IN THE MATTER OF

BEFORE THE

:

HOWARD COUNTY

JOHN CLIME, T/A T AND J LAWN SERVICE

BOARD OF APPEALS

Petitioner

HEARING EXAMINER

BOA Case No. 09-009C

### **DECISION AND ORDER**

On June 15, 2009, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of John Clime, t/a T and J Lawn Service, to permit the operation of a landscape contractor conditional use in an RC (Rural Conservation) Zoning District pursuant to Section 131.N.31 of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner certified that notice of the hearing was advertised and that the subject property was posted as required by the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

The Petitioner was not represented by counsel. John Clime and Kathleen Audio appeared and testified in favor of the petition. Lisen Edwards and Joanne Alex appeared and testified in opposition to the petition.

#### FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, I find the following facts:

- 1. The subject property is located in the 4<sup>th</sup> Election District at the southeast corner of Bushy Park Road and Daisy Road (the "Property"). The Property is referenced on Tax Map 14, Block 1, Parcel 148, and is also known as 15751 Bushy Park Road.
- 2. The 5.634-acre Property has a considerable downward slope from its eastern property line to the southwest, toward Daisy Road. It is improved by a two-story frame, single-family detached dwelling, a one-story garage, a one-story garage/apartment building, and a log cabin, sited on the high ground in the Property's eastern section. According to the location drawing submitted with the petition, the log cabin lies about 22 feet from the eastern lot line, the one-story garage, about 59 feet, and the apartment/garage, less than 100 feet. The dwelling lies about 140 feet from the eastern lot line and about 134 feet from the northern lot line running along Bushy Park Road. An asphalt driveway on Bushy Park Road near the eastern lot line provides access to the buildings.
- 3. Several mature deciduous and evergreen trees dot the area of the improvements. The sloping grounds south and west of the improved area are planted with young nursery stock. Because a nursery is a permitted farming use, it does not require conditional use approval.
- 4. <u>Vicinal Properties</u>. All adjacent properties are also zoned RC-DEO. To the Property's north, across Bushy Park Road, Parcel 230 is a small farm property improved with a two-story, brick and frame single-family detached dwelling and multiple accessory buildings sited closed to the road. To the northeast, Parcels 231 and 232 are each improved with a two-story, single-family detached dwelling fronting on Bushy Park Road. Adjoining the Property's eastern lot line are the pipestem portions of Parcel 220, Lots 2 and 3, through which a driveway runs well to the

south to the single-family detached dwelling on each lot. Beyond this driveway is Parcel 152, which is improved by a one-story, frame, single-family detached dwelling.

To the south, Parcel 157 is a small farm property improved by a two-story, frame single-family detached dwelling with driveway access to Daisy Road, and several accessory buildings and structures. A vegetative "fence-line" buffer denotes the common property line. Across Daisy Road to the west, Parcel 141, is a large farm with an Agricultural Land Preservation Easement.

5. Roads. Bushy Park Road has two travel lanes and about 20 feet of paving within a proposed 60-foot right-of-way. The posted speed limit is 25 miles per hour. The estimated sight distance from the proposed driveway entrance on Bushy Park Road is about 400 feet to the east and west. According to traffic data, traffic volume on Bushy Park Road east of Daisy Road was 317 average daily trips as of January 2000.

Daisy Road has two travel lanes and about 20 feet of paving within a proposed 80-foot right-of-way. The estimated sight distance from the proposed driveway entrance on Daisy Road is more than 450 feet to the south and more than 700 feet to the north. According to traffic data, traffic Daisy Road south of MD 144 was 1,682 average daily trips as of January 2006.

- 6. <u>Water and Sewer Service</u>. The Property is served by private well and septic facilities.
- 7. <u>General Plan</u>. The Property is designated Rural Conservation on the 2000 General Plan's Policies Map 2000-2020. The General Plan's Transportation Map depicts Daisy Road as a Major Collector and Bushy Park Road as a Local Road.
- 8. <u>The Proposed Use</u>. The Conditional Use Petition included two Conditional Use Plans.

