

IN THE MATTER OF : HOWARD COUNTY
STREAKER FIREWOOD, LLC : BOARD OF APPEALS
Petitioner : HEARING EXAMINER
 : BA Case No. 15-026C

.....

DECISION AND ORDER

On November 23, 2015 and February 8, 2016, 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 Streaker Firewood, LLC, (Petitioner) for a Bulk Firewood Processing conditional use in an RC-DEO (Rural Conservation-Density Exchange Option Overlay) zoning district, filed pursuant to § 131.0.N.46 of the Howard County Zoning Regulations (HCZR).

Petitioner certified to compliance with the notice, posting, and advertising requirements of the Howard County Code. The Hearing Examiner viewed the property as required by the Hearing Examiner Rules of Procedure. Thomas Meachum, Esquire, represented the Petitioner. George Streaker and Peter Stone testified in support of the petition. Karen Streaker testified in opposition to the petition.

A Preliminary Matter

At the outset of the November 23, 2015 hearing, the Hearing Examiner informed Petitioner and the community that the conditional use petition was wanting information necessary to evaluate it properly. As explained at the hearing, it has become the Hearing Examiner's practice to address certain aspects of conditional use petitions as a preliminary matter rather than well into the hearing, after petitioner and opposition testimony. This practice is partly a response to prior petitioners' stated interests (through requests for

reconsideration) in having the Hearing Examiner more fully identify concerns about petitions within the hearing process and partly a response to community participants who continue to express frustration about incomplete petitions and plans and/or multiple petition/plan amendments over the course of a hearing. A 2013 zoning text amendment enacted during the 2013 Comprehensive Rezoning Plan, HCZR § 131.0.F.2.f, imposes on DPZ the regulatory policy obligation to seek from a petitioner "the best petition" during the initial processing of a conditional use petition and before the preparation of technical staff reports. (The amendment was intended in part to address community concerns.) For these reasons, the Hearing Examiner continued the hearing to allow Petitioner to amend the petitions and plans. By letter of December 7, 2015, the Hearing Examiner informed Petitioner of the additional information required.

- Amend the conditional use petition/supplement/plan to depict the true location, width and total area of the access driveway running from MD 144 to the primary site. The driveway is part of the proposed conditional use area and is subject to the cumulative two percent cap for conditional uses on ALPP properties.
- Amend the conditional use petition/supplement/plan to reduce the size of the original conditional use site by the area of the driveway.
- Amend the conditional use petition/supplement/plan to denote the paving of the conditional use driveway.
- Amend the conditional use petition/supplement/plan to depict the location/storage area of all equipment involved in the use, including lawn mowers, a dump trailer, firewood processor, flatbed trailer, tractor trailer, two dump trucks, a pickup truck, a splitter and two sked loaders. Depict the location of the cords of wood (up to 500 cords) to be stored within the site.
- Amend the conditional use petition/supplement/plan to depict the paving areas for all vehicles/equipment parking/loading/storage within the primary conditional use site.
- Update the conditional use petition/plan/narrative supplement as may be further required.
- Amend the petition to include a copy of the required DNR permit referenced in the petition, per HCZR § 131.0.46.b, which authorizes the Hearing Authority, as a condition of approval, to impose requirements "which are more stringent than the requirements of the State and Federal permits."

Petitioner introduced the amended plans as exhibits at the February 8, 2016 hearing in accordance with Hearing Examiner Rule 9.5. Petitioner Exhibits 1 and 2 are both Petitioner's

2015 Forest Product Operator License. Petitioner's Exhibit 4 is the February 8, 2016 Amended Conditional Use Plan (Amended Plan) shown at a 1"=200' scale. Petitioner's Exhibit 5, which contains an inset depicting the Amended Primary Site, is shown at a 1"=100' scale.

Petitioner introduced into evidence the exhibits as follows.

1. Maryland Department of Natural Resources 2015 Forest Product Operator License (13540)
2. Maryland Department of Natural Resources 2015 Forest Product Operator License (13540)
3. Three videos on CD disk
4. Amended Conditional Use Plan, February 8, 2016
5. Amended Conditional Use Plan, Enlargement, February 8, 2016

FINDINGS OF FACT

Based upon the evidence of record, the Hearing Examiner finds as follows:

1. Property Identification. The subject property lies on the north side of MD 144 (Frederick Road) about 2,700 feet west of Fairgrounds Road. It is located in the 3rd Election District, identified as Tax Map 0015, Grids 0002 and 0003, Parcels 146 and 73 and known as 13300 and 13370 MD 144 (Frederick Road) (the Property). Parcel 146 (the eastern parcel, 13300 MD 144) is 83.22 acres and Parcel 73 (the western parcel, 13370 MD 144) is 120.35 acres. The Property is subject to a county ALPP (agricultural land preservation program) easement.

2. Property Description. The Property is bounded by I-70 on the north and MD 144 on the south. Access is gained from MD 144 via a driveway (the Main Driveway) running along the common lot lines of Parcels 146 (to the east) and 73 (to the west). The Main Driveway is paved for about 1,350 feet (up to the northern two structures and various outbuildings.)

