

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
 Stella B. Werner Council Office Building
 Rockville, Maryland 20850
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IN THE MATTER OF:	*	
AMERICAN LAWN AND LANDSCAPE, INC.	*	
	*	
Applicant	*	Conditional Use Application
	*	No. CU 24-10
Jeffrey K. Juneau	*	BOA Variance Application
For the Applicant	*	No. A-6853
	*	
Christopher M. Ruhlen, Esq.	*	
Attorney for the Applicant	*	

Before: Kathleen Byrne, Hearing Examiner		

HEARING EXAMINER'S REPORT AND DECISION

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I. STATEMENT OF THE CASE

Jeffrey K and SJ Juneau doing business American Lawn and Landscape, Inc. (Applicant or American Lawn) filed an application on November 1, 2023, seeking a conditional use to operate a landscape contractor business on the property known as 6412 Damascus Road, Gaithersburg, Maryland 20852 (subject property or property). Exhibit 1. On February 6, 2024, the Applicant filed a petition for variance associated with the conditional use application with the Board of Appeals. Exhibit 21. On February 15, 2024, the Board of Appeals transmitted the variance petition to OZAH for the two matters to be consolidated and a joint public hearing be held. *Id.* By order dated February 23, 2024, the Hearing Examiner consolidated both applications. Exhibit 22.

The property is described as a 4.62-acre lot located on the south side of Damascus Road approximately 0.5 miles east of the intersection of Hipsley Mill Road and Damascus Road,

zoned AR and further identified as Lot 2, Block A on Plat No. 19212 on tax account number 01-03045790 in the Etchison Acres Subdivision. Exhibit 1 and Exhibit 26, pg. 6. The Applicant owns and occupies the property. Exhibit 1.

Currently the Applicant lives on the property and has used the parcel for the last 25 years as a landscaping contractor business. Exhibit 3, pg. 1-2. When Mr. Juneau purchased the property he believed his landscape contractor business did not require any special approvals in the then Rural Density Transfer Zone and was unaware of the 1985 law change. *Id.* The Applicant seeks this conditional use and related variances to continue his current business operations. *Id.* On February 29, 2024, the staff of the Montgomery County Planning Department (Planning Staff or Staff) issued a report recommending approval of the proposed conditional use subject to certain conditions. Exhibit 26. By letter dated March 5, 2024, the Planning Board conveyed to OZAH that it agreed with Planning Staff approval of the proposed conditional use subject to certain conditions but added a further a condition “recognizing a new non-inherent impact due to the existing development and recommended requiring the applicant to provide stormwater management for all existing development on the subject property.”¹ Exhibit 27.

A public hearing was originally scheduled for March 18, 2024, but upon receipt of Motion from Applicant's attorney for a continuance, the Hearing Examiner postponed the public hearing to May 2, 2024. Exhibit 42. The public hearing proceeded as scheduled on Thursday, May 2, 2024.² Mr. Ruhlen represented the Applicant during the hearing and Mr. Jeffrey Juneau testified on behalf of the Applicant. Mr. Nicholas Driban and Mr. James Wilmer testified as the

¹ The Planning Board also recommended changing the hours of operation to end at 6:00 pm instead of 5:00 pm.

² The public hearing was held in a hybrid format using Zoom. A link and phone number for the parties and/or public to join the hearing were published on OZAH's website. Hearing exhibits were also published on OZAH's website prior to the hearing to permit the public to participate.

Applicant's experts in support of the application. Mr. Oscar Lyles an immediately abutting property owner, represented by Ms. Elizabeth McInturff, testified in Opposition as did Ms. Tracy Horn. Mr. Yarid "Tony" Lopez testified neither in support nor in opposition, but as a neighbor to both Mr. Juneau and Mr. Lyles and to his experiences with water runoff. After hearing evidence presented, the Hearing Examiner held the record open for a period of 10 days to receive the transcript and evidence of the resolution of any open violations at the subject property. OZAH received the transcript on May 13, 2024, and the Hearing Examiner closed the record on May 13, 2024. On June 3, 2024, the Hearing Examiner extended the time for issuing her Report and Decision until Tuesday, June 25, 2024. For the following reasons, the Hearing Examiner approves the conditional use application and recommends approval of the related variances subject to the conditions listed in Part V of this Report and Decision.

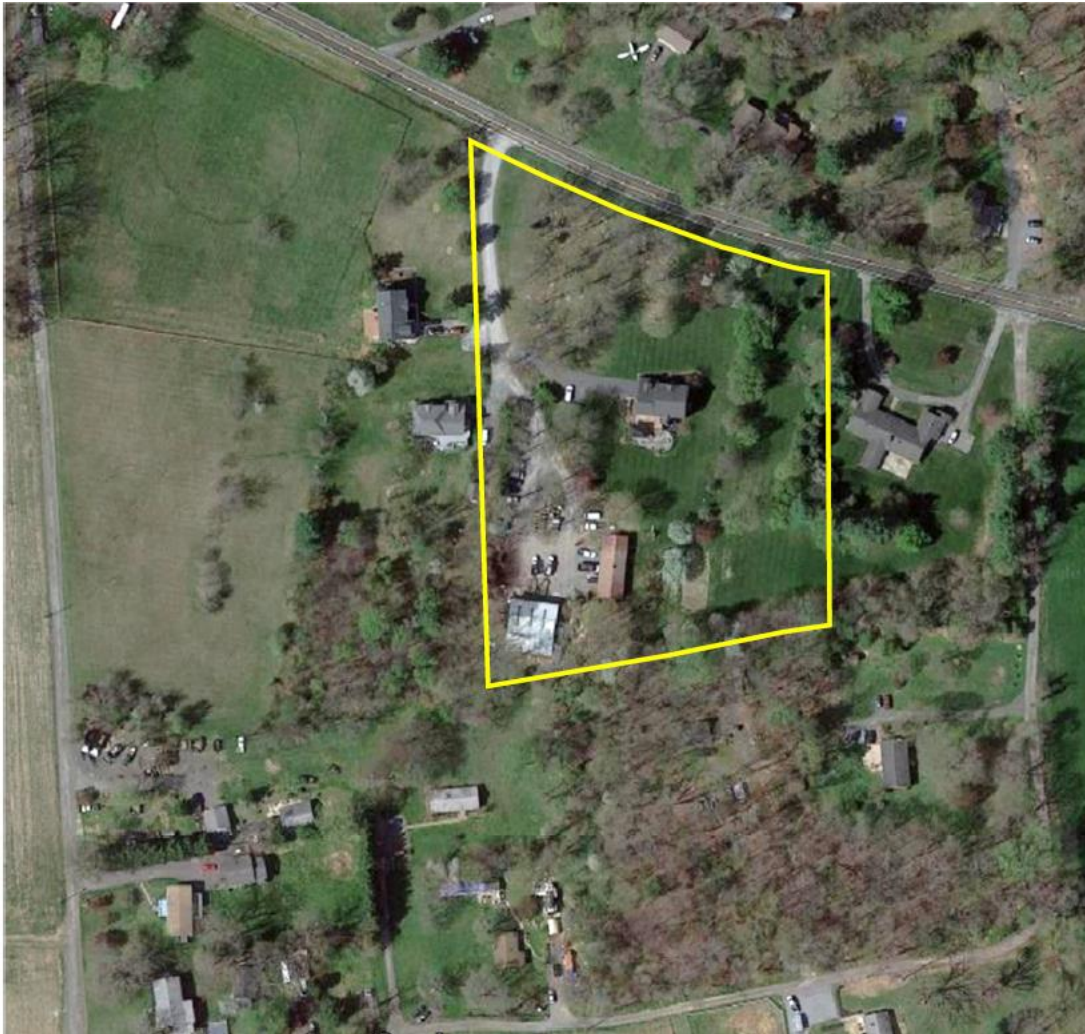
II. FACTUAL BACKGROUND

A. Subject Property

The subject property consists of 4.62 acres identified as Lot 2, block A on Plat No. 19212 with an address of 6412 Damascus Road, Gaithersburg, Maryland. Exhibit 26, pg. 5. The Applicant proposes no structural changes to the property which is accessed via a shared driveway that fronts on Damascus Road. *Id.* The property contains a single-family detached house located on the front of the parcel facing Damascus Road. *Id.* The rear of the property contains two existing outbuildings used for the landscape contractor business. The rest of the site in the rear also located behind the house is also used for the existing landscape contractor business including parking for employees, trucks and equipment. *Id.*



