the expert evidence in this case, he is not bound by it. As stated by the Maryland Court of Special Appeals in *Walker v. Grow*, 170 Md. App. 255, 275, 907 A.2d 255, 266 (2006),

Even if a witness is qualified as an expert, the fact finder need not accept the expert's opinion. To the contrary, "an expert's opinion is of no greater probative value than the soundness of his [or her] reasons given therefor will warrant." *Surkovich v. Doub*, 258 Md. 263, 272, 265 A.2d 447 (1970) (quoting *Miller v. Abrahams*, 239 Md. 263, 273, 211 A.2d 309 (1965)). The weight to be given the expert's testimony is a question for the fact finder. "The trier of fact may believe or disbelieve, accredit or disregard, any evidence introduced. We may not - and obviously could not - decide upon an appeal how much weight must be given, as a minimum to each item of evidence." *Great Coastal Express, Inc. v. Schruefer*, 34 Md. App. 706, 725, 369 A.2d 118 (1977) (citations omitted). Accord *Edsall v. Huffaker*, 159 Md. App. 337, 342, 859 A.2d 274 (2004).

Specifically, in cases related to zoning issues, the Maryland courts have made it clear that the fact finder may reject the opinions of experts and the Technical Staff regarding traffic conditions, when faced with testimony from local residents about dangerous traffic conditions around the subject site. Two excellent examples are decisions of the Maryland Court of Appeals in *Montgomery County v. Laughlin*, 255 Md. 724, 259 A.2d 293 (1969) and in *Tauber v. Montgomery County Council*, 244 Md. 332, 223 A.2d 615 (1966).

In the subject case, however small the traffic volume, there is a legitimate safety concern about large trucks sharing a 14-foot wide road with small cars and pedestrians. The size of some of the trucks compared to the width of Holy Grove Road is well illustrated by two photos taken by Ms. Mauldin and reproduced below (Exhibits 97(a)(7) and 97(a)(9)). They show mulch delivery trucks entering Holly Grove. The blue truck is clearly leaving the subject site, which bears the OZAH notice signs:



Mulch Truck (Exhibit 97(a)(7))



Mulch Truck (Exhibit 97(a)(9))

Other photos show the Applicant's trucks occupying most of the width of Holly Grove Road (Exhibits 97(a)(13), 97(a)(15), 97(a)(29) and 58(k)):



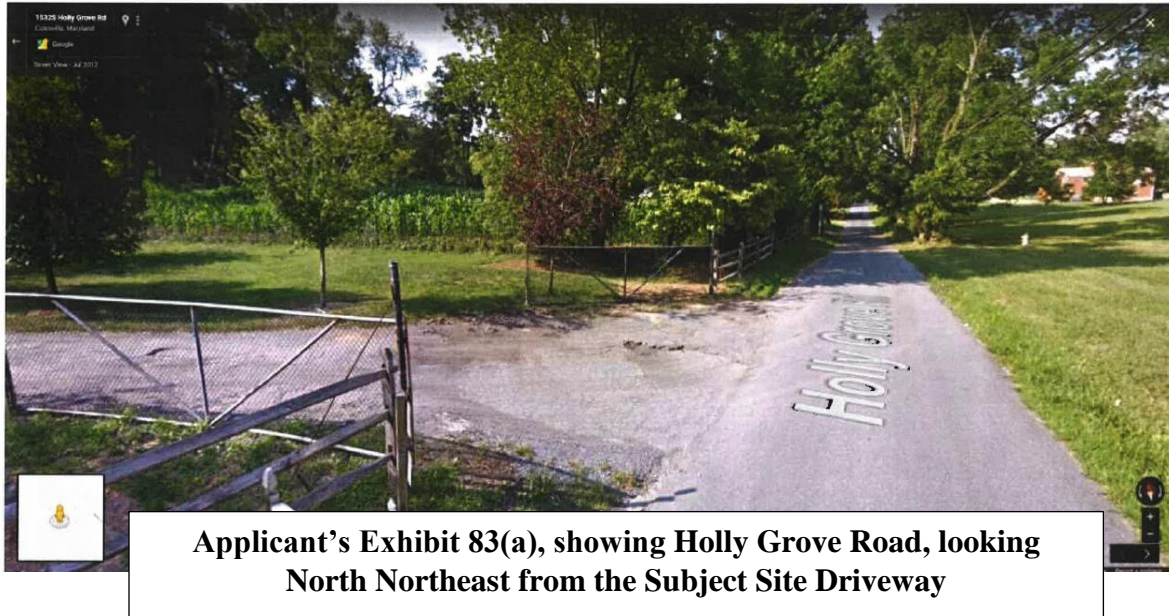
The Hearing Examiner is not aware of any case in which a special exception or conditional use was granted to a landscape contractor in a residential area with access only from a road as narrow as Holly Grove Road that had to be shared with local residents, who also had no other access except that same narrow, dead end road. The Hearing Examiner gave the Applicant the opportunity to cite to any such case, but its counsel was unable to do so. Exhibit 104. The cases he mentioned, except one, were not on point. The one arguably relevant case he mentioned was CU 18-06, *Goshen Enterprises*, where this Hearing Examiner granted a landscape contractor conditional use located on two rustic roads, Zion Road and Riggs Road. Applicant's counsel noted that "rustic Zion Road is 12 to 14 feet in width from Riggs Road to Sundown Road." What counsel failed to note was that access to that site was limited to Zion Road, which was much wider at that point, and the conditional use was granted subject, *inter alia*, to the following conditions, intended to avoid having large trucks using narrow roadways:

3. The conditional use must not use Riggs Road for access except in emergencies.
4. All vehicles with more than four wheels that are associated with the Applicant's business, including those belonging to employees, must not travel north on Zion Road from the property. All trucks must enter the property from the south.

Condition 4 required any large trucks to head **away** from Sundown Road, thus preventing trucks from using the narrow stretch of Zion Road north of the Goshen landscaper site on Zion Road.

The trucks being used by the Applicant in the case at bar range from 8 feet in width to 9 feet in width, when counting the side view mirrors. Exhibit 110. Since the mirrors must clear any oncoming vehicles, the Hearing Examiner includes them in his calculation of width. Looking at the opposition's photos reproduced on the previous page, it seems rather obvious that the Applicant's trucks cannot safely pass another vehicle going in the opposite direction along much of, if not most of, the stretch of Holly Grove Road from the subject site to Norwood Road.

Applicant's own photo, submitted as Exhibit 83(a) and reproduced below, demonstrates the narrowness of Holly Grove Road:



Since ALL the residents living in houses along Holly Grove Road and Awkard Lane have no alternative but to use Holly Grove Road to exit their neighborhood, the Hearing Examiner finds that the narrowness of Holly Grove Road is a non-inherent adverse site condition that poses a significant potential danger to the Applicant's neighbors, as well as an undue burden upon their use of the roadway. Ms. Mauldin said it well in her final submission (Exhibit 121, p. 2), "... Holly Grove Road and Awkard Lane are dead end streets and these residences are technically land locked without this right of way."

It is not sufficient that there may be some grassy areas or driveway aprons along Holly Grove Road that can be used as emergency pull-offs. If a neighbor's car does not have one of those areas readily available when it encounters the Applicant's trucks going in the opposite direction on Holly Grove Road, there is a potential danger and certainly there is a legitimate cause for apprehension. Based on these findings, the Hearing Examiner denies the subject application.⁸

⁸ There is an interesting legal question which the Hearing Examiner did not find necessary to decide --whether the Applicant can count on the "pull-off areas" along Holly Grove Road as part of its accessible right-of-way since by all

4. Other Opposition Concerns

In addition to the issues of traffic safety and undue burden on the neighbors' usage of the shared roadway, discussed above, the opposition asserts that the proposed conditional use will have non-inherent adverse impacts on imperviousness, the watershed, noise, air quality, Master Plan compliance, commercialization of a residential community, compatibility, and property values.