East Side of the Main Driveway (Parcel 146). Although not part of the Property, the

Hearing Examiner follows the technical staff report (TSR) lead in describing two adjoining, interior properties. Parcel 146 envelopes Lot 2 and borders three sides of Lot 1, which adjoins Parcel 73. Lots 1 and 2 were created as "child lots" from Parcel 265, which was carved out of Parcel 146. Lot 1 fronts the Main Driveway and is improved with a single-family detached dwelling. It sits about 220 feet from MD 144. Lot 2 is an unimproved lot located about 120 feet east of Lot 1 and 100 feet from MD 144. Lot 2 has a private access easement to the Main Driveway. To the north of Lot 1 are two dwellings, various outbuildings and a trailer clustered around a short paved access drive. From here the paving ceases and the now unpaved driveway continues to the east of the house, then loops north, west and south to form a rectangle which appears to enclose open fields. To the east of the rectangular drive are a pavilion and large pond. Howard County GIS records indicate large areas of wood piles are situated around the southwestern portion of the pond. This wood pile area is visible on the October 2015 site aerial shown on page 4 of the TSR. Further to the north, about 1,100 feet from MD 144, is a barn and a short driveway, which adjoins the looped driveway. The remainder of Parcel 146 is predominately fields. Stands of wood run along the parcel's south and southwest boundaries adjacent to MD 144 and along the western perimeter.

West Side of the Main Driveway (Parcel 73). A trailer lies about 680 feet north of MD 144. Beyond the trailer is a dwelling, several outbuildings and a spring house. Two barns lie further to the north and another barn lies further west, off a driveway.

3. Vicinal Properties. I-70 adjoins the north Property line. Across MD 144 to the south, RC-DEO Parcel 8 is a 201.6-acre agricultural parcel encumbered with an ALPP easement.

Adjoining the west side of Parcel 8, the RC-DEO Parcel 45 is a 55.7-acre parcel also encumbered with an ALPP easement. To the east, from north to south is the B-2 (Business: General) zoned Howard County Fairgrounds property and the 15.7 RC-DEO zoned Lot 1 of the Property of Charles O. Amos subdivision (Record Plat 6156), which fronts MD 144. A 100-year floodplain and drainage easement of this lot immediately adjoins the Property. Lot 2, a 3.0-acre residential parcel of this same subdivision adjoins the east side of Lot 1 and fronts MD 144. To the west, from north to south are Parcel 10, Lot 7 (55.8 acres); Parcel 10, Lot 3 (80 acres); Parcel 66 (3.6 acres) and Parcel 107 (6.5 acres). These properties are each improved with single-family detached dwelling, outbuildings, and agricultural uses.

4. Roads. MD 144 has two travel lanes and about 28 paving feet within a variable width right-of-way (ROW). The posted speed limit is 50MPH. MD 144 is a Howard County Scenic Road in the vicinity of the Property. According to the Amended Plan, the estimated sight distance is about 440 feet to the east and about 730 feet to the west. According to Department of Public Works data, the traffic volume on MD 144 west of MD 32 was 4,200 average daily trips as of August 1997.

5. Water and Sewer Service. The Property is served by private well and septic.

6. General Plan. PlanHoward 2030 depicts the Property as Rural West on the Designated Place Types Map. MD 144 is depicted as a Minor Arterial on the PlanHoward 2030 Functional Road Classification Map.

7. Zoning History.

A. CE-15-08 (Parcel 146; 13300 Frederick Road)

Action: Formal notice of violation issued February 26, 2015 for the operating of a tree contractors business on RC zoned property; the off-street parking of more than two commercial vehicles, including semi-trailers on RC zoned property and the dumping, storage of logs, tree stumps, trash and debris on RC-zoned property. Status: Open

B. CE-15-09 (Parcel 73; 13370 Frederick Road)

Action: Formal notice of violation issued February 26, 2015 for the operating of a tree contractors business on RC zoned property and the off-street parking of more than two commercial vehicles, including semi-trailers on RC zoned property. Status: Open

8. The Requested Conditional Use and Conditional Use Site. Petitioner is proposing a Bulk Firewood Processing operation on a portion of the Property. Because the Property is subject to an ALPP easement, the proposed land use is controlled in part by HCZR § 106.1.D, which limits the area devoted to a conditional use to 2% of the easement area. Consequently, and in order to maximize the land area of the proposed Bulk Firewood Processing operation, the proposed conditional use site (the Site) straddles Parcels 146 and 73. The proposed Site comprises two areas: the main Bulk Firewood Processing area (the Amended Primary Site) proposed to be located approximately 1,500 feet from MD 144 and the area containing the land required for ingress and egress (the Access). The total Site area, per the 2% use area limitation, is 177,700 sf, based on the Site Data in Petitioner Exhibit 5. This includes 72,503sf of Parcel 146, $(3,625,156\text{sf} \times 0.02\% = 72,503\text{sf})$ and 105,197sf of Parcel 73 $(120.76 \text{ acres} \times 0.02\% + 2.415 \text{ acres} \times 43,560\text{sf} = 105,197\text{sf})$. The Amended Primary Site Area is approximately 154,836sf. The Access is therefore approximately 22,8789sf.

