

IN THE MATTER OF : BEFORE THE

MARTY A. HOWARD : HOWARD COUNTY
T/A H & H LANDSCAPING :

Petitioner : BOARD OF APPEALS

: Case No. BA **16-028C&V**
:.....

DECISION AND ORDER

The Howard County Board of Appeals (the “Board”) met on November 26, 2019 to hear and deliberate the petitions of Marty A. Howard t/a H & H Landscaping (Petitioner), for variances and expansion of a Home-based Landscape Contractor conditional use, in an RR-DEO (Rural Residential: Density Exchange Option) zoning district. The petitions were filed pursuant to Sections 131.0.N.32 and 130.0.B.2 of the Howard County Zoning Regulations (the “Zoning Regulations”).

Board members James Howard, Neveen Kurtom, John Lederer and Steven Hunt participated in the hearing. Board member James Howard presided over the hearing and deliberation of the case. Barry M. Sanders, Assistant County Solicitor, served as legal advisor to the Board.

The notice of the hearing was advertised and the property was posted as required by the Howard County Code. The Board members indicated that they had viewed the property as required by the Zoning Regulations.

The hearing was conducted in accordance with Section 2.209 of the Board’s Rules of Procedure. The Howard County Charter, the Howard County Code, the Howard County Zoning Regulations, the various technical staff reports and agency comments, the Department of Planning and Zoning’s Technical Staff Report (“TSR”) recommendation dated May 10, 2019, the General Plan for Howard County, the General Plan of Highways, BA92-31E&V, the conditional use petition and plan; and the variance petition were incorporated into the record by reference.

Bradley Farrar, Esq., represented the Petitioner. Thomas Coale, Esq., represented the Hunterbrooke Homeowners Association, Inc. and Christopher Nowalk in support of the petitions.

The following persons testified in favor of the petitions: Carl Gutschick, Francis Metro Silberholz, John Polizos and Phillip Grace. No one testified in opposition to the petitions.

The Petitioner offered, and the Board accepted, the following documents into evidence:

Petitioner's Exhibits

1. Copy of Amended Conditional Use Plan "Settlement Exhibit" dated November 21, 2019;
2. Carl K. Gutschick, P.E., resume;
3. Francis Metro Silberholz, AICP, resume; and
4. Photographs of Property and Accessory Structure.

As a preliminary matter, during the hearing the Petitioner submitted an amended conditional use plan to the Board dated November 21, 2019. The conditional use and variance plan was amended to include changes to the plan made as part of a "settlement agreement" reached between the Petitioner and the Hunterbrooke Homeowners Association, Inc. In accordance with Sections 2.202(b) and (c) of the Board's Rules of Procedure, the Board determined that the changes to the Plan were not substantive and did not require remand to DPZ for further recommendations.

FINDINGS OF FACT

Based upon the testimony and evidence presented at the hearing, the Board makes the following Findings of Fact:

1. The 5.11-acre subject property is zoned RR-DEO (Rural Residential – Density Exchange Option) and situated in the 5th Election District on the southeast side of Hunterbrooke Lane approximately 875 feet south of Lime Kiln Road. It is identified as Tax Map 46, Grid 1, Parcel 344 and known as 8045 Hunterbrooke Lane (the Property).

2. The Petitioner/Owner of the Property proposes to expand an existing landscape contractor

facility initially approved by the Board in BA92-31E&V on December 17, 1992. In BA92-31E&V the Board approved a landscape contractor facility consisting of 13 employees, a 1,200-square foot office building (Building B), 1,500-square foot storage garage (Building G) and a 4,500-square foot gravel parking area containing eight parking spaces. All tools and equipment were required to be stored indoors. The proposed expansion consists of an additional 4,876 square feet of outdoor storage and parking area.

The landscape contractor facility will include six pick-up trucks, six trailers, one skid loader and two stake-body pick-up trucks. The hours of operation will be Monday through Friday 6:30 a.m. to 6:00 p.m. The number of employees is not proposed to increase.

The Petitioner proposes to expand the existing residential garage (Building B) and seeks approval of three residential accessory buildings (Buildings C, E and F) that encroach in to the setbacks.

