

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
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Rockville, Maryland 20850
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IN THE MATTER OF:
CHAPINGO, LLC

Applicant

Jose Alvarez

For the Application
Sean P. Hughes, Esq.

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OZAH Case No. CU 22-07

Laura Van Etten
Leslie Seville
Thomas Hartsock
James Ryan
Karen Ryan
Timothy Hunt

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Opposing the Application

Before: Kathleen Byrne, Hearing Examiner

HEARING EXAMINER’S REPORT AND DECISION ON REMAND

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I. STATEMENT OF THE CASE

The applicant, Jose Alvarez for Chapingo Investments, LLC (“Chapingo”), filed an application on December 15, 2021 seeking a conditional use for a Landscape Contractor under Section 59.3.5.5 of the Montgomery County Zoning Ordinance at 12120 Prices Distillery Road, Damascus, Maryland, (“Subject Property” or “Property”) located in the Agricultural Reserve (“AR”) Zone. Exhibit 1. The Office of Zoning and Administrative Hearings (“OZAH”) initially scheduled a public hearing for June 17, 2022, which was continued to July 22, 2022 at the request of the Applicant. Exhibits 32 and 36.

Staff of the Montgomery County Planning Department (“Planning Staff” or “Staff”) issued a report recommending denial of the application on May 20, 2022 (revised on June 27, 2022) due to lack of conformance to the general standards for approval of conditional uses of Sec. 59.7.3.1 and inconsistency with the *1996 Rustic Roads Functional Master Plan*. Exhibit 38. On July 18, 2022, the Planning Board also recommended denial citing the lack of onsite sanitary services in violation of Sect. 59.7.3.1.E.1.f; the negative impacts of the proposed use on the rural character

and design of the County's Rustic Roads; and the use's lack of substantial conformance with the 1996 Rustic Roads Functional Master Plan as required under Sect. 59.7.3.1.E.1.c. Exhibit 67.

The July 22, 2022 public hearing proceeded as scheduled. The Hearing Examiner held the record open for ten days after the close of the hearing to receive the transcript and, in response to testimony presented at the hearing, the Hearing Examiner specifically allowed the additional submission of any response from the Department of Permitting Services ("DPS") within the ten-day period before the record closed.¹ T. 253.² Some parties took the opportunity to submit written testimony after the close of the hearing. Those submissions were included in the record and were reviewed by the Hearing Examiner but were accorded limited weight due to the applicant's inability to cross-exam the written submissions. The record closed on August 1, 2022.

The Hearing Examiner issued her Report and Decision on September 28, 2022 denying the conditional use application for the following reasons:

1. Non-conformity with the goals and parameters of the 1996 Rustic Roads Functional Master Plan.
2. Undue harm to the neighborhood due to noninherent adverse effects because the topography the unscreened unsightly equipment will negatively impact scenic views and also obscure the scenic vista of the Small Barn.
3. Undue harm to the neighborhood due noninherent adverse effects from the lack of onsite sewer facilities will negatively impact the health, safety, and welfare of the employees.

Exhibit 83

On September 19, 2022, the Board of Appeals received a timely request from the Applicant for oral argument on the Report and Decision. Exhibit 84a. The Board of Appeals granted the request on October 12, 2022 and heard the oral argument on January 11, 2023.

¹ DPS did not provide any additional information.

² Page number from original hearing transcript.

Exhibit 84. The Board of Appeals remanded the matter back to OZAH for further analysis and the taking of additional evidence as needed to address the following matters:

1. Analyze other special exceptions and conditional uses granted in the County without a bathroom requirement or where a bathroom requirement was not fully evaluated prior to the granting of the use, including any landscape contractor uses granted in the County without either a bathroom for workers or without looking into the adequacy of existing septic/sewage;
2. Reconsider whether the proposed use would be served by adequate public services/facilities, specifically sewer in light of the “mobile workforce argument”;
3. Reconsider whether the proposed use conforms with the 1996 Rustic Roads Functional Master Plan and any new evidence as necessary to “assess the impact of the use on the viewshed and on conformity with the Rustic Roads Functional Master Plan”; and
4. Revisit concerns regarding vehicle weight and the impact on the surrounding rustic roads.³

The Hearing Examiner upon being assigned the remand, sent three emails to County agencies, Planning, Department of Permitting Services (DPS), and Department of Environmental Protection (DEP), seeking a report or recommendation from each agency on the issues identified above that the Board of Appeals requested be revisited and additional evidence be taken.

Exhibits 85, 86, and 87. DEP provided no additional information and directed the Hearing Examiner to DPS. Exhibit 90. Victor Salazar and Heidi Benham responded on behalf of DPS. Mr. Salazar explained that DPS has not looked at the grant or implementation of a special exception or conditional use through the lens of what constitutes “bathroom requirements, landscape contractor uses as they tie in with bathrooms, nor the adequacy of existing septic/sewage.” Exhibit 88. Because the approximately 900 existing special exceptions and conditional uses are not categorized in such a way to quickly obtain the requested information, DPS does not have the staff to audit all 900 existing files and cannot provide the information sought. *Id.* Ms. Benham responded for DPS specifically to the question of “whether the

³ Paraphrased by the Hearing Examiner from Exhibit 84.

proposed use would be served by adequate public services/facilities, specifically sewer in light of the ‘mobile workforce argument’”. Exhibit 110. Per Ms. Benham because the regulations do not define an adequate public facility, a mobile workforce is not a consideration for septic system requirements. *Id.* Ms. Benham responded to the question of whether a condition prohibiting urination and defecation on the property that it was her belief that this type of condition could not realistically be enforced by staff as it would require intense monitoring and compliance. *Id.* Planning provided an updated Staff Report on April 28, 2023 and remains of the opinion that the proposed use still does not meet the necessary findings to approve the proposed conditional use at this location. Exhibit 92.

OZAH scheduled and held a public hearing on Tuesday, June 27, 2023. Mr. Alvarez was present as the Applicant on behalf of Chapingo, LLC and the following individuals testified on behalf of the Applicant: Mike Nalepa with Street Traffic Studies as the expert in transportation planning and traffic engineering and Jim Sekerak with Santec Engineering as an expert in land use planning and architecture. T. 12-13. Those testifying opposition included the following neighbors: Jim Ryan, Karen Ryan, Tom Hartsock, and Tim Hunt. T. 101-120. Counsel for the Applicant reiterated the issues raised by Board of Appeals on remand and walked the hearing examiner through the application and prior admitted exhibits during his opening statement. T. 13-45.⁴

After very careful consideration of the supplemental information provided by County agencies, expert and lay testimony in this case, the Hearing Examiner concludes that the weight of evidence and testimony in this case supports a finding that the proposed use to be compatible with the 1996 Rustic Roads Master Plan, but failure to provide toilets onsite creates a noninherent adverse impact that alone requires denial of the conditional use application.

⁴ As part of his opening statement, Mr. Hughes made legal arguments specifically addressing the issues on remand. The Hearing Examiner takes those legal arguments into account in this Report and Decision.

II. FACTUAL BACKGROUND

The prior Hearing Examiner's report provided factual background of the subject property, the surrounding area, and the proposed use described in detail and are not repeated here. For convenience, the Hearing Examiner includes the conditional use site plan proposed by the Applicant taken from the Staff Report. Exhibit 38.



