



Robert A. Thomassen \*  
 Jane S. Hunter, individually and representing \*  
 Sugarloaf Citizens Association \*  
 Dolores Milmo, representing \*  
 Audubon Naturalists Society and \*  
 F.A.R.M. (For A Rural Montgomery) \*  
 Robert Chapman, representing the Izaak \*  
 Walton League \*  
 Beverly Strauss \*  
 Terry Cummings \*  
 Brett Michaels \*  
 Diane Hogan \*  
 James Evans \*

In Opposition to the Petition \*

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Before: David R. Podolsky, Hearing Examiner

**HEARING EXAMINER'S REPORT AND RECOMMENDATION**

**I. STATEMENT OF THE CASE**

Petition S-2528, filed June 3, 2002, requests a special exception to permit a landscape contractor use on Parcel P400, which is a 77-acre parcel located at 15315 Mt. Nebo Road on the east side of Mt. Nebo Road in the Rural Density Transfer Zone at a location near River Road, southwest of Poolesville. The application was filed jointly with Petition S-2527, which requests a special exception to permit a wholesale horticultural nursery on the subject property, and with Petition S-2529, which requests a special exception to permit a manufacture of mulch and compost use on the site.

By Resolution dated July 31, 2002 and effective September 13, 2002, the Board of Appeals referred the above-captioned matter to the Office of Zoning and Administrative Hearings (OZAH) acting under the provisions of §59-A-4.125 of the Montgomery County Zoning Ordinance. The Board requested the OZAH to schedule and conduct a hearing on the petition and submit a report and recommendation for consideration by the Board. By Resolution adopted June 26, 2002 and effective August 28, 2002, Cases S-2527, S-2528 and S-2529 were consolidated.

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The instant petition was initially reviewed by the Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC) who, in a report dated November 15, 2002 (Exhibit 36), recommended approval of the Petition subject to three general conditions applicable to all three petitions and six conditions applicable to the landscape contractor use.<sup>1</sup> The Planning Board considered the Petition on November 21, 2002, and, by a 5 to 0 vote, recommended approval of the first phase of each special exception subject to 3 conditions (one of which relates only to the mulch and compost manufacturing use) in addition to the conditions recommended by the Technical Staff (Exhibit 43).

Initially, a hearing was scheduled by the OZAH for October 18, 2002. This hearing was rescheduled to December 13, 2002 to permit the Planning Board to issue its recommendation prior to the commencement of the hearing. At the request of the Opposition, the hearing was rescheduled to February 10, 2003 and was rescheduled again to March 4, 2003. A public hearing was convened by the undersigned Hearing Examiner on March 4, 2003. Subsequent hearings were conducted on March 7, 2003, March 18, 2003, April 4, 2003, April 22, 2003, May 2, 2003, June 20, 2003, July 7, 2003 and September 5, 2003. In addition, at the request of the Opposition, the Hearing Examiner conducted a site visit on May 6, 2003. Various scheduled hearing dates from March to September 2003 were postponed at the request of one or more parties.

During the course of these proceedings, People's Counsel attempted to mediate disputes between the Petitioner and the Opposition. People's Counsel reported to the Hearing Examiner that, while he believed that certain issues were subject to resolution, the parties were unable to complete negotiations in face-to-face meetings. The undersigned Hearing Examiner offered the parties the opportunity to participate in voluntary, non-binding, "off the record" mediation to determine if the Petitioner and the Opposition could resolve their

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<sup>1</sup> The Technical Staff also proposed separate conditions that would be applicable only to the wholesale horticultural nursery use and to the manufacture of mulch and compost use.

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differences. The parties were advised that they were not required to participate in this process, any agreements reached by some, but not all of the parties, would not be binding on any party that did not wish to be bound and, nothing said or done in the mediation sessions would be considered evidence of record or would be considered in connection with the Hearing Examiner's Report and Recommendation to the Board of Appeals.<sup>2</sup>

At the conclusion of the mediation sessions, a status conference was held on August 20, 2003, to determine if, subsequent to the mediation sessions the parties were able to resolve any outstanding issues without the assistance of the mediator. At the status conference, it became clear that, although many issues were being addressed, the parties had irreconcilable differences. The Hearing Examiner requested that the Petitioner prepare revised proposed conditions of approval including those modifications that the parties were able to agree to through the mediation process and to submit those to the Opposition for review. Members of the Opposition agreed to meet with People's Counsel on August 28, 2003 to review the revised proposed conditions of approval and to advise the Petitioner, on August 29, 2003, of any discrepancies between the revised proposed conditions and the Opposition's understanding of the agreements reached by the parties, as well as any proposed clarifying language. The Petitioner was then to submit final proposed conditions of approval to the Opposition on September 2, 2003 so that the Opposition could identify any issues that the Opposition believed were not adequately addressed when the Opposition presented closing arguments which were scheduled for September 5, 2003.

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<sup>2</sup> For a more detailed discussion of the mediation process see Exhibit 140. Mediation sessions took place on July 28, 2003 and July 29, 2003. Although several modifications to the Petitioner's plan of operations were made and the Petitioner consented to certain conditions of approval regulating the Petitioner's operations, several parties remain in opposition to the Petition.

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On September 5, 2003, a hearing was convened and certain materials that the parties had requested or had agreed to provide prior to the close of the record were submitted. People's Counsel was unable to attend the September 5, 2003 session and, at his request, closing arguments were rescheduled for October 1, 2003. Closing argument was held on October 1, 2003 and the record was left open until October 7, 2003 for the submission of two documents discussed at the closing argument, to wit: the Petitioner's final revised proposed conditions of approval and a revised phasing plan. On October 7, 2003, the record was closed.

## II. BACKGROUND FACTS

For the convenience of the reader, the background facts are grouped by subject matter. Where there are any conflicts in the evidence, they are resolved under the preponderance of evidence test.

### A. The Subject Property

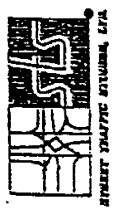
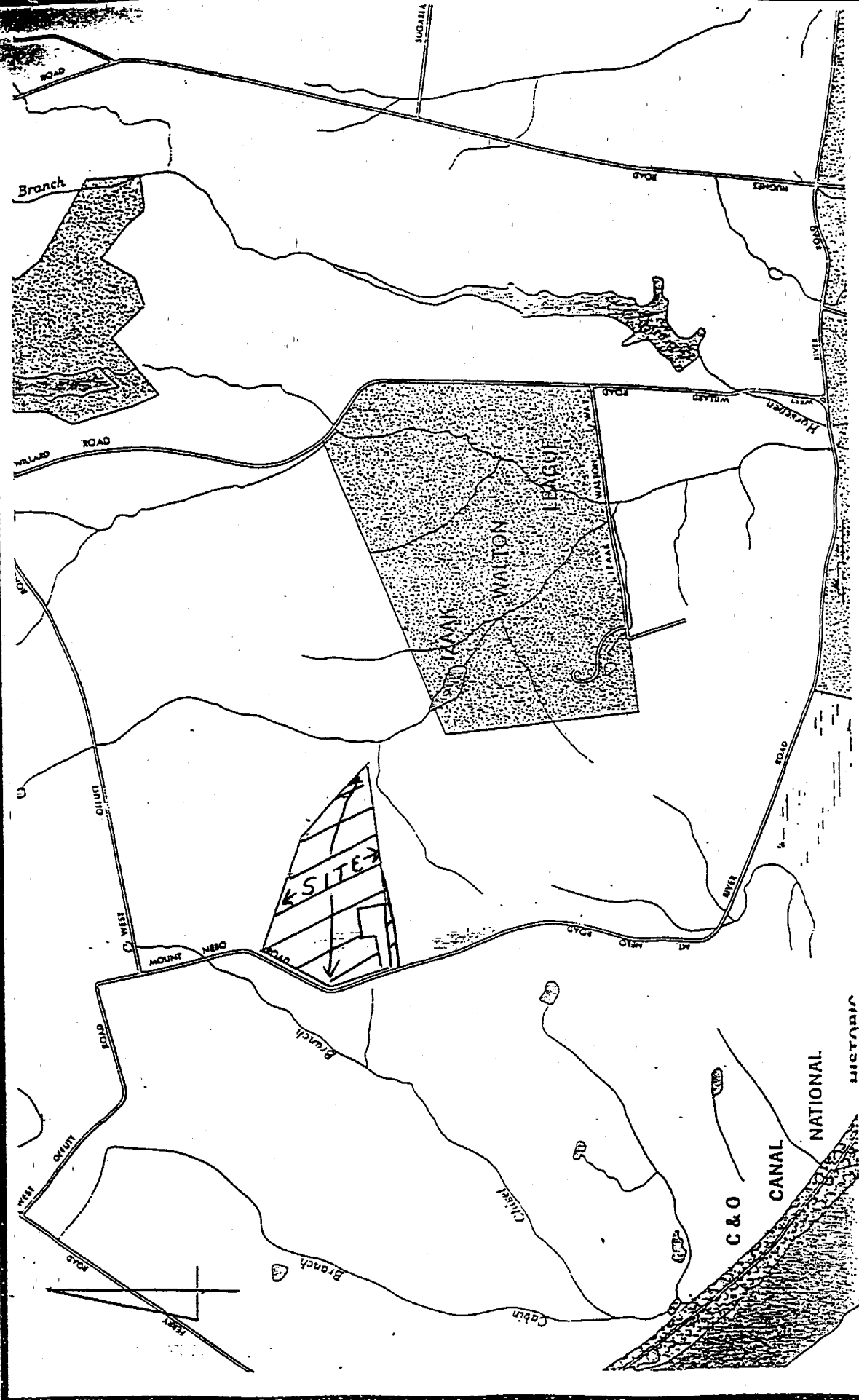
The subject property is a 77-acre parcel located on the east side of Mt. Nebo Road in the Rural Density Transfer Zone at a location near River Road, southwest of Poolesville. The address of the subject property is 15315 Mt. Nebo Road, Poolesville, Maryland. The location of the site is depicted on page 6, *infra*. Of the 77 acres comprising the subject property, the Petitioner initially proposed to use 10.4 acres for the mulch and compost manufacturing operation<sup>3</sup>, 7.8 acres for the nursery operation, and .33 acres for the landscape contractor use. The 58-acre balance of the property would remain in forest or agricultural operations.

