

IN THE MATTER OF : BEFORE THE  
**MICHAEL AND KIMBERLY TAYLOR** : HOWARD COUNTY  
Petitioner : BOARD OF APPEALS  
: HEARING EXAMINER  
: BA Case No. 11-004C

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**DECISION AND ORDER**

On September 19, 2011, 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 Michael and Kimberley Taylor for a Produce Stand Conditional Use in an R-20 (Residential: Single Family) Zoning District filed pursuant to Section 131.N.38 of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner certified to complying with the notice, posting, and advertising requirements of the Howard County Code. I viewed the property as required by the Hearing Examiner Rules of Procedure.

Thomas Meachum, Esquire, represented the Petitioners. David Dows, Kimberley Taylor, Michael Taylor, Debbie Kuhn, Rhoda Fawcett, James Fawcett, Pete Price, Greg Freed, Dennis Kratz, Amy Horneman, and Joan Casey testified in support of the petition. Ralph Ballman testified in opposition to the petition.

The Petitioners introduced into evidence the exhibits as follows.

1. September 17, 2011 email correspondence to Harbin Farms from Tim Ferrell supporting produce stand

Opponent Ralph Ballman introduced into evidence the exhibits as follows.

1. Hearing Examiner Decision and Order, Board of Appeals Case No. 04-049C, granted March 4, 2011
2. Department of Planning and Zoning Technical Staff Report for BA 07-006N, Edna May Harbin, April 27, 2007
3. Department of Planning and Zoning Technical Staff Report for Zoning Regulations Amendment ZRA-126 to create a new conditional use category (Farmer's Market and Produce Stand), October 26, 2011

#### **FINDINGS OF FACT**

1. Property Identification. The subject property is situated on the northwest corner of the MD 99 (Old Frederick Road) intersection with Old Mill Road/Bethany Lane side of Old Frederick Road (the "Property"). The Property is located in the 2<sup>nd</sup> Election District and is identified as Tax Map 17, Grid 8, Parcel 27, Lot 2 and is also known as 9920 Old Frederick Road.

2. Property Description. The 1.295-acre Property is currently the location of an unauthorized produce stand, which became so after the original Parcel 27 was subdivided to create the separate Lot 2. The large remainder of Parcel 27 was the subject of the age-restricted adult housing conditional use approved in Board of Appeals Case No. BA 04-049C (See Opponent's Exhibit 2).

The frontage along the eastern half of the MD 99 property line is a paved surface connecting directly to a gravel and macadam surface. This surface access ties directly to the road pavement. There is a short paved connection to Old Mill Road. The paved area functions as the vehicle circulation area, an unmarked paving area, and a display area. To the paved area's west and northwest is a sparsely wooded area. Within this wooded area are a large barn-like shed, several smaller wood sheds and cooler units. To the north of the cooler and sheds is

an area used for storage area. The gravel area to the west of the sheds extends generally to the north. The remainder of the Property is currently undeveloped and is either open or sparsely wooded.

3. Vicinal Properties. All vicinal properties are zoned R-20. Parcel 27 to the north is the site of an age-restricted, attached dwellings, adult housing development originally approved in Board of Appeals Case No. 04-049C and later modified through Board of Appeals Case No. 09-008C. Across Old Mill Road to the east, are single-family detached dwellings with access to that road. Across MD 99 to the south are single-family dwellings with access to that road. To the west, Lot 3 of Parcel 27 is improved with a one-story, single-family detached dwelling.

4. Roads. MD 99 along the front of the Property has one westbound through lane, one eastbound through lane, one eastbound left turn lane onto Old Mill Road, and one eastbound right turn lane onto Bethany Lane. The pavement width is variable within a proposed 80-foot right-of-way. The posted speed limit is 40 MPH. According to State Highway Administration data, the traffic volume on MD 99 west of US 29 was 15,631 annual average daily trips as of 2007.

5. Water and Sewer Service. The Property is within the Metropolitan District and the O-5 year Water and Sewer Service Area according to the Howard County Geographic Information System maps as of August 31, 2001. The TSR notes that in a previous Zoning Board case for the Property, ZB 1073M, the Petitioner stated the Property was served by public water and will be connected to public sewer in the future. DPZ is unable to find a public water

connection record for this specific address. The Bureau of Environmental Health concludes the proposed use is acceptable if served by public water and sewer.

6. General Plan. Policies Map 2000-2020 of the 2000 General Plan designates the Property as "Residential Areas." The General Plan Transportation Map depicts MD 99 as a Minor Arterial and Old Mill Road as a Minor Collector.