3. The Petitioner requests the following variances:

- (1) Reduce the side setback from 30 feet to 18 feet for and approved residential garage, Building "B" per Section 105.0.E.4.a.(3)(c)(1);
- (2) Reduce the side setback from 10 feet to 2.8 feet for a residential accessory storage building, Building "C" per Section 105.E.4.a.(3)(c)(2);
- (3) Reduce the side setback from 30 feet to 18 feet for a residential accessory storage building, Building "E" per Section 105.0.E.4.a.(3)(c)(1);
- (4) Reduce the side setback from 30 feet to 11 feet for a residential accessory storage building, Building "F" per Section 105.0.E.4.a.(3)(c)(1);
- (5) Increase the lot coverage of accessory structures for residential use from the permitted 2,200 square feet to 4,119 square feet for residential accessory storage

buildings and existing residential garage, Buildings B, C, E and F per Section 128.0.A.12.a.(1)(c); and

(6) Reduce the 100-foot conditional use setback to 50 feet for new outdoor storage and parking area per Section 131.0.N.32.b.

4. The Property is a parallelogram-shaped lot and contains the following buildings as depicted on the Conditional Use Plan:

Building A – 4,500 square foot single family detached dwelling;

Building B – 930 square foot residential garage;

Building C – 189 square foot residential storage;

Building D – 1,200 square foot landscape contractor office;

Building E - 1,800 square foot residential storage;

Building F – 1,200 square foot residential storage; and

Building G – 3,390 square foot landscape contractor storage.

Buildings B, C, D and F are situated along the east side of the site. Building D is located to the southeast of the dwelling. Building G is located near the center of the rear lot line. Two small sheds proposed to be removed are situated near the southwest corner of the site.

There are approximately 23, 221 square feet of gravel area in the eastern portion of the Property.

The Property also contains an existing pond near the front of the property along Hunterbrooke Lane and a septic easement is to the front of the dwelling. A row of mature evergreen trees runs along the rear of the lot adjacent to Preservation Parcel C.

The Property is accessed from Hunterbrooke Lane by an existing paved macadam driveway.

5. The topography of the Property slopes from a generally northwesterly direction toward the

existing pond near the Property road frontage along Hunterbrooke Lane. The topography ranges from a high elevation of approximately 454 feet Above Mean Sea Level (AMSL) located near the rear or southwest property boundary to a low elevation of approximately 420 feet near its front along Hunterbrooke Lane.

6. The neighborhood is predominantly improved with single-family detached dwellings and similarly zoned RR-DEO.

7. Hunterbrooke Lane is a local road with two travel lanes and approximately 22 feet of paving within a variable width right-of-way. The posted speed limit is 25 miles per hour. The estimated sight distance from the existing driveway entrance is approximately 160 feet to the northeast to a slight rise in elevation and approximately 380 feet to the southwest to a curve in the road.

8. The Property is served by private well and septic facilities.

9. The Property is designated Low Density on the Designated Places Map of Plan Howard 2030.

Howard County Zoning Regulations – The Petition must comply with the following applicable Regulations:

- § 131.0.B – General Standards Required for Approval;
- § 131.0.N.32 – Specific Conditional Use Criteria for Landscape Contractors; and
- § 130.0.B.2 – Variance Criteria.

Maryland's Common Law - *Schultz v. Pritts* and its Progeny

Maryland law requires the Board to apply the *Schultz* test when evaluating the Petition – a two-part test (or standard) that “lurks” within each individual factor the Board must consider under the Regulations. *People’s Counsel for Baltimore Cty. v. Loyola Coll. in Md.*, 406 Md. 54, 68-69 (2008) (citations omitted) (explaining *Schultz v. Pritts*, 291 Md. 1 (1981)). First, a conditional use is

presumed to be “in the interest of the general welfare, and therefore, valid.” *Loyola Coll.*, 406 Md. at 84 (citations and internal quotation marks omitted). Second, the favorable presumption incorporates the inherent adverse effects of the use. *Id.* at 79 (citations omitted).¹ *Schultz* “essentially adds language to statutory factors to be considered in evaluating proposed [conditional uses.]” *Id.* at 69 (citations omitted).

Once a conditional use complies with the applicable zoning regulations, notwithstanding even “severe” inherent adverse effects, it cannot be denied without evidence of adverse effects that are “above and beyond those inherently associated with [the use]” *Mossberg v. Montgomery Co.*, 107 Md. App. 1, 9 (1995); *see also Schultz*, 291 Md. at 22-23; *Loyola Coll.*, 406 Md. at 90, 99. The *Schultz* presumption can only be overcome with “strong and substantial” evidence of “detrimental effects above and beyond the inherent ones ordinarily associated with such uses.” *Loyola Coll.*, 406 Md. at 85 (emphasis added) (citing *Anderson v. Sawyer*, 23 Md. App. 612, 625 (1974)).