  The "Daisy Road" plan depicts access for the proposed landscape contractor use from Daisy Road. The "Bushy Park" plan depicts access for the proposed landscape contractor use from

Bushy Park Road. According to the Technical Staff Report (the "TSR"), the Petitioner agreed to work with the option that best meets the county and neighbors' needs. Following a discussion with the Petitioner during the proceeding, he agreed to go forward in the proceeding with the Daisy Road plan.

The Petitioner is seeking retroactive approval for a landscape contractor operation to be generally sited in the center portion of the Property. The Petitioner proposes to remove the log cabin, the detached dwelling, and the one-story garage, but not the one-story garage/apartment. Mr. Clime testified the proposed hours and days of operation are 6:30 a.m. to 6:30 p.m. Monday through Friday, with Saturday hours during peak season and for weather delays. The operation currently employs 16 persons, which may increase to 25. Mr. Clime testified at the hearing that a maximum of eight employees would report to the Site on a daily basis, arriving and leaving in their own cars, with other employees, or in a company van. The Daisy Road Plan depicts nine vehicle parking spaces next to a hardscape storage area and 12 additional parking spaces adjacent to the proposed building.

Proposed outdoor activities include tree planting and maintenance, plant material storage, materials unloading and loading, and vehicle storage. The Daisy Road plan depicts a holding area sited within the Property's southeastern corner. The vehicles to be used in the operation include three one-ton trucks, one-five ton truck, two skid steers, one backhoe, a chipper, a bobcat, three maintenance trailers, and four standard, full-size pick-up trucks.

The Petitioner proposes to construct an L-shaped, one-story, 90' by 90' foot long, 40' wide, 5,600-square foot, steel agricultural building in the Property's approximate center. The building's four bays would face into the Site. The proposed height is 26 feet, measured to its

peak. The activities proposed within this building include equipment maintenance, equipment storage, plant propagation, and equipment trailer storage. At the hearing, Mr. Clime agreed to store the maintenance trailers within this building.

Flush-mounted lights on the building, seven outdoor light poles in the building area, and decorative pole lights in the driveway median would light the operation.

Access to the operation would be gained by a two-lane driveway and landscaped median running along the southwest property line. The Daisy Road/Bushy Park intersection would be landscaped to reduce the operation's visibility. At the hearing, Mr. Clime agreed to landscape along the eastern lot line, which adjoins two Bushy Park Estates pipestem driveways.

During the hearing, Mr. Clime amended the Conditional Use Plan to include the relocation of the dumpster from its current location near the structures to the area of the proposed agricultural building.

- 9. Mr. Clime testified that tractor-trailers make deliveries to the site on rare occasion and agreed to a limitation on their delivery hours. He also agreed to limit dumpster service hours and testified that only minor vehicle repairs would be made on-site.
- 10. Mr. Clime introduced into evidence a copy of his state water appropriation permit, which granted him water allocation rights to withdraw water for nursery stock irrigation.
- 11. Regarding the TSR's concerns about the use of the holding area for plant and material storage and its location within the 100-foot use setback from all lot lines (along the south property line), as discussed below, Mr. Clime agreed to relocate it outside the buffer.
- 12. Regarding the TSR's concerns about the location of the driveway within the 50-foot use setback, as discussed below, Mr. Clime agreed to relocate it 20 feet from the south lot line.

- 13. Mr. Clime testified there would be no on-site office because the apartment/garage lies within the 100-foot use setback.
- 14. Concerning the depiction of a gravel driveway and parking area on the Daisy Road Conditional Use Plan, Mr. Clime agreed to instead using asphalt.
- 15. Lisen Edwards introduced into evidence several photographs taken the day of the hearing and depicting trucks, trailers, and equipment around the dwelling to be demolished (Opponent's Exhibit 1). She testified the operation currently uses the driveway off Bushy Park Road. She also testified the location survey submitted with the petition is incorrect, because the log cabin is closer than 22 feet, and for this reason, the new plantings along the eastern lot line may be on her property (the driveway). Moreover, dumpsters arrive early in the morning and make a lot of noise. In response to her desire to have the log cabin remain, Mr. Clime stated it was in poor shape.
- 16. Kathleen Audia, an adjoining neighbor and small farmer, testified her family is very happy Mr. Clime bought the property because he cleaned it up and talked to them about the use. He used the chipper only when he was cleaning up the property. She testified the workers are always quiet, the water use is minimal, and federal and state laws will limit pesticide use in the operation and she is very supportive of the use. She also stated the county would not approve electricity for the log cabin.