The property currently contains one single family dwelling and two storage buildings. The majority of the land remains in agricultural use, open field or with forest cover, and row crop agriculture has been the primary use of the property. The northeast side of the site contains a portion of a small stream that flows east toward Horsepen Branch.

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<sup>3</sup> During the course of these proceedings, the Petitioner modified its proposal to reduce the acreage devoted to mulch and composting operations to approximately 3.7 acres.

Exhibit 1  
Site Location



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Access to the property is via two existing gravel driveways. One driveway runs near the northern property boundary to the dwelling and storage buildings. The other driveway extends in an easterly direction from Mt. Nebo Road approximately through the center of the property to the rear (east) section. The subject property is generally level, dropping slightly toward the east. There are two ponds on the property, approximately one-half acre each, located between the southern driveway and the forested area along the northern property boundary. There is a slight ridge at the approximate center of the property, draining to the east and west. The location of the driveways, fields, forested areas and other existing conditions can be seen on the final phasing plan (Exhibit 161(b)), a reduced copy of which is reproduced on page 8, *infra*.

An area containing approximately 3 acres at the east end of the subject property is currently used for the manufacture of mulch and compost for use on the crops raised on the property. The Petitioner asserts that this is a use permitted by right in connection with the continuing farming activity on the property. The Opposition disputes the Petitioner's contentions regarding the existing operations.

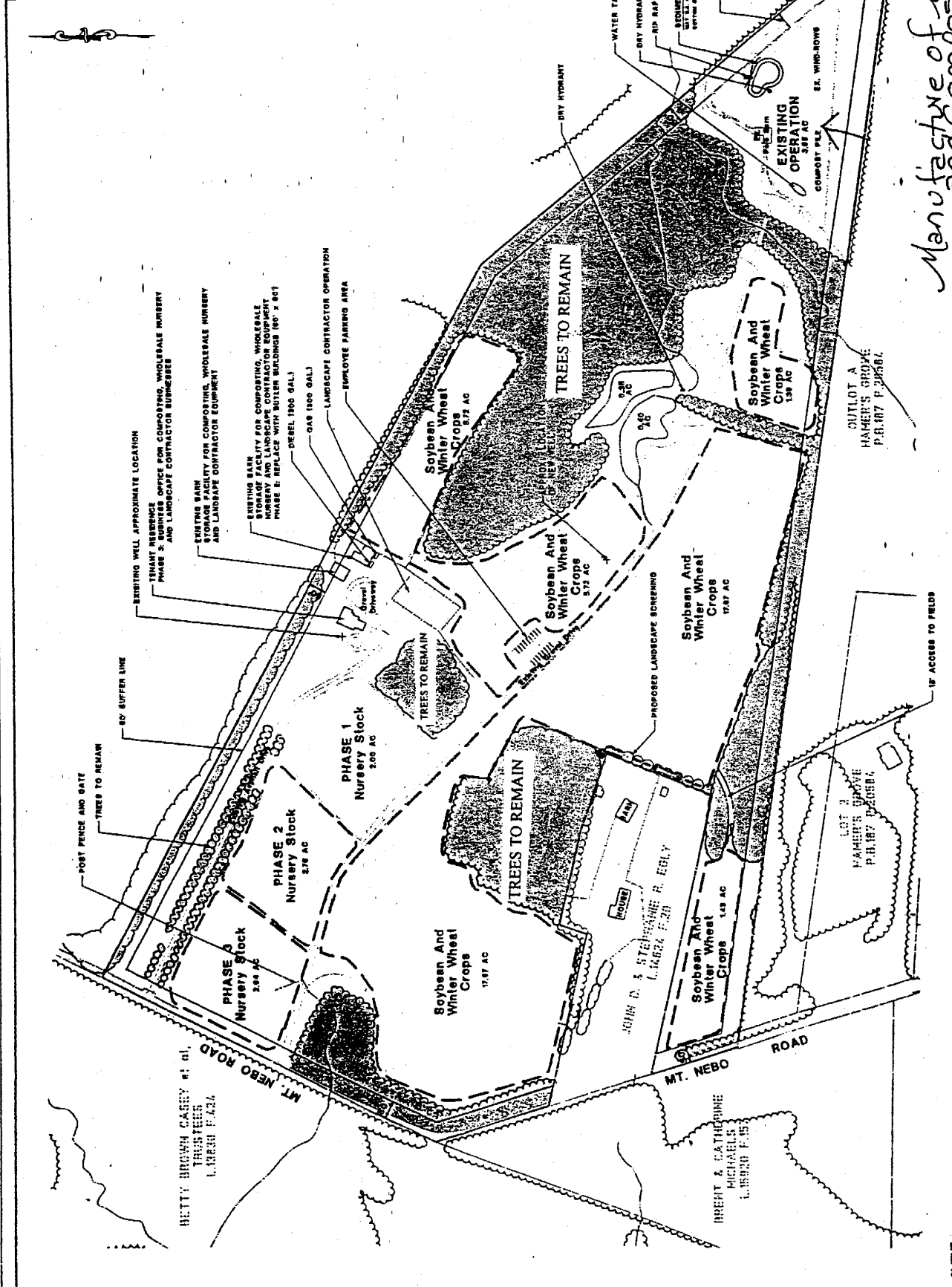
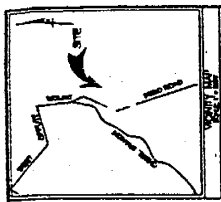
The subject property surrounds a parcel containing approximately 6 acres owned by Mr. and Mrs. John D. Egly. Mr. and Mrs. Egly's property contains a home, barn and horse pastures.

#### B. The Neighborhood and Its Character

The surrounding area is wholly within the agricultural reserve and is rural in nature. Nearby uses include agricultural operations to the north, east and west, and several large lot residential uses to the south. Adjacent properties to the west, east and southeast are heavily wooded. The large lot residential uses to the south include a mixture of open fields and woodland. The size of the parcels, location of buildings and extent of tree cover on nearby properties is depicted on the vicinity map reproduced on page 9, *infra*.

#### C. Summary of Proposal

As indicated above, the Petitioner proposes to operate a landscape contractor use along with a wholesale horticultural nursery and a mulch and compost manufacturing operation on the subject property. The Petitioner