CONCLUSIONS OF LAW

Based upon the evidence presented to the Board in this case, and upon the Board’s review of the evidence, the Board makes the following Conclusions of Law:

A. General Criteria for Conditional Uses (Section 131.0.B.)

- 1. The proposed Conditional Use plan will be in harmony with the land uses and policies in the Howard County General Plan which can be related to the proposed use. Section 131.0.B.1.**

The Petitioner proposes to expand an existing landscape contractor facility, approved in BA92-31E&V. There are no policies set forth in the Howard County General Plan (PlanHoward

¹ The *Schultz* test is consistent with the Regulations, which presume a conditional use is “generally appropriate and compatible in the specified zoning districts” and require a finding that a conditional use does not have any “adverse effects above and beyond those ordinarily associated with such uses.” Regulations, §§ 131.0.A, 131.0.B.3.

2030) directly related to Conditional Use requests for Landscape Contractors, however, the Board finds they are generally compatible with rural residential areas if the size and scale are appropriate. Accordingly, the conditional use plan is in harmony with the land uses and policies in the General Plan.

- 2. 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 are such that the overall intensity and scale of the use(s) are appropriate for the site. Section 131.0.B.2.**

The proposed conditional use expansion consists of 4,876 square feet of outdoor storage and parking area. The proposed expansion is adjacent to the approved parking area and located between buildings G and D, which were approved through BA92-31E&V. No new building additions are proposed. The Property is 5.11 acres, which exceeds the 5-acre lot size requirement. The 4,876 square foot expansion represents only 2% of the overall 5-acre Property. The hours of operation will be Monday through Friday, 6:30 a.m. to 6:00 p.m. and the number of employees is not proposed to increase. Hunterbrooke Lane is a local road which has provided safe access to the site in the past and should continue to provide safe access. The proposed expansion will be a medium intensity use that the Board finds is appropriate for the site and the surrounding community.

- 3. The proposed use at the proposed location will not have adverse effects on vicinal properties above and beyond those ordinarily associated with such uses. Section 131.0.B.3.**

Unlike Section 131.0.B.1, which tests the proposed use's harmony or compatibility with the General Plan, and Section 131.0.B.2, which tests certain on-site aspects of the proposed use relative to the subject property, Section 131.0.B.3 measures the use's off-site compatibility with the neighborhood under six "adverse effect" criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading; (d) access; (e) impact on vicinal environmentally

sensitive areas; and (f) impact on vicinal historic sites. Inherent in the assessment of a proposed conditional use under these criteria is the recognition that virtually every human activity has the potential for adverse impact. 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 Board is not whether the proposed use would have adverse effects in an RR zoning district. The proper question is whether there are facts and circumstances showing the particular use proposed at the particular location would have any adverse effects above and beyond those inherently associated with such a special exception [conditional 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). The *Schultz* adverse impact test, a non-inherent, off-site impact analysis, narrowly focuses on the locality of the specific proposal.

- a. **The impact of adverse effects such as, but not limited to, noise, dust, fumes, odors, intensity of lighting, vibrations, hazards or other physical conditions will be greater at the proposed site than it would generally be elsewhere in the same zoning district or other similar zoning districts.**

The proposed conditional use expansion of 4,876 square feet of outdoor storage and parking area will not have adverse effects on vicinal properties above and beyond those ordinarily associated with the use. The proposed conditional use expansion is not expected to produce dust, fumes, odors, lighting, vibrations or other hazards which would adversely the surrounding residential area and local road access.

- b. **The location, nature and height of structures, walls or fences, and the nature and extent of the existing and/or proposed landscaping on the site are such that the use will not hinder or discourage the development and/or use of adjacent land and structures more at the subject site than it would generally elsewhere in the same zoning district or other similar zoning districts.**

The area of the conditional use is 5.11 acres in size. The conditional use expansion consists of 4,876 square feet of outdoor storage and parking area. The expanded conditional use area will be screened by a 6-foot tall privacy fence and landscaping. The Petitioner has a history of operating his landscape contractor business as a low impact use to neighboring properties and the surrounding community. The increased amount of loading and unloading of equipment/supplies and the movement of vehicles and equipment will not generate noise, dust, and fumes that would have adverse effects on the surrounding residential area. Therefore, the location, nature and height of fences and proposed landscaping will not hinder or discourage the development or use of adjacent land and structures more at the Property than generally elsewhere in the same zoning district or other similar zoning districts.