Exhibit 38, Pg. 9 – Staff Report,
Subject Property with Conditional Use Area Outlined in Red

III. AGENCY COMMENTS

As part her due diligence the Hearing Examiner requested specific information from the Planning, DPS and the DEP on the issues raised by the Board of Appeals on remand. In addition, the Rustic Roads Advisory Committee provided a recommendation on January 3, 2023.

A. Planning

On June 27, 2022, Staff provided its revised Report on the proposed conditional use recommending denial of the Application asserting that the proposed use does not conform to certain necessary findings within Section 59.7.3.1.E and is inconsistent with the 1996 Rustic Roads Functional Master Plan. Exhibit 38. On February 27, 2023 the Hearing Examiner sent an email to Mr. Butler, Mr. Zeigler and Mr. Penn with Planning restating the Board of Appeal's area for review as follows:

1. Analyze other special exceptions and conditional uses granted in the County without a bathroom requirement or where a bathroom requirement was not fully evaluated prior to the granting of the use, including any landscape contractor uses granted in the County without either a bathroom for workers or without looking into the adequacy of existing septic/sewage;
2. Reconsider whether the proposed use would be served by adequate public services/facilities, specifically sewer in light of the "mobile workforce argument";
3. Whether the proposed use conforms with the 1996 Rustic Roads Functional Master Plan and any new evidence as necessary to "assess the impact of the use on the viewshed and on conformity with the Rustic Roads Functional Master Plan"; and
4. Revisit concerns regarding vehicle weight and the impact on the surrounding rustic roads. Exhibit 86.

On April 28, 2023, Planning provided a supplemental Report addressing the issues raised by the Hearing Examiner in her email of February 27, 2023. Exhibit 92.

Regarding the first issue comparing the proposed use to those previously granted special exceptions or conditional uses in the County without a bathroom for workers or without looking into the adequacy of existing septic or sewage, Staff did not include the "unmanned" or "unapproved" cases as a direct comparison when preparing its original Staff Report. *Id.* at 1. Staff asserts they were reviewed and considered but determined that the uses were too disparate from what was being proposed by the subject Application and as such were not considered a "legitimate comparison for review." *Id.* Staff reviewed

all the cases specifically identified by the Applicant during its testimony before the Board of Appeals. *Id.* Staff found that all the cases referred to by the Applicant were either unmanned utility locations or landscape contractor locations that contained septic systems.⁵ Staff deemed an unmanned facility to be a utility site with no regularly scheduled daily employees, only visited 1 to 2 times a month or more to address a mechanical issue. *Id.* at pg. 3

Addressing the second issue of whether adequate public services/facilities, i.e., sewer, could be satisfied by the “mobile workforce argument,” Staff reviewed CFR 1910.141(d)(2)(i) in conjunction with the required County findings pursuant to 59.7.3.1.E.1.f.⁶ Staff determined that per OSHA a mobile workforce is a “work crew, comprised of workers who continually or frequently move from jobsite to jobsite on a daily or hourly basis as compared to workers who report to a conventional site...for more extended periods of time.” *Id.* pg. 3. Based upon Staff’s review of OSHA and the Applicant’s Statement of Justification, Staff concluded that the employees reporting to the subject property could not be considered a “mobile crew” because they report to a fixed location a minimum of twice a day and remain onsite for extended periods of time. *Id.*

The third issued raised by the Board of Appeals is whether the use conforms with the 1996 Rustic Roads Master Plan (or “Rustic Roads Plan”) and what impact the use has on the viewshed. Staff points out property is located near the intersection of two rustic roads: Burnt Hill Road and Prices Distillery Road. *Id.* at pg. 4. Referring to the Rustic Roads Plan paramount goal of protecting scenic views, Staff reiterated the significant features of each road, the “driving experience” and scenic views. Staff expressed concern about storage of numerous pieces of equipment, both large and small, in the parking areas surrounding the two barns on the site and its impact on identified scenic views. *Id.* at pg. 6. In addition, Staff noted the property’s location within the “greater network of rustic roads”. *Id.* at pg. 7. Specifically, pointing out that at least one rustic road must be accessed to travel to and from the site numerus trips with heavy equipment several times a day adding unnecessary wear and tear on these roads

⁵ Staff reviewed 8 “unmanned” facilities and 3 landscape contractors.

⁶ Code of Federal Regulations relating to general labor and sanitation.

and taking away from the scenic roadway experience. *Id.* at pg. 8.

The fourth and final issue addressed by Staff in the supplemental report surrounds the issue of vehicle weight and the impact on those surrounding rustic roads. Staff referred to the Rustic Roads Plan and its focus on damage to the roads from heavy vehicles, also pointing out that Burnt Hill Road prohibits thru truck traffic. *Id.* at pg. 9. Staff asserts that these truck prohibited roads are narrow, poorly constructed Burnt Hill Road and Kingstead Road are weight-listed at 15 tons. Staff concluded its supplemental report by affirming the conclusion reached in the original Report that the Applicant does not meet the necessary findings for approval. *Id.* at pg. 9

B. DPS

On February 27, 2023, in an email directed to Mr. Salazar, Mr. Nichols and Mr. Motazedi, the Hearing Examiner expressed her belief that DPS could provide valuable information on two of the issues raised by the Board of Appeals on remand. Exhibit 87. Specifically, whether first if they could perform a review of other special exceptions and conditional uses granted in the County without a bathroom requirement, including any landscape contractor uses granted in the County without either a bathroom for workers or without looking into the adequacy of existing septic/sewage and second answer the question as to whether the proposed use would be served by adequate public services/facilities, specifically sewer in light of the “mobile workforce argument”. *Id.* Mr. Salazar informed the Hearing Examiner that over 900 Special Exceptions and Conditional Uses have been granted in the County and because these uses are not organized in such a way to easily find or review “bathroom requirements, landscape contractor uses as they tie in with bathrooms, nor the adequacy of existing septic/sewage”, such a review was not possible. Exhibit 88.

Regarding the second request Mr. Salazar directed the Hearing examiner to Ms. Linda Kobylski and Heidi Benham. *Id.* Ms. Benham responded as follows:

The onsite sewage disposal regulations don't define an adequate public facility, nor do they dictate under what circumstances an operation must have restrooms (facilities) for employees. Therefore, having a mobile workforce isn't a consideration for septic system requirements. Our office has no record of a permitted septic system for the property, and I am unsure if there is an existing water supply. A permit to install a septic system on the

property may be issued upon completion of the soil (percolation) testing requirements. The use of portable chemical toilets is only permitted on a temporary, short-term basis and would not be adequate to serve the proposed use. Exhibit 89.

Ms. Benham also responded to the Hearing Examiner's question of whether a condition placed on the use "such as no urination or defecation on the property" could be enforceable by DPS, stating,

If improper disposal of human waste were to occur, our office can issue a citation for a public health nuisance, but short of that I do not believe this type of condition could be realistically enforced by staff as it would require intense monitoring and compliance. Id.

C. DEP

On February 27, 2023, in an email directed to Mr. Shofar with DEP the Hearing Examiner reiterated the Board of Appeals' request that OZAH to consider whether the proposed use must be served by adequate public services/facilities, specifically sewer, based on the "mobile workforce argument" and asked if DEP could provide a recommendation or a report regarding what appropriate adequate public sanitary facilities would be required for a landscape business with a "mobile workforce" at the subject property. Exhibit 85. On March 13, 2023, the Hearing Examiner followed up with Mr. Shofar posing the following more direct questions:

(1) Do you need permanent bathrooms for adequate public facilities purposes,
(2) will long-term use of chemical toilets have an environmental impact, and
(3) what is the environmental impact of a site with no onsite toilet facilities that hosts a work force who visits the site twice a day, am and pm for the purposes of pick-up and drop-off of vehicles and materials?