The problem with most of the opposition's concerns is that the adverse effects they fear (*i.e.*, some noise, some commercialization and air quality issues) are largely inherent in this type of use (Tr. 153-154), and the Zoning Ordinance permits this type of use in this residential zone. Whether or not that is wise is not up to the Hearing Examiner; it is a policy decision for the Council. Inherent adverse effects alone are not a basis for denial of a conditional use application under Zoning Ordinance §59.7.3.1.E.1.g., as discussed in Part III of this Report and Decision.

Other feared results (*e.g.*, stormwater runoff issues and increased imperviousness, with resultant environmental impacts) are refuted by the evidence in this case. Stormwater runoff to neighboring land would be addressed for the first time on this site with Environmental Site Design and would, in fact, be reduced. See discussion in Part II.D.2. at p. 30 of this Report and Decision. Imperviousness would be reduced to levels consistent with Master Plan recommendations, as discussed in Part II.D.2. at pp. 28-29 of this Report and Decision, notwithstanding the arguments of Quentin Remein, President of the Cloverly Civic Association (Exhibits 91, p. 5 and Tr. 330.)

the evidence, these areas belong to the property owners abutting the roadway, not to the Applicant. Zoning Ordinance §59.7.3.1.B.1.b. provides the following requirement for conditional use application, among others:

b. If any land or right-of-way is owned or controlled by the State, County, or any other entity or agency, written authorization from that entity or agency must be submitted with the application.

This provision mentions not just land but also any "right-of-way" to be used in the conditional use. There is no evidence in this case that the owners of the land abutting Holly Grove Road have given their permission to use their land adjacent to the roadway, as distinguished from the roadway itself, which is useable as a prescriptive right-of-way. The Hearing Examiner does not rely on this provision in reaching his decision because it can be reasonably interpreted to be referencing only land and rights-of way on the subject site, not those along the roadway leading up to the site; however, it does raise an interesting legal issue not addressed by the Applicant or Technical Staff in this case.

As is discussed in Part III of this Report and Decision, the proposed conditional use does not violate the recommendations of the applicable Cloverly Master Plan, and except to the extent the narrowness of Holly Grove Road creates non-inherent site conditions, the proposed use in and of itself is typical of a well-screened landscape contractor as permitted by the Zoning Ordinance and therefore cannot be considered incompatible with the surrounding area. In fact, with the Forest Conservation Plan approved by the Planning Board (Exhibit 75), significant afforestation and other screening will further reduce visual impacts on the neighbors. Tr. 157. Nor is there evidence that it would impact property values in any way different from the type of landscape contractor permitted by the Zoning Ordinance in this zone. Tr. 157-158. It must also be remembered that the County Council has elected to permit landscape contractors in the RE-2C Zone if they fulfill the requirements for a conditional use.

At the hearing, the opposition made it clear that they did not favor the Planning Board's proposed community liaison condition (Tr. 255). Moreover, the Cloverly Civic Association's President stated that the Cloverly Civic Association does not meet monthly, and he feels that the Civic Association "[doesn't] have the resources to be involved" in the proposed community liaison process, and it "wouldn't be feasible." Tr. 325-327. Given this circumstance, the Hearing Examiner would not have imposed the proposed community liaison condition even if he had approved the conditional use. Whatever the wisdom of such a community liaison process, the Hearing Examiner has no authority to impose conditions on any party other than the holder of the conditional use.

In sum, for the reasons set forth above and in Part III of this Report and Decision, the Hearing Examiner finds that none of the points raised by the opposition, other than the unusual narrowness of Holly Grove Road and the fact that it is the sole access for the Applicant and those living in the neighborhood, requires denial of the conditional use application.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW ON CONDITIONAL USE

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. General standards are those findings that must be made for all conditional uses. *Zoning Ordinance*, §59.7.3.1.E. Specific standards are those which apply to the particular use requested, in this case, a landscape contractor business. *Zoning Ordinance* §59.3.5.5.

Weighing all the testimony and evidence of record under the “preponderance of the evidence” standard specified in *Zoning Ordinance* §59.7.1.1, the Hearing Examiner concludes that the conditional use proposed in this application would not satisfy certain prerequisites for approval of the use.

A. Necessary Findings (Section 59.7.3.1.E.)

The general findings necessary to approve a conditional use are found in Section 59.7.3.1.E of the Zoning Ordinance. Standards pertinent to this review, and the Hearing Examiner’s conclusions for each finding, are set forth below:⁹

E. Necessary Findings

1. To approve a conditional use application, the Hearing Examiner must find that the proposed development:

a. satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended;

Conclusion: Staff advises that there are no previous conditional use approvals for the property (Exhibit 40, p. 20), and therefore this standard is inapplicable.

b. satisfies the requirements of the zone, use standards under Article 59-3, and to the extent the Hearing Examiner finds necessary to ensure compatibility, meets applicable general requirements under Article 59-6;

⁹ Although §59.7.3.1.E. contains six subsections (E.1. through E.6.), only subsections 59.7.3.1.E.1., E.2. and E.3. contain provisions that apply to this application. Section 59.7.3.1.E.1. contains seven subparts, a. through g.

Conclusion: This subsection requires an analysis of the standards of the RE-2C Zone contained in Article 59-4; the use standards for a Landscape Contractor in Article 59-3; and the applicable development standards in Article 59-6. Each of these Articles is discussed below in separate sections of this Report and Decision (Parts III. B, C, and D, respectively). Based on the analysis contained in those discussions, the Hearing Examiner finds that the application could satisfy the requirements of Articles 59-4 and 59-6, with appropriate conditions of approval, but it cannot meet the setback requirements of Section 59.3.5.5.B.2.

c. substantially conforms with the recommendations of the applicable master plan;

The property lies within the geographic area covered by the *1997 Cloverly Master Plan* (Master Plan or Plan). It is within an area designated the “Residential Wedge” and within the “Northwest Branch Watershed.” Technical Staff provided the following discussion of the Master Plan (Exhibit 40, p. 10-11):

The Master Plan, discusses the Residential Wedge and states that, “the RE-2C zone was applied to properties of sufficient size to provide substantial amounts of open space or properties within the historically African American community of Holly Grove where lot sizes are generally smaller than 2-acre minimum of the RE-2 Zone.” (p. 21)

The Master Plan also provides guidelines for special exceptions (now Conditional Uses) in the Residential Wedge Communities. The following guidelines (p. 37) are applicable to the subject property and the proposed use:

- *Maintenance of a residential appearance, where feasible.*
- *Compatibility with the scale and architecture of the adjoining neighborhood, consistent with the proposed use.*
- *The impact of signs, lighting, and other physical features on surrounding residential communities.* No signs exist or are proposed. No new lighting is proposed with this use.
- *Location of parking, loading, and other service areas to maintain residential appearances to the extent feasible.*
- *Options for landscaping that minimize the non-residential appearance of the site and the view from surrounding properties and roads. It is preferable for landscaping to reinforce Cloverly’s rural character and be consistent with the streetscape standards (page 49).*

The existing single-family house on the site will not change with this application. The residential structure that was constructed in 1989 preexisted the landscape contractor business and is a two-story single-family dwelling with a basement. The activities associated with the landscaping contractor use were established before the current Applicant purchased the property in 2005. All landscape contractor activities will occur in the rear yard of the property. In addition, these operations will be screened and buffered from surrounding neighbors by existing and proposed landscaping and tree conservation areas.

The accessory structures associated with the landscape contractor use are of a height and dimension that is consistent with those in the neighborhood and are in the interior of the property, hidden from the views from the street as well as from the residents of neighboring properties. All parking, loading, and other services are in the rear yard with distance and screening in the form of afforestation and landscaping providing substantial buffer.