Subject Property – Exhibit 26, pg. 5

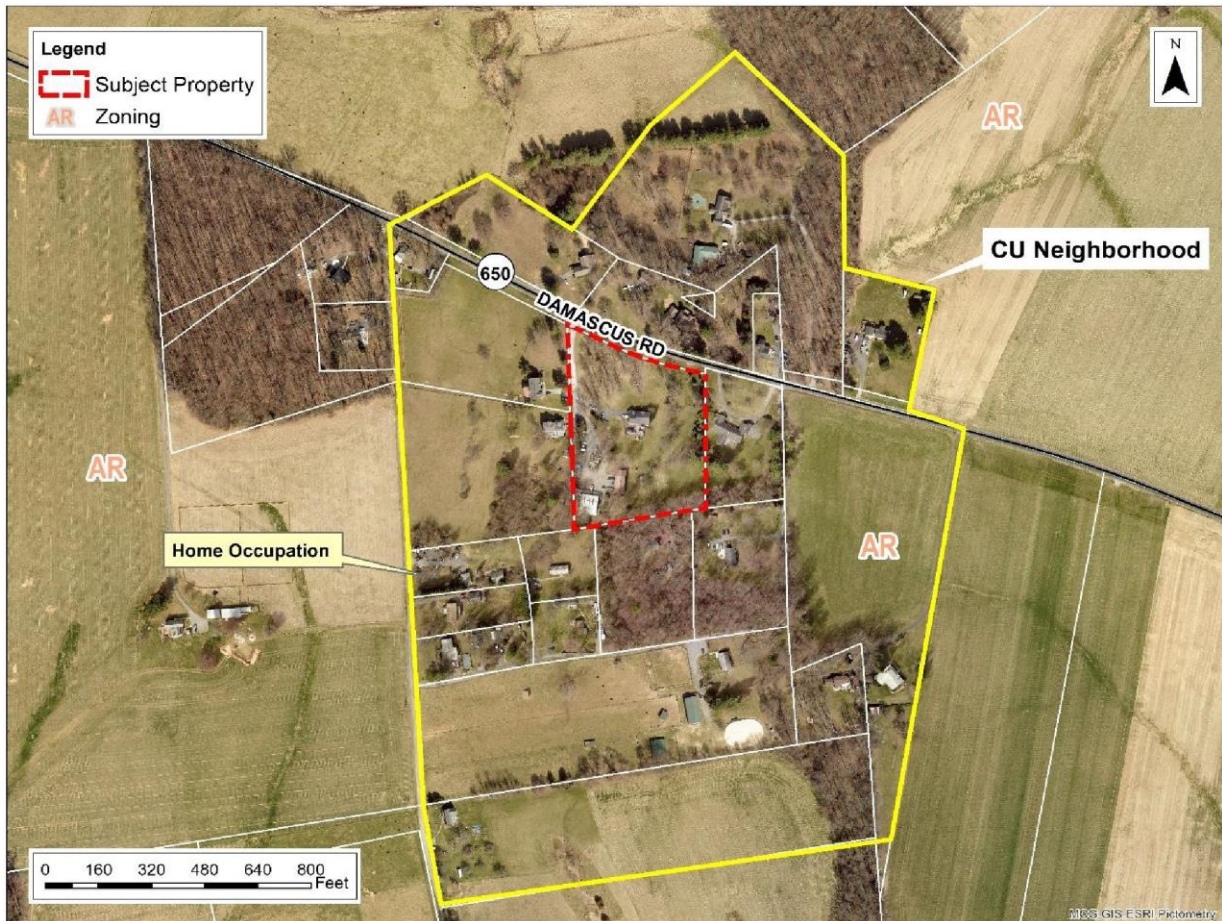


Aerial Photo - Exhibit 36, pg. 2

B. Surrounding Neighborhood

Staff identified the neighborhood for purposes of analyzing the application as being zoned AR and that all the properties in the defined neighborhood as also being zoned AR. *Id.* at pg. 4. The neighboring properties consist of single-family dwelling units as well as agricultural uses. *Id.* Staff identified no existing special exceptions or conditional uses within the defined

neighborhood but did identify one home occupation for a landscape contractor use at 20461 Sunbright Lane owned by Mr. Oscar Lyles. *Id.*



Staff Defined Neighborhood Aerial/Map – Exhibit 26, pg. 4

C. Proposed Use

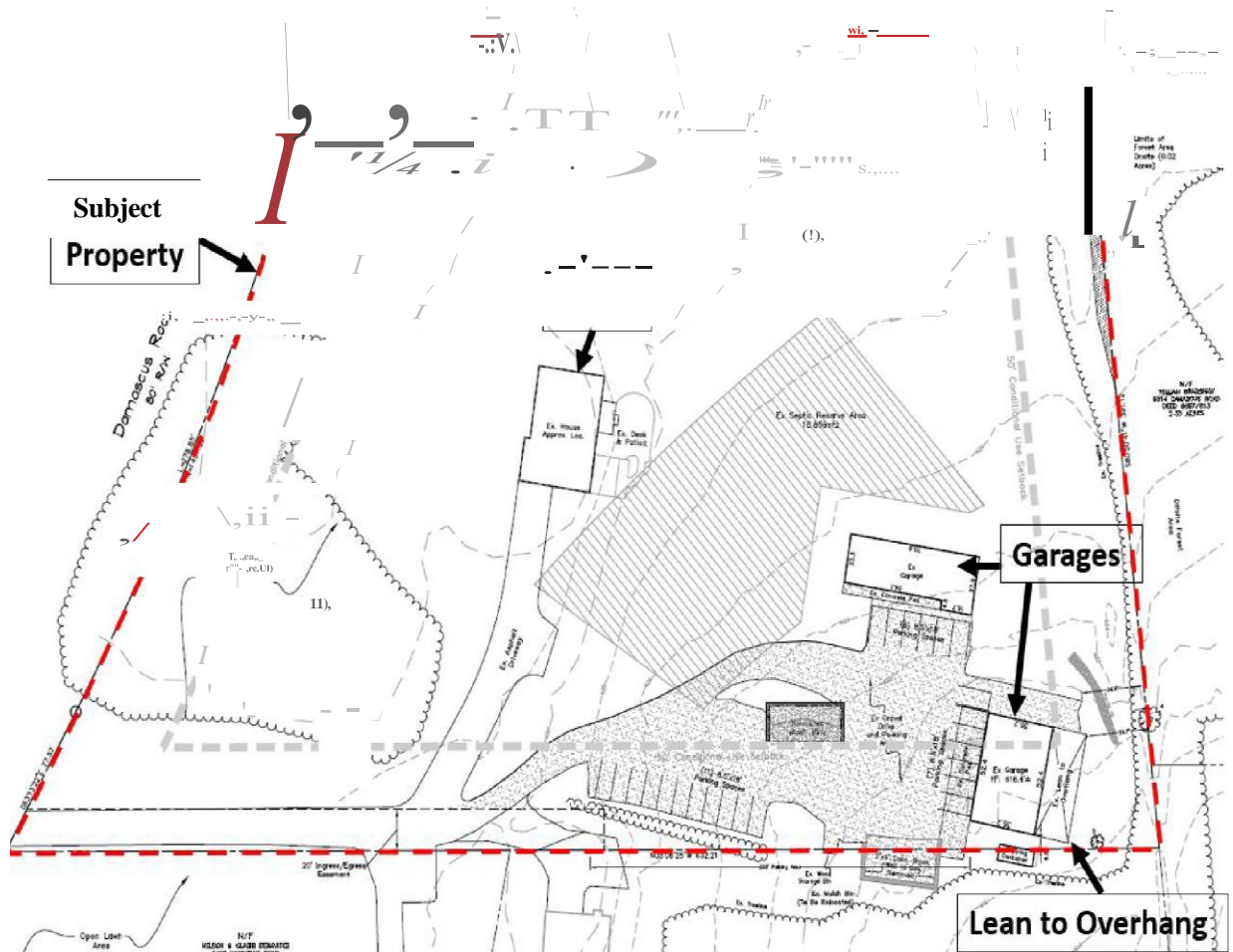
The Applicants “propose” use using the rear portion of the property for a landscape contractor business that focuses mainly on commercial landscape maintenance for condos and HOAs. T. 30. The existing house will remain as a residence use for Mr. Juneau and his

wife. Exhibit 3, pg. 2. A restroom within the dwelling will be available for employees to use. T. 129. The Applicant proposes using the existing gravel area as a parking area for the employees, equipment, and trucks for the business as well as use of the outbuildings for equipment storage and office use. Exhibit 26, pg. 6. The Applicant will remove the existing concrete block wall that currently encroaches on the neighboring property, move the fuel tanks and mulch bins to an interior area outside the 50-foot setback with the fuel tanks screened from the neighbors by the mulch block wall. T. 36-40. The landscape contractor use will utilize twelve (12) vehicles including seven (7) stake body trucks, four (4) pick-up trucks and one passenger van. *Id.* The Applicant estimates approximately 20 employees visit the site daily but will have no more than 24 employees on site at any given time. *Id.* and Exhibit 3, pg. 2. Employees will arrive at the property in the morning starting at 6:45 a.m. and will leave by 5:00 p.m. Monday through Friday. *Id.* The Applicant does not propose weekend hours except in the case of emergencies such as a storm or other similar events. *Id.* Employees will leave for jobsites shortly, approximately 7:30 am, and then return around later in the day around 5:00 pm. *Id.* and T. 30-31. Employees arrive to the site either via their own vehicles or in a van/shuttle provided by the Applicant. *Id.* Specifically, Applicant's shuttle van accommodates approximately 9 employees, and the rest of the employees travel in their own vehicles. *Id.* The Applicant intends to remove an existing wood chip storage bin along the west side of the Property. *Id.*

1. Site Plan and Landscape

The rear portion of the site used for the landscape contractor business has a gravel parking/work area that fronts the two outbuildings with additional parking on the western lot

line. Exhibit 26, pg. 6-7. The Applicant is requesting variances with the conditional use application because of the requirement for landscape contractors to be set back 50 feet from lot lines. *Id.* The existing outbuildings and gravel parking areas currently in use have been submitted as part of this application and these structures and parking areas are not meeting the required 50-foot setback. *Id.*