Exhibit 90.

Mr. Shofar responded by directing the Hearing Examiner to someone either at DPS or possibly WSSC. DEP offered not recommendation or insight to the Hearing Examiner on the issues posed by the Board of Appeals.

D. Rustic Roads Advisory Recommendation

During the hearing on June 22, 2022, representatives of the Rustic Roads Advisory Committee ("Committee") testified in opposition of the Application. The Committee issued a formal opposition on January 3, 2023. Exhibit 96. Specifically, they pointed out the following:

1. The Applicant misstates the number of miles of rustic roads;

2. Tree removal services serving off-site locations are not agriculture;
3. The Applicant uses weight restricted roads for through movement;
4. The Applicant uses a protected weight limited bridge for his regular heavy truck traffic;
5. The Applicant has shown consistent disrespect for laws and regulations;
6. The historic King barn is specifically executed from the land proposed for the CU; the Applicant dumped wood debris on the property in view of the road;
7. Applicant installed a chemical toilet on site;
8. Applicant admitted to hosting inappropriate after-hours parties on site; and
9. Committee received complaints about the Applicant's business at a prior location. *Id.*

Representatives of the Committee also testified in opposition before the Planning Board Hearing prior to the first hearing in 2022 before OZAH.

VI. TESTIMONY

The Hearing Examiner reminded the parties to focus testimony and evidence on the very specific points as remanded from the Board of Appeals that included the onsite bathroom requirement, the mobile workforce argument and conformance with the Rustic Roads Plan. T. 9.

A. Applicant

The Applicant began with counsel providing an overview of the conditional use application, discussion of the site using various exhibits and a lengthy legal argument essentially recapping the arguments presented to the Board of Appeals. T. -45. See Exhibit 51 on the following page.

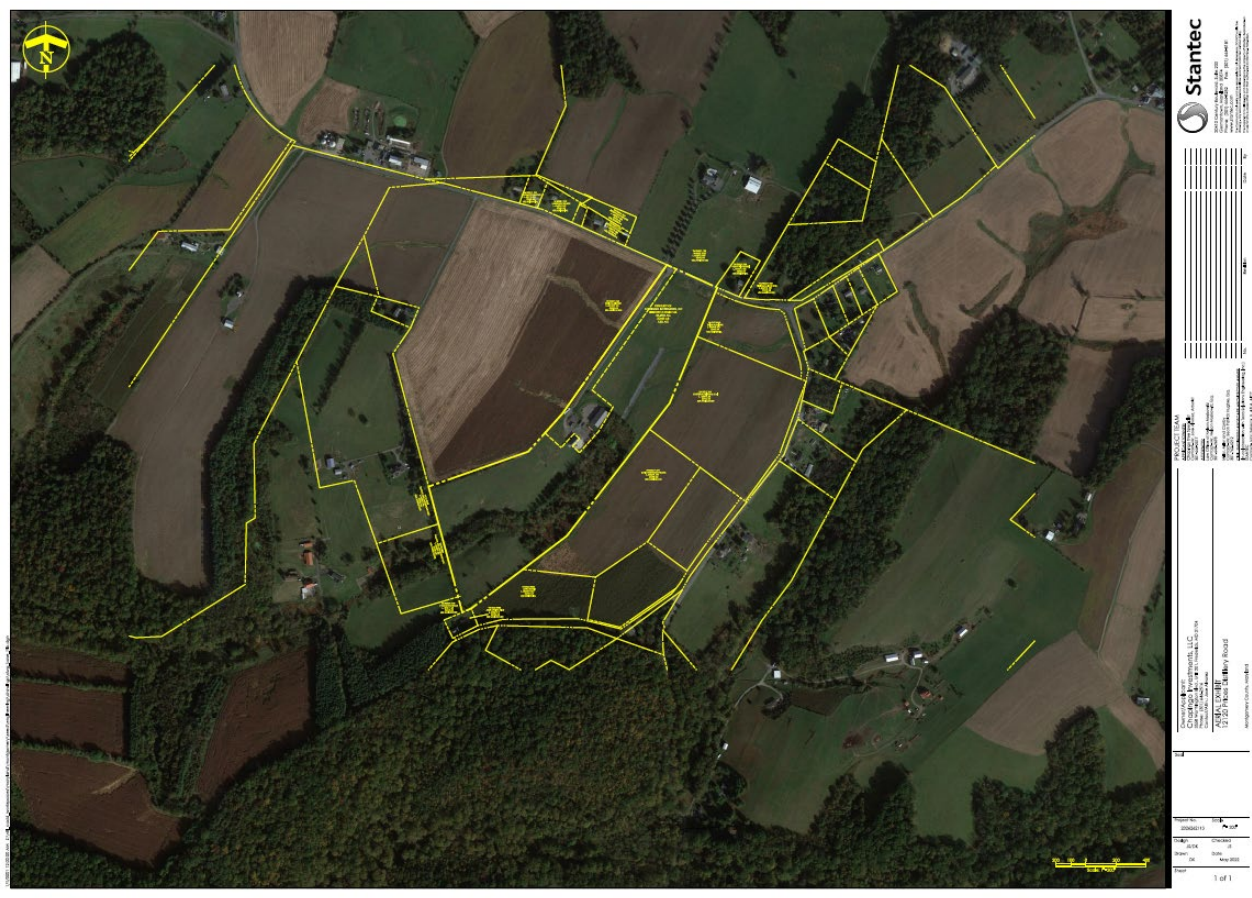


Exhibit 51 – Aerial Photo of Property
and Surrounding Area

Regarding the onsite bathroom requirement and exploration of the mobile workforce argument, Applicant argues that the use proposed does not require a bathroom for the following reasons: the adequate public facility requirement is misplaced because no public facilities are lacking; under OSAH 1910.141 sanitation requirements do not apply to mobile crews and the County has a history of approving uses without onsite bathrooms. T. 34-42. Regarding the compliance with the Rustic Roads Plan, counsel for the Applicant agreed with the Board of Appeals' position that any impact from the viewshed would be minimal. T. 42. The Applicant argues that conditions of approval in the "Emerald" and "Goshen" cases both involved uses

where weight restricted roads were involved. T. 43.

The Applicant offered expert testimony from John Sekerak in land use planning and landscape architecture. Mr. Sekerak testified at length to Exhibits 101 and 101 (a) through (g) all photographs taken from various locations along various Burnt Hill and Prices Distillery Road within a ¼ mile radius showing the degree of visibility to the subject property.