#### **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact, I conclude as follows:

# I. General Criteria for Conditional Uses (Section 131.B)

- 1. Harmony with the General Plan. Section 131.B.1 requires me to evaluate whether the proposed conditional use plan will be in harmony with the land uses and policies indicated in the Howard County General Plan for the district based on in which it is located. In making this evaluation, I am required to consider:
  - a. The nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site; and
  - b. If a conditional use is combined with other conditional uses or permitted uses on a site, whether the overall intensity and scale of uses on the site is appropriate given the adequacy of proposed buffers and setbacks.

General Plan Policies. The Howard County General Plan designates the area in which the Property is located as "Rural Conservation." Landscape contractor operations are typically located in rural, agricultural areas. In this case, three of the proposed operation's neighbors are farms. The Property will be largely used as a plant nursery, a permitted use. The nursery/landscape contractor combined use is compatible with Rural Conservation, agricultural uses.

The Nature and Intensity of the Use. Subject to the approval conditions stated below concerning the operation's location within the buffers, the use of a portion of the 5.63-acre Property for a landscape contractor operation is a moderate intensity of use. The Property is located in the western section of Howard County, which is predominately rural and agricultural in nature. Concerning the Petitioner's desire to maintain Saturday hours, I reviewed landscape contractor conditional uses approved in rural, agricultural areas and determined it is customary for them to maintain Saturday hours. Consequently, I am approving Saturday hours for this use.

Given the predominately off-site nature and hours of operation, the landscape contractor operation is an appropriate intensity of use for this area, in accordance with Section 131.B.1.a.

The size of the site in relation to the use. The operation would be generally concentrated in the central portion of the 5.63-acre Property, most of which will be used as a nursery, a permitted use. Subject to the conditions discussed below relating to the relocation of the driveway and holding area to meet the specific criteria for the use, the site is an appropriate size in relation to the use.

The location of the site with respect to streets giving access to the site. Daisy Road is a major collector road. There is no evidence the traffic along it would be impaired by the use. The driveway will provide safe access to the Conditional Use site with adequate sight distance.

The appropriateness of the conditional use in combination with a permitted use on the site. The proposed conditional use would be combined with a permitted use, the one-story apartment/garage. The residential and nonresidential uses will be physically separated by existing and proposed landscaping, and will have separate driveways. I therefore conclude the combined uses are compatible, subject to the condition that the landscape contractor operation shall not utilize the residential driveway upon completion of the Daisy Road driveway and viceversa.

2. Adverse Effect. Unlike Section 131.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, compatibility with the neighborhood is measured under

<sup>&</sup>lt;sup>1</sup> Because the residential dwelling is to be removed, the TSR's concern about the potential illegal or nonconforming residential use of the one-story building is moot, as the Zoning Regulations permit a residential use on the property in combination with the proposed landscape contractor use.

Section 131.B.2's four "adverse effect" criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, and; (d) access.

When assessing a proposed conditional use under these criteria, we must first recognize that virtually every human activity has the potential for adverse impact. Zoning recognizes this fact and, when concerned with conditional uses, accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before me is not whether the proposed use would have adverse effects in an RC district. The proper question is whether there are facts and circumstances showing that the particular use proposed at the particular location would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone. *People's Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md. 54, 956 A.2d 166 (2008); *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981); *Mossburg v. Montgomery County*, 107 Md. App. 1, 666 A.2d 1253 (1995).

For the reasons stated below, I conclude the Petitioners have met their burden of presenting sufficient evidence under Section 131.B.2 of the Zoning Regulations to establish this proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with a landscape contractor operation in an RC district.

a. Physical Conditions. Whether the impact of adverse effects such as noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions will be greater at the subject site than it would generally be elsewhere in the zone or applicable other zones.