Existing Conditions Site Plan – Exhibit 26, pg. 7

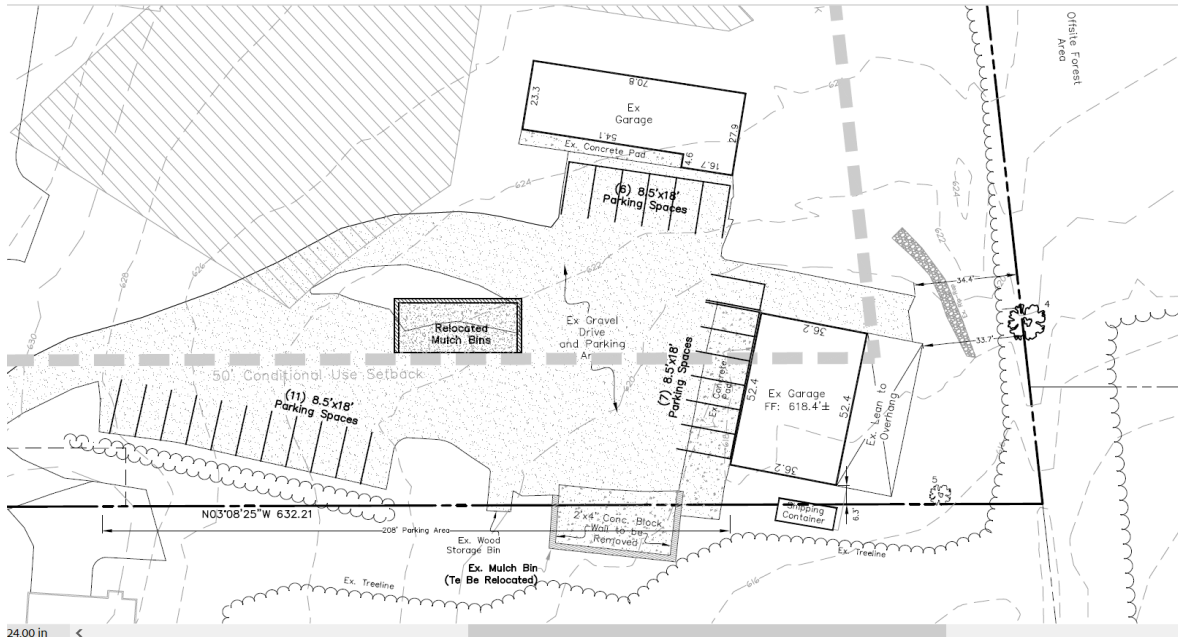
3. A maximum 16.3' variance from the minimum 50' conditional use setback requirement that otherwise would apply from the lot line to the existing outbuilding under Zoning Ordinance Section 59-3.5.5.B. The outbuilding is set back a minimum of 33.7' from the lot line.
4. A maximum 15.6' variance from the minimum 50' conditional use setback requirement that otherwise would apply from the lot line to the existing gravel parking area under Zoning Ordinance Section 59-3.5.5.B. The parking area is set back a minimum of 34.4' from the lot line.

Exhibit 19.

2. Parking, Lighting Plans and Signage

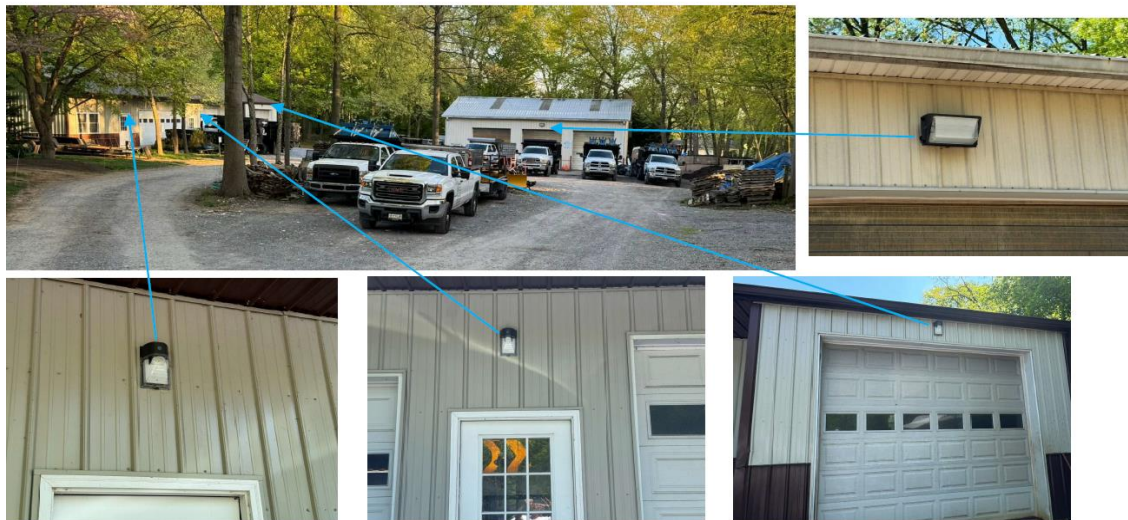
The site plan shown above identifies 26 parking spaces approximately 16 of which are located within the 50-foot setback. Exhibit 17. The Applicant's expert testified that there is more than enough parking on site even if the Applicant did not provide a shuttle service for his employees. T. 112-113. The employees park along the edge of the property. T. 66. The Applicant's trucks when they are parked on site, pull in and either back into the area in front of the garage or pull in, circle and around and park on the gravel under the trees. T. 94-96. The Applicant proposes no signage. T. 122.

The only lighting associated with the use is located on the front face of the two outbuildings shining back onto the gravel area illuminating the area around the entry and garage doors on the structures. Exhibit 41, pg. 3 and T. 44. The Applicant testified that they are "photocell" lights on a switch and are not motion sensor. T. 197. The Applicant's expert testified that while a photometric study has not been done, he believed that given the landscaping and the proposed fencing he did not think the lighting "would be an issue". T. 117-119. Images of the existing lighting are shown on the next page.



Close In of Updated CU Plan – Exhibit 17

Site Lighting



Add. Exhibits - Exhibit 17 – Pg. 3

3. Operations

Mr. Juneau testified that he started his business then known as American Lawn as a kid cutting grass, escalating the business in high school and again during college. T. 23. When he got married, he focused on his landscape business fulltime. *Id.* When Mr. Juneau and his wife purchased the subject property in 1996, he knew it was in the Agriculture Preserve Zone and at the time the property was used as a tree farm. *Id.* He continued his business at the subject property renaming it American Lawn & Landscape and has continually operated the business at this location since that time. *Id.* Because the property was in the “ag preserve” and other similar business were operating around the property he was “under the impression that [he] did not need to have any type of conforming use or special exception on this property.” T. 26. Mr. Juneau did not become aware he needed an approval for the landscape contractor business until the Fall of 2022 when he received a notice of violation. *Id.* This application seeks to correct that zoning violation. T. 25.

For the past 25 years the Applicant has used the entrance/shared driveway to access his home and for his business. T. 27. In 1998 he built the first structure for his business in the far southern corner of the property and the second structure between 2012 and 2015 located closer to the existing residence. T. 26-29.³ The second structure is used for personal storage, office and workshop. T. 28. The business's employees arrive between 6:45 am and 7:00 am and then leave around 7:30 am to go to offsite jobs doing commercial landscape maintenance. T. 28-30. The employees load the equipment into the trucks, run the trucks in the winter months to warm them

³ Mr. Juneau testified that at the time the first structure was built in 1998 his builder pulled the appropriate building permits. T.55-56. The second structure built between 2012 and 2015 was not permitted at the time of construction but has since been permitted/approved by DPS. T. 59

up before they leave. T. 33-35. In the evening the employees return between 5:00 pm and 6:00 pm, unload the trucks and leave the property. T. 59-60. All the business's trucks are serviced off-site, but the oil changes for lawnmowers/machines are done onsite monthly and the oil new and old is stored onsite. T. 34-36. The landscape contractor use is concentrated on long the western side in particular the southwestern corner of the property. T. 31.

D. Community Response

At the time the Staff report was issued Staff did not receive any correspondence about the application but did receive a "phone call from an adjacent resident regarding water draining on the property at 6340 Damascus Road." Exhibit 26, pg. 8. On or about February 28, 2024, OZAH received emails from Mr. Oscar Lyles specifically opposing the application. Exhibit 23 and 25. In addition to the email Mr. Lyles provided a dropbox link with 44 items dating from August 24, 2023, through January 2024 either a video or photo each depicting site conditions showing standing water or other conditions on or at the rear of the subject property onto Mr. Lyles property. Exhibit 23. OZAH received several letters from neighbors in opposition raising issues regarding stormwater runoff leading to standing water and mosquitos, wash-off chemicals coming from the Applicant's property, septic issues from the standing water, and exhaust fumes. Ms. Kelly Schools at 6336 Damascus Road submitted a letter in opposition. Exhibit 24. Ms. Roseanna Campanile at 56310 Damascus Road submitted a letter in opposition. Exhibit 38a. Ms. Schools also submitted another letter on behalf of the Schools/Chase family in opposition. Exhibit 38b.

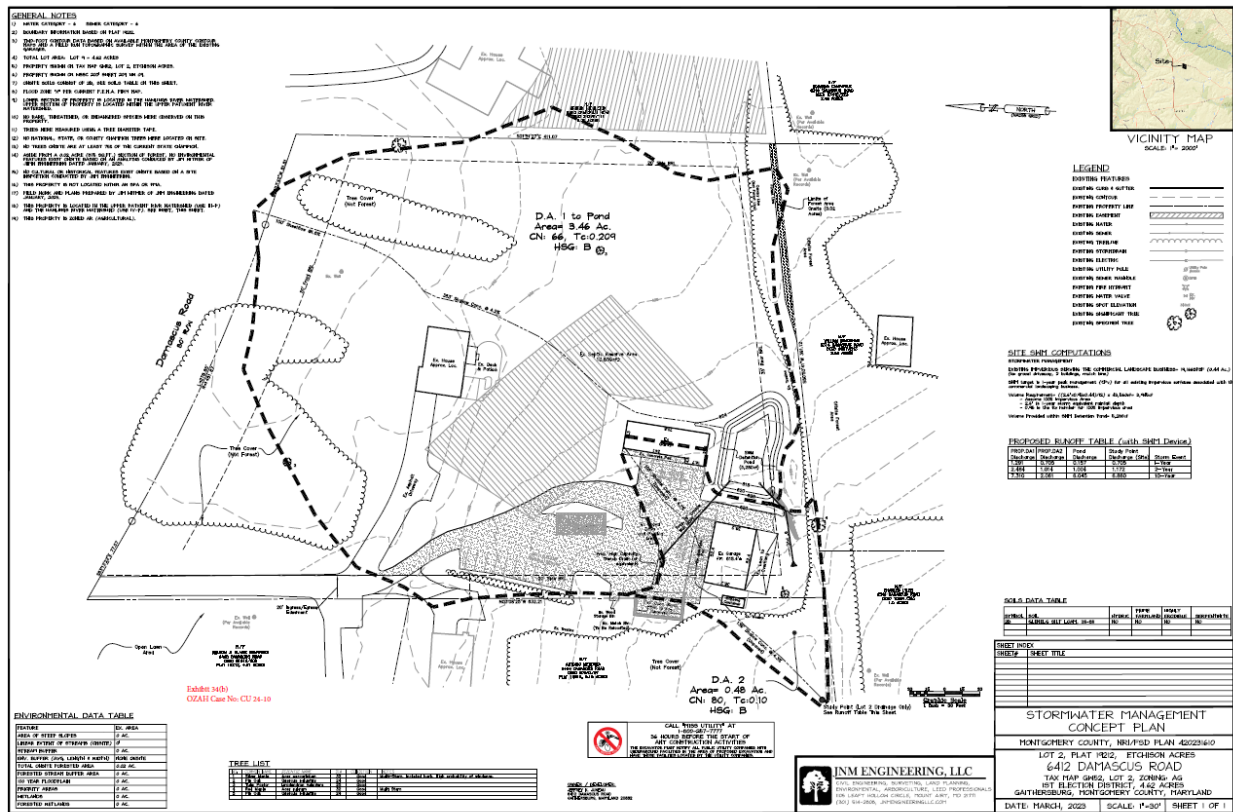
OZAH received several letters in support of the application. Mr. Nunez at 6408 Damascus Road submitted a letter in support the application. Exhibit 30a. Mr. Clifton Johnson