**PHASING PLAN**

**TWIN PONDS**

30 POUNDS PER BAG (NET WT) COMPOSTING PLANT, MOUNTAIN

1500-00-00

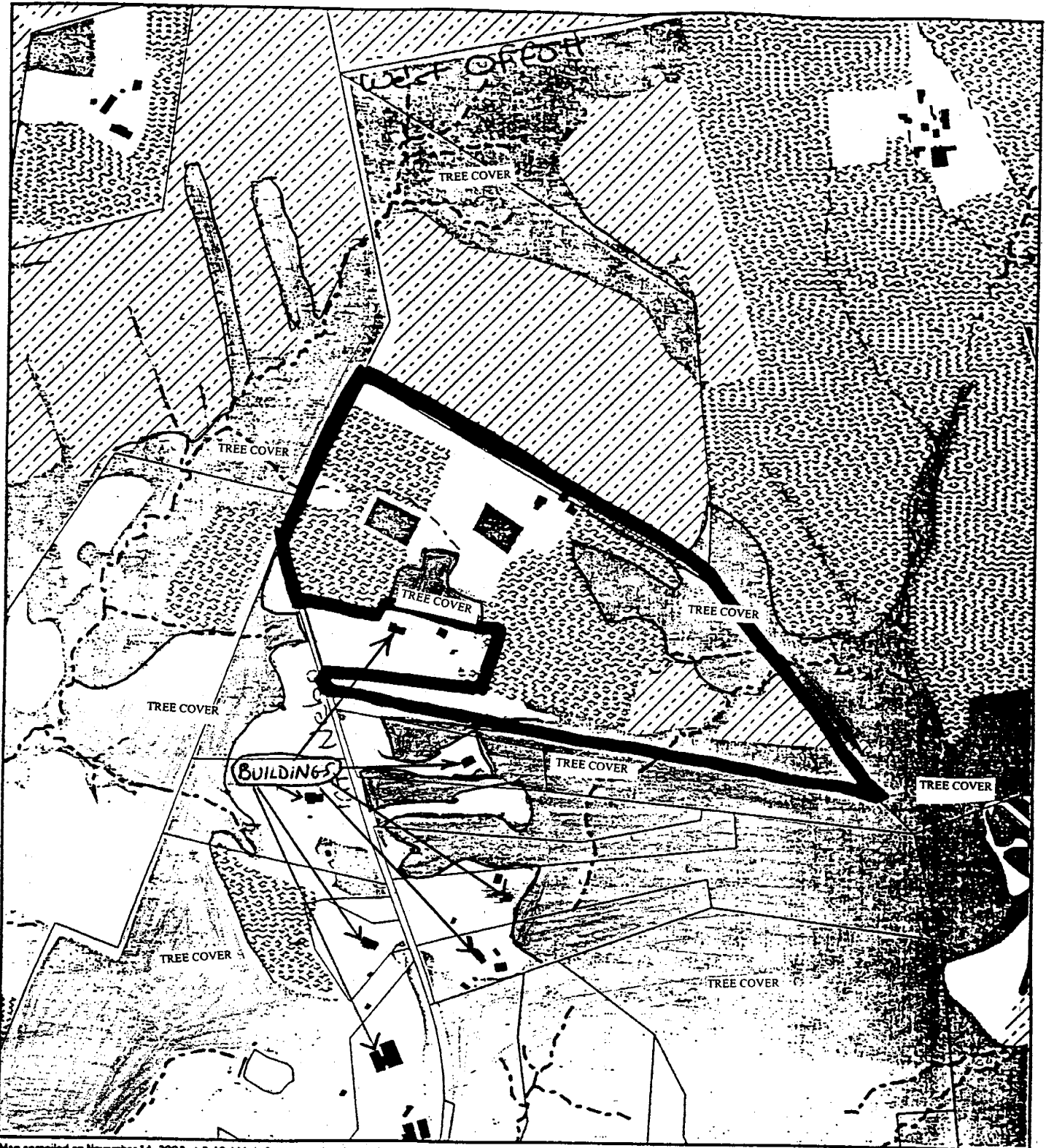
NO. 1	NO. 2	NO. 3	NO. 4	NO. 5	NO. 6	NO. 7	NO. 8	NO. 9	NO. 10	NO. 11	NO. 12	NO. 13	NO. 14	NO. 15	NO. 16	NO. 17	NO. 18	NO. 19	NO. 20	

CLIENT: TWIN PONDS FARM, LLC  
750 WOODROW PLACE  
CABIN JOHN, MD 20768

LOIEDERMAN  
SOLTZ ASSOCIATES



VICINITY MAP FOR  
TWIN PONDS



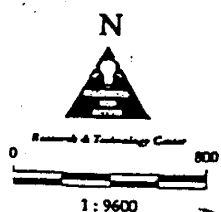
Map compiled on November 14, 2002 at 8:48 AM | Site located on base sheet no - 22DNW21

**NOTICE**

The planimetric, property, and topographic information shown on this map is based on copyrighted Map Products from the Montgomery County Department of Park and Planning of the Maryland-National Capital Park and Planning Commission, and may not be copied or reproduced without written permission from M-NCPPC.

Property lines are compiled by adjusting the property lines to topography created from aerial photography and should not be interpreted as actual field surveys. Planimetric features were compiled from 1:14400 scale aerial photography using stereo photogrammetric methods.

This map is created from a variety of data sources, and may not reflect the most current conditions in any one location and may not be completely accurate or up to date. All map features are approximately within five feet of their true location. This map may not be the same as a map of the same area plotted at an earlier time as the data is continuously updated. Use of this map other than for general planning purposes is not recommended. - Copyright 1998



**MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING**  
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION  
8777 Georgia Avenue - Silver Spring, Maryland 20910-3700

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proposes to lease a portion of the subject property to a related business entity that would operate the landscape contracting business. This business entity is to be managed by one or more of the members of the Petitioner. This use would be operated primarily during the growing season.

Business activities would be concentrated around the area adjacent to the existing home. Prior to implementing this special exception, the house would be converted to use as an office. This area, located in the middle of the property, is more than 1200 feet from Mt. Nebo Road and would be screened from the road and the neighboring properties to the west, south and east. The Petitioner proposes to install screening along the northern property line to screen its use from the currently undeveloped property to the north. According to the Technical Staff Report (Exhibit 36), the closest home (the Eglys' house) is approximately 900 feet from the area in which the landscape contractor use would operate and the next closest home is over 1300 feet from this area.

A "storage area" is located near the north-center of the property, well off of Mt. Nebo Road and behind a stand of trees and the planting areas for the nursery stock. The storage area would be used for business trucks overnight and for the parking of employee cars during the day. In addition, certain equipment, such as snow plow blades, would be stored in this area. The Petitioner has modified its proposal to include the planting of a stand of evergreen trees to the south of the storage area and to provide additional screening along the boundary with the Egly's property. Additional storage of materials, equipment and vehicles to service this business would be in the two existing storage buildings near the house on the property. The storage building closest to the northern property line encroaches into the 50-foot setback from that property line and, accordingly, could not be used for the landscape contractor use as currently located. The Petitioner proposes to relocate and expand this building to a 60 by 80 foot building prior to using the building for landscape contractor use. An above-ground diesel tank for the storage of fuel to operate the agricultural and mulching equipment is to be

installed near these buildings. The locations of the buildings, fuel tank and equipment storage area are shown on the Phasing Plan reproduced on page 8, *supra*.

The first phase of the landscape contractor business is proposed to involve up to 4 vehicles, each of which would support a "team" of two employees. As the business grows, the number of "teams" (1 vehicle and 2 employees) is expected to increase to a total of 12.<sup>4</sup> The landscape contractor operation would use commercial pickup trucks or similar vehicles that do not exceed a maximum of 30 feet in length, with the largest having a roll-off (dump) bed with a 30 cubic yard capacity. Smaller trucks will be less than 5 tons and the larger vehicles would not exceed 13 tons. Sometimes these trucks would pull trailers to transport mowers and similar equipment.

Most vehicle trips associated with this use are planned to occur before and after peak traffic periods. To reach work sites in the early morning, the Petitioner proposed that the work vehicles leave the site at approximately 7:00 a.m. After discussions with the Opposition, the Petitioner agreed that the work vehicles would not leave the site earlier than 7:00 a.m. Thus, employees would arrive between 6:45 and 7:00 a.m. in their personal vehicles, pick up their tools and leave the subject property in the trucks described above between 7:00 and 7:15 a.m. to drive to the job sites. Due to the distance between the employees' residences and the subject property, a certain amount of carpooling is anticipated among the employees. Because they would be returning from worksites of varied distances, employees would return to the site over the course of the afternoon and early evening so that the return trips would be spread out over several hours. Saturday hours of operation would be shorter. The Petitioner agreed to a condition of approval that the

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<sup>4</sup> Originally, the Petitioner proposed a total of 15 teams, but agreed to reduce the total number to 12 vehicles and 28 employees (some of whom may be shared with the other uses).

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"Hours of operation are restricted to 7:00 a.m. through 7:00 p.m., Monday through Friday, and 7:30 a.m. through 4:30 p.m. on Saturday; provided that employees may arrive at the property between 6:45 a.m. and 7:00 a.m. Operation of machinery or departures to job sites are not permitted before 7:00 a.m."

To aid in enforcing this condition, the Petitioner agreed to keep a log of all company vehicles operating from the property, in the same form as the sample log submitted for the record (Exhibit 150).<sup>5</sup>

The access point to the site is from Mt. Nebo Road, a two-lane roadway with a posted speed limit of 25 mph, classified as a Rustic Road. The Petitioner proposes to limit commercial access to a route going north on Mt. Nebo, east on West Offutt and south on West Willard to River Road. Technical Staff recommended that access to the site be restricted to "left turn in and right turn out only" so that no traffic using this site may use Mt. Nebo Road to the south to and from River Road. This would include the vehicles of the operations on the site, and all of their customers and suppliers. The Petitioner agreed to the restriction recommended by the Technical Staff and to "channelize" access to the primary driveway to prevent the use of Mt. Nebo Road to the south.

The portion of Mt. Nebo Road south of the site to River Road is narrow (approximately 14' to 16') and contains substandard vertical/horizontal curves and two one-lane bridges. River Road, from the Mt. Nebo intersection to West Willard Road is similarly restricted. Under the Petitioner's proposal, all traffic visiting the site would be prohibited from using this portion of Mt. Nebo Road.

Mt. Nebo Road north of the site is generally approximately 18' wide. West Offutt Road and West Willard Road, also classified as Rustic Roads, are approximately 18' and 24' wide with posted speed limits of 30 mph and 35 mph, respectively. None of these road segments have substandard curves or vehicle weight restrictions.

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<sup>5</sup> The Hearing Examiner is recommending that the Petitioner keep a somewhat more detailed log.

The Petitioner agreed to the following additional conditions of approval with respect to the Landscape

Contractor use:

- a. If required by Chapter 22A of the Montgomery County Code, a Final Forest Conservation Plan must be submitted prior to issuance of a Sediment and Erosion Control Permit (if required by the Department of Permitting Services).
- b. If required by Chapter 19 of the Montgomery County Code, an approved concept Stormwater Management Plan must be submitted to the M-NCPPC Environmental Staff prior to approval of the Final Forest Conservation Plan and issuance of sedimentation and erosion control permits.