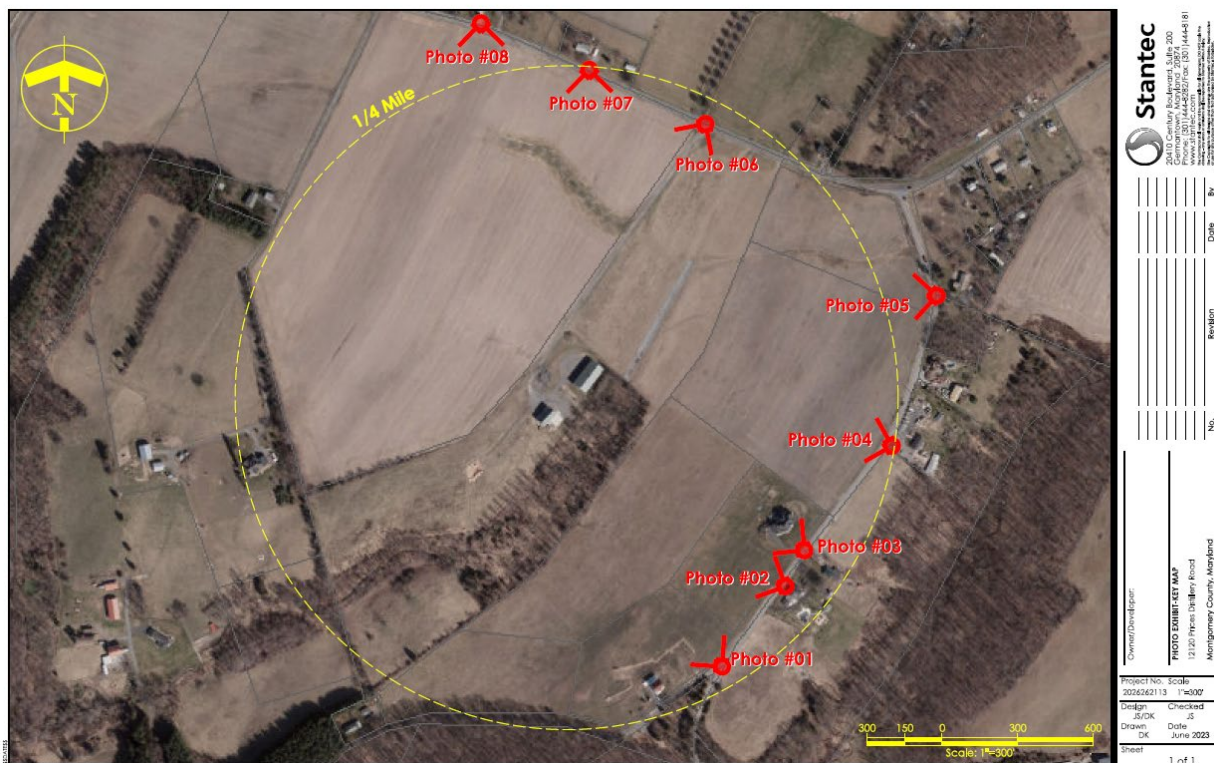


Exhibit 101 – Photo Key Map

Mr. Sekerak walked the Hearing Examiner through each photo identifying the viewshed from each point back to the subject property. T. 48-56. In addition, Mr. Sekerak confirmed that no new buildings, signs, or changes in the road are being proposed. T. 57. The use will add 14 trucks to be stored on the property overnight, with only 10 being used on any given day traveling to and from the subject property. T. 64. Mr. Sekerak further testified that it would be “difficult

to imagine a landscape contracting use that would have less impact on the roads.” T. 60. The expert witness affirmed that the most direct route from the subject property may be using Burnt Hill Road, but the alternative non-weight-restricted road would only add 1 or 2 minutes to the route. T. 68⁷. In addition, the expert testified that in his experience it would be normal for a route restriction condition to be included in a conditional use approval. T. 70. Mr. Nalepa also testified as an expert that impact on the local roads by the proposed use to be de minimis. T. 97. Referring to Exhibit 98(c), Mr. Nalepa, identified the portion of Lewisdale Road with weight restrictions that would not be used by the Applicant’s trucks as they would turn onto Clarksburg Road prior to the Lewisdale Road restrictions. Mr. Nalepa explained that the Applicant’s trucks can travel from the subject property to 270 without traveling on a weight restricted road. T. 93-96.

Regarding the bathroom facility arguments, Mr. Sekerak testified that not all conditional uses require restroom facilities, such as “utilities, the cemeteries, the equestrian centers.” T. 73. Mr. Sekerak stated a public facility may be deemed adequate because there are no impacts or de minimum impacts to those particular public facilities. *Id.* Mr. Sekerak argues no bathroom is required because no continuous staff remain at the property and public restrooms exists within 10 minutes of the subject property. In his opinion, the public facilities at this location should be deemed adequate. *Id.*

B. Opposition

Mr. Hartsock, a neighboring farmer, started the opposition testimony informing the Hearing Examiner that he is retired from the University of Maryland where he served as Director of the Institute of Applied

⁷ Mr. Nalepa also testified as an expert regarding the availability of routes that would avoid weigh-restricted roadways. T. 92-95

Agriculture and in his professional capacity is familiar with the commercial landscaping industry. T. 102. Mr. Hartsock's property is just downstream from the subject property and as a working farm he is required to document and report all "nutrients, including chemical fertilizers, collected animal manures, compost, and other organic materials like wood chips." T. 105. Mr. Hartsock pointed out that the Emerald conditional use application, as referred to by the Applicant, included sanitary facilities per an approved septic plan. T. 106. In addition, he pointed out that the Emerald application was ultimately withdrawn and never received approval. T. 107. In discussing the "practical issues" surrounding toilet facilities Mr. Hartsock stated, "no male worker will get in a truck and drive several miles from the subject property... just to pee when they can walk behind a building and do it." *Id.* Mr. Hartsock testified to personal experience working on similar crews in his youth and as a farmer in his own field working a quarter mile away from indoor plumbing. T. 107-108. Mr. Hartsock pointed out while he is one farmer who encounters the need to urinate problem a few times a year, with up to 22 employees on site daily in the morning and evening in a small area within a stream buffer frequented by other humans. *Id.* and Exhibit 8.

Mr. Ryan a neighbor also testified in opposition. He and his wife dispute the Applicant's claim that no workers are on the subject property during day; stating that most of the time the workers do not leave until between 7:00 and 7:30 am and that many times they hear people on site during the day moving equipment, items being dumped and running of "chainsaws". T. 117. Mr. Ryan testified that on 5/4 and 5/6 workers were on site all day and for a portion of the day on 5/5 and 5/18 based on the voices heard. T. 118. In addition, based on his observation the gross vehicular weight of the trucks leaving the site should exceed 10,000 pounds. T. 117.

During Mr. Ryan's testimony there was some confusion over whether or not one of the roads traveled by the Applicant's trucks was actually a weight restricted road. Ultimately, it was determined that Clarksburg Road was not a weight restricted road. T. 115. Mr. Ryan pointed out that Lewisdale and Burnt Hill Road remain weight restricted. *Id.*

Mr. Hunt another neighbor testified in opposition. Mr. Hunt believes the Staff Report prepared for

the Emerald application to be incorreced and as the application was never approved the Staff Report should not be relied upon as a basis for approving the Application before the Hearing Examiner. T. 119. Mr. Hunt asserts the property is small and it has been his observation that the Applicant continually stores bulk items on site including asphalt millings in front of the barn for over a year. T. 120.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Required Review

Generally, the key standards to approving a conditional use are whether the proposed development will be compatible with the surrounding area or whether will it cause harm. This is reflected in the “Necessary Findings” for approval of a conditional use in Sections 59.7.3.1.E.1 and 59.7.3.1.E.3 of the Zoning Ordinance:

Section 7.3.1.E.1. To approve a conditional use application, the Hearing Examiner must find that the proposed development:

* * *

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

* * *

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**

g. will not cause undue harm to the neighborhood as a result of a noninherent adverse effect alone or the combination of an inherent and a noninherent 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;**
- i. traffic, noise, odors, dust, illumination, or a lack of parking; or**
- iii. the health, safety, or welfare of neighboring residents, visitors, or employees.**

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.