Technical Staff concluded that “The subject use conforms to the recommendations of the applicable Master Plan.” Exhibit 40, p. 22.

Somer Cross, the Applicant’s land planner, also testified that in her opinion the proposed use conforms to the recommendations of the Cloverly Master Plan.

Conclusion: The Hearing Examiner agrees that the use would comply with the *1997 Cloverly Master Plan* for the reasons given by Staff. The issue of imperviousness raised by the opposition in regard to the Master Plan was discussed in Part II.D.2. of this Report and Decision. As indicated there, Technical Staff found the reduction in imperviousness to 13.8 percent to be sufficient in that it matches the impervious level of the Johnson Road tributary. It is also well within the 10-15 percent impervious level suggested for this area by the Cloverly Master Plan.

The Hearing Examiner also finds that the combination of existing screening and new landscaping and afforestation would significantly minimize the commercial aspects of the use, in accordance with the Plan’s recommendations for special exceptions.

d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan;

Technical Staff concluded that with the conditions it recommended, the proposed use would be in harmony with the general character of the neighborhood. (Exhibit 40, p. 22):

The Conditional Use Site Plan and the Landscape and Lighting Plan provide for extensive landscaping and adequate setbacks meeting code requirements.

The Conditional Use Site and Landscape Plans provide for extensive landscaping, adequate setbacks, green areas (in the form of lawns and private gardens), new afforestation areas and sufficient building setbacks. There is extensive buffering, in the form of landscaping, afforestation, and fencing between the nearest residential properties and the proposed use.

The Applicant [originally] propose[d] 19 employees, including three family members of whom two handle the administration part of the business. Staff recommends that the total number of employees to remain unchanged from the current 15 to maintain the family-run business nature of the use at scale that doesn't impose change to the existing semi-rural character of the immediate neighborhood. There is a single-family dwelling on the property that is occupied by one of the three family members working in the business. However, there is no office on site or within the existing residential dwelling. The Applicant has indicated that two of the three family members manage the business electronically via telephone and computers off site. The number of employees varies seasonally, with the largest number of employees being present during the spring, fall and summer seasons.

Due to the nature of the use, the restricted hours of operation, and with staff recommended condition that the existing use remain at its current level of operation, it is unlikely that the proposed use will generate a level of traffic or noise that will adversely affect the residential neighborhood.

Conclusion: The Hearing Examiner generally agrees with Staff that, given the extensive screening around the site, the view of the proposed use will not alter the character of the surrounding neighborhood and is not inconsistent with the Master Plan's environmental safeguards. However, as discussed at length in Part II.E.3 of this Report and Decision, the Hearing Examiner finds that the proposed use's location on a narrow, dead end road, which is the only source of access for all the residents on Holly Grove Road and Awkard Lane south of Norwood Road, means that the proposed use cannot operate harmoniously with the surrounding residential neighborhood.

e. will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area;

In response to this provision, Technical Staff opined that “It is not likely that the approval of the subject Conditional Use would adversely affect the predominantly semi-rural nature of the area. In fact, it is more likely that the operation will not be visible from any adjacent property or road.” Exhibit 40, p. 24. Staff also noted:

There is one approved Conditional Use (Special Exception) within the neighborhood boundary as defined by staff. The use was first approved in 1970 for animal boarding by CBA 2822, amended to add a Kennel for Dogs, in 1972 by S-142 and to increase the size of the property to five acres in 1973. The conditional use doesn’t appear to be currently active. It is not likely that the approval of the subject Conditional Use would adversely affect the predominantly residential area, nor would it represent an over concentration of Conditional Uses in the immediate neighborhood.

Conclusion: The Hearing Examiner agrees with Staff as to the fact that the use would be adequately screened, and except for the narrow road upon which it is situated, the use would not alter the residential nature of the area any more than is contemplated in the Zoning Ordinance’s allowance of landscape contractor conditional uses in this zone. Moreover, the number of conditional uses in the area is not sufficient, in and of itself, to affect the area adversely. As previously stated, the Hearing Examiner finds that the use would substantially comply with the *1997 Cloverly Master Plan* for the reasons given by Staff.

f. will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required; and:

i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; or

ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be

served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; and

Conclusion: Technical Staff indicates that the application would not require approval of a new preliminary plan of subdivision. Exhibit 40, p. 25. Therefore, the Hearing Examiner, must determine whether the proposed development will be served by adequate public services and facilities. Staff addressed each of the listed public facilities and services (Exhibit 40, pp. 25-27), and except for the issue of transportation facilities, the Hearing Examiner agrees with Staff and adopts its findings, which are set forth below. The issue of transportation facilities was addressed extensively in Part II.E.3. of this Report and Decision, and based on that discussion, the Hearing Examiner finds that the available transportation facilities are not adequate in this case due to the narrowness of Holly Grove Road and the fact that it is a dead end road that must be used by all the residents of Holly Grove Road and Awkard Lane south of Norwood Road in order to access their residences.

As to the other public services and facilities, Technical Staff stated, and the Hearing Examiner agrees (Exhibit 40, pp. 25-27):

(a) Water and Sewer Service

The property is served by well and a septic disposal system. The well serves the existing dwelling and will continue to do so. The Applicant explained that the contractor business doesn't have an office on the property and that the use of the residential structure remains as a private dwelling. The existing septic system has been determined to be sufficient to serve the residential dwelling.

(b) Storm Water Concept Plan

The stormwater management concept plan had been submitted to the MCDPS Water Resource Section. MCDPS has posted on its web site an Approved Storm Water permit dated December 20, 2018. . . .

(c) Transportation

* * *

[For the reasons stated above, the Hearing Examiner does not agree with Staff on this issue.]

Fire Access

The Applicant submitted a fire access plan to the MCDPS, Fire Department Access and Water Supply Office. The Office approved the proposed fire access plan on November 1, 2018 . . .

(d) Other Facilities

The Hillendale Volunteer Fire Department is located at 13216 New Hampshire Ave, Colesville approximately 3.4 miles (seven minutes) south of the property. The closest police station is located at 1002 Milestone Dr. White Oak, Maryland, 3.7 miles south of the property.

Due to the nature of the Conditional Use, it does not generate any school aged children; therefore, school facilities review is not necessary.

Based on this evidence, the Hearing Examiner finds that public facilities and services are adequate to serve the proposed use, except for transportation facilities.

g. will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:

- i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;*
- ii. traffic, noise, odors, dust, illumination, or a lack of parking; or*
- iii. the health, safety, or welfare of neighboring residents, visitors, or employees.*

Conclusion: This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood.

Inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations.” Zoning Ordinance, §59.1.4.2. Non-inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site.” Id. As specified in §59.7.3.1.E.1.g, quoted above, non-inherent adverse effects in the listed categories,

alone or in conjunction with inherent effects in those categories, are a sufficient basis to deny a conditional use. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception.

Analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a landscape contractor business. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed use that are not consistent with the those identified *or* adverse effects created by unusual site conditions will be considered non-inherent adverse effects. The inherent and non-inherent effects then must be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff determined that the following physical and operational characteristics are necessarily associated with (*i.e.*, are inherent in) a landscape contractor business (Exhibit 40, pp. 27-28):

- (1) Buildings, structures, outdoor areas for the storage of plants and gardening-related equipment;
- (2) Outdoor storage of plant stock, mulch, soil and landscaping materials in bulk and in containers;
- (3) On-site storage of business vehicles and equipment including small trucks and landscaping trailers;
- (4) Traffic associated with the trips to the site by employees and suppliers; trips to and from the site by employees engaged in off-site landscaping activities;
- (5) Adequate parking areas to accommodate employees;
- (6) Dust and noise associated with the movement of landscaping products and the loading and unloading of equipment associated with landscaping businesses; and
- (7) Hours of operation.