at 6329 Damascus Road submitted a letter in support of the application. Exhibit 30b. Ms. Kristen Middleton at 6300 Damascus Road also submitted a letter in support of the application. Exhibit 30c.

E. Environmental Issues

On May 3, 2023, a Forest Conservation Plan Exemption 42023207E under Chapter 22A-5(q(1) was granted for the conditional use and per Staff the application is compliance with the environmental guidelines and all applicable requirements of Chapter 22A. Exhibit 26, pg. 8. The subject property does not contain streams or stream buffers, wetlands or wetland buffers, 100-year floodplains, hydraulically-adjacent steep slopes, or known occurrences of rare, threatened and endangered species. *Id.* at pg. 6. The subject property drains to the Upper Hawlings River watershed, classified by the State as Use Class IV-P waters and it is not located within a special protection area. *Id.*

Stormwater management and runoff from the subject property is of great concern to the immediately adjacent neighbors. The Applicant was cited by DPS for “failure to obtain the required sediment control permit & approved plan for land disturbing on September 26, 2022. Exhibit 46. The citation was dismissed on November 28, 2023, and no additional outstanding violations regarding sediment control or runoff currently exist at the subject property. *Id.* and T. 57. The Planning Board recommended an additional condition be added to those suggested by Staff requiring “the applicant provide stormwater management for all existing development on the subject property, to ensure there is not unreasonable runoff on the adjacent, downhill property.” Exhibit 27. To that end, the Applicant prepared a stormwater management analysis and plan for the property. Exhibits 34(a) and 34(b).



SWM Plan – Exhibit 34(b)

III. CONDITIONAL USE FINDINGS OF FACT AND CONCLUSIONS OF LAW

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set standards are both specific (to a particular use) and general (applicable to all conditional uses). The specific standards applied for a landscape contractor are found in Section 59.3.5.5 of the Zoning Ordinance. The general standards (termed “Necessary Findings” in the Zoning Ordinance) for all conditional uses are found in Section 59.7.3.1.E. An applicant must prove that the use proposed meets all specific and general standards by a

preponderance of the evidence. The Hearing Examiner concludes that the Applicant has done so in this case, with conditions of approval included in Part V of this Report.

A. Necessary Findings (§59-7.3.1. E)

The relevant standards and the Hearing Examiner's findings for each standard are discussed below.⁴ For discussion purposes, the general standards may be grouped into four main areas:

1. Substantial Conformance with the Master Plan;
2. Adequate Public Services and Facilities;
3. No Undue Harm from Non-Inherent Adverse Effects; and
4. Compatibility with the Neighborhood

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: No prior approvals were granted for the subject property. Exhibit 26, pg. 10.

Nothing in the testimony or the record disputes this fact. This section does not apply.

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;

Conclusion: This subsection requires review of the development standards of the AR Zone contained in Article 59.4; the use standards for a Landscape Contractor contained in Article 59.3.5.5.B.b and the applicable development standards contained in Article 59.6. Each of these

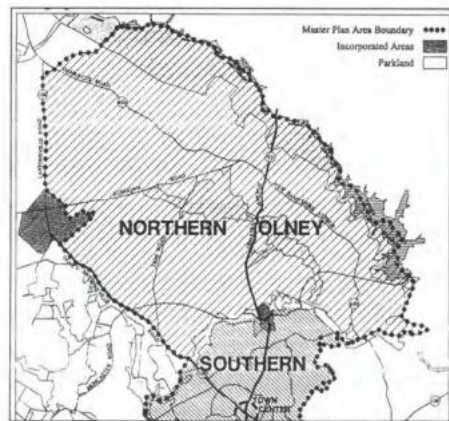
⁴ Although §59.7.3.1.E. contains six subsections (E.1. through E.6.), only subsections 59.7.3.1.E.1., E.2., E.3 and E.4. contain provisions that apply to this application. Section 59.7.3.1.E.1. contains seven subparts, a. through g.

Articles is discussed below in Parts III.B, C, and D, of this Report, respectively. For the reasons explained there, the Hearing Examiner finds that the application satisfies these requirements.

I. Substantial Conformance with the Master Plan

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

The property is located within the 2005 Olney Master Plan area. Exhibit 26, pg. 12. The Plan identifies no specific land use recommendation for the property but confirms the AR zoning in which landscape contractors are permitted as a conditional use. *Id.* The Plan “envisions the Olney of the future to be a more refined picture of what is there today”. 2005 OLNEY MASTER PLAN, MONTGOMERY COUNTY, MD, pg. 15.



2005 Olney Master Plan
Northern Olney – Pg. 17

Staff note the use of the property, while not specifically permitted was in existence at the time the 2005 Olney Master Plan was adopted. Exhibit 26, pg. 12. The Applicant proposes no changes to the structures, street frontage or operation. T. 25. The Applicant in its Exhibit 36 identified nearby agricultural uses in existence and the existing home occupation for a landscape

contractor use. The Applicant's expert testified that the master plan reinforces the permanent use of the property. T. 105. Mr. Witmer opined that the project proposed complies with Olney Master Plan and the property fits within the neighborhood and community. T. 122-123.

Conclusion: Based on this record, the Hearing Examiner finds that the landscape contractor use will substantially conform to the recommendations of the 2005 Olney Master Plan. The project as designed maintains the uses in existence at the time of adoption. The Applicant seeks to continue the exact residential use and seeks to gain approval for a landscaping contractor business that was in operation in 2005. The Hearing Examiner agrees with Mr. Witmer that the proposed landscape use substantially conforms to the Master Plan.

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;

Conclusion: Staff note the property is not in a residential zone, but in the agricultural reserve zone. Even with that Staff noted that they found no active conditional uses or special exceptions in the defined area but identified one home occupation landscape contractor use one parcel over from the property to the southwest. Exhibit 26, pg. 12-13. From the defined neighborhood and aerial photographs submitted the area is rural in character and the landscape contractor use proposed conforms with the recommendations of the master plan and the use itself does not alter the nature of the area. The Hearing Examiner previously found that the project conforms to the Master Plan. For reasons stated in Part III.A.4 of this Report below, she agrees with Staff and

the Applicant and finds that the application will not adversely affect or alter the mix of residential and non-residential uses in the area.

2. Adequate Public Services and Facilities

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

No preliminary plan of subdivision is required, and Staff determined that there are adequate public services and facilities to serve the proposed use. Exhibit 26, pg. 13.

Transportation

Staff noted the following:

The Subject Property is located on Damascus Road (MD 650), with an master-planned right-of-way width of 80 feet. Damascus Road is classified as a Country Road on the segment of which the Subject Property is located.

Consistent with the 2021 Complete Streets Design Guide and 2018 Bicycle Master Plan, the default bikeway type for Damascus Road is bikeable shoulders. However, the Subject Property is exempt from providing pedestrian and bicycle improvements based on Section 49-33(d)(A) of the County Code. According to the Code, residential properties in Road Code Areas identified as rural and

totaling more than 25,000 square feet are exempted from constructing sidewalks or any master-planned facilities.

The Subject Property is located in both a Rural Road Code Area and the Agricultural Reserve. The Site is approximately 4.62 acres (~200,000 square feet). The Subject Property is exempted from constructing any bicycle or pedestrian frontage improvements or infrastructure based on the latter. No additional right-of-way dedication is required as the full right-of-way has been achieved.

Id. at pg. 13-14

Mr. Driban, the Applicant's traffic expert prepared a traffic impact statement and opined that the number of trips generated by the use during the peak hours per day will not exceed 50 trips. T. 75. In addition, he noted the use would have a de minimis use on traffic impact. T. 88.

Water/Sewer/Stormwater

Staff noted Department of Permitting Services (DPS) Well and Septic division had no objection to the application and confirmed one bathroom in the house may be used for employees without major impact on the existing well or septic. *Id.* The applicant's expert testified to the well and septic analysis completed to determine the capacity for the number of employees using the facilities on site. T. 126-128. He concluded the existing septic to be capable of handling the increased use. *Id.*

Currently no stormwater management exists on the property. T. 64-65. Nothing in County law requires that the Applicant install stormwater management. Exhibit 18. However as noted above the Planning Board recommended the applicant address stormwater management on site and prepare a plan to address stormwater management for the additional development.