The Amended Primary Site depicted on Petitioner Exhibit 5 is a 253'-wide, 612'-deep rectangular area, fenced on all sides. On the Parcel 146 side, the Amended Primary Site is 100' wide. On the Parcel 73 side, it is 153' wide. The western side of the Amended Primary Site abuts a 100-foot stream buffer. Also on the western side, along the common lot line with Parcel 146,

is a row of vegetation, which the Hearing Examiner infers would need to be removed for the proposed operation. The inset shown on Petitioner Exhibit 5 depicts the use areas of the Bulk Firewood Processing operation area within the Amended Primary Site. A paved truck, trailer and equipment storage area and two sheds, included a new 10'x'12 shed, would be located in the southwestern section, to the east of which is the log drop-off area. To the north of this drop-off area is the proposed log storage area. To the north of the paved vehicle and equipment area is an area for firewood processing and beyond that, an area for processed firewood storage. Petitioner Exhibit 5 contains this note above the inset: "Locations shown on this plan are general locations for the firewood processing activity. Due to the mobile nature of the equipment and the process, locations may be shifted within the fenced area as firewood is processed." A maximum of 500 cords of wood would be stored within the Amended Primary Site.

The proposed Access is approximately 1,500' in length with about 1,350 paving (asphalt) feet from MD 144 to the two structures below the Amended Primary Site. The petition states the proposed Access varies in width from nine to eighteen feet. Petitioner Exhibits 4 and 5 show a portion of the proposed Access running through the two structures where the paved portion of the Access ends. The distance between the two structures is approximately 15 feet. Petitioner Exhibits 4 and 5 show a portion of the proposed Access running through Lot 1, which is not part of the Property nor designated as part of the Site.

9. TSR Recommendation. The TSR recommends the petition be granted, subject to compliance with all agency comments and recommended conditions of approval. DPZ's primary

concern is the petition's compliance with HCZR § 131.0.B.3.d, the general standard requiring Petitioner to demonstrate safe access and no adverse impact from the proposed land use on a driveway shared with other residential properties. The TSR states on Page 8:

Access is from MD 144, a two lane Minor Arterial with narrow shoulders and without acceleration and deceleration lanes. The CUP indicates that the sight distance is approximately 730 feet to the west and 440 feet to the east; however based on actual conditions of road curvature and sloping topography adjacent to the paving, it appears the sight distance may be less than shown on the CUP.

There is insufficient information in the petition to reach a conclusion regarding safe access with adequate sight distance for trucks entering and exiting MD 144; however, the State Highway Administration did not offer comments regarding safety or a requirement for acceleration/deceleration lanes. A professional sight distance analysis would need to be conducted in order to conclusively evaluate sight distance at the proposed location.

Lots 1 and 2 are residential properties which share or will share access to the Main Driveway. With respect to the impact of the Use on properties that share the driveway, the Petitioner notes that "the property has trees on the north and south side of its property, so nothing in either direction is visible, the driveway is paved so there is no dust, and that noise from Routes 70 and 144 is louder at the location of Lot 1 than the trucks passing for the 100-200' or so by the property."

However, commercial tree trimming trucks, dump trucks and other large vehicles utilize the portion of the driveway which serves the house on Lot 1 and will serve the house on Lot 2. The house on Lot 1 is located approximately 65 feet from the Main Driveway. Additionally, Parcel 73 has the potential to create one-acre lots which are not required to be owned by family members. The location recommended by the Agriculture Board for such lots would be approximately across the Main Driveway from Lots 1 and 2.

Given the proximity of the residence on Lot 1, and the potential for future residences on Parcel 73, it is not certain that the impacts of noise, dust or vibrations generated by large vehicles on these properties will not adversely affect the convenience or safety of shared driveway use. However, the Hearing Authority could choose to request that more persuasive evidence be submitted (i.e. an affidavit of the resident of Lot 1 regarding adverse impacts).

For these reasons, the TSR recommends as a condition of approval that "[s]ufficient information shall be provided which confirms to the satisfaction of the Hearing Authority that the convenience or safety of shared driveway users is not adversely impacted and that sight distance is adequate for trucks entering MD 144."

10. Agency Comments. The Fire Department's November 11, 2015 comment (based on the initial petition) informs Petitioner that the Property shall meet all local codes for fire

products. Maryland State Highways had no objection to the initial petition.

11. Peter Stone, project manager, testified to there being adequate sight distance to the east and the presence of warning signs in the area where MD 144 curves.