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- e. This Special Exception is limited to using no more than twelve (12) commercial pick-up trucks, or similar vehicles, a maximum of thirty (30) feet in length weighing less than 26,000 pounds (trailers may be attached to such vehicles), in addition to one tractor-trailer per month to make deliveries. The parking/storage area for the vehicles shall be screened by evergreen trees as reflected on the Site Plan (Exhibit 154).
- f. The existing storage building closest to the north property line shall only be used for farm equipment. When, and if, the building is used for the Landscape Contractor Special Exception operation, the building must be relocated along the same axis; adjusted to meet the setback requirement in the RDT Zone.
- g. Petitioner shall install plantings in accordance with the Site Plan (Exhibit 154).
- h. Petitioner is limited to no more than twenty-eight (28) employees for this Special Exception, excluding the three individual members of the Petitioner-LLC and outside contractors.
- i. Prior to implementation of this Special Exception, the existing residential tenancy of the dwelling unit on the property shall be terminated in order to provide sanitary

facilities for the employees of the landscape contractor operation.

Finally, the Petitioner proposed that the following conditions apply to all three cases (S-2527, S-2528 and S-2529).

1. The Petitioner is bound by all submitted statements and plans, as revised.
2. Access to the site for the three Special Exceptions is restricted to left turn ingress from and right turn egress onto Mt. Nebo Road via a channelized island. No special exception-related traffic to and from the site may use Mt. Nebo Road to the south to reach River Road. The Petitioner must inform contractors visiting the site and companies that have delivery activities associated with any of the three uses of this restriction and the Petitioner is responsible for their adherence to this restriction.
3. For the three Special Exceptions, a total of one outside contractor may be on the property per day. Such contractor may have more than one employee to carry out the work on the site.
4. Operations on the site are limited to the following, as shown on the amended Phasing Plan submitted by the Petitioner (Exhibit 161(b)):
  - a. Phases 1, 2 and 3 of the Wholesale Nursery operation.
  - b. Phases 1, 2 and 3 of the Landscape Contractor operation; however, vehicles associated with the Landscape Contracting operation shall not exceed twelve (12) vehicles stored on-site.
  - c. Phase 1 of the Manufacture of Mulch and Composting operation.
5. The Petitioner shall properly maintain the landscaping areas and promptly replace any dead trees.
6. The only track vehicles used on the property shall be (1) a loader and (2) the vehicles used by the independent

contractor to process materials for the Manufacturing of Mulch and Composting Special Exception operations (see Condition 15(d))[applicable to S-2529].

7. There shall be no burial or burning of any material on the subject properties of these Special Exceptions.
8. Any relevant federal, state or county agency shall have the right to inspect any Special Exception, pursuant to standard procedures for access to the property.
9. The Petitioner shall designate a representative to coordinate with the Community Liaison Committee established in conjunction with these uses. The Community Liaison Committee shall include adjacent and confronting property owners and a representative from the Sugarloaf Citizen's Association. The Committee shall meet twice a year for three (3) years from the date of approval of the Special Exceptions and meetings shall be arranged and noticed by the Petitioner. The People's Counsel shall receive notice of all meetings.
10. All required logs shall be made available upon request by the Montgomery County Department of Permitting Services, Montgomery County Department of Environmental Protection, the Maryland Department of the Environment and the Maryland Department of Agriculture during normal business hours. Petitioner shall distribute copies of required logs to members of the Community Liaison Committee at meetings held pursuant to Condition 9, above. In addition, all logs shall be compiled [sic] annually and provided to the Board of Appeals, along with summaries of all Community Liaison Committee meetings for that year.
11. The Petitioner shall install a steel, double-lined 300 gallon tank for #2 diesel fuel. The tank shall be inspected regularly and replaced as needed.
12. The Petitioner shall maintain at least \$1,000,000 in liability insurance from an insurance company rated A or better. A Certificate of Insurance shall be made available upon request.

### III. SUMMARY OF TESTIMONY

The following is a **summary** of the testimony that was presented in connection with Case No. S-2528. It should be noted that some testimony, although primarily related to one of the other two cases (S-2527 or S-2529), may affect the decision in the present case due to the cumulative effects of the three proposed special exceptions as well as the inter-relationship between the three proposed special exceptions. Therefore, testimony relevant to all three cases is described in this Report. However, because each special exception must stand or fall on its own merits, testimony related solely to one of the other two cases is not repeated in this Report. Also, it should be noted that some testimony presented early in these proceedings was superceded by subsequent modifications to the proposed operations.

John Hughes, a member of the Petitioner, testified regarding the operation of the proposed landscape contractor use. He stated that in the morning the landscape contractor's employees would drive to the site in their personal vehicles. They would then load company trucks with plant materials, mulch, compost and tools and drive the company trucks to the customers' property. In the afternoon, the employees would bring wood waste and grass from the customers' properties back to the site for composting.

Mr. Hughes stated that the landscape contractor's employees would install plants, bushes and sod on customers' properties. The landscape contractor use would employ 1 or 2 office workers and approximately 26 landscapers<sup>6</sup>. Mr. Hughes testified that the parking area would be screened with evergreen trees and the

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<sup>6</sup> As indicated earlier in this Report, the plan of operations was amended during the course of these proceedings. The testimony described in this summary generally reflects the final testimony provided by the Petitioner. For example, initially Mr. Hughes testified that the Petitioner would have up to 30 employees using 15 trucks. Mr. Hughes' testimony near the end of these proceedings stated that this use would involve no more than 28 employees and no more than 12 trucks. Thus, earlier testimony which was subsequently amended, is not reported herein.



Petitioner would prefer to screen the subject property from the Eglys' property with the use of evergreen trees rather than a board on board fence as proposed by the Technical Staff. He stated that the Petitioner would start operations with 3 to 5 trucks, but seeks permission to use as many as 12 trucks for its operations. He noted that landscaping is a seasonal operation. The Petitioner also would perform snow removal services using the same trucks. Snow plow blades would be stored along the parking lot when not in use. The Petitioner would use an existing barn and a barn to be relocated for the storage of equipment. Mr. Hughes testified that the noise of the employees' coming to and going from the site would be less than the noise of a combine or tractor used to farm crops.

Mr. Hughes testified that each vehicle used for the landscape contractor use would not exceed 13 tons in gross vehicle weight and a commercial driver's license is not required to operate these trucks. In response to cross-examination, Mr. Hughes testified that a gate would be installed at the front of the property for security. Mr. Hughes testified that there might be some deliveries of bagged mulch to the site. He agreed that not more than a total of 1 tractor-trailer would visit the site on any day so that if a delivery is made to one of the other two proposed special exception uses, a delivery to the landscape contractor use would not be made on the same day. Also, not more than 1 tractor-trailer per month would visit the site in connection with this use.

Carl F. Starkey, who was recognized as an expert in transportation planning and traffic engineering, testified on behalf of the Petitioner. He stated that he is familiar with the Zoning Ordinance, Adequate Public Facilities Ordinance and Montgomery County road regulations. He described the travel routes and volumes of traffic that travel the roads that would be used by the landscape contractor's vehicles. He testified that the roads that would be used by these vehicles (Mt. Nebo Road to the north of the site, West Offutt Road and West Willard Road) have low volumes for roads with the capacity of these roads. Accordingly, Mr. Starkey concluded that the proposed use, even in conjunction with the other two proposed special exceptions, would not



adversely impact the roadways. He described the volume of traffic generated by the proposed uses as minimal and stated that the Technical Staff concurred with his finding that the volume of traffic generated by the proposed uses would not create any problems.

Mr. Starkey testified that the road network has a capacity for 8,000 trips per day. Currently, there are approximately 200 trips per day on Mt. Nebo and West Offutt Roads. This would increase to approximately 270 trips per day (these calculations assumed 15 teams of 2 employees) if the three proposed special exceptions are granted. Mr. Starkey testified that the roads to be used by the Petitioner have no weight restrictions and more than adequate radii at all intersections. Mr. Starkey stated that all relevant intersections operate at level of service A. He testified that currently, some tractor-trailers use Mt. Nebo Road and West Offutt Road. According to Mr. Starkey, approximately 4% to 11% of the vehicles on these roads are large trucks. He testified that the traffic volume on West Offutt Road is approximately 19 vehicles per hour. This figure represents a total for traffic in both directions. Thus, there is 1 vehicle every 3 minutes in one direction or the other. He testified that the roads meet geometric design criteria for low volume roads.

Mr. Starkey testified that the entrance to the subject property would be channelized so that vehicles would be required to make a right turn when exiting the property and would have to enter the property by making a left turn from southbound Mt. Nebo Road. According to Mr. Starkey, the channel is designed to County standards and would effectively prevent truck traffic from using Mt. Nebo Road to the south of the subject site.

Jagdish Mandavia, an expert in civil engineering, testified on behalf of the Petitioner. Almost all of his testimony related to the mulch and composting use. He stated that the Petitioner's operations would not create a nuisance.

Stephen Tawes testified as an expert in landscape architecture and site planning. He described the site plan submitted by the Petitioner. Mr. Tawes testified that agricultural uses surround the property which is in the RDT Zone. He stated that the proposed uses would operate at the same scale of activity as surrounding uses. According to Mr. Tawes, the three proposed uses have been sited to minimize their impact on the neighborhood. He does not believe that the proposed use would have any non-inherent impacts. Mr. Tawes emphasized that all parking for the proposed uses would be on site and would be screened from Mt. Nebo Road and from the Eglys' property. He noted that all three uses would be operated at least 50 feet from any property line. Mr. Tawes stated that he has spent 6 hours on the site over the course of 3 visits during the summer and fall. He stated that the parking spaces are sized to comply with County Code, and that the parking area is already present.