Exhibit 27. Mr. Witmer the Applicant's expert testified at length to the planned installation of

a stormwater device on the subject property to manage the water runoff from the subject property only. T. 133-155. Mr. Witmer designed a stormwater management device intended to detain the water “enough storage ... where the runoff conditions would be similar if it was just Jeff’s house here, the driveway and grass.” T. 147. Mr. Witmer testified his design exceeds what the Board recommended to provide stormwater management on the site. T. 148.

Schools & Other Facilities

No impact on schools as the use will not increase the number of children in schools and other utilities, public facilities and services, such as electric, telecommunications, police stations, firehouses and health services are currently operating within the standards set by the Growth and Infrastructure Policy as of when the Application was submitted. Exhibit 26, pg. 15.

Conclusion: Upon a thorough review of the documentation submitted and testimony from the Applicant’s witnesses, the Hearing Examiner finds the evidence provided and testimony of Applicant’s expert persuasive regarding adequate public facilities. Based on the information in the record, adequate public facilities do exist for the project, including police, fire, schools, healthcare, sewer, water, and public roads. Regarding the stormwater management proposal, under the existing County Code none is required. The Hearing Examiner will address the adequacy of stormwater management in the next section regarding inherent and non-inherent adverse effects as well as in the variance section.

3. No Undue Harm from Non-Inherent Adverse Effects

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.***

This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use on the surrounding area. 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*, §1.4.2. Inherent adverse effects, alone, do not justify the denial of a conditional use. 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.* Non-inherent adverse effects may be a basis to deny a conditional use, alone or in combination with inherent effects, if they cause “undue” harm to properties in the surrounding area.

Staff concluded that the following physical and operational characteristics are inherent to a landscape contractor use (Exhibit 26, p. 16):

- Vehicle trips
- Employee parking
- Noise or odors associated with truck and equipment

Staff found no non-inherent adverse effects and determined that none of these identified inherent effects would cause undue harm to the neighborhood. *Id.* However, the Planning Board did determine one non-inherent adverse impact identifying the “existing development associated

Conclusion: The Hearing Examiner agrees with Staff's list of inherent adverse characteristic of this use. The Hearing Examiner also agrees with the Planning Board that the development related to the business created a new non-inherent impact on the immediately adjacent properties. Staff determined that the proposed conditional use will not result in any harm or adverse effects alone or in combination to the neighborhood. Exhibit 26, pg. 16. Mr. Wilmer testified to the impacts of the landscape contractor use and referenced the statement of justification and noted that this use is in the AR Zone, not a residential zone. T. 108, 129-131. In addition, he opined that the use would not cause harmful traffic, noise, odors, dust and parking would be sufficient. *Id.* The Applicant's statement of justification discussed at length the types of characteristics OZAH previously identified as inherent effects of a landscape contractor including buildings, traffic, noise, parking and dust vehicle movement identifying that none of the identified inherent characteristics related to the proposed use will negatively affect the surrounding neighborhood nor create an adverse impact. Exhibit 18, pgs. 10-11. The statement of justification further points out that these inherent impacts have been operational for approximately 25 years. *Id.*

As stated above non-inherent adverse effects may result from the "physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site". The testimony in opposition focused primarily on the stormwater impacts as a result of the impervious surfaces associated with the landscape contractor use. The Hearing Examiner finds that while stormwater management measures were not required by Code at the time of construction/permitting of the outbuildings and driveways and stormwater runoff is a real impact for the immediate neighbors. The Hearing Examiner finds that stormwater runoff is a non-inherent adverse effect to this use. However, the Hearing

Examiner also finds that installation of a stormwater management device would sufficiently mitigate this non-inherent adverse reducing the runoff to pre 1998 conditions as stated by the Applicant's expert that the water can be captured to an equivalent to the only the existence of the house, driveway and grass. T. 147. The Hearing Examiner agrees with Staff, the Applicant and the Planning Board and finds that the stormwater runoff non-inherent adverse effects if mitigated with an onsite stormwater management device that the use and proposed development will not cause undue harm to the surrounding neighborhood from either non-inherent adverse effects or a combination of inherent or non-inherent adverse effects.

4. Compatibility with the Neighborhood

Several sections of the Zoning Ordinance require a proposed conditional use be compatible with the character of the surrounding neighborhood.

Section 59.7.3.1.E.1 includes the standards of approval below:

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

Conclusion: Section 59.7.3.1.E.1.d examines whether the Master Plan goals are achieved in a manner compatible with the area. The existing house is being retained for the primary residence for the Applicant and his family toward the front of the property and the landscape contractor business is toward the rear of the property and cannot be seen from the Road. Exhibit 26, pg. 12-13. The lot, home and business are screened by existing trees forest. *Id.* The Hearing Examiner has adopted Staff's characterization of the existing neighborhood as being agricultural uses and single-family homes. *Id.* at 4. She already found that the use fulfills the goals of the Master Plan

and further finds that the use itself it does so in a manner that is compatible with the surrounding area.

Section 59.7.3.1.E.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: The Applicant does not propose any new construction with the Application and this section is inapplicable.

Section 59.7.3.1.E.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 all specific requirements for the conditional use, and with the conditions imposed, meets the standards required for approval.

Section 59.7.3.1.E.4 In evaluating the compatibility of an agricultural conditional use with surrounding Agricultural or Rural Residential zoned land, the Hearing Examiner must consider that the impact does not necessarily need to be controlled as stringently as if it were abutting a Residential zone.

Conclusion: The Hearing Examiner finds that as this use is in the Agricultural Zone and upon review of the surrounding properties and uses it is compatible.

B. Development Standards of the Zone (Article 59.4)

To approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the AR Zone for a landscape contractor use, contained in Article 59.4 of the Zoning Ordinance. Staff included a table (Exhibit 26, p.10-11, shown on the following page) in its Report comparing the minimum development standards of the AR Zone to

what is proposed in this application. Staff correctly note in the chart that “[t]here is no proposed development with this application.” *Id.*

Table 1: Conditional Use Development and Parking Standards (AR Zone)

Development Standard Section 59.4.2.1.F.2	Permitted/ Required	Conditional Use Required Section 59.3.5.5.B.b.2	Existing/ Proposed*
Principal Structure:			
Minimum Lot Area	40,000 sq. ft.	n/a	4.62 acres
Minimum Lot Width at Front Building Line	125 ft.	n/a	>430 ft.
Minimum Lot Width at Front Lot Line	25 ft.	n/a	>400 ft.
Maximum Density	1 dwelling/25 acres	n/a	1 dwelling
Maximum Lot Coverage	10%	n/a	3.09%
Minimum Front Setback	50 ft.	50 ft.	230 ft.
Minimum Side Setback (left/right)	20 ft.	50 ft.	230 ft./2.7 ft.**
Minimum Sum of Side Setbacks	40 ft.	n/a	
Minimum Rear Setback	35 ft.	50 ft.	33.7 ft.**
Maximum Height	50 ft.	n/a	25 ft.
Accessory Structure:			
Minimum Side Setback	15 ft.	50 ft.	230 ft./2.7 ft.**
Minimum Rear Setback	15 ft.	50 ft.	33.7 ft.**
Maximum Height	50 ft.	n/a	
Vehicle Parking Requirement	2 spaces/ dwelling= 2 spaces 0.50 spaces/ employee=12 spaces 1 space/ company Vehicle= 12 spaces Total Required=26 Spaces		26 spaces

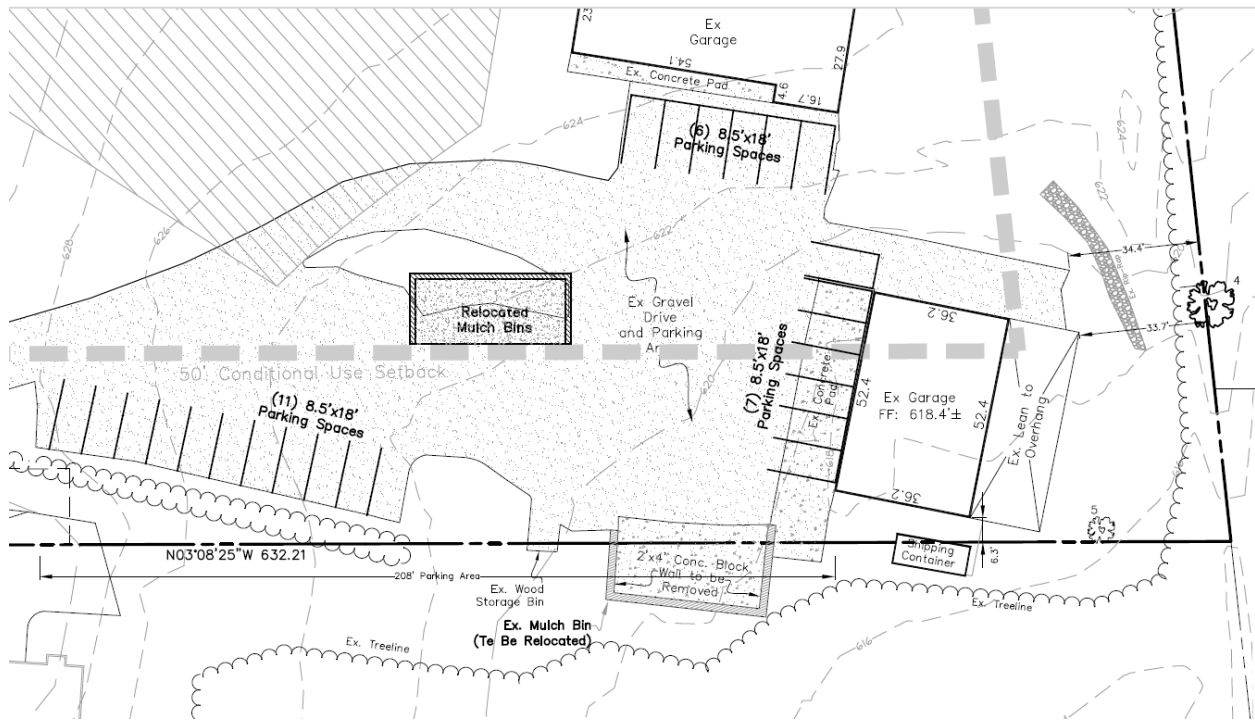
* There is no proposed development with this Application

**Variances are being requested. See Variance Section below.

The Applicant requested the following variances:

1. 47.3-foot variance to allow a setback for the outbuilding to be set back between 2.7 feet and 13.5 feet from the lot line as shown on Exhibit 17.
2. A 50-foot variance to allow the existing gravel parking area that is setback between 0' and 25.5' from the lot line as shown on Exhibit 17.
3. A 16.3-foot variance to allow the existing outbuilding to be set back a minimum of 33.7' from the lot line as shown on Exhibit 17.
4. A 15.6-foot to allow the gravel parking area to be set back a minimum of 34.4 feet from the lot line as shown Exhibit 17.

