

IN THE MATTER OF	:	BEFORE THE
<b>CHAD ZIRK</b>	:	HOWARD COUNTY
	:	BOARD OF APPEALS
Petitioner	:	HEARING EXAMINER
	:	BA Case No. 17-012C
		Modification of Conditions of Approval
		for BA Case No. 16-016C&V

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### DECISION AND ORDER

On September 19, 2017, 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 Chad Zirk to modify an approved Landscape Contractor conditional use in an RC-DEO (Rural Conservation: Density Exchange Option) zoning district, in accordance with Howard County Zoning Regulations (HCZR) § 130.0.H.4.

The Petitioner certified to compliance with the advertising and posting requirements of the Howard County Code. Thomas Coale, Esq., represented the Petitioner. Robert Vogel testified in support of the petition. No one appeared in opposition to the petition.

The primary subject property is located in the 4<sup>th</sup> Election District on the north side of Woodbine Road about 870 feet west of A.E. Mullinix Road. It is identified as Tax Map 0034, Grid 0015, Parcel 362. The primary subject property is known as 2060 Woodbine Road (the Property). A portion of the driveway access conditional use site is located on Parcel 504, which according to SDAT is identified as Tax Map 0007, Grid 0021, Parcel 504 and known as 2070 Woodbine Road. The Petitioner currently resides at 2070 Woodbine Road.

I.

**BACKGROUND: BA 16-016C&V**

The Hearing Examiner on December 23, 2016 granted the petitions of Chad Zirk for a Landscape Contractor conditional use and related variances in an RC-DEO (Rural Conservation: Density Exchange Option) zoning district subject to 15 conditions of approval:

1. The Conditional Use and Variance shall apply only to the uses and structures as described in the petition, the Amended Plan, and the Findings of Fact and not to any other activities, uses, structures, or additions on the Property and as subject to all conditions of approval.
2. The approved hours of operation are 6:30am to 6:00pm, Monday through Saturday.
3. A maximum of 15 employees, including the Petitioner, is approved.
4. The entire perimeter of Area 1 shall be fenced. The fence shall be compliant with HCZR § 128.0.A.9 and shall be erected no later than 30 calendar days upon final inspection of the building in Area 1.
5. Equipment and vehicles to be used and/or stored on the site will include only the following, or similar machinery: two chip trucks, two chippers, a spare chipper, two trailers, and a mini-skid stored on the trailer attached to the truck, a log truck, and a log trailer. When the work crew increases to 15, two additional trucks are approved.
6. Petitioner shall provide an appropriately sized dumpster within Area 1. The size and location of the dumpster shall be depicted on the Site Development Plan.
7. Petitioner shall obtain all permits, including a building permit for the equipment repair structure in Area 1 and any required fence permit.
8. The Landscape Contractor operation shall comply with the Howard County Noise Ordinance.
9. No mulching or wood chipping or any type of chipping or processing of wood is permitted within any part of the Conditional Use Site. No mulching or chipping associated with the approved Landscape Contractor use shall be performed elsewhere on Parcels 362 or 504.
10. No Bulk Firewood Processing shall be conducted within the Conditional Use site or on Parcels 362 or 504.
11. Petitioner shall submit a Site Development Plan for review and approval. This requirement for Site Development Plan approval may not be waived. No alternative compliance is permitted. The Site Development Plan shall denote Areas 1 and 2 and their square footage, which shall be noted as the Conditional Use Site, the location of all parking areas, paving surface materials, and the location of all vehicle and equipment parking/storage areas. Seven employee parking spaces shall be noted on the Site Development Plan. The Site Development Plan shall also specify the type of materials/supplies to be stored within Area 1, their location and manner of storage and the location and size of contained storage areas for the wood chipping material brought back to the site for long-term storage. These storage areas shall comply with all state and county laws and regulations. No open storage of chipped wood is permitted.
12. The Site Development Plan shall comply with the Bureau of Environmental Health's comment: "The proposed conditional use plan shows the vehicle and equipment storage area overlapping a large portion of the sewage disposal area. The sewage disposal area must remain free from buildings and any other

permanent or physical objects, and may not be disturbed by earth moving, compaction, tree removal or grading."

13. The Site Development Plan shall contain a note stating a Landscape Contractor Conditional Use and Variances were granted in BA No. 16-016C&V, decided December 15, 2016, for Parcels 362 and 504. The note shall list all approval conditions.

14. Pursuant to Howard County Zoning Regulations § 131.0.1.2, the approved Conditional Use shall not commence until all required building permits are issued.

15. The use-in-common easement shall be recorded in the Land Records of Howard County prior to submission of the Site Development Plan. The Site Development plan shall reference the easement recording liber and folio.

On request for reconsideration, the Hearing Examiner on January 17, 2017 modified Approval Condition #11 to read as follows.