B. Scope of Review

The previous Hearing Examiner found the proposed landscape contractor use did not conform to the 1996 Rustic Roads Functional Master Plan and did not meet the adequate public facilities standard due to a lack of sanitary sewer on the property. Exhibit 83 pg. 21, 24. In addition she determined that the lack of sanitary sewer would negatively impact the health, safety and welfare of the employees, and cause an undue harm to the neighborhood creating a noninherent impact that would alone cause an adverse effect. *Id.* pg. 26

Under the limited purview of the Board of Appeals' remand, the above standards require the Hearing Examiner to determine whether the proposed landscape contractor use will negatively impact the viewshed and the roads themselves per the 1996 Rustic Roads Functional Master Plan, whether sanitary sewer is required under the law and whether the lack of sanitary sewer will create an adverse impact.

The analysis of potential harm in a conditional use case must focus on adverse impacts caused by the specific use at the specific location proposed. The "Necessary Findings" for approval of a conditional use require the Hearing Examiner to review the impact of the "proposed development" on the "surrounding neighborhood" while also considering the "health, safety, or welfare of neighboring residents, visitors or employees." This analysis is reinforced by the Court of Appeals holding in *Montgomery Cty. v. Butler*, 417 Md. 271, 304-06 (2010). In

Butler, the Court found Montgomery County's Ordinance to be consistent with prior case law defining the scope of review in a conditional use:

... in allowing the board to consider any "adverse effects created by the unusual characteristics of the site" is entirely consistent with *Schultz* and its progeny. We explain.

In *Schultz*, the Court wrote that an applicant for a special exception "does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community. If he shows to the satisfaction of the Board that the proposed use would be conducted *without real detriment to the neighborhood* . . . he has met his burden." *Schultz*, 291 Md. at 11, 432 A.2d at 1325. The phrase "detriment to the neighborhood" implies necessarily that the Board's task is to determine if there is or likely will be a detriment to the surrounding properties. The Court did not mean that the Board, hypothetically, must measure and assess what the adverse effects of a proposed use would be on an idealized or even *average* neighborhood or property in the zone. Rather, as Judge Rita Davidson explained for the Court, it is for the zoning board to ascertain in each case the adverse effects that the proposed use would have on the *specific, actual* surrounding area... (emphasis in original).

Butler, supra. The site- and use-specific inquiry that must be made is reinforced in Montgomery County's mandate to determine "inherent" or "noninherent" physical or operational characteristics of the use in the proposed location. In addition, the Applicant also bears the burden of both persuasion and production.

[A] presumption does not necessarily shift the burden of persuasion. Rather, it merely satisfies the burden of going forward on a fact presumed and *may* satisfy the burden of persuasion if no rebuttal evidence is introduced by the other side. ... Stated differently, the party favored by the presumption is not relieved of the requirement of presenting evidence to establish a *prima facie* case as to those issues for which he bears the burden of proof if the adverse party sufficiently rebuts the presumption. In such instances, the presumption merely enhances the probative value of other evidence adduced.

Attar v. DMS Tollgate, LLC, 451 Md. 272, 287 (2017) (quoting *Litzenberg*, 115 Md. App. at 564, 694 A.2d at 157) (internal quotation marks omitted). *Clarksville Residents Against Mortuary Def. Fund, Inc. v. Donaldson Props.*, 453 Md. 516, 542 n.14, 162 A.3d 929, 944 (2017).

In light of the remand instructions from the Board of Appeals, the Hearing Examiner must examine the evidence presented and apply the conditional use standard taking into

consideration the physical and operational characteristics of the proposed use on the subject property.

A. Conformance with the 1996 Rustic Roads Functional Master Plan

1. Impact of Vehicle Weight on Surrounding Roads

The Board of Appeals directed the Hearing Examiner to consider conformity with the 1996 Rustic Roads Functional Master Plan by reviewing the existing evidence of the impact including expert testimony and to develop any new evidence as necessary to “assess the impact of and the use on the viewshed”. Exhibit 84, pg. 13. The evidence clearly shows that the property is surrounded by rustic roads. The Applicant established through expert testimony that a viable route exists from the subject property to the interstate without traveling on weight restricted roads. In addition, the travel distance on these non-weight restricted roads is only 1 or 2 minutes longer via this alternate route. See Exhibit 98(a).