12. George Streaker testified about the firewood processing operation. It would operate between 8:00am and 6:00pm six days a week and sometimes on Sunday in the June, November and December busy season. On average, four log trucks with a grapple on top would make deliveries twice a day, weather permitting. The trucks deliver and dump at about the same time and the contractor groups deliveries together. The latest the trucks come is about 2:00pm. Other trucks make deliveries, including one dump trailer. Petitioner may also hire a tractor trailer truck to come in and do deliveries, which occur 8-10 times a day, 3-5 times a week in the busy season between August and December. Deliveries are made only to wholesale nurseries. No deliveries are made to residences.

13. Mr. Streaker further testified that all Bulk Firewood Processing would be conducted on-site. The equipment proposed to be used include a firewood processor, one dump truck, one dump trailer, two skid loaders, a splitter, lawn mowers, a skid trailer, two regular trailers and two pickup trucks. He may also rent a skid loader. Processed wood would be stored in the Amended Primary Site. Up to four employees would work within the main conditional use Site and make deliveries. One employee runs a skid loader, another flips logs back into the processor, the third runs the firewood processor and the fourth may drive the dump truck. Processing activities run until about 6:00pm. No bulk firewood is processed in cold weather (January and February) or in the hot summer months.

14. Petitioner introduced into evidence Petitioner Exhibits 1 and 2, which are both copies of his Maryland Department of Natural Resources (DNR) 2015 Forest Product Operator License (13540), which is issued to George Streaker, Streaker Firewood, at 13540 Rt. 144, West Friendship.

15. Petitioner also introduced into evidence Petitioner Video Exhibit 3, which Mr. Streaker identified during play as proof that the proposed land use would not create any atypical noise and which is less than the noise from US 70 traffic. In the first video, the recorder is placed in front of the mailbox for 13270. US 70 traffic can be heard in the background. In the second video, Mr. Streaker is driving a red vehicle up the proposed Access at 10MPH. To the left of the proposed Access is a line of intermittent trees and fencing. There is also a line of trees on either side of the 13270 driveway right up to the paved area. The posted speed limit in this area is 15MPH. Portions of the paved area have eroded edges with loose gravel. Before the crest of the modest incline, just past the 13270 mailbox are 7-10 mailboxes/newspaper slots, at which point is a driveway turning east, and an arrow pointing to 13300 MD 144. There is a large pile of firewood in this area. The third video depicts current operation activity in the eastern portion of Parcel 146. The video shows two apparent employees using a mechanical grapple to remove the largest logs from a dump truck. After these logs are unloaded, the truck dumps smaller logs and wood waste, debris and waste water directly onto the bare ground.

16. Mr. Streaker testified the current illegal operation on the Property has not been involved in any accidents exiting or entering the current driveway. He also discussed the operation. Bulk wood is delivered processed into pieces, which is processed into firewood for

delivery, mostly to wholesalers like nurseries, and some old residential customers. There is no onsite retail. Firewood delivery runs from May to August and picks up in December when nurseries are supplied. Deliveries are mild from January to May. A dump truck and dump trailer are used for delivery and he may also rent a tractor trailer. Deliveries are made 8-10 times a day during busy season, 3-5 days a week.

17. Because the videos in evidence showed several large vehicles, the Hearing Examiner questioned Mr. Streaker about their size and wheelbase (WB). Mr. Streaker did not know the wheelbase of any vehicle. The dump trailer is about 26 feet long and the trailer, about 30 feet. When questioned about what the (DNR) Forest Product Operator License allows him to do as part of the proposed operation, he stated that DNR came out and looked at the Property.

18. Karen Streaker, the owner of Lot 1, cross-examined Mr. Streaker about his testimony concerning prior firewood operations on the properties by family members, asking whether these operations were wholesale operations, retail or for personal use. Mr. Streaker thought they sold firewood to the public and to commercial operators, but he is unsure. When questioned, he conceded that he does not make a contribution to the property taxes but would in the future.

CONCLUSIONS OF LAW

I. Background issues

A major challenge in this case is the simplicity of the conditional use petition and CUP. The CUP as originally submitted was scant. It showed a rectangle straddling the Property. We have somewhat more information about the Site with the submission of the Amended Plan,

Petitioner Exhibits 4 and 5. Specific work areas within the Amended Primary Site are shown in Petitioner Exhibit 5, but a note cautions these areas could be reconfigured as needed.

Another general concern is the apparent presence of a portion of the existing driveway and the proposed Access on Lot 1, as shown on Petitioner's Exhibits 4 and 5, which is not part of the Property. Lot 1 is owned by Opponent Karen Streaker. When a petitioner is not the property owner, the actual property owner must provide written authorization allowing the petitioner to make application. In this case, there is no such letter of authorization from Ms. Streaker. The petition includes only a letter of authorization from 13300 Route 144 owner MHGH and SLLC, signed by Howard Streaker, Jr. There is also no letter from the owner of 13370 Route 144. Additionally, there is no access/driveway easement for Lot 2 shown on Petitioner Exhibits 4 or 5. The implications of these general concerns are applied below in Part II.