Andrew Der testified that he prepared an environmental impact analysis. Most of his testimony related to the mulch and compost production use. However, he testified that the Petitioner will provide a 100-foot buffer around all streams and that the site is not hydrologically connected to the surrounding area. He testified that distances and existing vegetation provide adequate sound buffering for all three uses.

Philip Perrine, a land use planning expert, testified on behalf of the Petitioner. He stated that he has visited the site and driven around the area. He reported that the area is designated for agricultural and open space uses under the Master Plan. He described the relevant neighborhood and stated that it contains agricultural and related uses, large open tracts of farmland, some residences on large tracts to the south along Mt. Nebo Road, and the Izaak Walton League property to the east that is used for recreational purposes. He described the area as agricultural in nature and noted that the site is in the RDT Zone. Mr. Perrine testified that all three proposed uses are permitted as special exceptions in the RDT Zone. Mr. Perrine summarized his understanding of the proposed landscape contractor use and testified that it would have no non-inherent impacts

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on the road system or the neighborhood. In his opinion, the proposed use is compatible with the surrounding area. He testified that, prior to 1985, the three special exceptions requested by the Petitioner were treated as one unified special exception use. According to Mr. Perrine, the three proposed special exceptions are typically grouped together. He noted that the Zoning Ordinance requires a lenient application of the standards for special exceptions in an agricultural area. He disputed the Opposition's contention that the neighborhood is a "one-family" residential area.

Beverly Strauss, a realtor who lives on Westerly Avenue in Poolesville, testified in opposition. She believes that property values will drop as a result of the proposed special exceptions. She is concerned that the traffic generated by the proposed use would create noise and that people run stop signs. In response to questioning, she acknowledged that she is not familiar with the amount of traffic that would be generated by the proposed use and that she has not reviewed the file or listened to the testimony in these cases. She testified that the proposed special exception would have the same effect anywhere in the RDT Zone and, accordingly, does not believe that this use should be permitted in the RDT Zone.

Terry Cummings, of 15200 Mt. Nebo Road, testified that she lives across Mt. Nebo Road from the site on a 430-acre parcel of land upon which she operates an animal sanctuary. She testified that she is concerned regarding truck traffic on Mt. Nebo Road. Ms. Cummings stated that school busses frequently visit her property so that children can interact with the animals at the sanctuary. She is concerned that the school busses and the Petitioner's trucks may have difficulty passing each other in opposite directions. Ms. Cummings testified that normally 4 or 5 school busses and 8 other vehicles visit the animal sanctuary each day. Typically, visitors are at the animal sanctuary between 10 a.m. and 2 p.m. to visit the farm animals. Ms. Cummings has had as many as 1,000 visitors on "Farm Day." The animal sanctuary operates fund raisers in September that involve about 900 visitors between the hours of 1:00 p.m. and 4:00 p.m. The animal sanctuary is open 7 days

per week. Animals are delivered to the animal sanctuary on trucks and trailers. On cross-examination, Ms. Cummings testified that she is not aware of any conflicts between busses and trucks occurring during the year preceding her testimony.

Hagos Gebre, of 14929 Mt. Nebo Road, testified that he works in the District of Columbia and used to live there as well. He moved to the Poolesville area to have a quiet environment. In the past several months Mr. Gebre has noticed several more trucks on Mt. Nebo Road. He believes this is changing the character of the neighborhood. Mr. Gebre is concerned about the possible impact of the proposed activities on property values. He was not able to identify any non-inherent effects of the proposed use.

Robert A. Thomassen, of 15001 Mt. Nebo Road, whose property adjoins the subject property, testified that he is concerned with increased traffic on Mt. Nebo Road and the noise that may be generated by the trucks using the gravel road on the Petitioner's property. He pointed out that some of the trees that would screen the Petitioner's property from the Thomassens' property are located on the Thomassens' property. Most of Mr. Thomassen's testimony related to the mulch and compost manufacturing use requested in Case S-2529.

John D. Egly, of 15115 Mt. Nebo Road, testified in opposition. Although most of his testimony related to the mulching and composting operation, he stated that in his opinion, the neighborhood is a rural residential area and that there are no "farms" in the area. Mr. Egly believes that the proposed channelization of the driveway entrance would change the vista along Mt. Nebo Road.

Brett Michaels, of 14920 Mt. Nebo Road, testified that he is concerned regarding the noise that the proposed uses may generate. He stated that he is aware of a case in which Mr. Hughes told a truck driver not to drive south on Mt. Nebo Road, but the driver drove in that direction anyway. He believes that the proposed channelization would help the situation, but that some trucks may use Mt. Nebo Road to the south despite the

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Petitioner's efforts. Mr. Michaels believes that all three special exceptions are inconsistent with the agricultural preserve and allowing them in the RDT Zone would affect property values.

Dolores Milmoie testified on behalf of the Audubon Naturalists Society and "For A Rural Montgomery" (F.A.R.M.). Although most of Ms. Milmoie's testimony related to the proposed mulch and composting operation, she testified that Mt. Nebo and West Offutt Roads are rustic roads that she believes are not adequate for truck traffic.

Stephanie Egly, of 15115 Mt. Nebo Road, testified in opposition. Ms. Egly presented a video tape (Exhibit No. 104) showing conditions along West Willard Road, West Offutt Road and Mt. Nebo Road. The video tape revealed Ms. Egly's vehicle passing a truck going in the opposite direction on West Willard Road. Ms. Egly testified that West Willard Road has a 35 mile per hour speed limit and West Offutt Road has a 30 mile per hour speed limit. She testified that the paved surface of West Offutt Road narrows to 15 feet at one bridge, 14 feet at another bridge and 13 feet 10 inches at another spot. She stated that the speed limit on Mt. Nebo Road is 25 miles per hour and that Mt. Nebo Road narrows to as little as 11 feet 5 inches in width at one point south of the site. The video tape showed Ms. Egly's vehicle passing a car going in the opposite direction without slowing down. Ms. Egly testified that there are a lot of school busses on West Offutt and Mt. Nebo Roads. Ms. Egly acknowledged that her vehicle passed (in the opposite direction) 4 or 5 cars during the 20-minute video. She acknowledged that school busses and cars currently meet each other from opposite directions and are able to pass. She stated that the major issue is the speed of the trucks.

Diane Hogan, of 15001 Mt. Nebo Road, testified that she owns and resides on a property adjacent to the subject property. Ms. Hogan expressed concern regarding Case S-2528 relating to the noise of trucks driving over the gravel driveway.

In rebuttal, Mr. Perrine testified that almost all roads in the agricultural preserve are rustic. Therefore, almost any special exception use in the RDT Zone must use rustic roads for access. According to Mr. Perrine, this renders the use of rustic roads an inherent aspect of any use that is allowed by special exception in the RDT Zone. He testified that the area is agricultural - not residential in nature because residential lots comprise approximately 5% of the surrounding area. He noted that the zone requires that residential lots have at least 25 acres per parcel, although smaller lots have been "grandfathered." He acknowledged that all 8 residential lots to the south of the site along Mt. Nebo Road are smaller than 25 acres. Mr. Perrine stated that the area is not residential according to the Master Plan, which describes the area as agricultural. He noted that the Izaak Walton League property to the east of the subject property contains 493 acres and is a working conservation farm. Mr. Perrine drew a distinction between the RDT Zone which expresses a preference for agricultural uses and other rural zones which allow 1 house per 5 acres. According to Mr. Perrine, this distinction means that in the RDT Zone, the residential uses must be compatible with the agricultural uses, whereas in the rural residential zones, the agricultural uses must be compatible with the residential uses. Mr. Perrine also testified that the "rustic" roads designation is not intended to affect the use of abutting properties.

Mr. Starkey testified in rebuttal that school busses are currently safely negotiating the route that would be followed by the Petitioner's trucks. He viewed the narrow areas described by Ms. Egly in her testimony and stated that within 160 feet of each narrow area there is a spot that provides at least 22 feet of clear surface without a 2-foot dropoff. Therefore, although a vehicle might have to slow or stop to allow a vehicle in the opposite direction to pass at the narrowest areas of the road, he believes that this can be accomplished safely.

Jane Hunter, of 20400 West Hunter Road, Beallsville, Maryland, testified individually and on behalf of the Sugarloaf Citizens Association. Although most of her testimony related to Case No. S-2529, she expressed concern regarding noise generated by the proposed landscape contractor operations. She testified that the

trucks used in connection with the proposed operation would generate noises that differ from the existing country sounds generated by the wind and birds. She acknowledged that there is little traffic on area roadways, but stated that the ample capacity encourages speeding. She believes that the proposed use would be better located in an industrial area where there are more suitable roads. Ms. Hunter expressed concern regarding the enforceability of a condition of approval requiring that the use-related traffic not use Mt. Nebo Road to the south of the site. Ms. Hunter stated that, based on the past history of the Petitioner, she doubts that the Petitioner will enforce any routing requirements. In Ms. Hunter's opinion, although there is road capacity for the trips generated by the proposed uses, this volume of trips would change the character of the neighborhood. She believes that the weight of the trucks that would be used would damage the roads, which she stated were not designed for daily truck traffic. According to Ms. Hunter the roads will be reduced to rubble. She asserted that the roads to be used by the Petitioner's vehicles are on the Bicycle Master Plan.