7. Zoning History.

ZB 1073. Edna May Harbin, Robert Harbin, Kimberley Taylor Harbin, Petitioners. Zoning Map Amendment to rezone 1.295 acres from R-20 to B-1. Currently on the Unscheduled Docket

BA 07-006N. Edna May Harbin, Petitioner. Confirmation and enlargement of a nonconforming use for a produce stand. Dismissed January 7, 2008

TU 07-005. Edna May Harbin, et al., Petitioner. Temporary Use to operate a produce stand. Dismissed March 2, 2007

8. The Produce Stand Conditional Use Proposal. The Petitioner is proposing to develop the Property with a new produce stand use (the Proposed Use).

Produce to be sold. The petition states, "those items listed in [HCZR Section 131.N.] 38C will be those sold."

Structures and displays. The petition states the produce stand will consist of small storage buildings. The July 15, 2011, conditional use plan depicts five structures, a 20' by 40' food prep structure with what appears to be a 10' by 18' attached shed, a 12' by 24' barn next to the food prep structure, coolers on a 20' by 45' foot pad, and a 12' by 24' barn in front of the coolers. To the west of these structures are a 7,125 sq. ft. seasonal display area (Display Area 1), a 2,970 display area in front of the structures,

and a 2,720 sq. ft. seasonal display area (Display Area 2) to the east of the structures.

Access and Parking. The Petitioners propose access from both MD 99 and Old Mill Road, leading to an L-shaped parking lot with 28 parking spaces. As proposed, the Old Mill access would be set back from the intersection, which is it not under the current use. Both entrances would be standard commercial entrances with curb and gutter and landscape buffers along the frontages. There is a service and loading space behind the Seasonal Display Area 2 and the coolers.

Proposed Hours of Operation. The produce stand would operate seven days a week, from 9:00 a.m. to 8:00 p.m. from March through November, from 9:00 a.m. to 10:00 p.m. in December, and the use would be closed in January and February.

Employees. Three to six employees will work at the produce stand, depending on the season.

Number of Customers. The petition estimates the number of customers on site at the busiest time of the year as approximately 20-25.

Lighting. The petition states lighting will consist of "low intensity security lights on some of the buildings" and "lighting on poles approximately 12-14 feet in height."

Dumpsters. No dumpsters are proposed.

9. Kimberley Taylor testified that he runs the stand with her husband Mike. The Harbin Produce Stand has operated at the site for several decades and more recently began to purchase produce, eggs and cider from area farmers because deer from encroaching development made it impossible for her family to continue farming.

10. Ms. Taylor testified that the seasonal display items to be sold would include summer produce, flowers, and in the fall pumpkins, and other seasonal items: During December, the stand sells Christmas trees.

11. With the exception of Christmas tree sales and seasonal items, when the stand would remain open until 10:00 p.m., the stand would be open until 8:00 p.m. at the latest, according to Ms. Taylor.

12. Ms. Taylor further testified there is string lighting or lot lights. The Petitioners are no longer proposing to use pole lighting. There are currently about 25 parking spaces, which are now unmarked.

13. In reference to the structures depicted on the conditional use plan, Ms. Taylor testified the term "food prep" is a Health Department term describing the Taylors' desire to wash and cut fruit and vegetables for sale or to rewrap a baked good. For these activities, the Health Department requires a stainless steel table area, a sink for hand washing and cleaning knives. No cooking or oven is proposed. The Health Department also wants the standup display for cider and eggs to be in a climate controlled display area, hence the adjoining shed. With respect to the TSR's concerns about the potential use of the property as a carry-out restaurant, Ms. Taylor testified none is proposed. The barns and sheds are to store boxes, bags, and produce items and administrative storage. The area in front of the barn is for produce. The areas to the right and left are for plants and seasonal items. The Taylors seek to reduce their carbon footprint, so cow or pig farmers pick up daily waste. The Taylors' son removes bag trash and the produce stand recycles.

14. On cross-examination by Ralph Ballman, Ms. Taylor testified they currently use hose water from an adjoining residence. They would hook up to water and sewer as part of construction. They do have electrical service.

15. David Dows testified to being a landscape architect and land planner. He prepared the produce stand conditional use plan. The buildings will be moved back slightly from the center. Internal vehicle circulation now includes two well-defined means of access. The Old Mill Road access was requested by residents of Old Mill during the pre-submission meeting. Shipments would be delivered via the driveway behind the buildings. He based the number of parking spaces on commercial nursery and gardening center requirements. Trash would be collected in one of the buildings and carted out for pig farmers. All but about a half-dozen trees would be retained. They will also landscape the perimeter in accordance with the Landscape Manual. As proposed, all waste would be collected and treated on-site.