Staff found that “the scale of the existing structure, the proposed access points, the internal vehicular circulation system, onsite parking areas, storage buildings, material storage areas, loading and unloading of supplies and equipment for off-site operations are operational

characteristics typically associated with a landscape contractor operation. Staff, however, “considered the fact that the property fronts on and is accessed from a local road with a paved width of about 14 feet to be a non-inherent characteristic.” Exhibit 40, p. 28. The Hearing Examiner agrees with both of Staff’s conclusions in this regard.

However, the Hearing Examiner disagrees with Staff’s stated belief that this non-inherent characteristic does not rise to a level that warrants a denial. For the reasons discussed at length in Part II.E.3. of this Report and Decision, the Hearing Examiner finds that the non-inherent site condition of the proposed use’s sole access from the narrow, dead-end Holly Grove Road, which serves as the exclusive access to all the homes on Holly Grove Road and Awkard Lane south of Norwood Road, constitutes an undue harm to the neighborhood in each of the three categories listed in this provision, in that it adversely affects the use and peaceful enjoyment of abutting property owners; it imposes an undue traffic burden on the neighborhood; and it inflicts an undue risk to the safety of neighboring residents, visitors and employees.

While the operation of the proposed use undoubtedly has other adverse effects on the neighborhood, such as the noise complained of and documented by Ms. Thomas’s video recording in Exhibit 58(q), none of those other adverse effects are atypical of a landscape contractor operation. Since the Zoning Ordinance permits a landscape contractor use in the subject RE-2C Zone (wisely or unwisely), the Hearing Examiner finds that those other adverse effects are inherent in the use, and not a basis for denial of this application for the reasons stated in Part II.E.4. of this Report and Decision.

Nevertheless, based on the entire record, the Hearing Examiner finds that the non-inherent adverse effects of the proposed use being sited with sole access from the narrow, dead-end Holly Grove Road, combined with the fact that that road is the sole access for all the homes on Holly

Grove Road and Awkard Lane south of Norwood Road, require denial of this application for failure to meet the standards of Section 59.7.3.1.E.1.g.

2. Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must be compatible with the character of the residential neighborhood.

Conclusion: This standard does not apply since the Applicant's plans do not include the construction, reconstruction or alteration of any structures on the site.

3. The fact that a proposed use satisfies all specific requirements to approve a conditional use does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require conditional use approval.

Conclusion: The application satisfies some, but not all, of the specific requirements for the conditional use, and for the reasons discussed above, it is being denied.

B. Development Standards of the Zone (Article 59.4)

In order to approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the zone where the use will be located – in this case, the RE-2C Zone. Staff compared the minimum development standards of the RE-2C Zone to those provided by the application in a table included in the Staff Report (Exhibit 40, p. 12). It is reproduced below and on the next page:

Table 2: Development Standards

RE-2C Development Standards	Required 59.4.4.5.B	59.3.5.5.B Landscape Contractor	Proposed
Minimum Lot Area	2 acres	2 acres	6.18 acres
Minimum Lot Width:			
• At street line	25'		449'
• At building line	150'		335.9'
Maximum Lot Coverage	25%		1.2%
Minimum Principal Building Setback			
• Front	50	50'	284'
• Side street	20	50'	40.3'*
• Side	17	50'	300'

<ul style="list-style-type: none">Sum of SidesRear	35 35	50'	340.4' 451.5'	
Accessory Building Setback <ul style="list-style-type: none">FrontSide StreetSideRear	80' 20 15 10'		Cinderblock Building 401.7' 181.9' 115' 314.3'	Metal Shed 328.6' 165.1' 157.5' 419.3'
Height of Principal Building	50'		≤50'	
Height of Accessory Building	50'		≤50'	
*NOTE: A variance for principal building setback has been requested in conjunction with this application.				

Conclusion: Based upon the above table, the Hearing Examiner concludes that the application meets all of the development standards of the RE-2C Zone, although without a variance, it cannot meet the 50-foot conditional use building setback requirement contained in Zoning Ordinance §59.3.5.5.B.2. The Applicant's variance request will be discussed in Part V of this Report and Decision.

C. Use Standards for a Landscape Contractor Business (59.3.5.5)

The specific use standards for approval of a Landscape Contractor business are set out in Section 59.3.5.5 of the Zoning Ordinance. Standards applicable to this application are set forth below, along with the Hearing Examiner's findings of fact and conclusions of law on each standard.

A. Defined¹⁰

Landscape Contractor means the business of designing, installing, planting, or maintaining lawns, gardens, hardscapes, water features, outdoor structures, decorative features, stormwater and drainage features, or other activities intended to enhance the appearance or usefulness of outdoor areas. Landscape Contractor also means providing snow removal services with vehicles, equipment, and supplies that are stored, parked, serviced, or loaded at the business location. Landscape

¹⁰ ZTA 18-09, amending the Landscape Contractor Conditional Use, was adopted 10-2-18 in Ord. No. 18-49, eff. 10-22-18. It changed the definition of Landscape Contractor to read: "Landscape Contractor means the business of designing, installing, planting, or maintaining lawns, gardens, hardscapes, water features, outdoor structures, decorative features, stormwater and drainage features, or other [landscaping] activities intended to enhance the appearance or usefulness of outdoor areas [and]. Landscape Contractor also means providing snow removal services with vehicles, equipment, and supplies that are stored, parked, serviced, or loaded at the business location. Landscape Contractor includes tree installation, maintenance, or removal. Landscape Contractor does not include Lawn Maintenance Service (see Section 3.5.14.G, Lawn Maintenance Service). It also added some language to another section (59.7.7.1.D.8.d.) that is not relevant here because it pertains to a different Zone (RC).

Contractor includes tree installation, maintenance, or removal. Landscape Contractor does not include Lawn Maintenance Service (see Section 3.5.14.G, Lawn Maintenance Service).

Conclusion: The Applicant's operations, as discussed in Part II.C.3. of this Report and Decision, meet the definition of Landscape Contractor set forth in this section.

B. Use Standard

Where a Landscape Contractor is allowed as a conditional use, it may be permitted by the Hearing Examiner under Section 7.3.1, Conditional Use, and the following standards:

1. In the Agricultural, Rural Residential, and Residential Detached zones the minimum lot area is 2 acres. The Hearing Examiner may require a larger area if warranted by the size and characteristics of the inventory or operation.

Conclusion: The conditional use site is approximately 6.18 acres. Exhibits 45(e) and 40, p. 21. It thus exceeds the minimum requirement, and this standard has been met.

2. Building and parking setbacks, including loading areas and other site operations, are a minimum of 50 feet from any lot line.

Conclusion: Staff found that areas for parking and loading of trucks and equipment, as well as other on-site operations, are located a minimum of 50 feet from any property line. Exhibit 40, p. 21. However, as previously noted, the residential building on the site does not meet the 50-foot setback requirement of this provision. It is about 40.4 feet from the western lot line, as shown in the Development Standards Table and Dimensioning Plan of the Amended Conditional Use Site Plan Exhibit 45(e). The Applicant has therefore filed a application for a variance of 9 feet, 7 inches (about 9.6 feet) with the Board of Appeals (A-6575), which that body referred to OZAH for a report and recommendation. Exhibits 32 and 33.

For the reasons set forth in Part V of this Report and Decision, the Hearing Examiner finds that the Applicant has not satisfied the standards for the granting of a variance, and he therefore concludes that the setback requirements of Section 59.3.5.5.B.2, have not been satisfied.

3. The number of motor vehicles and trailers for equipment and supplies operated in connection with the contracting business or parked on-site must be limited by the Hearing Examiner to avoid an adverse impact on abutting uses. Adequate parking must be provided on-site for the total number of vehicles and trailers permitted.