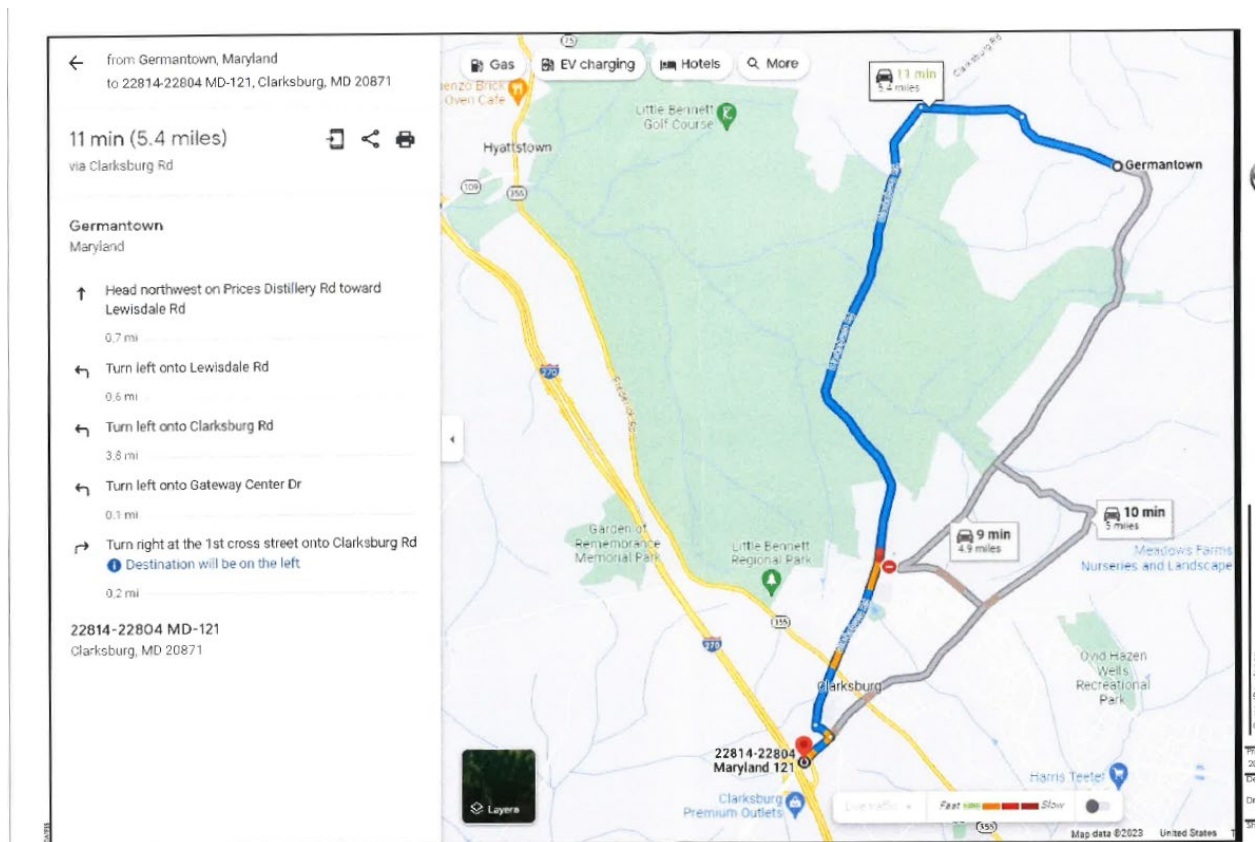


Exhibit 98(a) – Google Map Route

The Board of Appeals correctly states that fear of future noncompliance to a condition is no reason to deny a conditional use application. *See, Mossburg v. Montgomery County*, 107 Md. App. 1, 26 (1995). The Hearing Examiner finds the research and testimony of Applicant's expert, Mr. Nalepa persuasive that the proposed travel route is open to any sized vehicle. T. 95. Both the Applicant's experts expressed an expectation that a condition of approval would include a restriction prohibiting the Applicant's trucks from traveling on weight restricted roads and identifying a specific route for travel. This kind of condition would alleviate concerns regarding the use's impact on weight restricted roads. In addition, not all the Applicant's trucks are over 10,000 lbs. in weight nor are they all on the County roads every day. T. 64. The Applicant's expert testified that approximately 10 trucks including 3 pick-up style trucks would be traveling to and from the site on a daily basis. *Id.* A condition restricting the travel route provides protection to the weight restricted roads.

The opposition's concern given their observations of the Applicant's past practice of trucks traveling on restricted roads is understandable. The Hearing Examiner agrees with the opposition that garbage trucks, school buses and fire equipment cannot be considered "like" when comparing impact because those heavy vehicles cross the rustic roads specifically for the public's health, safety and welfare. T. 109. With that said, Hearing Examiner finds the Applicant's traffic expert's trip generation testimony that the number of trips generated during peak hours were far less than 50 to be persuasive. T. 97. Even if the maximum number of vehicles (14) parked at the site were to leave and return on any given day it is still significantly less than 50 trips per peak hour. Adding an additional 14 am and pm trips by vehicles many of which weighing less 10,000 lbs. will not significantly negatively impact the rustic roads to place the proposed use out of conformance with the 1996 Rustic Roads Functional Master Plan.

2. *Viewshed*

The Board of Appeals asked the Hearing Examiner to revisit concerns about the proposed use and its impact on the viewshed. To that end, the Hearing Examiner finds the testimony Applicant's expert Mr. Sekerak and his photographs in Exhibit 101 persuasive. *See Exhibit 101 – Photo Key above.* The eight photographs taken from a variety of angles along the "scenic" road traveling as a vehicle looking

back to the subject property clearly identified the “viewshed” if traveling by car. The testimony of Mr. Sekerak and his exhibits depicting the ¼ mile viewshed was undisputed by the opposition. Adding a condition to any conditional use approval restricting the location of parking and storing of vehicles on the property would further protect the viewshed.

The Hearing Examiner finds that the viewshed will not be impacted by the use. The Hearing Examiner also agrees with the Board of Appeals that fear of future non-compliance cannot be a justification for denial of a conditional use. A condition, limiting the travel route for the use and restricting the location of parked vehicles on the property resolves the concerns previously expressed by the Hearing Examiner and used to deny the Application for nonconformity with the 1996 Rustic Roads Functional Master Plan.

B. Sanitary Facility Requirement

1. Other Special Exceptions/Conditional Uses without a Bathroom

The Board of Appeals requested the Hearing Examiner analyze other special exceptions and conditional uses as identified by Mr. Hughes including but not limited to S-581, S-2596, S-2706, S-2729, S-2805, CU19-07, CU16-04 and CU19-01. Exhibit 84, pg. 12. In addition, the Board of Appeals directed the Hearing Examiner to consider specifically whether any landscape contractor uses have been granted without either fully evaluating or requiring a “bathroom” for the workers, pointing to S-2807, S-2761 and CU19-04. *Id.*

Staff in their supplemental report reviewed all cases referenced in the paragraph above. Exhibit 92. Regarding the special exceptions listed from S-581 through S-2805, as well as CU19-07, CU16-04 and CU19-01, Staff found all these uses granted without a bathroom requirement on the basis that all locations were unmanned facilities housing either PEPCO, Washington Gas, Verizon, T-Mobile or American Towers, LLC equipment specifically for electrical, gas and telecommunication services. *Id.* at pg. 1. Staff noted these locations

accommodated no regularly scheduled employees or regular daily trips to or from these facilities and estimated human visits to be approximately 1 to 2 times a month. *Id.* Staff did not include the referenced cases in its initial report stating that these types of cases are not similar to the proposed use and are not a direct comparison to the subject Application. *Id.* at pg. 1. The Hearing Examiner agrees with Staff's position that the utility cases are not a direct comparison to the proposed landscape contracting use. The human component of a "utility" use and "landscaping" business is very different. Utility uses operate 365 days a year with minimal human visits. The proposed landscape business will operate a minimum five days a week with at least twice daily visits by up to 22 employees. Comparing these two uses is like an "apples to oranges" comparison, both may be fruit, but vastly different in taste and texture. The Hearing Examiner finds Applicant's reliance on utility uses as a direct comparison to the proposed use is misplaced. No bathroom facilities are required for these utility uses because people do not regularly visit the utility approved locations.

The Applicant is correct in looking to other landscape businesses as a direct comparison. Staff reviewed the following landscape uses S-2807, S-2761, and CU19-04. In S-2807, Kline Landscaping, the special exception was to permit the continued use of the property as a landscape contractor.⁸ To ensure that the site could continue to be served by private well and septic, upon the recommendation of technical Staff, the DPS Well and Septic Division evaluated the septic capacity for the landscape contractor and determined by percolation testing that there was adequate septic capacity for the use proposed on the site. *Id.* In S-2761, Pacano Property: Landscape Contractor, the special exception was granted even though the existing septic system serving the Property had limitations, but DPS approved a concept agreement, allowing the

⁸ The use was revoked on May 7, 2019 because the property was annexed into the Town of Laytonsville.

system to continue to serve the existing house provided the house only serve as the office to the landscape contractor business and did not permit a residential use since the septic system did not have the capacity to serve both uses. *Id.* In CU19-04, Francisco Landscaping, the landscape contractor business was denied, however, plans submitted showed septic field available for the proposed use. *Id.*

In addition, the Hearing Examiner reviewed landscape contractor case files going back to 2015 and found the following landscape contractor applications; CU16-09, CU15-04 and CU18-06. The Staff Report prepared for CU16-09, Emerald Landscaping indicated the property would be served by onsite water and septic disposal system where the Well and Septic Division of DPS approved the proposed plan.⁹ The plans submitted for CU15-04, Greenskeeper Landscaping, another landscape contractor application in an AR Zone, and found a septic system planned in an area tested and approved for a septic system by DPS.¹⁰ The plans submitted for CU18-06, Goshen Enterprises, Inc. Landscape Contractor identified the location of a well and septic to serve the use.¹¹

Staff reviewed all comparative landscape contractor businesses raised by the Applicant and found none without some kind of septic/sewer onsite. The Hearing Examiner found no proposed landscape contractor uses, at least since 2015, without septic available onsite. For all these reasons, the Hearing Examiner finds that the approved utility uses are not an appropriate direct comparison to the subject Application for a landscape contractor business. The Hearing Examiner finds the Applicant's reliance on previously reviewed landscape contractor uses not persuasive for the argument that no bathroom facilities are required for the proposed use given

⁹ See Technical Staff Report dated 3-24-16 in CU-16-09.