See Exhibit 19.



Portion of Exhibit 17 – CU Site Plan

Mr. Wilmer, the Applicant's expert, thoroughly reviewed and testified the variances requested, setback requirements for a landscape contractor and impact on development standards during the hearing. T. 160-166.

Conclusion: The Hearing Examiner finds that except for where the Applicant has requested four variances from the setback requirements the proposed use will satisfy all applicable requirements of the AR Zone.

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

The specific use standards for approval of a Landscape Contractor use are set out in Section 59.3.5.5. of the Zoning Ordinance.

Zoning Ordinance §59.3.5.5.

A. *Landscape Contractor*

1. *Defined*

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 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 proposes to operate a landscape contractor business focusing primarily on landscape maintenance for commercial properties. T. 30. The use proposed meets this definition.

2. *Use Standards*⁵

b. Where 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:

⁵ 59.3.5.5.B.b

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: As identified in Staff's chart above on page 28 of this Report and Decision, the property measures 4.62 acres. The Hearing Examiner finds the Application meets the acreage requirement.

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

The Applicant seeks 4 variances to satisfy the 50-foot minimum lot line setbacks.

Exhibit 119. They are as follow: 1) a setback for the southernmost outbuilding between 2.7 feet and 13.5 feet from the lot line; 2) a setback between for parking between 0' and 25.5' from the lot line; 3) a setback for the southernmost outbuilding a minimum of 33.7' from the lot line; and 4) a setback for parking of 34.4 feet from the lot line.⁶ *Id.*

Conclusion: Should the Board of Appeals grant the requested variances; the Hearing Examiner finds the setback requirement to be 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: Applicant's expert opined that the number size and layout of the parking spaces on the conditional use plan would be adequate to accommodate the total number of vehicles proposed. T. 112. Upon the testimony presented, review of the Applicant's site plan, and Staff's determination that the parking allocated for the commercial vehicles meets the regulation

⁶ See CU site plan on page 29 for visual layout.

requirements, the Hearing Examiner finds adequate parking exists onsite for the total number of vehicles permitted.

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: No plants, plant materials, garden supplies or equipment will be sold onsite.

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

The Applicant proposes the following operating parameters:

- a. Regular on-site operations beginning at 6:45 am and no later than 6:00 p.m., Monday through Friday. Operations may be conducted on weekends in the event of an emergency such as a storm.
- b. No more than 12 vehicles used for the operation including 7 stake body trucks, 4 pickup trucks and one passenger van.
- c. No more than 24 employees will be on site per day.
- d. Existing outbuildings will be used for the operation.
- e. Existing gravel areas will be used for parking.

See Exhibit 26, pg. 6 and Exhibit 27. Applicant testified that all vehicle repairs are made offsite and that the mulch bin and oil tanks used for the machines will be moved behind the relocated mulch bin. T. 60. Mr. Juneau also testified that he operationally made changes to when and how the vehicles are started to minimize the noise and fumes. T. 33

Conclusion: The Hearing Examiner finds the proposed hours of operation and onsite operations such that they will avoid adverse impacts on abutting uses. The operations onsite are minimal and moving the mulch bin and oil tanks away from the lot line and out of site of the neighbors' view will further lessen the impact. The equipment used on site will not generate significant noise and the parking and hours of operation will avoid any adverse impacts.

D. General Development Standards (Article 59.6)

Article 59.6 sets the general requirements for site access, parking, screening, landscaping, lighting, and signs. These requirements need be satisfied only “to the extent the Hearing Examiner finds necessary to ensure compatibility.” *Zoning Ordinance*, §59.7.3.1.E.1.b.

1. Site Access

Zoning Ordinance section 59.6.1 governs “Site Access”. Access to the site is proposed via the existing driveway that fronts Damascus Road. The Applicant’s traffic expert testified that in his opinion “having reviewed the site and seeing the types of trucks that are out there, the access that exists today is adequate to safely and effectively facility the vehicles that they are using at the site.” T. 93.

Conclusion: The Hearing Examiner finds based on the documentation submitted by Applicant and testimony from the Applicant’s expert that the site access is adequate.

2. Parking, Queuing and Loading

Zoning Ordinance section 59.6.2 governs “Parking, Queuing and Loading.” The Staff Report addressed parking, queuing and loading as follows:

The proposed Landscape Contractor is utilizing the existing parking area for the 12 business vehicles as well as the 12 employee parking spaces that have been in present for the nearly 27 years that the business has been in existence. Exhibit 26, pg. 11.

The Applicant’s expert testified that no queuing would take place on the property. T. 117. He further testified that the total of 26 parking spaces is “far more than what we would need.” T. 112-113. While Staff did not directly indicate whether the parking was sufficient in its

narrative it did identify in the development standards that a minimum of 26 spaces was required, and 26 spaces are being provided.

Conclusion: The Hearing Examiner agrees with Staff and the Applicant's expert and finds that no queuing will take place on site and the loading and unloading will be minimal and that parking will be adequate. The additional information provided by the Applicant and the Applicant's experts also provide sufficient evidence that parking, loading and queuing will be adequate for the application submitted.

3. *Lighting*

Zoning Ordinance section 59.6.4 governs "General Landscaping and Outdoor Lighting". Specifically, section 59.6.4.4.E states "[o]utdoor lighting for a conditional use must be directed, shielded, screened to ensure that illumination is 0.1 footcandles or less at any lot line that abuts a lot with a detached housing building type, not located in a Commercial/Residential or Employment Zone." The Applicant did not submit a lighting plan and counsel for the Applicant argues that none is required because no exterior changes are proposed. Exhibit 18, pg. 6. While Applicant's counsel may technically be correct, no new exterior changes are proposed the use is not legally in existence and every structure related to that use must be analyzed. Staff while they did request a lighting plan in the beginning, but never received one, leads the Hearing Examiner to assume that Staff that it did not require one to complete the Staff Report. Staff stated that the Applicant is not proposing any new lighting with this application and that the property will utilize existing residential lighting. Exhibit 26, pg. 12. The Applicant's expert testified that very little lighting is on the site and that the lighting on the outbuildings illuminate the doors on the front of the structures. T. 112. He further testified that he believed lighting

complies with the applicable zoning code standard regarding the number of foot-candles. T. 118. The Hearing Examiner questioned the neighbor who installed the lighting. He stated the lights were installed to shine the light down and out at 180 degrees. T. 277-278.

Conclusion: Based on the testimony and evidence presented, the Hearing Examiner finds Staff's lack of a request for a lighting plan at the end to determine no light plan was required for this application. Even so, the impact of lighting in existence is still important to review and determine the impact on the neighboring properties. Based on the testimony, the Hearing Examiner finds the lighting proposed satisfies the requirements.

4. Screening & Landscaping

Section 59.6.4.3 of the Zoning Ordinance governs landscaping and 59.6.5 of the Zoning Ordinance governs "Screening". The Applicant is essentially requesting alternative compliance for the landscaping stating that the six-foot board fence on the property that would better screen the use from the neighbors' perspective, but does not request alternative compliance directly, but rather points to the Hearing Examiner's flexibility to approve deviations from Division 6 per 59.7.3.1.E.1.B. T. 15-16. Section 59.6.8.1. the Hearing Examiner sets forth the requirements for the alternate compliance method and states as follows:

The applicable deciding body may approve an alternative method of compliance with any requirement of Division 6.1 and Division 6.3 through Division 6.6 if it determines that there is a unique site, a use characteristic, or a development constraint, such as grade, visibility, an existing building or structure, an easement, or a utility line. The applicable deciding body must also determine that the unique site, use characteristic, or development constraint precludes safe or efficient development under the requirements of the applicable Division, and the alternative design will:

- A. satisfy the intent of the applicable Division;

- B. modify the applicable functional results or performance standards the minimal amount necessary to accommodate the constraints;
- C. provide necessary mitigation alleviating any adverse impacts; and
- D. be in the public interest.

The Applicant testified to plantings installed over the years to provide shade and screening of the operations. T. 40-41. Further he testified to his intent to install a 6-foot privacy fence on the inside of the trees that are installed on his property that would be “50 feet past the building” beyond where the property line meets Mr. Lyles property and follow up to before the parking area. T. 41-42. In addition, he stated based on the slope and the lack of sunlight in the area evergreens would not work as screening. T. 42-43.

Further the Applicant's expert opined, that the 6-foot fence running along portions of the southern and western property lines creates a permanent barrier not dependent on sunlight and eliminating the worry about leaves on the tree and seeing through to the property, and that a fence is the best option. T. 119-120.

Staff determined that landscape plans were not required to be submitted because the Applicant was not proposing anew use but noted that the property is surrounded along the east, south and west sides by existing trees and forested areas. Exhibit 26, pg. 12.