Conclusion: The Applicant's equipment permitted on site would have been listed as a condition if this application had been approved, in order to avoid an adverse impact on abutting uses. The approved equipment would have been as follows¹¹:

- ***10 trucks:*** including 2 international Dump trucks, 3 large trucks, 4 medium size trucks, 1 box truck
- ***6 trailers:*** 5 utility trailers and one carry-on trailer
- ***1 Chipper***
- ***2 Bobcats***

Technical Staff also recommended limiting the number of employees on site to no more than 15, and the Applicant agreed.¹² Staff found that parking would be adequate to accommodate both the equipment and the number of employees proposed, and indeed recommended reducing the number of parking spaces to a maximum of 30 to reduce imperviousness. As noted by Staff (Exhibit 40, p. 21):

The parking areas are located in the interior of the property towards the rear portion, a substantial distance from the adjoining residential properties. The closest residential property is located west of the subject property across Holly Grove Road about 140 feet from the closest parking area. Screening of the parking area between the closest residential property includes perimeter planting of two rows of trees, a proposed restored lawn area, and a fence.

Based on Technical Staff's evaluation and the entire record, the Hearing Examiner concludes that the standards for vehicles, equipment, employees and parking embodied in this provision would be satisfied by the described limitations if the application had been granted.

¹¹ At the hearing, the Applicant's attorney clarified that, in addition to the 10 trucks, 6 trailers and a chipper, the Applicant would seek to have two "bobcats" on site. The Applicant has dropped the request for a 7th trailer and for a crane truck. Tr. 155-157.

¹² Technical Staff has recommended limiting the number of total staff (including family members) to 15 (Exhibit 40, p. 2). The Applicant agreed (Tr. 42). The number refers to those on site at any time.

4. Sale of plant materials, garden supplies, or equipment is prohibited unless the contracting business is associated with a Nursery (Retail) or Nursery (Wholesale).

Conclusion: Technical Staff reports (Exhibit 40, p. 22):

There is no Nursery (Retail) or Nursery (Wholesale) business operating on the property and there will be no sale of plant materials or garden supplies on the property.

The Applicant does not propose to have retail sales to the public or operate a wholesale nursery on the premises, and if this application had been granted, a condition of approval for the conditional use would so provide. The Hearing Examiner therefore finds that this standard has been met.

5. The Hearing Examiner may regulate hours of operation and other on-site operations to avoid adverse impact on abutting uses.

Conclusion: Had this application been granted, the permitted hours of operation would have been specified in conditions. Technical Staff recommended two conditions that would control hours of operation. They are, as modified by the Planning Board (Exhibit 60):

3. The hours of operation must be Monday through Friday 6:00 a.m. to 7:00 p.m. and Saturday, 7:00 a.m. to 5:00 p.m. Snow removal may be provided when needed seven days a week, 24 hours a day.

8. Semi-trucks, not higher than Gross Vehicle Weight Rating Class Seven, shall visit the subject property for mulch deliveries up to two times a week, between the hours of 10:00 a.m. and 2 p.m., during prime mulch season only, March 1 through April 30.

Other operational features are limited, as well, in order to protect the neighbors. These include limits on the number of employees permitted on site (15); limits on the numbers and kinds of equipment and vehicles, as previously described; and a prohibition against mulch manufacturing, composting or sale of plant materials, garden supplies or equipment on site.

With these conditions, the Hearing Examiner finds that, had the application been granted, the limits on hours of operation and other operational features would have appropriately reduced most adverse impacts on abutting uses; however, because of the narrowness of the dead-end Holly Grove Road, the conditional use would still have unacceptable adverse impacts on the neighbors.

D. General Development Standards (Article 59.6)

Article 59.6 sets the general requirements for site access, parking, screening, landscaping, lighting, and signs. The applicable requirements, and whether the use meets these requirements, are discussed below.

1. Site Access Standards:

Conclusion: Section 59.6.1.1 of the Zoning Ordinance provides that the intent of the site access requirements specified in Division 59.6.1 of the Zoning Ordinance is “*to ensure safe and convenient vehicular, bicycle, and pedestrian circulation within and between lots on the same block face and to reduce traffic congestion.*” However, Section 59.6.1.2 of the Zoning Ordinance provides that the Site Access Division (59.6.1) imposes site access standards on conditional uses only “*in Residential Multi-Unit, Commercial/Residential, Employment, Industrial, and Floating zones.*”

Because this property is within a residential detached zone (the RE-2C Zone), and not in any of the zones listed in Section 59.6.1.2, the site access standards do not apply. Nevertheless, Staff concluded that the driveway access proposed (as realigned) would be adequate to serve the site, provided the Applicant complies with its recommended condition limiting access for the conditional use to the Holly Grove entrance (Exhibit 40, p. 13):

The subject property is accessed from and fronts on Holly Grove Road, a publicly maintained right-of-way running through a predominantly residential neighborhood. The existing driveway access for the subject property, which currently intersects Holly Grove Road at an angle, will be realigned to intersect perpendicularly. The property also has a second entrance on the west side of the property also along Holly Grove Road. This entrance is gated. This entrance is primarily reserved for tenants who reside onsite, therefore, it is rarely used.

The Applicant’s transportation planner, Shahriar Etemadi, also testified that sight distances, access, roadway conditions and circulation on the site would be safe. Tr. 185-186. Although on-site circulation may be safe, the Hearing Examiner finds that the narrowness of Holly Grove Road presents serious and undue safety and convenience issues for the neighbors, if they

have to share that roadway with the Applicant's trucks. This issue was discussed at length in Part II.E.3. of this Report and Decision, and that discussion is incorporated herein.

2. Parking Spaces Required, Parking Setbacks and Parking Lot Screening

The standards for the number of parking spaces required, parking setbacks and parking lot screening are governed by Division 6.2 of the Zoning Ordinance.

a. Number of Parking Spaces Required by Section 59.6.2.4

Conclusion: Zoning Ordinance §59.6.2.4 requires a base minimum of .5 spaces per employee plus 1 space per each vehicle operated in connection with a Landscape Contractor use. Two additional spaces must be provided for the on-site residence. Thus, with a maximum of 15 employees, 19 vehicles and one residence, the use requires a minimum of 29 parking spaces ($(15 \times .5 = 8) + 19 + 2 = 29$). If the application had been granted, the Applicant would have been required to provide 30 vehicle parking spaces. Technical Staff concluded, as does the Hearing Examiner, that the application provides adequate parking for the proposed use. Exhibit 40, pp. 13-14.

b. Parking Lot Screening

Section 59.6.2.9.C sets out the screening and lighting requirements for conditional use parking lots having 10 or more spaces:

C. Parking Lot Requirements for 10 or More Spaces

1. Landscaped Area

- a. A surface parking lot must have landscaped islands that are a minimum of 100 contiguous square feet each comprising a minimum of 5% of the total area of the surface parking lot. Where possible, any existing tree must be protected and incorporated into the design of the parking lot.***
- b. A maximum of 20 parking spaces may be located between islands.***
- c. A landscaped area may be used for a stormwater management ESD facility.***

2. Tree Canopy

Each parking lot must maintain a minimum tree canopy of 25% coverage at 20 years of growth, as defined by the Planning Board's Trees Technical Manual, as amended.

3. Perimeter Planting

a. The perimeter planting area for a property that abuts an Agricultural, Rural Residential, or Residential Detached zoned property that is vacant or improved with an agricultural or residential use must:

- i. be a minimum of 10 feet wide;*
- ii. contain a hedge, fence, or wall a minimum of 6 feet high;*
- iii. have a canopy tree planted every 30 feet on center; and*
- iv. have a minimum of 2 understory trees planted for every canopy tree.*

4. Lighting

Parking lot lighting must satisfy Section 6.4.4, General Outdoor Lighting Requirements.