Several residents of the area submitted letters in opposition but did not testify. The Cabin John Citizen's Association supported the Petition. In assessing the credibility of the testimony, it should be noted that, while the Opposition raised many serious concerns and presented significant evidence, many of the Oppositions' allegations were not supported by a preponderance of the evidence of record. For example, the Opposition asserted that the Petitioner's current operations do not comply with laws or regulations in numerous ways. However, Exhibit 158, submitted by the Opposition, reveals that, upon investigation, most allegations of non-compliance were deemed to be unfounded.

#### IV. CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided pre-set legislative standards are met. The special exception is evaluated in a site-specific context because there may be locations where it is not appropriate. Nevertheless, a special exception use is deemed compatible within the zoning district in which



it is authorized unless specific adverse conditions at the proposed location are shown to overcome this presumption. Impacts which are inherent in the special exception use, regardless of where it is located within the zoning district, may not be the sole basis for denial of a special exception.

Further, Section 59-G-2.30.00 which establishes standards for landscape contractor uses states:

- (6) In evaluating the compatibility of this special exception with surrounding land uses, the Board must consider that the impact of an agricultural special exception on surrounding land uses in the agricultural zones does not necessarily need to be controlled as stringently as the impact of a special exception in the residential zones.

The proposed use is considered an agricultural-commercial special exception under the Zoning Ordinance. Section 59-C-9.3 (c).

#### A. Standard for Evaluation

##### **Sec. 59-G-1.2.1. Standard for evaluation.**

A special exception must not be granted absent the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner, or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site. Non-inherent adverse effects, alone or in conjunction with the inherent effects, are a sufficient basis to deny a special exception.

*Analysis of inherent and non-inherent adverse effects considers size, scale, scope, light, noise, traffic and environmental effects. It is understood that every special exception has some or all of these effects in varying degrees. What must be determined during the course of review is whether these effects are acceptable or will create adverse impacts sufficient to result in a denial. To that end, inherent adverse effects associated with the use must be determined. The general neighborhood affected by the proposed use is predominantly rural with a mixture of agricultural and one-family residential uses. The immediate neighborhood contains large lot residential uses to the south and predominantly agricultural or open space uses to the west, north and east.*

*The inherent, generic physical and operational characteristics arising from the given use, in this case a landscape contractor, include temporary storage of landscaping materials to be taken by crews to work*

sites, storage of business vehicles and equipment, storage buildings and an office. These inherent characteristics have been accepted by the Board of Appeals in prior cases (e.g. S-2506).

As noted by the Technical Staff, a landscape contractor operation can vary considerably in size and intensity. This business inherently uses trucks (of variable sizes) to move equipment and products from where they are stored to where the work is performed. The use usually has stores of products (such as mulch or compost) that it delivers to work sites, and the same vehicles take organic debris from the work sites to places where that debris is recycled into compost or otherwise disposed of in a landfill. This use usually requires that the employees must arrive very early in the morning to get the trucks and equipment out to job sites early in the morning. This characteristic is compounded by the fact that most landscape contractors choose sites in rural areas (as encouraged by the Zoning Ordinance) to avoid the greater disruptions that would occur in more densely settled residential areas. The farther this use is located from the jobsites in residential or business areas, the earlier the employees must leave the business location in the morning.

The Technical Staff did not identify any non-inherent effects and found that the inherent effects would be less than if the use were located in a more densely populated residential area. The Technical Staff concluded that the operations as initially proposed by the Petition, subject to certain conditions of approval, would "cause no detrimental impacts to the surrounding area" (Exhibit 36 at 14).

All of the special exception activities proposed by the Petitioner are arranged on the site in a logical manner and are 50 feet or more from all property lines. The special exception site plan for the proposal (Exhibit 154) identifies where activities would occur on the site.

A proliferation of trucks and other vehicles can render a generic aspect of the use, business vehicles, non-inherent. The zoning ordinance specifically requires that the number of vehicles be identified and limited by the special exception. While this requirement does burden a petitioner with needing to seek a modification when the petitioner's fleet is changed, it protects the character of the neighborhood from uncharacteristic groupings of business vehicles. In the present case the number of vehicles would be limited to 12 vehicles by proposed condition number 18.

The volume of traffic can present a non-inherent adverse effect. While increased volumes of traffic can occur in commercial and industrial areas with little impact, in a zone that includes residential uses, the timing and frequency can be of significant concern. In this case, the timing of arrivals and departures of business vehicles has been limited by a proposed condition of approval to the period between the hours of 7:00 a.m. and 7:00 p.m. on weekdays and between 7:30 a.m. and 4:30 p.m. on Saturdays, with no operations on Sunday. This serves to protect the neighborhood from disturbance during late evening or very early morning hours. Based on the volume of traffic anticipated, the effects of traffic would be typical for a landscape contractor and, therefore, inherent. The area road system would continue to operate efficiently with intersections at level of service A.

The Opposition asserts that the use of Mt. Nebo Road, which is a Rustic Road, by the landscape contractor's trucks is a non-inherent characteristic. However, as indicated above, a certain amount of

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The Opposition asserts that the use of Mt. Nebo Road, which is a Rustic Road, by the landscape contractor's trucks is a non-inherent characteristic. However, as indicated above, a certain amount of



traffic, including truck traffic, is inherent in the use. The Petitioner agreed to limit the number of employees (28) and trucks (12) associated with this use. Also, the Petitioner agreed to channelize the entrance to the site so that ingress and egress would be left turn in, right turn out only, so as to prevent the use of Mt. Nebo Road to the south of the site. This would keep truck traffic off the section of Mt. Nebo Road that traverses the portion of the neighborhood where most residences are located as well as the section where visibility is most obscured by hills and turns.

While some parcels in the RDT Zone abut or are near higher grade roadways, much of the RDT is served by roads similar to Mt. Nebo Road and West Offutt Road. Thus, the use of such roads cannot be considered non-inherent. If operated in accordance with the Statement of Operations (Exhibit 152) and the conditions of approval proposed by the Petitioner, as modified by the Hearing Examiner, the use would have no non-inherent impacts and the inherent impacts would be sufficiently mitigated to support granting the petition.

Technical Staff concluded that there are no non-inherent adverse effects associated with the Petition that warrant denial. Technical Staff found that, subject to the proposed conditions of approval (which have been enhanced since the date of the Technical Staff report to further protect the neighborhood), all of the physical and operational characteristics of the proposed use would be inherent. The undersigned concurs with the Technical Staff's findings.

### B. General Standards

The general standards for a special exception are found in Section 59-G-1.21(a).

#### **Sec. 59-G-1.21. General conditions.**

- (a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:

- (1) Is a permissible special exception in the zone.

*The proposed use is permitted by special exception in the Rural Density Transfer Zone.*

- (2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

*The proposed use, as limited by the Statement of Operations and recommended conditions of approval, complies with the standards and*

*requirements for the use in Division 59-G-2 as is discussed in more detail on pages 33 through 35, infra.*

- (3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

*As found by the Technical Staff, the Planning Board and Mr. Perrine, the proposed uses are consistent with the Master Plan for the Preservation of Agricultural and Rural Open Space, as they are specifically noted as Agricultural-Commercial uses in the zoning ordinance, and therefore appropriate, with the recommended limits on the uses, in the Rural Density Transfer Zone (see Exhibit 36, at page 16).*

- (4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.

*The Technical Staff found that the proposed use, as limited by the Petitioner and by staff recommendations, would be in harmony with the general character of the rural area. The proposed use would not increase the population and the only "new" structure would be the enlargement and slight relocation of an existing barn that would be far removed from any existing residences in the neighborhood. Although, as the Opposition asserts, there are some residences to the south of the site along Mt. Nebo Road, the general character of the neighborhood is rural and the majority of the acreage is devoted to agricultural or open space uses. By implementing measures to assure that traffic to and from the site does not use Mt. Nebo Road south of the site, the impact of the proposed use on the residential portion of the neighborhood is significantly mitigated. The limited hours during which traffic would arrive at or depart from the site as well as the limitations of the number of vehicles and employees would avoid any material change to the character of the neighborhood resulting from traffic. The on-site activities of the proposed use would be located several hundred feet from the nearest public road (Mt. Nebo Road) and*

900 feet from the nearest residence. The on-site activities associated with the use would be amply screened from both Mt. Nebo Road and neighborhood residences.