16. On cross-examination by Mr. Ballman, Mr. Dows testified the Petitioners proposed the Old Mill Road access to the Department of Planning and Zoning (DPZ) and the Fire Department. He recalled no objections. In response to questioning about Board of Appeals Case No. BA 04-049C, the original conditional use approval for the age-restricted adult housing development, Mr. Dows testified to being involved with that project. Ballman made inquiry about the potential conflicts between the Hearing Examiner's conclusion in that case that a drive located further south would interfere with traffic stacking at the Old Frederick Road intersection and the current proposal to locate an access in a similar location. In Mr. Dows' opinion, there is a current access, which is very close to Old Frederick Road and the County

agreed it should be moved back. In BA 04-049C, the stacking concern related to was peak hour traffic, whereas in the instant proposal, most customers would arrive at off-peak hours. The developer of the Enclave at Ellicott Station is responsible and will pay for the road frontage improvements along the Property.

17. In response to questions about the number and type of buildings proposed, and whether sheds, which Mr. Ballman stated were accessory uses, were being used as primary uses, it was Mr. Dows' opinion that the Food Prep building and the sheds are all primary uses, since there was no residential use proposed.

18. Michael Taylor testified the produce stand would have a rustic feel and is intended to stay small. The Health Department and the county regulations direct many of the proposed improvements, and are not an attempt to grow.

19. Debbie Kuhn testified in support of the petition. She lives about ¼ miles away. She moved to the area and fell in love with Harbin Produce. She is a frequent customer.

20. Rhoda Fawcett testified in support of the petition. She lives in Columbia and has attended many meetings on behalf of Harbin Farms. She feels the operators are bending over backwards to comply with all regulations.

21. James Fawcett testified to residing in Columbia. He supports the proposed produce stand and has been a customer for about 25 years. He goes to the produce stand for the food, the community and the friendship.

22. Pete Price testified to residing about 2½ miles away. He supports the produce stand and has been a customer for about 19 years. He has never seen a problem with parking



and access.

23. Greg Freed testified to residing about six miles away. He supports the proposed produce stand because he works there. It is a great environment. There are rarely more than four cars lined up on Old Mill Road. Customers frequently ask if there is sliced watermelon and hopes to offer that service.

24. Dennis Kratz testified to residing about five-ten miles away. He is a landscaper who buys plants from the produce stand and believes the community would lose an important asset if it were denied.

25. Amy Horneman testified to residing in the Enclave at Ellicott City. She moved there in 2010 and was thrilled to buy a home in a community where there is a produce stand. If anyone were bothered, it would be her community, which supports the produce stand. She is not concerned about stacking on Old Mill Road because most residents are retired. She is a food microbiologist and has no concerns about food preparation.

26. Joan Casey testified in support of the petition and to residing in the Enclave at Ellicott City. On her first day in her new residence, she walked to the stand and met Greg Freed and several community members. She frequently walks to the produce stand with her grandchildren and feels very safe.

27. Mr. Ballman testified to residing in a nearby cul de sac. He is not in specific opposition to the produce stand, but has been long opposed to commercial development along Old Frederick Road. He and other members of the community have actively opposed multiple development and rezoning proposals for commercial development on MD 99. He is concerned

the proposed commercial development would set a precedent because persons seeking to have a property rezoned under the "change-mistake" rule commonly cite to area commercial uses, such as a snowball stand. He is concerned the proposed produce stand, if approved, would be referenced in a future rezoning request along M D99.

28. In Mr. Ballman's opinion, the existing and proposed produce stand is as much a garden center as it is a produce stand and is concerned the use, if approved, would evolve into a more intense commercial use and a future petitioner might seek to have it rezoned to a commercial district. He testified that in 2001 garden centers were removed as a then-special exception in the R-20 district. The River Hill garden center was therefore recently rezoned because the County eliminated the use in the R-20 district.

29. Mr. Ballman introduced into evidence Opponent Exhibit 2, a TSR recommendation for denial of a petition for confirmation and enlargement of nonconforming use for a produce stand in Board of Appeals Case No. 07-006N, which the Hearing Examiner subsequently dismissed. Mr. Ballman read into the record the TSR's conclusions on Page 9, including in part the conclusion that the use was not a legal nonconforming use and that the proposed enlargement would create a "very conspicuous, overtly commercial retail development that would be as entirely out of character with the surrounding large residential neighborhood."