The Petitioner agreed to using asphalt paving on the driveway and parking areas. As a condition of approval, no materials shall be brought to the site for chipping; any chipping done

on the Property will be part of general property maintenance. The proposed lighting in sufficiently distant from neighboring residences to have minimal impact. Although the use will be outdoors and would presumably generate some dust and noise during the hours of operation, most of the work will be off-site, and vicinal properties would be buffered by the existing woods, nursery stock, and landscaping. There is no evidence that the use will cause fumes, odors, glare, vibrations, or hazards. I therefore conclude these inherent operational adverse effects will be not greater at the subject site than elsewhere in the zone or applicable other zones.

b. Structures and Landscaping. The location, nature and height of structures, walls and fences, and the nature and extent of the landscaping on the site are such that the use will not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.

The landscape contractor operation will be screened by existing woods, the nursery, and landscaping along the four property lines, a condition of approval. The building will be situated in the central portion of the Property and will be 26 feet in height, measured to its peak. I therefore conclude the location, nature and height of structures, walls and fences, and the nature and extent of the existing and proposed landscaping on the site are such that the use will not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.

c. Parking and Loading. Parking areas will be of adequate size for the particular use. Parking areas, loading areas, driveways and refuse areas will be properly located and screened from public roads and residential uses to minimize adverse impacts on adjacent properties.

There are no specific parking requirements for a landscape contractor. The Conditional Use Plan depicts two designated vehicle parking areas. Two parking spaces are required for the

residential use. The site can accommodate these spaces as well as parking spaces for the employees, even if the total number of spaces is reduced to accommodate the relocated holding area.

d. Access. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate.

It appears the proposed ingress and egress driveway along Daisy Road will provide safe access with sight distance, even if relocated further north.

# II. Specific Criteria for a Landscape Contractor Conditional Use (Section 131.N.31)

A conditional use may be granted in the RC Zoning District for Landscape Contractors subject to certain criteria.

### a. The site is at least 5 acres in area.

The Property on which the use will operate is 5.63 acres in size, which exceeds the five-acre minimum. The proposed conditional use complies with Section 131.n.31.a.

b. All structures and uses which are part of the conditional use including parking, driveways, storage, and areas open to retail customers, shall be at least 50 feet from lot lines, unless the Hearing Authority finds that a lesser setback is more appropriate and will not adversely affect neighboring properties due to visual impact, activity, noise, dust, fumes or other cause.

No retail uses are proposed. The driveway shown on the Daisy Road Conditional Use Plan lies within 50 feet of the south lot line. However, Mr. Clime agreed to move it. The TSR suggests there is sufficient area for a 20-foot setback for the driveway. Subject to the condition of approval that the Daisy Road driveway be set back 20 feet from the south lot line, and that the Petitioner install a Type B equivalent landscape buffer along the lot line, the proposed use complies with Section 131.n.31.b.

c. The location and design of the operation shall be such that the use will not be a nuisance to neighboring properties due to noise, dust or fumes.

The conditional use will be generally sited within the central portion of the Property and screened by existing vegetation and new landscaping. The proposed L-shaped building will be set back at least 100 feet from property lines and will visually block most activity from view. The dumpster will be relocated near the building. Subject to the condition that there be no dumpster cleanout and or tractor-trailer deliveries before 7:00 a.m., the proposed use complies with Section 131.n.31.c.

d. Buildings used for sales, storage or offices will be screened or compatible in scale and character with other residential or agricultural structures in the vicinity. If new structures or additions to structures are proposed, architectural elevations or renderings must be submitted with the petition.

The proposed storage and propagation building is compatible in scale and character with other residential or agricultural structures in the vicinity, according to the photographs submitted with the Conditional Use Plan, in accordance with Section 131.n.31.d.

- e. The following requirements apply to retail nurseries or greenhouses:
- (1) The principal business use shall be the sale of plants. In addition, accessory sales of other items related to gardening or lawn care may be permitted, including the following: seeds, fertilizers, pesticides, firewood, hand tools, hand spraying and watering equipment, and incidental seasonal items. Sale of general hardware or power equipment is not permitted.
- (2) Sites for retail greenhouses or nurseries must have frontage on and direct access to a collector or arterial road as designated in the General Plan.
- (3) Areas to be used for accessory sales of items related to gardening or lawn care shall be designated on the conditional use plan.
- (4) Adequate landscaping shall be provided to screen parking, storage, display and other activity areas related to the conditional use from residential properties.