- c. The number of parking spaces will be appropriate to serve the particular use. Parking areas, loading areas, driveways and refuse areas will be appropriately located and buffered or screened from public roads and residential uses to minimize adverse impact on adjacent properties.**

There is no specific parking requirement for a landscape contractor use. In BA92-31E&V, a 4,500 square foot parking area was approved. The parking area will be expanded to 9,376 square feet which is sufficient to accommodate 13 employees. The parking area will be screened from adjacent properties and Hunterbrooke Lane by existing/proposed vegetation, fencing and buildings B, D and G. No refuse areas are proposed on the plan.

- d. 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. For proposed Conditional Use sites which have driveway access that is shared with other residential properties, the proposed Conditional Use will not adversely impact the convenience or safety of shared use of the driveway.**

The estimated sight distance is 160 feet to the northeast and 380 feet to the southwest.

According to the American Association of State Highway and Transportation Official (“AASHTO”) guidelines, based on an estimated stopping sight distance of 155 feet for a car going 25 miles-per-hour, the proposed access point on Hunterbrooke Lane should provide safe access with adequate stopping sight distance. The driveway is not shared with other residential properties. As such, the Board concludes that the ingress and egress drive will provide safe access with adequate sight distance, based on actual conditions.

- e. The proposed use will not have a greater potential for adversely impacting environmentally sensitive areas in the vicinity than elsewhere.**

The TSR comments that closest environmentally sensitive area is a stream located approximately 550 feet west of the proposed expansion. Therefore, the proposed use will not have a greater potential for adversely impacting environmentally sensitive areas in the vicinity than elsewhere.

- f. The proposed use will not have a greater potential for diminishing the character and significance of historic sites in the vicinity than elsewhere.**

The closest historic site is the Waters-Fulton Store and Post Office (HO-985) and St. Paul’s Evangelical Lutheran Church (HO-986), which are located over 800 feet to the north. A dense forest area on the adjacent property and existing vegetation on the Property will screened the proposed 4,876 square-foot parking/storage area from these historic sites. The Resource Conservation Division reviewed the proposal and commented that it is unlikely to diminish the character significance of these historic sites due to their significant distance from the Property and the existence of the forest conservation area that buffers the view-shed. Therefore, the proposed use will not have a greater potential for diminishing the character and significance of historic sites in the vicinity than elsewhere.

B. Conditional Use Criteria for Landscape Contractors (Section 131.0.N.32.)

- a. The site is at least 5 acres in area.**

The 5.11 acre lot size exceeds the minimum lot size requirement.

- b. Buildings and outdoor areas to be used for parking, loading and storage of vehicles, equipment and tools and supplies shall be delineated on the Conditional Use plan and located at least 100 feet from lot lines and public roads.**

The Plan shows the 4,500-square foot parking/storage area approved in BA92-31E&V approximately 50 feet from the property line when the conditional use setback was 50 feet. The expanded parking and storage area is approximately 50 feet from the property line. Pursuant to Section 131.0.D.4 the Hearing Authority may approve variances to the bulk regulations in Section 131.0.N. for modifications and expansions of existing conditional uses that were approved prior to July 12, 2001, subject to the variance provisions of Section 130.0.B. The Board is recommending approval of the variance. Building G does not comply with the 100-foot conditional use setback, however, a 1,500 square portion of this building which met the former 50-foot landscape contractor setback was approved in BA92-31E&V and is noncomplying. The remainder of Building G does not comply with the setback requirement of this section and is proposed to be removed.

- 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 proposed use is not expected to cause any objectionable noise, vibrations, fumes, odors, dust, illumination glare or physical activity at the site. The Petitioner indicates that the business operation consists of “providing landscaping services to off-site locations and the site is strictly used for the storage of equipment, operational supplies, and vehicles associated with said business”. No sale of plant material or garden supplies will be conducted on the

Property. No wholesale or retail horticultural nursery operations exist on or are proposed for the Property. There will be no light spillage to the adjacent properties.

- d. Buildings used for 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 Petitioner is not proposing any new buildings or structures. The buildings will be adequately screened by distance, landscaping and fencing.

- e. Outdoor parking and storage areas shall be screened from neighboring properties and roads.**

The outdoor parking and storage areas are screened by existing/proposed landscape and proposed fencing and buildings.

- f. 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.**

The Petitioner indicated that minor repairs to vehicles and equipment are conducted inside the building. No body work, engine rebuilding, engine reconditioning, or painting will take place.