Conclusion: The Hearing Examiner agrees with the Applicant that a fence is better screen given the slope and existing trees and even though not requested believes the proposal satisfies the alternative compliance criteria regarding landscaping and screening. She further finds maintaining the existing trees and adding the fencing compliance satisfies the intent of the landscape/screening division, accommodates the property's constraints, alleviates any adverse impacts and is in the public interest.

5. *Signage*

Conclusion: Zoning Ordinance section 59.6.7 governs “Signage”. The Applicant proposes no signage and finds this section in applicable.

IV. VARIANCE FINDINGS OF FACT CONCLUSIONS OF LAW

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 February 15, 2024, referring Variance Application A-6853 to OZAH for a hearing and recommendation. Exhibit 21. The Variance application seeks four variances. The first (Variance #1) a 47.3-foot variance, from the side lot line for an existing outbuilding that is located within 2.7 feet of that lot line at its closest point. The second (Variance #2) a 50-foot variance from the side lot line for an existing gravel parking area that is located within 0 feet of that lot line at its closest point. The third (Variance #3) a 16.3-foot variance from the rear lot line for an existing outbuilding that is located within 33.7 feet of that lot line at its closest point. The fourth (Variance #4) a 15.6-foot variance from the rear lot line for an existing gravel parking area located within 34.4 feet of that lot line at its closets point. *Id.*

Pursuant to OZAH Zoning Rule 4.2(g), the Hearing Examiner, on February 23, 2024, ordered Conditional Use Application CU 24-10 and Variance Application A-6853 be consolidated for purposes of OZAH's public hearing. Exhibit 22.

A. Variance Necessary Findings (59.7.3.2.E)

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, Staff stated that the provisions of Section 59.7.3.2.E.2.a.v. justify the of granting all four variances. Exhibit 26, pg. 18-23. Staff did not provide comment under any of the remaining subsections of 59.7.3.2.E.2. *Id.* The

Applicant's expert testified at length to the standards set forth below and submitted a variance plan identifying the site configuration and the issues presented on site related to the requested setbacks variances. Exhibit 26, Attachment C.

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

Regarding the Variance #1, Staff asserted under subsection v. as follows:

The other existing Landscape Contractor business in the surrounding neighborhood has their business operations up to their property lines which includes the parking areas for equipment. Staff supports this variance because this condition substantially conforms to the character and development pattern of the surrounding neighborhood.

Exhibit 26, pg. 19.

Regarding Variance #2, Staff asserted under subsection v. as follows:

The existing Landscape Contractor as well as most of the homeowners in the surrounding neighborhood have their detached sheds and detached garages within 2 to 5 ft. of their property lines. Staff supports this variance because this condition substantially conforms to the character and development pattern of the surrounding neighborhood.

Exhibit 24, pg. 20.

Regarding Variance #3, Staff asserted under subsection ii. as follows:

The other existing Landscape Contractor business in the surrounding neighborhood has their business operations up to their property lines which includes the parking areas for equipment. Staff supports this variance because this condition substantially conforms to the character and development pattern of the surrounding neighborhood.

Exhibit 24, pg. 21.

Regarding Variance #4, Staff asserted under subsection ii. as follows:

The existing Landscape Contractor as well as most of the homeowners in the surrounding neighborhood have their detached sheds and detached garages within 2 to 5 ft. of their property lines. Staff supports this variance because this condition substantially conforms to the character and development pattern of the surrounding neighborhood.

Exhibit 24, pg. 23.

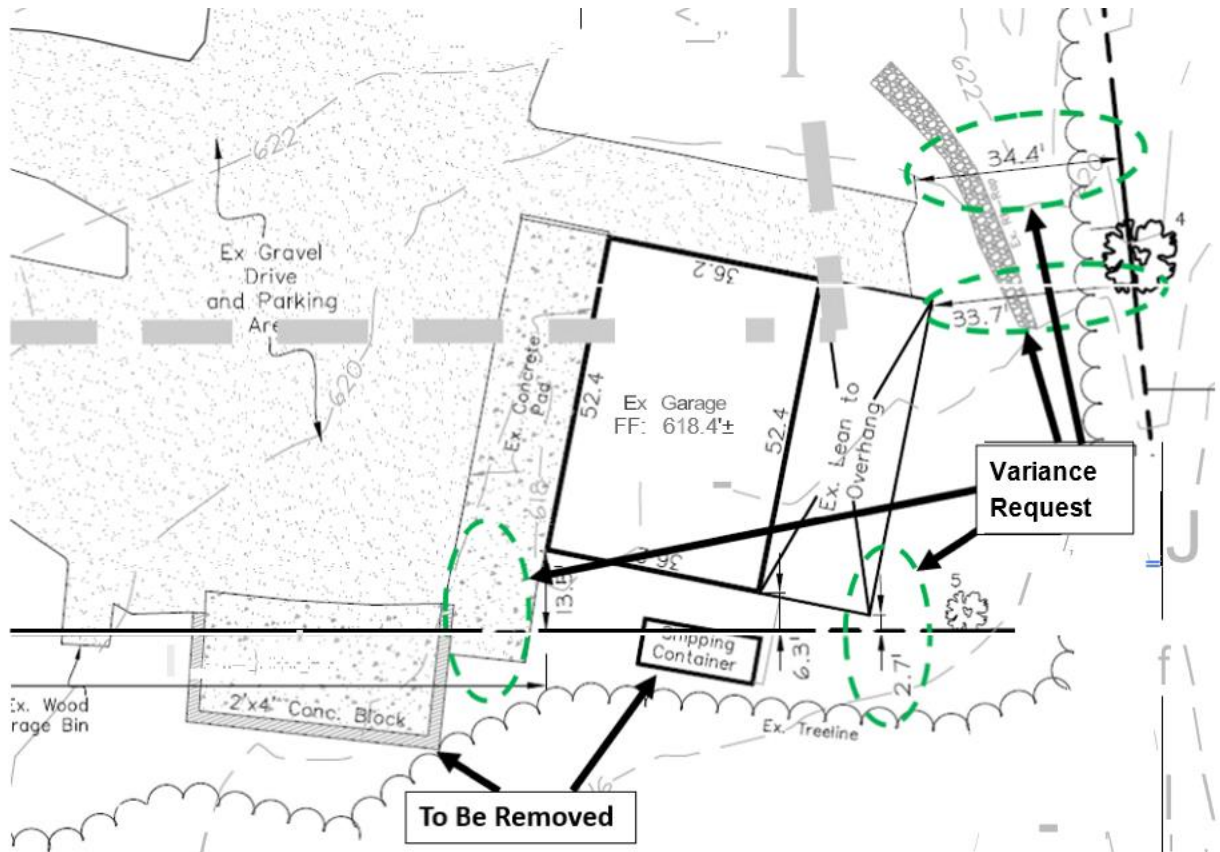


Figure X: Variance Plan for the existing "Lean to Overhang" and parking areas

Variance Plan, Staff Report - Exhibit 26, pg. 21.

Staff failed to comment on the remaining prerequisites for a variance (*subsections lettered b through e*) as set forth below and in the Zoning Ordinance. Exhibit 24, pgs. 21-23.

Conclusion: Regarding Section 59.7.3.2.E.a.2, the Hearing Examiner agrees with Staff and finds that the proposed development substantially conforms with the established development pattern in the neighborhood in that most landscape contractor businesses, agricultural uses and homes in the surrounding properties have their business operations, primary structures and/or outbuildings to away from the road and located within a few feet of to their property lines including parking and

equipment placement. In particular, the Hearing Examiner found Exhibits 36 and 41 instructive on this point.

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

The Applicant testified to the construction of the first outbuilding referred to during testimony as the “southern” building. He testified that in 1998 he hired a builder who obtained the required construction permits and that he has used this outbuilding continually for his landscape contractor business. T. 55. This outbuilding is the subject of Variance requests #1 and #3. The Applicant’s expert, Mr. Wilmer, testified that the “southern” building is a legal nonconforming structure. T. 159. Due to the fact that the southern building is a legal nonconforming structure, Mr. Wilmer opined the variances sought today are not of the result of the Petitioner’s actions. T. 160. Further he stated but for the landscape contractor use, the buildings could be used without a variance as part of the residential use. T. 160-161. Applicant also submitted a site plan and recorded deed regarding the existing shared driveway. Exhibit 41. The shared driveway depicted is on the Applicant’s property further limiting any deviation or alteration of the existing access to and from the site. *Id.* The fixed location of the driveway and the natural extension of the gravel area for parking and access to the rear of the Applicant’s lot is not of the Applicant’s making regarding Variances #2 and #4.

Conclusion: Regarding Section 59.7.3.2.E.2.b the Hearing Examiner agrees with the Applicant’s expert and relying on the documents submitted finds that for Variance #1, Variance #2, Variance #3 and Variance #4 special circumstances present on the property were not a creation of or the results of actions taken by the Applicant. Of particular importance to this finding is the fixed

location of the common driveway and the permitted construction of the nonconforming southern building. While the Applicant did construct the building he did so 25 years ago under permit in conformance with the County codes that existed at that time.

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;

Mr. Wilmer opined that the four requested variance to be the minimum necessary for to accommodate the existing site conditions. T. 165. Looking solely at the location of the portions of existing improvements with no additional external changes proposed, the request meets the “minimum necessary” standard. *Id.* In reviewing Exhibit 34b, the septic reserve area takes up a large portion of the center of the property. The location of the dwelling on the house to the east, the existing house on the property and the tree cover along the front property line also limit the location for outbuildings and parking outside of the 50 foot setback. *Id.* The fixed location of the driveway along with the central location of the house on the lot severely restricts the placement of parking. *Id.*

Conclusion: Regarding Section 59.7.3.2.E.2.c. based on the evidence presented and testimony given, the Hearing Examiner finds that the requested variances (Variance #1, Variance #2, Variance #3 and Variance #4) are the minimum necessary to overcome the practical difficulties that full compliance with the specific 50-foot setback requirement would impose due to the unusual or extraordinary situations or conditions on the property. Denial of the variances requested would create unusual and practical difficulties on the Applicant. In reviewing the site plans and related exhibits in conjunction with expert testimony, a forced removal and relocation of the “southern” most building and reconfiguration of the parking area outside of the 50-foot setback cannot occur

onsite due to the existing configuration of the lot, fixed residence, septic reserve area and existing driveway.