In the Hearing Examiner's view, many of the specific concerns raised in Part II arise from the proposed location of the Amended Primary Site, which would enable Petitioner to utilize 2% of the land area of both Parcels 146 and 73. Certainly, Petitioner is entitled to do so. However, the location of the Amended Primary Site some 1,500 feet into the Property means the proposed land use lacks direct access to MD 144, obliging Petitioner to configure the Site to include the area needed for access to/from MD 144, the proposed Access. Consequently, Petitioner must demonstrate compliance with the general standards for conditional uses and the specific standards for the conditional use category for the entire Site—the Amended Primary Site and the proposed Access—and particularly with respect to atypical inverse impacts

on the existing and future residential lots within the Property.¹ This circumstance poses particular challenges.

II. General Criteria for Conditional Uses (§ 131.0.B)

Sections 131.0.B.1-3 requires the Hearing Authority to evaluate whether the proposed Conditional Use will be in harmony with the land uses and policies indicated in the Howard County General Plan for the district in which it is located through the application of three standards: harmony with the General Plan, intensity of use, and atypical adverse impacts.

A. Harmony and Intensity of Use

§ 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.

The TSR concludes the proposed Conditional Use will be in harmony with the land uses and policies in Chapter 4 of the Howard County General Plan as it relates to the need for flexibility in order for farmers to prosper in a competitive economy and maximize profits to remain viable through diversification of products. The TSR characterizes the proposed land use as an ancillary operation which supports the economic viability of the farm.

§ 131.0.B.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.

¹ At the November 23, 2105 hearing, the Hearing Examiner explained to Petitioner the need to revise the proposed conditional use site to include the proposed access is consistent with DPZ and Hearing Examiner policy for similarly situated conditional uses, referring to the October 19, 2015 TSR for Board of Appeals Case No. 15-031C, a petition for a landscape contractor conditional use. The TSR recommended the petition be denied in part because the use required access through an R-ED (Residential: Environmental Development) zoned portion of the subject property and the proposed use is not allowed by conditional use in the R-ED district. The proposed access was not depicted as part of the conditional use site. Petitioners withdrew the petition before the hearing.

The TSR concludes the Site's location within the 203.58-acre Property would provide adequate separation from surrounding properties, including residential Lots 1 and 2, and roads. It would gain access from a Minor Arterial Road. In the Hearing Examiner's view the proposed use is an intense activity, but it is also one associated with farming. The proposed Amended Primary Site appears to be smaller in area than the existing illegal operation visible on Page 4 of the TSR. The overall intensity and scale of the proposed land use are generally appropriate, given the ultimate access street is MD 144.

B. Adverse Impacts

Unlike HCZR §§ 131.0.B.1 and B.2, which concern the proposed use's harmony or compatibility with the General Plan and the on-site characteristics of the proposed use, compatibility with the neighborhood is measured under § 131.0.B.3's six, off-site "adverse effect" criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, (d) access, (e) impact on environmentally sensitive area; and (f) impact on the character and significance of historic sites. These six adverse impact tests gauge the off-site effects of the proposed conditional use.

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 Hearing Examiner is not whether the proposed use would have adverse effects in an RC-DEO 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 zones. *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, Petitioner has not met its burden of presenting sufficient evidence under HCZR § 131.0.B.3 to establish the proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with a Bulk Firewood Processing conditional use in the RC-DEO zoning district.

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 TSR raised concerns about Petitioner's compliance with this standard given the proximity of the residence on Lot 1, and the potential for future residences on Parcel 73. DPZ is not certain the impacts of noise, dust or vibrations generated by large vehicles traveling up and down the proposed Access on these properties will not adversely affect the convenience or safety of shared driveway use. It further noted the Hearing Authority could request more persuasive evidence be submitted (i.e. an affidavit of the resident of Lot 1 regarding adverse impacts.)

Petitioner's Exhibit 3 includes a video intended to demonstrate the lack of noise from the proposed land use relative to vehicle traffic noise from US 70. As the Hearing Examiner

understands this evidence, any noise from the proposed land use (at the Amended Primary Site), would be less than or muffled by the background traffic noise from US 70. However, the proposed Bulk Firewood Processing operation would be routinely unloading and dumping large logs, dumping smaller logs off the back of the uplifted dump truck and operating a firewood processor and wood splitter. Log unloading and dumping can be heard in the Exhibit 3 video of dump trucks off-loading large logs with a grapple and dumping smaller logs. Even this limited activity is rather loud. We do not know whether the splitter or processor is hydraulic, which is more quiet than other types. Petitioner currently operates an unlawful operation on the Property and was therefore capable of demonstrating the general and inherent operational noise levels relative to the existing and future residential lots. Because the proposed Access is also part of the Site, Petitioner is also obliged to demonstrate the impact of physical conditions associated with this aspect of proposed land use, with large vehicles and equipment moving up and down the approximately 1,500-foot driveway. It did not. Certainly, the necessary configuration of the Site, with its long proposed Access, has the potential to create atypical adverse physical condition impacts different from a Bulk Firewood Processing operation with direct access to a road. Based on the evidence of record, Petitioner has not met its burden of production and persuasion that the proposed land use, given the configuration of the Site, would not generate atypical (greater) noise, dust, fumes, odors, intensity of lighting, vibrations, hazards or other physical conditions than it would generally be elsewhere in the same zoning district or other similar zoning districts.