Because the nursery is not a retail use, but rather, a permitted agricultural use, this section is inapplicable.

- f. The following requirements apply to landscape contractors:
- (1) A landscape contractor which is a home-based contractor as defined in these regulations and meets the requirements of Section 128.C.2 is a permitted accessory use and does not require a conditional use.

Because the landscape contractor operation is not a home-based contractor as defined in these regulations and Section 128.C.2, a conditional use is required.

(2) Buildings and outdoor areas to be used for parking, loading and storage of vehicles, equipment, tools and supplies shall be delineated on the conditional use plan and located at least 100 feet from lot lines and public roads.

Because the holding area will be used for the temporary storage of plants and materials, Mr. Clime agreed to locate it at least 100 feet from all lot lines. Subject to the condition of approval that the holding area be relocated at least 100 feet from the public road, the proposed use complies with Section 131.n.31.f(2).

(3) Outdoor parking and storage areas shall be screened from neighboring properties and roads.

Most vehicles and equipment will be stored in the proposed building or in the ample parking area, which will be screened by the existing vegetation, the building, and proposed landscaping. Mr. Clime also agreed to store the large maintenance trailers in the building. Because the holding area is part of the use, I am requiring it be separately screened by landscaping or a fence as a condition of approval. Subject to these conditions, the proposed use complies with Section 131.n.31.f(3).

(4) Minor repairs to vehicles or equipment are permitted, provided such activities take place inside a building. Body work, engine rebuilding, engine reconditioning, painting and similar activities are not permitted.

According to the evidence and testimony, the storage structure will be used for some equipment repair. Subject to the condition that only minor repairs to vehicles or equipment occur inside the structures, the proposed use complies with Section 131.n.31.f(4).

# **ORDER**

Based upon the foregoing, it is this 22<sup>nd</sup> day of June 2009, by the Howard County Board of Appeals Hearing Examiner, ORDERED:

That the petition of John Clime, t/a T and J Lawn Service, for a Landscape Contractor Operation Conditional Use in an RC-DEO Zoning District, is hereby **GRANTED**;

## Provided, however, that:

- 1. The conditional use will apply only to the uses and structures as described in the petition and the Daisy Road Conditional Use Plan, as amended by this Decision and Order, and not to any other activities, uses, structures, or additions on the Property.
- 2. The Daisy Road driveway shall be set back 20 feet from the south property line.
- 3. The holding area shown on the Daisy Road Conditional Use Plan shall be set back 100 feet from all property lines.
- 4. The relocated holding area shall be fenced or landscaped.
- 5. The driveway and all parking areas shall be asphalt surfaced.
- 6. The dumpster shall be located near the building used in the operation and shall be screened and fenced.
- 7. No dumpster cleanout or tractor-trailer deliveries shall be made before 7:00 a.m.
- 8. The hours of operation shall be 6:30 a.m. to 6:30 p.m., Monday through Saturday.
- 9. The Landscape Contractor shall not bring materials back from work sites for chipping on the Property, This condition does not apply to chipping done on the Property in relation to general property management.
- 10. A maximum of eight employees are permitted to report to the site.

- 11. The vehicles to be used in the operation are limited to three one-ton trucks, one-five ton truck, two skid steers, one backhoe, a chipper, a bobcat, three maintenance trailers, and four standard, full-size pick up trucks.
  - 12. A Type C equivalent landscape buffer shall be provided along the Property's eastern lot line. A Type B equivalent landscape buffer shall be provided along the southern, northern, and western perimeters.
- 13. The landscape contractor operation shall not use the Bushy Park Road driveway upon completion of the Daisy Road driveway.
- 14. The Petitioner is permitted to make only minor repairs to vehicles or equipment, which must take place within a structure. Body work, engine rebuilding, engine reconditioning, painting, and similar activities are not permitted.
- 15. The Petitioner shall obtain a building permit for the construction of the "L" building within two years of the date of this Decision and Order.

HOWARD COUNTY BOARD OF APPEALS HEARING EXAMINER

Michele L. LeFaivre

Date Mailed: 6/23/09

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.