It was Mr. Ballman's opinion that the proposed use was too intense a use and did not meet Zoning Regulations Section 131.B criteria, which are addressed below. He also questioned whether a produce stand operation could sell eggs, questioning whether egg sales are dairy

products, which are a permitted retail sale item.

### **CONCLUSIONS OF LAW**

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

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

**A. 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 a "Residential" land use. Produce stands in the R-20 district as conditional uses are presumptively compatible with this land use.

The Nature and Intensity of the Use. The proposed use of the Property as a produce stand is relatively low-level commercial use. As proposed, the produce stand would have a more ordered appearance. The use is anticipated to be most intense, but still moderate, during the summer months, and perhaps during the Christmas season.

The Size of the Site in Relation to the Use. The proposed use will comply with all bulk regulations, including landscape buffers.

The Location of the Site With Respect to Streets Giving Access to the Site. The Property has frontage on and direct access to a Minor Arterial road and a Minor Collector road, and is a corner lot at an intersection with a traffic signal.

The Appropriateness of the Conditional Use in Combination with a Permitted Use on the Site. This criterion is inapplicable, as there is no permitted use on the Property.

**B. Adverse Impacts.** 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 Section 131.B.2's four "adverse effect" criteria": (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, and; (4) access.

The assessment of a proposed conditional use under these criteria recognizes the potential for adverse impact by virtually every human activity. The assessment therefore 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 the Hearing Examiner is not whether the proposed produce stand use would have adverse effects in an R-20 district. The proper question is whether there are facts and circumstances showing the proposed use 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, the Petitioner has met its burden of presenting sufficient evidence under Section 131.B.2 of the Zoning Regulations to establish the proposed uses will not have adverse effects on vicinal properties beyond those ordinarily associated with a produce stand in an R-20 district.

**a. Physical Conditions. 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 TSR concludes a typical produce stand operation would involve the sale of fruit, vegetables and plants. No dumpsters are proposed. Waste will be picked up by pig farmers and the operator will recycle and remove garbage. The Petitioner is no longer proposing to install additional outdoor lighting other than the string lighting currently in use. The use will not generate objectionable odors, noise dust, fumes, vibrations, hazards, lighting or other physical effects detectable within the neighborhood.

**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 proposed structures will be set back from the center of the Property. The TSR concludes the buildings and structures are lower in height and less massive than the single-family detached dwellings on the adjoining northern property. No wall or fences are proposed. The existing trees will be retained to the maximum extent possible and the MD 99 and Old Mill Road frontages will be landscaped with a Type E buffer. A Type C buffer is proposed along the common property line with The Enclave at Ellicott Mills. The Hearing Examiner concludes 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.**

The Petitioner is proposing 28 parking spaces. As the TSR comments, the Zoning Regulations do not specify minimum parking requirements for a produce stand use and reasons the number of proposed spaces is based on the requirement for a retail garden center or nursery. The parking spaces and area are reasonable and sufficient for the particular use, even during Christmas season, when more parking area may be required for each motor vehicle. The parking and loading area will be screened from residential uses. No outside refuse area is proposed.

**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.**

The State Highway Administration will make the final determination as to the driveway and other road improvement off MD 99. There are no sight distance issues on Old Mill Road. Based on the proposed location of the driveways, the TSR concludes the ingress and egress drives will provide safe access with adequate sight distance. No acceleration or deceleration lanes are necessary on Old Mill Road.

**II. Specific Criteria for 38. Produce Stands (Section 131.N.38)**

A conditional use may be granted in the R-20 Zoning District for a produce stand, provided that:

**a. The use may not be located on a lot less than one (1) acre nor larger than two (2) acres.**

The Property is 1.295 acres, in compliance with Section 131.N.38.a

**b. The produce stand shall be the sole use on the property.**

No other use is currently on the Property and no additional use is proposed. However, see discussion of permitted uses in the evaluation of the proposed use under Section 131.N.38.c.

**c. The use may include the retail sale of crops, produce, flowers, plants and seasonal displays, baked goods, dairy products and bottled/package food products.**

With respect to the evaluation of the proposed produce stand under Section 131.N.38.c, DPZ, through the TSR, has some concern the proposed "Food Prep" structure might be a carry-out operation that impermissibly includes the sale of food items prepared on the premises. DPZ reasons food previously bottled or packaged food products is an allowable use as part of a produce stand operation, but food prepared on the premises is not, because it is not expressly permitted.