- (5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

*The proposed use, as limited by the Petitioner's Statement of Operations (Exhibit 152) and the recommended conditions of approval, would not be detrimental to this rural area. As discussed above, the use would not have any non-inherent impacts. Other than a small amount of traffic, most neighbors would not notice the presence of the use. Despite the large distance between the Egly's house and the storage/parking areas for the proposed use, the Egly's may be aware of some activity on the site. However, the screening proposed by the Petitioner to the south of the parking area and along the Egly's property line, as well as the recommended conditions of approval, would ameliorate the effects of the use to the extent that the use would not be a material detriment to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood.*

- (6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

*The proposed use, as limited by the Petitioner's Statement of Operations and by the recommended conditions of approval, would not cause objectionable noise, vibrations, fumes, odors, dust or other impacts. As Technical Staff found, the potential for impact is limited by the large size of the property, the operation plan, and the specific limitations and modifications agreed to by the Petitioner.*

*While the Opposition understandably objects to any new noise or other impacts, the effects of the proposed use would be minimal. The inherent noise of car and truck doors and engines would be substantially diluted by the distance of the parking area from any other property. If the Petitioner had sited its storage and parking area 50 feet from the Egly's property line, the noise impact could be significant. However, the parking area is several hundred feet from the Egly's house with substantial screening in between. There is no evidence that the landscape contractor use would generate any noticeable fumes or odors nor is there any evidence the use would cause objectionable illumination or glare.*

*The Opposition expressed concern regarding noise, vibrations and dust that might be generated by trucks using the gravel driveway on the site. In response, the Petitioner agreed to maintain the driveway and to abide by a dust suppression plan. These measures combined with the distance of the driveway from abutting properties, the limits on the number and size of vehicles, the limited hours of operation and other restrictions on the use would prevent a material amount of objectively objectionable noise, vibrations or dust from impacting nearby properties.*

- (7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.

*As the Technical Staff and Mr. Perrine properly concluded, the proposed use is not located in a one-family residential area. The proposed special exception use is consistent with the recommendations of the Master Plan. The evidence does not reveal the existence of any other special exceptions in the neighborhood.*

- (8) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

*For the reasons discussed in greater detail above and below, the Technical Staff and Mr. Perrine correctly concluded that the proposed use would not adversely affect the health, safety, security, morals, or general welfare of residents, visitors or workers in the area, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

- (9) 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.

*The proposed use would not require any public school facilities. This use, would not require any additional police or fire protection or storm drainage. The Opposition expressed concern regarding the adequacy of water and sanitary facilities on site to serve the employees. However, the Petitioner submitted correspondence from Harry Sandberg of the Montgomery County Department of Permitting Services (Exhibit 149) stating that:*

*The septic system currently serving the on-site single family residence is adequate to serve 30 persons as proposed by Mr. Hughes on a strictly commercial basis.*

*The evidence reveals that while the proposed use would generate noticeable additional traffic on Mt. Nebo Road and West Offutt Road, the reason the traffic to and from the use would be noticeable is because there is currently very little traffic on these roads. Even combined with the traffic that would be generated by the uses proposed in S-2527 and S-2529, all intersections in the area would operate at level of service A. By prohibiting special exception traffic south of the site on Mt. Nebo Road, the Petitioner would avoid those sections of Mt. Nebo Road where improvements to the public road might be necessary to handle the special exception traffic.*

*The Opposition asserts that Mt. Nebo Road north of the site and West Offutt Road are inadequate to accommodate the traffic that would be present if the special exception is granted. It is undisputed that these roads are rural in character with limited or, in some areas, no shoulder space. Thus, large vehicles must use care when passing other large vehicles heading in the other direction. However, the pickup trucks and any other trucks not exceeding 30 feet in length or 13 tons in weight would be able to safely pass the few other vehicles they may encounter on their way to or from the site. Eighteen-wheel tractor-trailers present a greater concern. However, the Petitioner has agreed to a condition of approval that only one such truck per month may visit the site in connection with the landscape contractor use and that such a visit will not occur on the same day as a tractor-trailer visits the site for one of the other uses.*

*It must be noted that, currently, refuse collection trucks and delivery trucks regularly use West Offutt Road and Mt. Nebo Road. The testimony of Terry Cummings was particularly helpful in evaluating this issue. Ms. Cummings operates an animal sanctuary located directly across Mt. Nebo Road from the Subject Property. Ms. Cummings testified that the sanctuary holds open houses that involve 900 to 1000 visitors on certain days and is frequently a field trip destination for school classes. According to Ms. Cummings, 4 or 5 school busses per day visit the sanctuary. It is apparent that sometimes an arriving or departing school bus must pass by another bus or a truck on Mt. Nebo Road or West Offutt Road. Ms. Cummings is not aware of any collisions or other similar incidents involving school busses visiting or departing the sanctuary. Moreover, the school bus arrivals and departures which occur between 10:00 a.m. and 2:00 p.m. are at least as likely to conflict with truck traffic making deliveries to and collections from area farms or residences as would the Petitioner's vehicles which would leave the site shortly after*



7:00 a.m. Further, the Petitioner's vehicles would not be on the local roads at the same time of day as the school busses visiting the animal sanctuary.

Finally, although Mt. Nebo Road is a Rustic Road, the designation of Rustic Road status is not to be used to limit otherwise permitted land uses. Page 5 of the Rustic Roads Master Plan states: "The rustic roads designation is not intended to affect the use of adjoining land except in the design of access to subdivision." Further, the area of Mt. Nebo Road of primary interest in the Rustic Road Master Plan description is the southern end, where truck traffic is to be prohibited. The Plan states: "The northern half (of Mt. Nebo) is generally flat with long, straight sections." The site is located in the rural policy area, where the County's roadway design standards do not include pedestrian facilities due to the relatively low level of pedestrian activity and inconsistency with rural character. The proposed uses are not expected to generate pedestrian activity along public roadways.

Although this issue is in greater dispute than some others, the undersigned agrees with Technical Staff that the proposed use would be served by adequate public services and facilities.

- (i) If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception.

*The proposed special exception does not require approval of a preliminary plan of subdivision. Also, according to Technical Staff, the proposed special exception does not require approval of a preliminary plan of subdivision. The proposed use meets Local Area Transportation Review and the Policy Area Transportation Review requirements.*

- (ii) With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.

*The proposed use, as limited by the Statement of Operations and recommended conditions of approval, would not have a material detrimental effect on the safety of vehicular or pedestrian traffic. Although even one additional car or truck can have some effect, for the reasons discussed in detail above, the effects of the*

*proposed use would be minimal and would not materially affect the safety of vehicular or pedestrian traffic.*

### C. Specific Standards

#### **Sec. 59-G-2.30.00. Landscape contractor.**

This use may be allowed together with incidental buildings upon a finding by the Board of Appeals that the use will not constitute a nuisance because of traffic, noise, hours of operation, number of employees, or other factors. It is not uncommon for this use to be proposed in combination with a wholesale or retail horticultural nursery, or a mulch/compost manufacturing operation. If a combination of these uses is proposed, the Board opinion must specify which combination of uses is approved for the specified location.

- (1) The minimum area of the lot must be 2 acres if there are any on-site operations, including parking or loading of trucks or equipment.

*The proposed use is on a parcel of land containing approximately 77 acres.*

- (2) Areas for parking and loading of trucks and equipment as well as other on site operations must be located a minimum of 50 feet from any property line. Adequate screening and buffering to protect adjoining uses from noise, dust, odors, and other objectionable effects of operations must be provided for such areas.

*The area designated for parking trucks and equipment is approximately 200 feet from the nearest property line, and several hundred feet from the nearest off-site house. Although Technical Staff concluded that the distance above is sufficient protection for adjoining properties, Staff recommended a fence along the Egly property line to provide some further protection from the noise of vehicles starting and leaving in the early morning hours. The Petitioner has agreed to install plantings along the currently unscreened portion of the common property line with the Eglys and to install evergreen trees on the south side of the portion of the driveway that is adjacent to the parking area.*

*The Petitioner proposes to use existing storage barns for storing equipment and supplies. One of the existing barns does not currently meet the setback requirement. The Petitioner has agreed to a condition of approval that this structure must be moved to meet the setback requirement before it can be used for the special exception use. All of the other existing structures meet the required setbacks.*

- (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 Board so as to preclude an adverse impact on adjoining uses. Adequate parking must be provided on site for the total number of vehicles and trailers permitted.

*The Petitioner currently has trucks arriving at the site daily as part of the farming operation, dropping off organic debris (chipped trees and greenery) and leaving empty. If the proposed use is approved, many of the same trucks would be parked at the site, leave the site with loads of mulch, and return with the organic debris.*

*The Petitioner originally proposed up to 15 trucks in conjunction with the landscape contracting business. The Petitioner has agreed to a limit of 12 commercial vehicles which would be pickup trucks or similar vehicles (as models change) a maximum of 30 feet in length, the largest with a dump bed with a 30 cubic yard capacity. The smaller trucks would be less than 5 tons and the larger vehicles would not exceed 13 tons.*

*The proposed site for parking the vehicles and equipment is adequate in size. With the addition of evergreen plantings on the south side of the driveway, directly across the driveway from the parking area, and the proposed screening along the Eglis' property line, the properties to the south would be adequately buffered from the view and noise of the equipment and vehicles.*

- (4) No sale of plant materials or garden supplies or equipment is permitted unless the contracting business is operated in conjunction with a retail or wholesale nursery or greenhouse.

*The Petitioner is proposing a separate special exception for a wholesale horticultural nursery operation. (S-2527)*

- (5) The Board may regulate hours of operation and other on-site operations so as to prevent adverse impact on adjoining uses.