Conclusion: In its final Landscape Plan (Exhibit 76), the Applicant sets forth parking lot landscaping calculations and parking lot canopy coverage and screening requirements. These Tables are reproduced in Part II. C.2. of this Report and Decision and in the Staff Report (Exhibit 40, pp. 14-18).

Staff found that the application complies with the landscaping requirements provided in Section 59-6.2.9.C. Exhibit 40, p. 14-18. The Hearing Examiner agrees, finding that the proposed landscaping is more than sufficient to screen the parking areas, especially given the afforestation required by the approved Forest Conservation Plan (Exhibits 45(l), (m) and (n) and Exhibit 75). As called for under §59.7.3.1.E.1.b, the Hearing Examiner finds that the screening proposed would be compatible with the surrounding area.

3. Site Landscaping, Screening and Lighting

Standards for perimeter site landscaping and site lighting are set forth in Divisions 6.4 and 6.5 of the Zoning Ordinance. The stated intent of Division 6.4 is “*to preserve property values, preserve and strengthen the character of communities, and improve water and air quality.*” §59.6.4.1. The stated intent of Division 6.5 is “*to ensure appropriate screening between different building types and uses.*” Zoning Ordinance §59.6.5.1. These site screening and landscaping requirements are in addition to those that apply to screening and landscaping of parking facilities.

a. Site Screening and Landscaping

Conclusion: Zoning Ordinance §59.6.5.2.B contains the standards for perimeter site screening of a conditional use in the RE-2C Zone:

In the Agricultural, Rural Residential, and Residential Detached zones, a conditional use in any building type, except a single-family detached house, must provide screening under Section 6.5.3 if the subject lot abuts property in an Agricultural, Rural Residential, or Residential Detached zone that is vacant or improved with an agricultural or residential use. All conditional uses must have screening that ensures compatibility with the surrounding neighborhood.

Section 6.5.3., referenced in the above-quoted section, provides details for screening that would generally apply to a conditional use in the RE-2C Zone; however, Section 59.7.3.1.E.1.b. provides that the applicable general requirements under Article 59-6 need be satisfied only “to the extent the Hearing Examiner finds necessary to ensure compatibility.” In this case, the Hearing Examiner agrees with Technical Staff that compatibility will be achieved by the landscaping and screening to be provided in accordance with the Applicant’s revised landscape plan (Exhibit 76). As stated by Staff (Exhibit 40, p. 18):

... In response to Staff’s comments, the Applicant had submitted a revised Landscape Plan. The revised landscaping satisfies the General Landscape Requirements as defined and specified under Section 59-6.4.3.

Michael Norton, the Applicant’s expert in landscape architecture and site design, testified as to the extensive existing screening and proposed plantings. Tr. 49-88. Somer Cross, the Applicant’s land planner, testified that the proposed use, as it would be landscaped and screened, would be compatible with the neighborhood. Tr. 131.

The Hearing Examiner finds that this conditional use would be well screened from the neighbors, and the application, if granted, would thus fulfill the screening requirements of the Zoning Ordinance.

b. Lighting

E. Conditional Uses

Outdoor lighting for a conditional use must be directed, shielded, or screened to ensure that the illumination is 0.1 footcandles or less at any lot line that abuts a lot with a detached house building type, not located in a Commercial/Residential or Employment zone.

Proposed Lighting for the site is shown on the Lighting Plan (Exhibit 45(j)), reproduced in Part II.C.2. of this Report and Decision. The fixture details were provided on the Lighting Photometric Plan (Exhibit 45(k)). Michael Norton, the Applicant's expert in landscape architecture and site design, testified that there would be no light spillage or glare into adjoining properties from the operations of the conditional use. Tr. 75-76):

Technical Staff found the proposed lighting to be sufficient, non-intrusive and compliant with the Zoning Ordinance (Exhibit 40, p. 18):

The Lighting Plan is adequate and safe for vehicular and employee movement. The proposed lighting serves multiple purposes, including illumination of the site entrance, visibility lighting in the employee parking areas and area lighting near the structures. A photometric study submitted with the Application shows measured lighting intensity across the entire property in foot-candles, the locations of lighting fixtures and the manufacturer's specifications on the proposed lighting fixtures. The Photometric Plan shows that the lighting will not cause glare on adjoining properties, nor will it exceed the 0.1 foot-candle standard at the side and rear property lines. The lighting, with no direct light or light glare, will not have a negative impact on neighboring properties.

Conclusion: Based on this record, the Hearing Examiner finds that the proposed lighting will be safe and sufficient, and most importantly, the Photometric Plan demonstrates that lighting at the property lines will not exceed 0.1 footcandles. In fact, the photometric projections indicate 0.0 footcandles at the property lines. In sum, the Hearing Examiner finds that if granted, the conditional use would be compliant with the standards of §59.6.4.4.E, requiring that illumination from the proposed use not exceed 0.1 foot-candles at the property lines.

4. Signage

Conclusion: Signage for the use is governed by Division 6.7. Zoning Ordinance §59.6.7.8 sets the standards for signs in Residential Zones. The Applicant does not propose to erect a sign on the subject site, and Technical Staff recommended a condition specifying that “There will be no identification sign on the property.” The Applicant agreed to that condition, and if the conditional use had been granted, such a condition would have been imposed in this Report and Decision.

IV. CONCLUSION AND DECISION ON CONDITIONAL USE

The Hearing Examiner finds this matter to be a close case. On the one hand, Section 59.3.1.6 of the Zoning Ordinance permits a Landscape Contractor conditional use in the subject RE-2C Zone, and Section 59.7.3.1.E.1.g. recognizes that a conditional use may result in inherent adverse effects, which alone are not a basis for denial. However, the existence of non-inherent adverse effects that cause undue harm, alone or in combination with inherent adverse effects, can serve as the basis for denying a conditional use application. Zoning Ordinance §59. 7.3.1.E.1.g.

There is a temptation to consider what added effects the granting of a conditional use would have on the current state of a neighborhood that already includes the existing Francisco landscape contractor; however, this case cannot be evaluated in this fashion because the subject landscape contractor has been functioning without the benefit of the required conditional use. The Hearing Examiner does not hold it against the Applicant that it has been operating illegally on this site for 13 years because the past illegal operation is not an issue to be decided on this new application. The only issue here is whether the application meets the standards set forth in the Zoning Ordinance for the granting of the requested conditional use.

Nevertheless, the potential impact on the neighbors from this proposed use must be evaluated as if it had never been located on the site because the Applicant cannot gain an advantage from the fact that it has been operating illegally for years. In other words, we must assess whether

the new operation of a landscape contractor of the proposed size and operational characteristics, on a site of these dimensions, and with the proposed access to the subject site would create undue harm to the neighborhood from non-inherent adverse effects alone or in combination with inherent adverse effects.

The neighbors have, of course, raised concerns about commercialization of a residential neighborhood, noise from the landscape contractor operations, and other issues (*See*, discussion in Part II.E.4. of this Report and Decision) but the Hearing Examiner concludes that the most significant problem with the proposed application is the fact that the site must be accessed only from the very narrow (14-foot wide for long stretches) Holly Grove Road, which carries two-way traffic to a dead end. Given the widths of the trucks operated by the landscape contractor and the nearby existence of numerous residences along that very same road, with no other access, this situation poses an undue risk to the pedestrians, bicyclists and other drivers using the road.