As the Hearing Examiner reads DPZ's evaluation of the proposed use for compliance with Section 131.N.38.c, the department recognizes the new conditional use category "produce stand" is a limited use, an operation limited to the sale of "retail sale of crops, produce, flowers,

plants and seasonal displays, baked goods, dairy products and bottled/package food products." The TSR therefore makes a cautionary comment that the proposed Food Prep structure may potentially and impermissibly qualify the proposed use as a carry-out operation or use, rather than a produce stand operation, based on the Zoning Regulations definition of a "carry-out restaurant." Section 103.A.167 defines a carry-out restaurant as "[a]n establishment, such as a delicatessen or ice cream parlor, which prepares and sells food products intended for ready consumption, which are generally packaged in paper or served in other types of disposable plates, wrappers, or containers for consumption off the premises, but which may provide thirty or fewer seats for use by eat-in customers." Because the sale of prepared foods is not permitted as part of a produce stand operation, DPZ recommends the petition "not be approved" if it includes the sale of food items prepared on the premises.

The Petitioners and their witnesses testified that the proposed produce stand would not sell prepared foods, only the occasional sliced melon. The Petitioners would also use the Food Prep area to clean up produce and repackage a packaged food product that had come unwrapped. Importantly, the Health Department instructed the Petitioners they must incorporate the Food Prep structure into the produce stand use to meet sanitary requirements, according to the July 15, 2011 letter to J. Robert Lalush from Thomas Meachum. The July 15, 2011 letter is attached to the TSR and amends the conditional use petition.

The Hearing Examiner concludes the Petitioner's proposed uses are consistent with the sale of "produce." Webster's Third New International Dictionary of the English Language, Unabridged defines "produce" as "something that is brought forth or yielded either naturally or



as a result of effort or work.” It also means “agricultural products.” A melon, even sliced, is an agricultural product. So are eggs.

DPZ's construal of the phrase "bottled/package food products" by reference to another provision of the zoning code, which, of course, should be read as a whole, has broader import for the new conditional use category. As Section 131.N38.c provides, a produce stand use "may include the retail sale of crops, produce, flowers, plants and seasonal displays, baked goods, dairy products and bottled/package food products." (Emphasis Added.) Zoning Regulation Section 101.C provides that "[t]he word “may” is permissive. Hence, the retail sales uses listed in Section 131.N.38.c are optional uses; these uses are allowable uses rather than required uses, giving produce stand operators discretion to determine what combination of products will be sold.

What the operator of a produce stand may not do is not engage in the retail sale of items regulated by other zoning regulations, as they may be impermissible accessory or principal uses, such as the accessory sale of barbecue, ice cream, or prepared foods for carry-out. As plainly expressed in Section 131.N.38.c, the produce stand must be the sole use on the property. The expansion of other retail sales or commercial activities regulated by the Zoning Regulations is not permitted.

The proposed produce stand accords with Section 131.N.38.c.

**d. The site has frontage on and direct access to a minor arterial road as designated in the General Plan.**

MD 99 is a Minor Arterial. The petition accords with Section 131.N.38.d.

**ORDER**

Based upon the foregoing, it is this **6<sup>th</sup> day of October 2011**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petition of Michael and Kimberley Taylor for a Produce Stand Conditional Use in an R-20 (Residential: Single Family) Zoning District is **GRANTED**;

**Provided**, however, that:

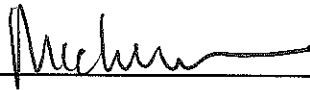
1. The Property must be hooked up to public water and sewer during the construction process.

2. The Conditional Use shall be conducted in conformance with and shall apply only to the proposed produce stand use as described in the petition, as amended by the July 15, 2011 letter attached to the Technical Staff Report, and as depicted on the conditional use plan for the "Harbin Property Lot 2 of the Harbin Property Minor Subdivision Produce Stand" submitted on July 20, 2011 and not to any other activities, uses or structures on the Property.

3. The hours, days, and periods of operation shall be as follows: The produce stand may operate seven days a week. The hours of operation shall be 9:00 a.m. to 8:00 p.m. from March through November, and from 9:00 a.m. to 10:00 p.m. in December. The produce stand shall be closed in January and February.

4. No pole lighting shall be installed.

HOWARD COUNTY BOARD OF APPEALS  
HEARING EXAMINER



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Date Mailed: \_\_\_\_\_

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.