*Although the Technical Staff and Planning Board originally found the proposed hours of operation of 6:00 a.m. to 8:00 p.m. acceptable, the Petitioner has agreed to restrict the hours of operation to 7:00 a.m. to 7:00 p.m. on weekdays and 7:30 a.m. to 4:30 p.m. on Saturdays. No Sunday hours are proposed. Also, the Petitioner has agreed to limit the number of employees and other aspects of the proposed use. See page 13, supra, and the Statement of Operations (Exhibit 152).*

- (6) In evaluating the compatibility of this special exception with surrounding land uses, the Board must consider that the impact of an agricultural special exception on surrounding land uses in the agricultural zones does not necessary need to be controlled as stringently as the impact of a special exception in the residential zones.

*The proposed use is categorized as an "agricultural-commercial" use (Section 59-C-9.3(c)), and given the size and scale proposed, the Technical Staff correctly concluded that the landscape contractor use is appropriate in the Rural Density Transfer Zone, which is an agricultural zone (Section 59-C-9.1). As stated earlier in this Report, although there are residences in the neighborhood, these residences are primarily south of the Subject Property, comprise a minority of the acreage in the general neighborhood,*

*most about the portion of Mt. Nebo Road that would not be used by traffic visiting the site, are generally "upwind" (using the prevailing wind pattern) of the site, and except for the Egly and Thomassen properties, do not adjoin the site.*

**59-G-1.22. Additional requirements.**

- (a) The Board, the Hearing Examiner, or the District Council, as the case may be, may supplement the specific requirements of this Article with any other requirements necessary to protect nearby properties and the general neighborhood.

*In order to protect nearby properties and the general neighborhood, the Petitioner should be required to comply with all of the conditions of approval as set forth under Section V. Recommendations, below.*

**V. RECOMMENDATIONS**

Accordingly, based on the foregoing findings and conclusions, I recommend that Petition No. S-2528, for a special exception under the Rural Density Transfer Zone for a landscape contractor use, on property known as Parcel P400, which is a 77-acre parcel located at 15315 Mt. Nebo Road on the east side of Mt. Nebo Road at a location near River Road, southwest of Poolesville, Maryland, be approved subject to the following conditions:

1. The Petitioner is bound by all of the Petitioner's testimony and exhibits of record and is bound by the testimony of the Petitioner's witnesses and attorneys' representations, to the extent that the evidence and representations are identified in this report and recommendation (Section 59-A-4.127).
2. The Petitioner is bound by all submitted statements and plans, as revised.
3. Access to the site for the three special exceptions is restricted to left turn ingress from and right turn egress onto Mt. Nebo Road via a channelized island. No special exception-related traffic to and from the site may use Mt. Nebo Road to the south to reach River Road. The Petitioner must inform contractors visiting the site and companies that have delivery activities associated with any of the three uses of this restriction and the Petitioner is responsible for their adherence to this restriction.

4. For the three special exceptions, a total of one outside contractor may be on the property per day. Such contractor may have more than one employee to carry out the work on the site.

5. Operations on the site are limited to the following, as shown on the amended Phasing Plan submitted by the Petitioner (Exhibit 161(b)):

- a. Phases 1, 2 and 3 of the Wholesale Nursery operation.
- b. Phases 1, 2 and 3 of the Landscape Contractor operation; however, vehicles associated with the Landscape Contracting operation shall not exceed twelve (12) vehicles stored on-site.<sup>7</sup>
- c. Phase 1 of the Manufacture of Mulch and Composting operation.

6. The Petitioner shall install the landscaping described on the Revised Site Plan (Exhibit 154) prior to commencement of operations<sup>8</sup> and shall properly maintain these landscaped areas and promptly replace any dead trees. A majority of the trees for screening along the boundary line with the Thomassen property shall be Thuja "Green Giant" evergreens. At the time of installation, all buffer trees shall be at least 5 feet in height above the top of the proposed 2 foot to 3 foot berm (for a total height above the general grade of 7 to 8 feet.

7. The only track vehicles used on the property shall be (1) a loader and (2) the vehicles used by the independent contractor to process materials for the Manufacturing of Mulch and Composting Special Exception operations.

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<sup>7</sup> The Technical Staff and Planning Board recommended limiting the initial approval of this use to 10 trucks and giving the Petitioner the opportunity to request a modification to increase the number of trucks to 15 (see Exhibit 36 at page 15 and Exhibit 43). Because the Petitioner has agreed to delete phases 2 and 3 of the proposed Manufacture of Mulch and Composting use, and has agreed to numerous restrictions on the proposed Landscape Contractor use (including but not limited to reducing the number of vehicles and employees), the Hearing Examiner does not see any significant benefit in approving only one phase of this proposed use and requiring all parties to return to the Board of Appeals for what may involve many days of hearings when the Petitioner is ready to expand to 12 vehicles for this use. There is no evidence to support the conclusion that an increase from 10 vehicles to 12 vehicles would impact the neighborhood in a way that would justify restricting the Petitioner to only 10 vehicles for this use and imposing upon all parties the time and expense of further hearings for only 2 additional vehicles.

<sup>8</sup> The Petitioner proposed to install the screening during the first planting after the Board of Appeals approves the special exception.

8. There shall be no burial or burning of any material on the Subject Property.

9. Any relevant federal, state or county agency shall have the right to inspect any special exception, pursuant to standard procedures for access to the property.

10. The Petitioner shall designate a representative to coordinate with the Community Liaison Committee established in conjunction with these uses. The Community Liaison Committee shall include adjacent and confronting property owners and a representative from the Sugarloaf Citizen's Association. The People's Counsel shall be an ex officio member of the Committee. The Committee shall meet four times a year and meetings shall be arranged and noticed by the Petitioner.<sup>9</sup>

11. All required logs shall be made available upon request by the Montgomery County Department of Permitting Services, Montgomery County Department of Environmental Protection, the Maryland Department of the Environment and the Maryland Department of Agriculture during normal business hours. The Petitioner shall distribute copies of required logs to members of the Community Liaison Committee at meetings held pursuant to Condition 10, above. In addition, all logs shall be compiled annually and provided to the Board of Appeals, along with summaries of all Community Liaison Committee meetings for that year.

12. The Petitioner shall install a steel, double-lined 300 gallon tank for #2 diesel fuel. The tank shall be inspected regularly and replaced as needed.

13. The Petitioner shall maintain at least \$1,000,000 in liability insurance from an insurance company rated A or better. A Certificate of Insurance shall be made available upon request.

14. If required by Chapter 22A of the Montgomery County Code, a Final Forest Conservation Plan must be submitted prior to issuance of a Sediment and Erosion Control Permit (if required by the Department of Permitting Services).

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<sup>9</sup> The Petitioner proposed to meet only twice a year for 3 years at which time the Committee would disband. The Petitioner also objected to People's Counsel being an ex officio member of the Committee. The condition recommended by the Hearing Examiner reflects modifications proposed by People's Counsel.

15. If required by Chapter 19 of the Montgomery County Code, an approved concept Stormwater Management Plan must be submitted to the M-NCPPC Environmental Staff prior to approval of the Final Forest Conservation Plan and issuance of sedimentation and erosion control permits.

16. Hours of operation are restricted to 7:00 a.m. through 7:00 p.m., Monday through Friday, and 7:30 a.m. through 4:30 p.m. on Saturday; provided that employees may arrive at the property between 6:45 a.m. and 7:00 a.m. Operation of machinery or departures to job sites are not permitted before 7:00 a.m.

17. Petitioner shall keep a log of all vehicles, except employees' personal vehicles, entering or leaving the property, that will contain the time of day the vehicle enters and departs the site, the truck type and size, the type of load, the truck number (for Petitioner's vehicles), as well as the special exception to which the trip is assigned and the entity responsible for the vehicle (e.g., Petitioner, third party contractor, etc.). In addition to company vehicles, the log will record vehicles delivering or picking up materials from the site as well as vehicles used by independent contractors.<sup>10</sup>

18. This special exception is limited to using no more than twelve (12) commercial pick-up trucks, or similar vehicles, a maximum of thirty (30) feet in length weighing less than 26,000 pounds (trailers may be attached to such vehicles), in addition to one tractor-trailer per month to make deliveries. Any tractor-trailer visiting the site in connection with this use may not visit the site on the same day as a tractor-trailer visits the site in connection with either of the other special exceptions. The parking/storage area for the vehicles shall be screened by evergreen trees as reflected on the Site Plan (Exhibit 154).

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<sup>10</sup> It should be noted that the log required by this recommended condition would contain details, requested by the Opposition, that were not included in the logs proposed by the Petitioner.

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19. The existing storage building closest to the north property line shall only be used for farm equipment. When, and if, the building is used for the Landscape Contractor Special Exception operation, the building must be relocated along the same axis; adjusted to meet the setback requirement in the RDT Zone.

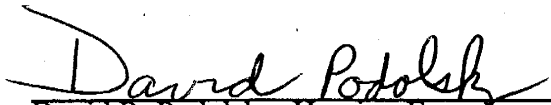
20. Petitioner shall install plantings in accordance in accordance with the Site Plan (Exhibit 154).

21. Petitioner is limited to no more than twenty-eight (28) employees for this special exception, excluding the three individual members of the Petitioner-LLC and outside contractors.

22. Prior to implementation of this special exception, the existing residential tenancy of the dwelling unit on the property shall be terminated in order to provide sanitary facilities for the employees of the landscape contractor operation.

Dated: November 5, 2003

Respectfully submitted,

  
David R. Podolsky, Hearing Examiner

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