The Hearing Examiner recognizes that there have not been any recently reported accidents on this roadway and that both Technical Staff and the Applicant's expert have opined that it is not a safety hazard. However, as discussed at length in Part II.E.3. of this Report and Decision, the testimony of the witnesses at the OZAH hearing and photographs of the roadway and the Applicant's trucks make it apparent that there is a hazard because of the narrowness of the roadway. The wider areas along the edge of some portions of the roadway are the property of other landowners, not part of the prescriptive right-of way. Yet, the Applicant's expert and Technical Staff seem to rely on those occasional side areas for their conclusion that other drivers or trucks could pull to the side. Moreover, for long stretches, there are no pull-off areas. So, what is supposed to happen when an 8 to 9-foot wide truck meets a 6-foot wide car going in the opposition direction on this roadway? How can bicyclists and pedestrians safely use this road?

The Hearing Examiner gave the Applicant the opportunity to come up with even one case in which a landscape contractor special exception or conditional use had been approved on such a narrow, dead-end roadway. It could not find even one case. While not dispositive of the issue, it would indicate that the access problem here is unprecedented. The residents along Holly Grove Road and Awkard Lane have no alternative to using Holly Grove Road to access their homes. Allowing the Applicant's trucks to share the roadway with those residents would impose an undue burden and safety hazard upon them.

Based on the entire record, the Hearing Examiner finds that the application does not meet some of the standards for approval of the conditional use set forth in the Zoning Ordinance, as detailed in Part III of this Report and Decision. The Hearing Examiner has therefore denied the conditional use application.

The Hearing Examiner is not unmindful of the fact that his decision will require an ongoing family business to relocate; however, his decision must be grounded on the Zoning Ordinance and the facts of the case, not on sympathy for a family business.

Based on the foregoing findings and conclusions and a thorough review of the entire record, **the application of FM Group, Inc., d/b/a Francisco Landscaping, for a conditional use** under Section 59.3.5.5 of the Zoning Ordinance, to operate a landscape contractor business at 15400 Holly Grove Road, Silver Spring, Maryland, **is hereby DENIED.**

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW ON VARIANCE

The Conditional Use application was accompanied by an application for a Variance, pursuant to Section 59.7.3.2 of the Zoning Ordinance, and a Resolution from the Board of Appeals, effective September 27, 2018, referring Variance Application A-6575 to OZAH for a hearing and recommendation (Exhibits 32 and 33). The Variance application seeks a variance of 9 feet, 7

inches (9.6 feet), from the setback required for a landscape contractor under Zoning Ordinance §59.3.5.5.B.2., because the current house location cannot meet the 50-foot setback requirement.

In accordance with the request of the Applicant (Exhibit 31) and pursuant to OZAH Zoning Rule 4.2(g), the Hearing Examiner, on December 7, 2018, ordered Conditional Use Application CU 19-04 and Variance Application A-6575 consolidated for purposes of OZAH's public hearing. Exhibit 36.

Initially, it should be pointed out that the Hearing Examiner's denial of the conditional use application, unless reversed by higher authority, effectively moots the variance request, since the need for the variance is generated only by the special conditions required for a landscape contractor conditional use (*i.e.*, a 50-foot setback under Zoning Ordinance §59.3.5.5.B.2). Nevertheless, we analyze the merits of the variance application below, as if the conditional use were granted, subject to the variance.

Under Zoning Ordinance §59.7.1.1, "*The applicant has the burden of production and has the burden of proof by a preponderance of the evidence on all questions of fact.*" To determine whether the Applicant should be granted a variance, we must turn to the Zoning Ordinance standards that control that issue –Zoning Ordinance Section 59.7.3.2.E:

E. Necessary Findings

Granting the variance may only authorize a use of land allowed by the underlying zone. To approve a variance, the Board of Appeals must find that:

- 1. denying the variance would result in no reasonable use of the property; or***
- 2. each of the following apply:***
 - a. one or more of the following unusual or extraordinary situations or conditions exist:***
 - i. exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;***
 - ii. the proposed development uses an existing legal nonconforming property or structure;***
 - iii. the proposed development contains environmentally sensitive features or buffers;***
 - iv. the proposed development contains a historically significant***

- property or structure; or*
- v. the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood;*
 - b. the special circumstances or conditions are not the result of actions by the applicant;*
 - c. the requested variance is the minimum necessary to overcome the practical difficulties that full compliance with this Chapter would impose due to the unusual or extraordinary situations or conditions on the property;*
 - d. the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan; and*
 - e. granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties.*

Applying these standards to the case under consideration, Technical Staff argued that the provisions of Section 59.7.3.2.E.2.a.ii. justify granting the variance (Exhibit 40, p. 29). According to Staff,

- a. one or more of the . . . [specified] unusual or extraordinary situations or conditions exist . . . :*

The property has exceptional shape or extraordinary conditions due to the following features:

1. Holly Grove Road, which is a local road, bends at the southwestern end of the property and wraps around the property creating a situation that the property fronts the same road on both its western and southern property lines.
2. The property is accessed from a road that is publicly maintained and 14 feet wide (in front of the property).

The existing home was constructed with a building permit approved by the County Department of Permitting Services in 1989 and met all required set-backs for a residential dwelling. The dwelling has not been expanded or had any changes to its original footprint since its construction. . . .

Technical Staff also found that the remaining prerequisites for a variance are satisfied as well (Exhibit 40, pp. 30-31):

- b. The special circumstances or conditions are not the result of actions by the applicant;*

As noted, the existing residential dwelling meets and exceeds the setback from the side street requirements for a residential dwelling in the RE-2C Zone. The need for the requested variance is triggered because the specific Conditional Use

requirements [*i.e.*, Section 59.3.5.5.B.2.] necessitate an additional setback [*i.e.*, 50 feet] that is above the normally required setback for residential uses in the zone.

The existing side street setback on the west side of the property is only 40.33 feet from the property line. Although it exceeds the 20 feet set back requirement for residential use in the RE-2C Zone it fails short of the 50-foot set back requirement causing the need for the requested variance of 9.6 feet.

c. The requested variance is the minimum necessary to overcome the practical difficulties that full compliance with this Chapter would impose due to the unusual or extraordinary situations or conditions on the property;

The requested variance is the minimum necessary to overcome the practical difficulties that full compliance with the specific Conditional Use requirement would impose due to the unusual or extraordinary situations or conditions on the property. Any attempt to meet the Conditional Use requirement would necessitate a demolition of a portion of the existing house which would be unreasonable and would create an unusual and practical difficulties on the Applicant.

d. The variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan; and

The variance can be granted without substantial impairment to the intent and integrity of the General Plan and the 1997 Cloverly Master Plan. In addition, the variance, if granted, would be in harmony with the general purpose, intent and spirit of the Zoning Ordinance.

e. Granting the variance will not be averse to the use and enjoyment of abutting or confronting properties.

Granting the variance will not be averse to the use and enjoyment of abutting or confronting properties. The variance would not result in any change in the current conditions or appearance of existing developments on the property. The requested variance of 9.6 feet from the 50 feet setback requirement, in this case, is minor given the fact that the proposed use meets or exceeds all other required setbacks and other development standards. The variance, if granted, would be in harmony with the general purpose, intent and spirit of the Zoning Ordinance.

Based on the preceding analysis, staff recommends approval of the requested variance.

Staff's interpretation of the variance provisions is shared by the Applicant's land planning expert, Somer Cross. She testified that "it's an extraordinary condition or unusual in that the road

does bend around the property,” and in her opinion the application meets all the requirements for the granting of a variance. Tr. 146-151.