¹⁰ See Exhibit 42D3 in CU15-04.

¹¹ See Exhibit 81(b) in CU18-06.

the fact that all applications reviewed by Staff and the Hearing Examiner contained some sort of sewer or septic onsite to accommodate use by employees.

2. Mobile Workforce & Adequate Public Facilities

The specific facts and circumstances presented by the Application must be reviewed under the existing necessary findings subsection of the County's conditional use law to determine if the proposed use could be considered a "mobile workforce" and if so, how does that impact the evaluation of adequate public facilities. For every conditional use application submitted to OZAH, the Hearing Examiner must find that the proposed development will be served by adequate public facilities (or APF) including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities if a preliminary subdivision plan is not filed concurrently or required subsequently. *See* Zoning Ordinance §7.3.1.E.1.f.(i).¹² In addition, for every conditional use application submitted to OZAH, the Hearing Examiner must determine that the use will not cause undue harm to the neighborhood because of noninherent adverse effects alone or in combination with inherent adverse effects. *Id.* at (g).

i. Adequate Public Facilities Review

Counsel for the Applicant argues Staff incorrectly applies the County APF law in this instance referring to a "Managing Maryland's Growth – Models and Guidance #24, Adequate Public Facilities Ordinances." Exhibit 42(b). Specifically, pointing to the following paragraph, which states in part:

In plain English, an APFO says that if the roads are too congested, if the school classrooms are too crowded, if the water system cannot provide enough water, if the sewer pipes or treatment plant are full, or if there are not enough playing fields for recreational use, then the development cannot be approved until the problem is corrected. At the same time, however, an APFO is not the appropriate tool to stop

¹² No site preliminary subdivision plan is required for the proposed Application.

growth that is otherwise consistent with local zoning. The application of an APFO must be associated with a funding source to remedy whatever the constraint on growth approval might be. *Id.* at pg. 3.

The Applicant argues the APFO is inapplicable to the review of this proposed new use because “the sewer pipes or treatment plants are not full... not being used as they do not exist ... on site.” Exhibit 99, pg. 4. Further the Applicant argues a substantive review by OZAH of the necessity of bathroom may not be required. *Id.*

The purpose of a timely adequate public facilities determination is “to avoid premature development of land where public facilities are inadequate.” MONTGOMERY COUNTY CODE, CH. 8, ART. IV, §8-30(a). The law is clear; when the application is not subject to a preliminary plan of subdivision, the Hearing Examiner must find that the proposed development will be served by adequate public facilities, including sanitary sewer. 59.7.3.1.E.1.f. The Applicant correctly states the property is not served by sewer or septic. The Applicant also correctly states that OZHA has granted other conditional uses without a requiring a sewer or septic connection. In each of those prior conditional use approvals the Hearing Examiner still conducted a review of adequate public facilities as required by law. In the Report and Decision granting CU19-07, PEPCO, the Hearing Examiner reviewed the adequacy of public facilities and found the “Utility does not require public services and facilities including ... sanitary sewer, because it is an unmanned electric substation.”¹³ Since no sanitary sewer or septic serves the subject property, the Hearing Examiner as directed by the Board of Appeals evaluate the adequacy of the public facilities, specifically sanitary sewer, by reviewing the Applicant’s mobile workforce argument.

ii. Mobile Workforce

Applicant’s “mobile workforce” argument represents an issue of first impression before OZAH.

¹³ See pg. 28 of the Hearing Examiner’s Report and Decision for CU19-07, PEPCO, dated April 19, 2019.

Are the Applicant's employees a mobile workforce? If so, under the adequate public facilities review, is sanitary sewer/septic required at the property? The Applicant relies on an OSHA interpretation letter as to what constitutes a "nearby" toilet per 29 CFR §1926.51(c) and contains the following:

When determining whether paragraph (c)(4) applies to a work crew, employers must evaluate the nature of the site and job functions of the crew. Workers who continually or frequently move from jobsite to jobsite on a daily or hourly basis would be considered a "mobile crew." Workers who report to a conventional construction project, where they work for more extended periods of time (days, weeks, or longer), would not be considered a "mobile crew" for purposes of the sanitation standard. Exhibit 68.

In addition, the Applicant refers to COMAR 09.12.36.00 which does not require toilets for agricultural workers who perform field work for a period of 3 hours or less. Exhibit 47. The Applicant offered no direct evidence or testimony, other than counsel's legal argument during opening statements, on the definition of a "mobile workforce" under the law or on what considers to be OSHA a "mobile workforce" and provided only one guidance letter from 2002 on toilet requirements for construction workers. Staff in its supplemental report determined that the Applicant's employees would not be considered a "mobile crew" because they meet onsite a minimum twice a day for an extended period, i.e., their work location is not mobile but fixed. Exhibit 92, pg. 3. The opposition offered no other testimony or evidence as to whether Applicant's employees should be considered a mobile workforce.

The Hearing Examiner finds that because Applicant's employees report to the same location every day, they are not similar to the construction workers described in the OSHA guidance nor are they agricultural workers that move from location to location depending on what needs to be harvested. The Applicant's employees daily work schedule compares more to that of a police officer working a beat reporting to a specific police station location for a shift before heading out to his/her beat or a delivery driver reporting a warehouse to pick up a truck and goods for delivery or a service technician position that must report to a fixed location to pick up work, vehicle and/or equipment before traveling to various locations as assigned. Because the Applicant's employees report to the subject property at a minimum twice daily for period of time of at least 30 minutes to an hour or more, the Hearing Examiner finds the Applicant's employees cannot be considered a mobile workforce under OSHA.

Neither example of worker as described by the Applicant, construction workers and agriculture workers, report daily to the same primary work location as do Applicant's employees. The Applicant has failed to persuade the Hearing Examiner that the Applicant's employees are a mobile workforce that do not require toilets as established by OSHA regulations. The Hearing Examiner agrees that after the Applicant's workers leave and before they come back to the subject property, i.e., the worker's primary work location, then it is possible to classify the employees as a mobile workforce. Because the subject property serves as the employees' primary work location, the development must be served by some kind of sanitary sewer or septic to satisfy the conditional use adequate public facilities review. The Hearing Officer finds the mobile workforce argument fails and the Application does not meet the adequate public facilities standard.

3. Noninherent Adverse Impacts

For argument's sake, even if the Hearing Examiner accepts all the arguments put forth by the Applicant as to why bathroom facilities are not required at the subject property, the lack of sanitation facilities for the workers at the subject property creates a noninherent adverse impact that alone will cause harm to the surrounding properties and the Applicant's employees.¹⁴ The Applicant provided a map of bathrooms available within 10 minutes of the subject property as part of the "mobile workforce" argument. Exhibit 53. Is the availability of bathrooms for employees within a 10-minute drive enough to eliminate an adverse impact of not having a bathroom onsite?