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.

Petitioner is proposing a new fence to enclose the Amended Primary Site. Two sheds in the area proposed to be paved and used for vehicle and equipment storage are also proposed. There is no evidence that this fence or the sheds would 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.

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 impacts on adjacent properties.

According to the petition, employee parking spaces are not provided because some employees do not drive and some live on the Property. Assuming those employees who live on the Property, including George Streaker the licensee, walk to the Amended Primary Site, there is still the question of how those employees who do not drive travel to the Site. Petitioner did not adequately address compliance with this general standard. No refuse areas are proposed. The Hearing Examiner surmises the cords of wood going out for delivery would be loaded onto delivery vehicles and that this loading area is somewhere on the Amended Primary Site.

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.

1. Safe access. The TSR finds insufficient information in the petition to conclude there is

safe access from MD 144, a two lane Minor Arterial with narrow shoulders and without acceleration and deceleration lanes. It also comments the sight distance shown on the original CUP, based on actual conditions of road curvature and sloping topography adjacent to the paving, may be less than shown. Peter Stone testified there is safe access and that there are warning signs along the curvature. The Hearing Examiner concludes Petitioner has not met his burden of production and persuasion to demonstrate safe access.

2. No adverse impact on the convenience or safety of a driveway shared with other residential properties. This second test was one of many amendments to the Zoning Regulations in the 2013 Comprehensive Zoning Plan intended to resolve issues about conditional uses sharing driveways with residential properties. In support of this objective, the 2103 Zoning Plan definition of "direct access" was amended: "Vehicular access from a proposed development or use to a public road where the access is not by way of AN EASEMENT OR a common driveway WHERE THE ACCESS IS shared with other PROPERTIES OR uses. (The capitalized words are amending language.)

The TSR alerted Petitioner to DPZ's concerns about commercial tree trimming trucks, dump trucks and other large vehicles using that portion of the existing driveway serving the Lot 1 residence and which will serve the residence on Lot 2. DPZ recognized new, non-family owned, one-acre lots could be created on Parcel 73 across the Main Driveway from Lots 1 and 2 and would likely share the lower, shared driveway section of the proposed Access.

Importantly, a portion of the existing shared driveway—the proposed Access portion of the Site—appears to be located on Lot 1, which is not part of the Property. The owner, Karen

Streaker, did not submit a letter of authorization enabling Petitioner to apply for the requested conditional use. For this reason alone, the petition must be denied.

More than this, "child" Lots 1 and 2 were subdivided from a larger property. As with the driveways shared by these two lots and the Property and shown on the subdivision plat/s, common access driveways are regularly subject to a declaration of maintenance obligation, which is recorded in the Land Records of Howard County. Such declarations establish the maintenance obligations of the owners/users/lessees for the common access driveway. While the Hearing Examiner may not enforce the terms of such declarations in a conditional use hearing, the introduction of any such document would have assisted the Hearing Examiner in crafting appropriate approval conditions, possibly a Memorandum of Understanding to be incorporated in the decision and order, making Petitioner responsible for the maintenance of the shared driveway portion of the proposed Access, which would in part ensure the convenience or safety of all residential users, given the type and frequency of vehicles and equipment necessary for the Bulk Firewood Processing Operation.²

Lastly, the Hearing Examiner is not persuaded the existing width and location of the driveway, and the existing driveway entrance—the proposed 1,500-foot Access travelled by large commercial vehicles and equipment with heavy loads—will provide safe access to ensure the convenience and safety of the residential users and support emergency Fire Department

² In Board of Appeals Case No. 15-043V (decided April 19, 2016) Petitioners and adjoining property owners entered into an Agreement, the terms and conditions of which required Petitioner to relocate a driveway encroaching on adjoining property in exchange for the property owners' agreement to not appeal the variances granted. The Agreement, submitted as Petitioner Exhibit 3, was adopted and incorporated into the Decision and Order as if set forth therein in its entirety.

equipment access to the Amended Primary Site. A portion of the proposed "Access"—a crude paper line—runs through two aging structures, which are about 15 feet apart. The proposed Access varies in width from nine to eighteen feet.