Conclusion: The Hearing Examiner disagrees with Somer Cross’s and Technical Staff’s conclusion that the site has unusual or extraordinary characteristics warranting a variance. They rely on the fact that the property has two frontages, since the road bends around the site. The Hearing Examiner finds that this situation is essentially what exists for every corner lot, which makes the situation at bar not at all “unusual or extraordinary.” As demonstrated by the testimony of Mary Hemingway (Tr. 307-308), Ms. Cross’s reasoning and Staff’s is rather strained:

. . . Regarding reason number 1, well, there's nothing exceptional about the shape of the property. Larger than most on Holly Grove. P933 is the next largest. The property is not exceptionally narrow. The front property line is about 463 feet, the back about 263 feet. The west side approximately 737 feet, and the east side approximately 774 feet. This was taken off of the drawing on the computer using a program that measured lot lines.

. . . The fact that Holly Grove Road bends at the southwestern end of the property and wraps around the property creating a situation that the property fronts the same road on both its western and southern property lines is not extraordinary. There are plenty of roads that bend. And I don't know that Northwind Road on the 2090 -- between Bonifant and Notley Road, it curves. . . .

HEARING EXAMINER GROSSMAN: So your point is that their basis for claiming a variance of extraordinary conditions peculiar to a specific property are not that extraordinary or peculiar?

MS. HEMINGWAY: Correct.

The variance request has another odd twist. Although the Applicant’s land planner, Somer Cross, testified that the building requiring a variance “has no function whatsoever in the landscape contractor” (Tr. 148-149), the Applicant’s spokesman, Geovanni Argueta, admitted that three landscape employees live in the house. Tr. 233. While the building on site might otherwise be considered as unconnected with the actual landscape business, the fact that three landscape employees are living there suggests that it is part of the operation. Even if the building in question had no role in the landscaping operation, that does not mean the 50-foot setback is inapplicable,

given the explicit language of Section 59.3.5.5.B.2. The Applicant apparently recognized its application to this situation since it applied for a variance to reduce the setback requirement.

The Board of Appeals may deny a variance application where an applicant has failed to meet its burden of demonstrating extraordinary conditions peculiar to a specific property, or any of the other listed grounds for a variance. *Montgomery County v. Rotwein*, 169 Md. App. 716, 906 A.2d 959 (2004). That is the case here. The Hearing Examiner finds nothing unusual or extraordinary about a property with two frontages, as that is essentially the situation on every corner lot. Corner lots are defined in Zoning Ordinance §59.1.4.2 as “*Lot, Corner: A lot abutting 2 or more streets at their intersection where the interior angle of the intersection does not exceed 135 degrees.*” Corner lots are mentioned throughout the Zoning Ordinance. For example, Section 59.4.4.1.A.7. lists some development standards for corner lots in residential zones, and Section 59.4.4.5.B.2. lists development standards for accessory buildings on corner lots in the RE-2C Zone. *See also*, Board of Appeals Opinion in Case No. A-6502, *Petition of Araceli E. Velasquez*, (adopted 11/2/16, and effective 11/22/16), where the Board denied a variance on a corner lot.

There are essentially two intersecting streets on which the subject property fronts. SDAT real property tax records denominate both Holly Grove Road (Exhibit 84), while some residents indicate that the portion of Holly Grove Road that extends north-northwest has traditionally been called “Pumphrey Lane” (Tr. 273). The Hearing Examiner finds it irrelevant that the street west of the subject site (*i.e.*, the part of Holly Grove Road that extends north-northwest) bears the same name in SDAT records as the street southeast of the site (*i.e.*, the portion of Holly Grove Road that extends southwest from Norwood Road). Whether or not the northwest street bears the same name as the street it intersects does not change the subject site’s essence as a corner lot, nor does it impose any greater burden on the property owner or make the situation unusual or extraordinary.

Technical Staff also suggests that it is unusual or extraordinary that “The property is accessed from a road that is publicly maintained and 14 feet wide (in front of the property).” Exhibit 40, p. 29. While it is obviously unusual to have a landscape contractor located on a 14-foot wide roadway, as discussed in connection with the conditional use application, the roadway from which the site is accessed (the southeast segment of Holly Grove Road) has nothing to do with the subject of the variance request – *i.e.*, the required setback from the property’s western property line, adjacent to the northwest segment of Holly Grove Road. No access to the site would be permitted from the northwest segment of Holly Grove Road under the conditions recommended by Technical Staff (Exhibit 40, p. 2) and the Planning Board (Exhibit 60). Thus, the “unusualness” of access from the southeast segment has no bearing on the request for a variance from the setback required on the western property line.

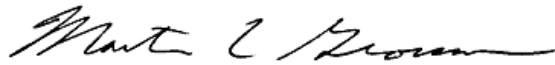
Based on the absence of any unusual or extraordinary situations that are relevant to the variance request, the Hearing Examiner recommends that the Board of Appeals deny the variance application. Moreover, given the conditional use denial, the variance request should be denied as moot because it arises specifically out of the setback provision governing the conditional use.

VI. CONCLUSION AND RECOMMENDATION ON VARIANCE

For the reasons set forth in Part V of this Report, Decision and Recommendation, the Hearing Examiner finds that Application A-6575 does not satisfy the standards for approval of the requested variance set forth in Zoning Ordinance Section 59.7.3.2, and additionally, the variance request is mooted by the denial of the conditional use, since the need for a variance arises only from the specific conditional use setback standards. He therefore recommends that the Board of Appeals deny the variance application. Both the Hearing Examiner’s decision on the conditional use application and his recommendation on the variance request are contained in this combined Report.

Based on the foregoing findings and conclusions and a thorough review of the entire record, **the Hearing Examiner hereby recommends that the Board of Appeals DENY the application of FM Group, Inc., d/b/a Francisco Landscaping, for a variance** at 15400 Holly Grove Road, Silver Spring, Maryland, of 9 feet, 7 inches (9.6 feet) from the 50-foot setback requirements for landscape contractors under Zoning Ordinance §59.3.5.5.B.2.

Issued this 18th day of July, 2019.



Martin L. Grossman
Hearing Examiner

NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT ON CONDITIONAL USE DECISION

Any party of record may file a written request to present an appeal and oral argument before the Board of Appeals regarding the Conditional Use decision, within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's Report and Decision on the Conditional Use. Any party of record may, no later than 5 days after a request for oral argument is filed in the Conditional Use case, file a written opposition to it or request to participate in oral argument. If the Board of Appeals grants a request for oral argument, the argument must be limited to matters contained in the record compiled by the Hearing Examiner. A person requesting an appeal, or opposing it, must send a copy of that request or opposition to the Hearing Examiner, the Board of Appeals, and all parties of record before the Hearing Examiner.

The Board of Appeals will consider this Office's Report and Recommendation on Variance Application A-6575 at its next available Worksession. Parties interested in the timing of that Worksession should contact the Board directly.

Contact information for the Board of Appeals is listed below, and additional procedures are specified in Zoning Ordinance §59.7.3.1.F.1.c.

The Board of Appeals may be contacted at:

Montgomery County Board of Appeals
100 Maryland Avenue, Room 217
Rockville, MD 20850
(240) 777-6600
<http://www.montgomerycountymd.gov/boa/>

The Board of Appeals will consider your request for oral argument at a work session. Agendas for the Board's work sessions can be found on the Board's website and in the Board's office. You can also call the Board's office to see when the Board will consider your request. If your request for oral argument is granted, you will be notified by the Board of Appeals regarding the time and place for oral argument. Because decisions made by the Board are confined to the evidence of record before the Hearing Examiner, no new or additional evidence or witnesses will be considered. If your request for oral argument is denied, your case will likely be decided by the Board that same day, at the work session.

Parties requesting or opposing an appeal must not attempt to discuss this case with individual Board members because such *ex parte* communications are prohibited by law. If you have any questions regarding this procedure, please contact the Board of Appeals by calling 240-777-6600 or visiting its website: <http://www.montgomerycountymd.gov/boa/>.

NOTICES TO:

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Sean Hughes, Esquire, Applicant's attorney
Barbara Jay, Executive Director
Montgomery County Board of Appeals
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