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

Mr. Wilmer opined that the proposed use with the variances will be compatible with the surrounding neighborhood and will cause no undue harm. T. 163-164. In reviewing applicable master plan, he reiterated that the master plan does not “touch on this property” but he found that the use is consistent with the agricultural reserve zone. *Id.*

Conclusion: Regarding Section 59.7.3.2.E.2.d., based on the testimony of the Applicant's expert, the Hearing Examiner finds the variances (Variance #1, Variance #2, Variance #3 and Variance #4) can be granted without substantial impairment to the intent and integrity of the 2005 Olney Master Plan. In addition, as the property is located in the agricultural reserve zone should the variances be granted will they 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.

The record contains letters both in support and opposition for the proposed conditional use. Exhibits 23, 24, 25, 30a-c, and 38a-b. In addition to the letters in opposition, Oscar Lyles and Tracy Horn both testified to their negative experiences as adjacent neighbors of the proposed/existing use. Mr. Lyles constructed a berm on his property to prevent runoff from the subject property. T. 211. He and Ms. Horn continue to suffer from standing water and the nuisances related to impacts of standing water such as mosquitoes, flooded septic fields and flooded basements. T.206-251. Mr. Lyles state prior to the construction in 1998 of the first

outbuilding that he never experienced runoff onto his property. T. 215. The Applicant's testified to the history of the construction and evolution of the business on the subject property stating that at all outbuildings have been permitted and no stormwater management was required by the County for those structures. T. 64-65. He further testified that the violation for sediment control was dismissed by the County and that "everybody" has come out found there is a "slope" and a lot of water drainage", but no notices regarding water and sediment control remain on his property. T. 56-57.

The Applicant's expert testified to the existing conditions and a proposed stormwater management plan. T. 132-155. With regard to the existing conditions, Mr. Wilmer stated that Mr. Lyles property is located at the "bottom of a bowl on three sides" and no matter what stormwater management is done on the existing property, water will still go to that point. T. 148. Mr. Wilmer further opined that there's a "large contributing drainage area over six areas that will continue to drain" to the low point on Mr. Lyles property. *Id.* In addition, Mr. Wilmer further opined that the berm is a "big part of the problem" because water sits for days and weeks and has no where to go and that when you detain or retain water there should be an engineered design to contemplate how the retained water affects drainage, storage, pests, etc. T. 149. An email from the Linda Kowbilsky, Division Chief of Land Development with County DPS stated the "berm constructed approximately nine years ago is blocking the natural flow of water and creating the issues you have with mosquitoes and potential contamination with your well. We strongly recommend the berm be removed or relocated and additional grading be performed with guidance from a design professional." Exhibit 28. Mr. Wilmer strongly agreed with the recommendations of the County

regarding the berm removal. T. 152. Mr. Wilmer believed the water problem to be a “conveyance problem” not a volume problem. *Id.*

Mr. Lyles testified also to the location of the oil drums and fuel tanks not just from an appearance issue, but the oil stains on the ground fearing contamination. T. 220. He also testified to employees urinating in the rear of the property. T. 32. Letters from neighbors mentioned truck fumes. Exhibits 38a-b. Mr. Juneau identified steps to address those concerns, specifically relocating wall and fuel tanks outside the setback with no view to the neighbors, storage of oil drums inside the building and the availability of a toilet inside the house for use by the employees. T. 32-38, 200-201. Regarding the trucks idling, he no longer has his employees start their trucks up early in the summer, but because the vehicles are diesel engines during the winter months they must warm up somewhat before running. *Id.*

Conclusion: The Hearing Examiner finds the testimony of both Mr. Lyles and Mr. Wilmer persuasive. With installation of an onsite stormwater management facility, removal of the port-a-potty, relocation of the oil tanks/drums and change in procedure regarding truck starting, granting Variance #1, Variance #2, Variance #3 or Variance #4 will address Mr. Lyles concerns and not be adverse to the abutting or confronting neighbors. Placing certain conditions upon the issuance of the use/variance will improve the current conditions and appearance of existing developments on the property. Regarding Section 59.7.3.2.E.2.e., the Hearing Examiner finds that placement of specific conditions for the issuance of the conditional use should the Board grant Variance #1, Variance #2, Variance #3 and Variance #4 will then not be adverse to the use and enjoyment of abutting or confronting properties. Regarding stormwater management the Hearing Examiner agrees with the Applicant's expert that water conveyance must be “planned” and “engineered” and

further finds the email from the County persuasive that not all the stormwater management problems stem from the subject property. Mr. Lyles testified to “before 1998” water conditions and Mr. Wilmer testified to how a stormwater management device he designed would capture and slowly release more than the flow from the impervious surfaces at the southern end of the subject property without creating a nuisance on the neighboring properties essentially taking the water runoff back to pre-1998 conditions. While the neither the Hearing Examiner nor the Board of Appeals can dictate change on abutting properties nor require those properties be restored to pre “1998” condition, they can condition on the subject property approvals on improvements made to the subject property in order to meet the code requirements for the granting of the requested conditional uses and related variances.

V. CONCLUSIONS AND DECISION

As set forth above, the application meets all the standards for approval in Articles 59.3, 59.4, 59.6 and 59.7 of the Zoning Ordinance. Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of American Lawn and Landscape, Inc. (CU 24-10) for a conditional use under Section 59.3.7.1. of the Zoning Ordinance to operate a landscape contractor business on property described as 6412 Damascus Road, Gaithersburg, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The use is limited to a Landscape Contractor with two outbuildings/garages, parking onsite and a single-family house to remain for residential purposes.
2. The port-a-potty must be removed, and no temporary bathroom facilities are permitted onsite. The existing single-family house must provide a restroom for the employees for the Landscape Contractor.
3. The Landscape Contractor must not have more than 24 employees on site per day.

4. The Applicant will utilize the following work vehicles onsite at any given time and must not have any more than the following: seven (7) stake body trucks, three (3) pick-up trucks and one (1) passenger van.
5. The Applicant must provide 12 parking spaces for the employees to use on-site and must also continue to provide the van shuttle service for his employees so long as the use continues at this location.
6. Hours of operation must be limited to 6:45 a.m. through 6:00 p.m., Monday through Friday. No hours after hours operation or operation on the weekends unless for emergency maintenance because of storms or other similar events. In the event that the Applicant must work after hours or weekends, they must keep a log of emergency events should complaints be filed with Department of Permitting Services.
7. The public shall not visit the Property.
8. The changes to the existing conditions, aside from installation of the stormwater management device discussed in paragraph 9 and construction of the 6-foot board on board fence, are limited to those identified in Exhibit 17. In addition, to moving the "mulch bin" the oil tanks must be placed behind the block wall outside of view from the abutting property owners and all oil drums must be placed inside one of the outbuildings and not on the bare ground outside of the two structures. The oil drums may only be placed outside the structures on the day of removal or replacement.
9. The Applicant must adhere to the following truck start-up procedures: 1) during warmer months no idle time onsite and 2) during the colder months idle only for minimum necessary time for the trucks to function properly.
10. The Applicant must reconfigure the stormwater management plan as identified in Exhibit 34b per the testimony of the Applicant's expert on pgs. 268-270 of the transcript that is part of the record to reconfigure the proposed stormwater management design to capture an additional area in front of the southernmost outbuilding. The final design must be resubmitted to the Hearing Examiner for inclusion in the record of this conditional use. The Applicant must adhere to the following criteria for the installation and maintenance of the private stormwater management device.
 - a. Obtain all required permits for the installation of the stormwater management device.
 - b. Cause the creation of a stormwater management maintenance agreement to then be recorded in the land records for Montgomery County.
 - c. Contract with a private entity or individual to maintain the stormwater management device at a minimum of once every other year.
 - d. Maintain a record of the maintenance of the stormwater management device on the property for review by the Department of Permitting Services.

11. The Applicant must obtain and satisfy the requirements of all licenses and permits, including but not limited to use and occupancy permits, necessary to occupy the conditional use premises and operate the conditional use as granted herein.
12. The grant of this conditional use is subject to the Board of Appeals granting Variance A-6853.

FURTHER the variance application (A-6853) is the Hearing Examiner recommends *granting* as shown on the Applicant's Variance Plan and set forth below:

1. Variance #1 - 47.3-foot variance from the side lot line for an existing outbuilding that is located within 2.7 feet of that lot line at its closest point.
2. Variance #2 - 50-foot variance from the side lot line for an existing gravel parking area that is located within 0 feet of that lot line at its closest point.
3. Variance #3 - 16.3-foot variance from the rear lot line for an existing outbuilding that is located within 33.7 feet of that lot line at its closest point.
4. Variance #4 - 15.6-foot variance from the rear lot line for an existing gravel parking area located within 34.4 feet of that lot line at its closets point.

Issued this June 25, 2024.



Kathleen E. Byrne
Hearing Examiner

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:

Christopher Ruhlen, Esq.

Attorney for the Applicant

Elizabeth McInturff, Esq.

Attorney for Mr. Oscar Lyles

Mr. Yarid "Tony" Lopez

Ms. Tracy Horn

Barbara Jay, Executive Director, Montgomery County Board of Appeals

Robert Kronenberg, Deputy Director, Planning Department

Mark Beall, Planning Department

Greg Nichols, Manager, Department of Permitting Services

Victor Salazar, Department of Permitting Services

Michael Coveyou, Director, Finance Department

Elana Robison, Esquire, Associate County Attorney