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

The petition states "[t]here is a stream not far away, but this use does not affect it." The TSR found "no known environmentally sensitive areas in the vicinity of the proposed Site." Seeking further guidance, the Hearing Examiner requested DPZ to assess any potential adverse impacts from the proposed Bulk Firewood Processing operation on the stream and stream buffer to the west of the proposed Site and located primarily on Parcel 73, pursuant to Hearing Examiner Rule 10.4. DPZ's March 29, 2016 response states:

An analysis of potential adverse impacts from the proposed firewood processing use on the stream and stream buffer cannot be conducted given the information available at this time. Such an analysis would require information pertaining to the direction and flow of run-off, drainage areas, impervious surface area and storm water management features. Current, State Stormwater management requirements shall be required for the development area. The Department of Planning and Zoning (DPZ) has confirmed that the operation will be conducted outside of the stream buffer; therefore, the requirement that no construction is permitted within the stream buffer has been met.

What is being tested under HCZR § 131.0.B.3.e?

PlanHoward Policy 4.5 called for the refinement of the RC and RR zoning regulations to "provide greater flexibility for the agricultural community as well as appropriate protections for rural residents." Implementing Action 4.5.a recommended amending the standards for conditional use approval to realize this objective. The 2013 Comprehensive Zoning Plan was the primary regulatory vehicle for implementing Action 4.5.a.

DPZ's February 25, 2013 "Preliminary Comprehensive Zoning Plan: Regulation Highlights" is an overview of the pertinent regulatory amendments included in the Preliminary Comprehensive Zoning Plan presented to the Planning Board. Concerning § 131.0, this document discussed the section's comprehensive revision, including modifying and expanding the general standards used to evaluate all conditional use categories in order to better ensure conditional use proposals *are compatible with, and do not negatively affect, the neighborhood in which they are proposed* (emphasis added). To this end, the Planning Board supported the amendment of § 131.0.B.3 to add tests for atypical adverse impacts on vicinal environmentally sensitive areas and historic sites (§§ 131.0.B.3.e & .f) The 2013 Comprehensive Zoning Plan enacted by the County Council included these tests with no change in language.

Since the October 6, 2013 effective date of the 2013 Comprehensive Zoning Plan, a proposed conditional use's compliance with § 131.0.B.3.e has been a non-issue due to the nature of the proposed land use and the absence of vicinal environmentally sensitive areas. In this case, however, the proposed land use, a Bulk Firewood Processing operation, abuts a 100-year floodplain (stream buffer and stream). The Sawmills, Bulk Firewood Processing, Mulch Manufacture and Soil Processing conditional use category itself is susceptible to atypical adverse impacts on vicinal environmentally sensitive areas, due to the nature of these uses.³

³ The conditional use category was substantially revised in the 2013 Comprehensive Zoning Plan. Zoning Regulation Amendment (ZRA-149), Bill No. 20-2014, effective August 4, 2014, generally reinstated the pre-2013 standards for the conditional use category in response to concerns about the scope and location of mulch operations authorized in the 2013 Comprehensive Zoning Plan. ZRA-149 retitled § 131.0.N.46 as "Sawmills, Bulk Firewood Processing, Mulch Manufacture, or Soil Processing" to reflect the actual uses permitted under the approval criteria. A County Council Task Force Studying Mulching, Composting, and Wood Processing Report was submitted to the Council on

DPZ's 10.4 response reasoned the Amended Primary Site was compliant to county environmental subdivision and development regulations because the operation will be conducted outside of the stream buffer; therefore, the requirement that no construction is permitted within the stream buffer has been met. DPS was unable to analyze potential adverse impacts from the proposed firewood processing use on the stream and stream buffer given the information available, as the analysis would require information pertaining to the direction and flow of run-off, drainage areas, impervious surface area and storm water management features.

The plain language of § 131.0.B.3.e, though, does not cite to any state or county subdivision/development regulations or law as a regulatory directive limiting proof of compliance with the regulations and laws underlying DPZ's response. In the Hearing Examiner's view, were this test of a proposed conditional use construed as a cursory "check" for compliance with applicable environmental laws and regulations, it is legislatively redundant, of no legislative effect, because the Petitioner must comply with all such laws and regulations. Nor do the conditional use petition and CUP requirements mandate the submission of the requisite environmental information for even a cursory check. The information is unnecessary because this interpretation is contrary to the underlying purpose of the test.

Based on this adverse impacts test's legislative history, § 131.0.B.3.e unmistakably

injects different considerations into the conditional use approval process.⁴ DPZ's February 25, 2013 "Preliminary Comprehensive Zoning Plan: Regulation Highlights," is a legislative signpost to this adverse impact test being one of *zoning and land use compatibility with the neighborhood* in which the proposed land use is to be located. In the context of § 131.0.B.3.e, compatibility with the neighborhood includes the proposed land use's compatibility with "sensitive environmental areas" like streams and stream buffers. In other words, this limited legislative history recognizes the test is not a duplicative, superfluous review of a proposed land use's compliance with regulated environmental protection for "sensitive environmental areas." If this interpretation applied, opponents to a proposed conditional use could transform a hearing into a premature and lengthy challenge to environmental compliance, which as a matter of law is assigned to specific county, state and federal agencies for review later in the development process. Certainly the Hearing Examiner lacks jurisdiction to consider such challenges. Critically, federal, state and county laws and regulations may preempt the Hearing Authority from considering these challenges and, significantly, from imposing certain mitigation measures/conditions of approval, if preempted.