- g. The area used for parking and storage of commercial vehicles, equipment, materials and supplies, whether exterior or interior, shall be limited to no more than 50% of the area of the lot.**

The area used for parking and storage of commercial vehicles, equipment, materials and supplies, whether exterior or interior consists of Building G (1,500 square-feet), the approved parking/storage area (4,500 square-feet) and the expanded area (4,876 square-feet).

The combined is 10,876 square-feet which is 4.88% of the 5.11-acre lot.

- h. The Hearing Authority shall set limits on the maximum number of employees and shall set the days and hours of operation.**

The Petitioner does not propose to increase the number of employees from 13 employees approved in BA92-31E&V. The proposed hours of operation are Monday through Friday, 6:30 a.m. to 6:00 p.m.

- i. **A snow removal service shall not be conducted as an accessory use unless specifically authorized by the Hearing Authority, upon a finding that the noise and level of activity of such a service will not be a nuisance to the neighborhood.**

The Petitioner indicates that snow removal service will not operate from the Property.

- j. **On an ALPP purchased or dedicated easement property, the following additional criteria are required:**

- (1) **The use shall not interfere with farming operations or limit future farming production.**
- (2) **Any new building or building addition associated with the use, including any outdoor storage and parking area shall count towards the cumulative use cap of 2% of the easement.**

There are no ALPP purchased or dedicated easements on the Property; therefore, this section does not apply.

C. Variance Criteria (Section 130.B.2)

1. Petitioner has requested six variances from the bulk regulations' setbacks. The Board finds that the irregular shape and topography of the Property unique physical conditions peculiar to the lot that result in practical difficulties in complying strictly with the bulk regulations in accordance with HCZR §130.0.B.2.a.(1).

2. Buildings B, C, E and F are located 345 feet from the closest dwelling to the northeast and approximately 325 feet from the closest dwelling to the south. Building G is located approximately 190 feet from the dwelling on Lot 18 at its closest point. The buildings identified as residential storage are screened by existing/proposed landscaping from the adjoining properties. The expanded outdoor storage/parking areas will permit an increased amount of loading and unloading of

equipment/supplies and movement of vehicles and equipment; however, the outdoor storage/parking area will be screened by a 6-foot privacy fence as well as by proposed landscaping. As such, the Board concludes that the variances will not alter the essential character of the area, substantially impair the appropriate use or development of the adjacent property or be detrimental to the public welfare, in accordance with §130.0.B.2.a.(2).

3. The unique shape of the Property and existing features of the Property existed prior to the owner purchasing the Property. Therefore, the practical difficulties have not been created by the owner, in accordance with §130.0.B.2.a.(3).

4. The Board concludes that the requested variances are the minimum necessary to afford Petitioner relief, in accordance with §130.0.B.2.a.(4).

D. CONCLUSION

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard, the Board concludes that the instant petition complies with Sections 131.0.B (General Standards) and 131.0.N.32 (Specific Criteria) and 130.0.B.2 (Variance Criteria) of the Zoning Regulations.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is this June day of _____, 2020, by the Howard County Board of Appeals, ORDERED:

That the Petitions and Amended Conditional Use Plan dated November 21, 2019 (Petitioner’s Exhibit No. 1) of Marty A. Howard t/a H & H Landscaping, for expansion of a Home-based Landscape Contractor Conditional Use and Variances, in an RR-DEO (Rural Residential: Density Exchange Option) Zoning District are **GRANTED**, subject to the following conditions:

1. The Petitioner shall comply with all conditions set forth in the November 21, 2019

“Settlement Exhibit” between the Petitioner and the Hunterbrooke Homeowner’s Association Inc., submitted to the Board as Petitioner’s Exhibit No. 1.

2. The Petitioner shall comply with all applicable Federal, State and County laws and regulations.

ATTEST:


Ann Nicholson, Secretary


HOWARD COUNTY BOARD OF APPEALS


Neeven Kurtom, Chairperson

Did Not Participate
William Santos, Vice-Chairperson

PREPARED BY:
HOWARD COUNTY OFFICE OF LAW
GARY W. KUC

COUNTY SOLICITOR


Barry M. Sanders
Assistant County Solicitor


James Howard


Steven Hunt

Term Expired 12/31/19
*John Lederer

*Board member John Lederer’s term serving on the Board of Appeals expired prior to issuance of this Amended Decision and Order. On 1/1/20 Gene Ryan replaced John Lederer on the Board. Gene Ryan did not participate in this Amended Decision and Order.