Mr. Hartsock, a neighboring farmer in opposition to the Application, submitted both written testimony and testified orally during the hearing. Per Mr. Hartsock, without onsite sanitary facilities, he believes the 22 employees arriving at 6 am with coffee in hand waiting to start their day that it won't "take too much imagination to realize that the outside of the pole building (building in the stream valley buffer) will become a latrine." Exhibit 71, pg. 6. The stream that accepts the runoff from the subject property runs through his farm and past his home. T. 102. Mr. Hartsock is a retired professor from the University

¹⁴ See 59.7.3.1.E.1(g)(iii).

of Maryland last serving as the director of the Institute of Applied Agriculture, part of the College of Agriculture and Natural Resources, which includes the landscape management major, and he is very familiar with operations of the commercial landscape industry. *Id.* Mr. Hartsock testified to the “practical issues” in the absence of sanitary facilities. T. 107. In his experience as a farmer and having worked on crews like that of Applicant’s employees, “no male worker will get in his truck and drive several miles from the subject property ... just to pee when they can walk behind a building and do it.” *Id.* Mr. Hartsock admitted to this outdoor urination practice himself on his own farm. T. 108. As Mr. Hartsock points out, one farmer occasionally relieving himself outside is very different from 22 individuals onsite daily with no toilet facilities within walking distance. *Id.* Mr. Hartsock pointed to the location of the proposed use being a small area within a stream buffer frequented by other humans. *Id.* See the Applicant’s final FCP depicting the stream buffer boundary below.¹⁵

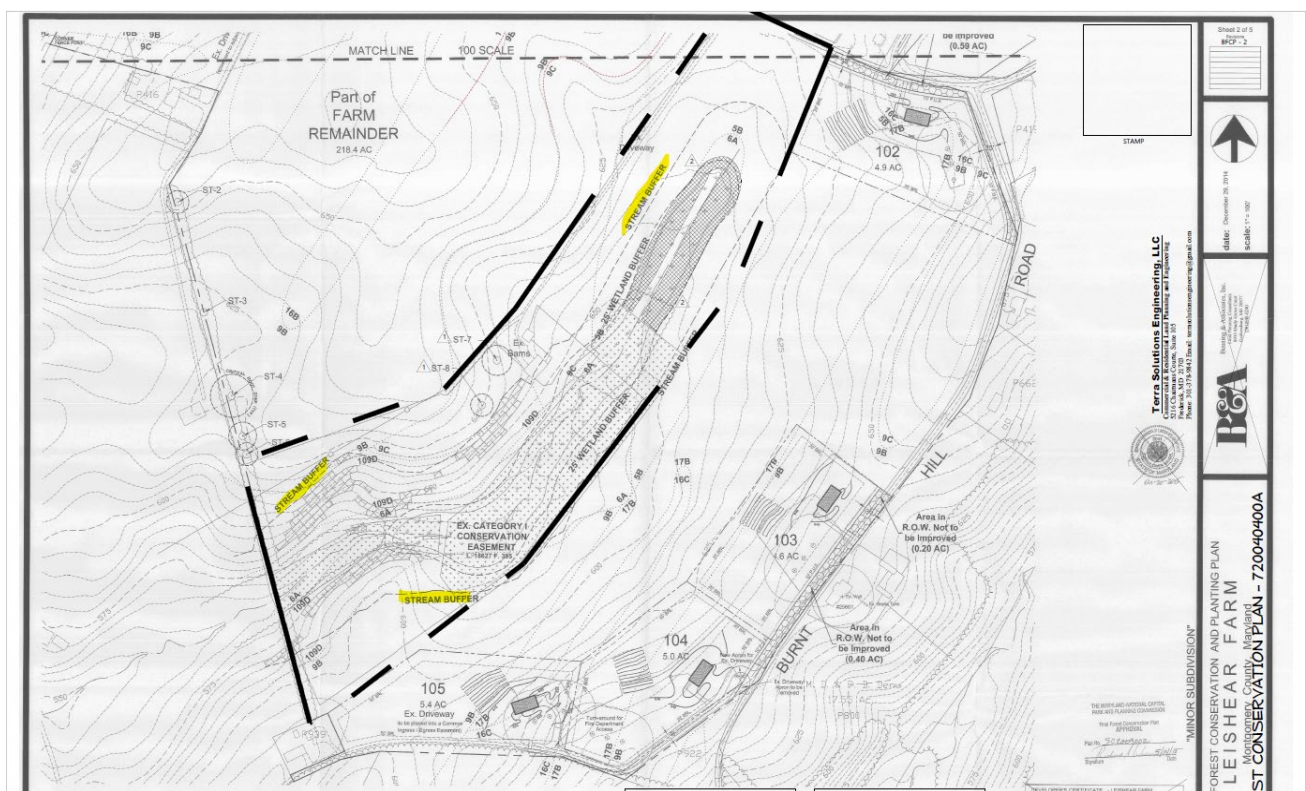


Exhibit 15a. Final FCP

¹⁵ Stream buffer notation on Exhibit 15a. highlighted for demonstration purposes.

The Hearing Examiner finds Mr. Hartsock's testimony persuasive and finds the facts as presented, i.e., the daily site visits of 22 people in the early morning and then back in the evening after working outdoors all day, without toilet facilities at the subject property creates a noninherent impact adverse to the neighboring properties and to the Applicant's workers themselves.

While the Hearing Examiner's reached a finding that the Applicant's employees are not a mobile workforce and the proposed use does not meet adequate public facilities standard, the evidence presented did not persuade the Hearing Examiner that the proposed use would not adversely impact the surrounding properties and the Applicant's employees. The finding that a not having onsite toilets is a noninherent adverse impact by the Hearing Examiner in and of itself is enough to deny the proposed conditional use.¹⁶

VIII. CONCLUSION AND DECISION

The Hearing Examiner issues this Supplemental Report and Decision pursuant to Board of Appeals' remand, and for the reasons set forth above, the conditional use application fails to meet the Zoning Ordinance standards for approval. Based on the foregoing findings and conclusions, the Hearing Examiner hereby ***DENIES*** the Applicant's application for a conditional use under Section 59.3.5.5.

Issued this 21st day of August 2023.



Kathleen E. Byrne
Hearing Examiner

¹⁶ See also §59.7.3.1.E.3

NOTICE OF RIGHT TO APPEAL

Any party of record may file a written request to appeal the Hearing Examiner's Decision by requesting oral argument before the Board of Appeals, within 10 days issuance of the Hearing Examiner's Report and Decision. Any party of record may, no later than 5 days after a request for oral argument is filed, 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.

Additional procedures are specified in Zoning Ordinance §59.7.3.1.f.1. Contact information for the Board of Appeals is:

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

PLEASE NOTE THE FOLLOWING BOARD OF APPEALS FILING REQUIREMENTS DURING THE COVID-19 PANDEMIC:

The Board of Appeals website sets forth these procedures for filing documents:

Because remote operations may not always allow us to promptly date-stamp incoming U.S. Mail, until further notice, all time-sensitive filings (administrative appeals, appeals of conditional use decisions/requests for oral argument, requests for public hearings on administrative modifications, requests for reconsideration, etc.) should be sent via email to BOA@montgomerycountymd.gov, and will be considered to have been filed on the date and time shown on your email. In addition, you also need to send a hard copy of your request, with any required filing fee, via U.S. Mail, to the Board's 100 Maryland Avenue address (above). Board staff will acknowledge receipt of your request and will contact you regarding scheduling.

If you have questions about how to file a request for oral argument, please contact Staff of the Board of Appeals.

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/>.

NOTIFICATION OF DECISION TO BE SENT TO:

Sean Hughes, Esquire
Attorney for the Applicant
Barbara Jay, Executive Director, Montgomery County Board of Appeals
Parties in Opposition
Robert Kronenberg, Deputy Director, Planning Department
Mark Beall, Planning Department
Greg Nichols, Manager, Department of Permitting Services
Victor Salazar, Department of Permitting Services
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