In the general context of a proposed conditional use's proximity to a sensitive environmental area—the neighborhood of the proposed land use—proof of compliance may implicate the need for more studied information from petitioners and a more nuanced review

⁴ Board of Appeals Case No. 15-024C&V (decided May 5, 2016) contains a similar analysis of the scope and nature of review under § 131.0.B.3.f, which tests for adverse impacts on historic sites, and which the Hearing Examiner reasoned is not limited to sites in the county's historic sites inventory, but rather has broader application to ensure the proposed land use's compatibility within the neighborhood.

from DPZ and the Hearing Authority, when applicable. Turning to the specific proposed use, a Bulk Firewood Processing operation, what atypical adverse impacts do we look for when testing for "compatibility" compliance with § 131.0.B.3.e where the Amended Primary Site abuts a stream buffer and stream? Furthermore, if there are atypical adverse impacts, what permissible conditions of approval are warranted to mitigate them so that the petition may be approved?

To answer this, we need to know more about the actual operation of the proposed Bulk Firewood Processing use. More detail about the land use is necessary. There being an existing unlawful operation on the Property, DPZ could have conducted a visual inspection to assess the operation. DPZ staff may have observed debris, wood waste and wastewater being generated (as seen in Petitioner's video Exhibit) or other conditions. The GIS image on Page 4 of the TSR shows large logs placed along the pond, an indication that the use may have some effect on this water body. Such visual evidence might have suggested the need for a specific type of fence to mitigate potential wood/water waste migration into the sensitive environmental area abutting the Site. With more detail, including the stream classification, the Hearing Examiner could examine whether the location of the Site or a use area nearest the sensitive environmental area should be reduced or reconfigured to mitigate atypical impact and which would be imposed as a condition of approval. With more detail, the Hearing Examiner could examine whether the specific use areas of the Bulk Firewood Processing operation in the Amended Primary Site, should be revised and fixed.

Petitioner should have provided a better description of the operation in the context of its environmental setting to demonstrate compliance with this test. Had Petitioner provided a

fuller description, any necessary mitigation could have been imposed as an approval condition. Absent details about the proposed operation, the Hearing Examiner must conclude Petitioner has not met its burden of proof as to compliance with § 131.0.B.3.e. To echo the Hearing Examiner's general concerns in Part I, the information provided in the petition and the Amended Plan is too scant.

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

There are no known historic sites in the vicinity.

III. Specific Criteria for Sawmills, Bulk Firewood Processing, Mulch Manufacture, or Soil Processing (§ 131.0.N.46)

Because the Petition and Amended Plan does not comply with the general standards for conditional uses, the Petition must be denied. For this reason, the Hearing Examiner does not review the petition for compliance with § 131.0.N.46.

IV. A Final Note

PlanHoward 2030 and the Howard County Zoning Regulations fully support conditional uses on ALPP property. Business operations like Bulk Firewood Processing support and complement these working farm properties. The Hearing Examiner recognizes small business owners like Petitioner, who is not a Property owner, as potentially important contributors to the economic viability of an ALPP farm if there is no undue harm on the neighborhood, which here includes existing and potential future residential properties and a stream buffer and stream.

For these reasons, the Hearing Examiner wrestled with this decision and explored at length whether the petition could be granted subject to some stiff approval conditions: requiring Petitioner go through the site development plan approval process, with no possibility of waiver; requiring the proposed Access to be relocated outside the shared driveway area (implicating a possible new entrance) with the resultant possible reduction in the square footage of the Amended Primary Site, and requiring the relocation or elimination of a portion of the proposed Amended Primary Site to ensure environmental compatibility. After weighing this option, the Hearing Examiner concluded this alternative could become very costly and there is no guarantee DPZ would ultimately approve the site development plan.

Petitioner had opportunity to revise the petition and CUP to respond to the TSR's concerns in conjunction with the Hearing Examiner's instruction to Petitioner to amend the CUP to include the proposed Access as part of the conditional use site. The Hearing Examiner further observes this petition was submitted to abate a Notice of Zoning Violation issued to the person/s responsible for 13300 and 13370 Frederick Road. For reasons not fully understood by the Hearing Examiner, such "abatement" petitions are habitually brief in their description of the proposed conditional use and contain CUPs with limited information about the site, making review problematic and exposing petitioners to further enforcement action. This was another reason for my plan amendment instructions to Petitioner at the outset of the November 23, 2015, to aid Petitioner in the effort to bring the Property into compliance by obtaining conditional use approval.

ORDER

Based upon the foregoing, it is this **17th day of May 2016**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petition of Streaker Firewood, LLC, (Petitioner) for a Bulk Firewood Processing conditional use in an RC-DEO (Rural Conservation-Density Exchange Option Overlay) zoning district, is **DENIED**.

HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER
Michele L. Farris

Date Mailed: _____

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 calendar 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.