11. Petitioner shall submit a site development plan for review and approval. This requirement for site development plan approval may not be waived. No alternative compliance is permitted. The site development plan shall denote Areas 1 and 2 and their square footage, which shall be noted as the Conditional Use Site, the location of all parking areas, paving surface materials, and the location of all vehicle and equipment parking/storage areas. Seven employee parking spaces shall be noted on the site development plan. The site development plan shall also specify the type of materials/supplies to be stored within Area 1, their location and manner of storage and the location of all chipped wood materials brought back to the site for long-term storage. All storage areas and the manner of all materials/supplies storage shall comply with state and county laws and regulations.

#### **The Matter of a New Residence on Parcel 364**

Mr. Vogel explained Mr. Zirk plans to build a new residence on Parcel 364 but was not ready to begin construction in the same timeframe as establishing the conditional use. As the Hearing Examiner further understands the history behind the submission of this petition, the Department of Planning and Zoning on becoming aware of Mr. Zirk's intention to one day build the residence informed him through Mr. Vogel of the need obtain approval for it through a conditions of approval modification petition. Hence the inclusion of this statement on p.3 of the approval modifications petition: "Petitioner has been notified by the Department of Planning and

Zoning that in order to reserve the right to build a residence on the Property, he will need to have the location of the residence identified on the Conditional Use plan. Petitioner has not yet designed the residence but seeks to have the location of the house approved so that he may continue with the Site Development Plan process in accordance with the Decision and Order."

The November 7, 2017 hearing on the petition was a colloquy between Mr. Coale, Mr. Vogel, and the Hearing Examiner on DPZ's position. The Hearing Examiner noted the "uniqueness" of the department's stance, explaining her recent review of approval conditions modification petitions in BA 16-026C included not one approval condition modification to accommodate a dwelling, which is a principal use permitted as a matter of right in the RC and other residential zoning districts. For this reason, the Hearing Examiner requested DPZ to update the record pursuant to Hearing Examiner Rule 10.4 to "identify the provision in the Zoning Regulations requiring a potential future residence that is not part of a conditional use site to be shown on a conditional use plan and/or why the department is imposing this requirement."<sup>1</sup>

DPZ's October 18, 2017 response stated:

Condition of Approval No. 1, states "The Conditional Use and Variance shall apply only to the uses and structures as described in the petition, the Amended Plan, and the Findings of Fact and not to any other activities, uses, structures, or additions on the Property and as subject to all conditions".

The Petitioner proposes to construct a single-family detached dwelling that was not depicted on the Amended Plan. Therefore, the Petitioner requests to modify Condition of Approval No. 1 and has submitted a new plan that shows a 60-foot by 75-foot single-family detached dwelling.

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<sup>1</sup> Rule 10.4. Referral to DPZ. The hearing examiner may at any time before making a decision refer an issue in a case to DPZ for the purpose of clarifying or updating the record. DPZ's response will be in writing. Before making a decision, however, the hearing examiner will afford all parties an opportunity to comment on or challenge DPZ's response.

### **Preliminary Conclusions of Law**

The Rule 10.4 referral was opportunity for DPZ to ground its determination that a use permitted as a matter of right on the same Property as an approved conditional use site required modified approval condition language in some provision of the HCZR. The circular rationale does not assist the Hearing Examiner in her evaluation of the petition, which cost Mr. Zirk some \$1700. The general location of the residence is some distance from the approved conditional use site and has no bearing on Petitioner's obligation to establish and operate the landscape contractor operation in conformance with the petition and amended plan.

As evaluated below, the HCZR § 131.0.H.4 petition requirements for modifying approval conditions imposed in a Decision and Order are specific to the approved conditional use and the public hearing held on the proposed modification is limited to consideration of the requested modification to a condition of approval. These original conditions of approval by law must relate back to the review of standards for approval. Thus, in BA 16-016C&V the Hearing Examiner imposed 15 conditions of approval to ensure compliance with the general standards for conditional uses contained in HCZR § 131.0.B.2 and the specific standards for landscape contractor conditional uses contained in § 131.0.N.32. None of these 18 standards bear on a residential dwelling permitted as a matter of right on the same lot as a landscape contractor use. DPZ therefore improperly read Approval Condition #1 as requiring the dwelling to be shown on the plan. Approval Condition #1 is boilerplate language to the effect that the petitioner is bound to establish and operate the approved conditional use as approved and shown on the conditional

use plan. The technical staff report (TSR) implicitly recognizes a residence/dwelling permitted as a matter of right has no bearing on the operation of the landscape contractor use through the staff evaluation of compliance with HCZR § 131.0.H.4.a.

The Petitioner submitted a revised Conditional Use and Variance plan, depicting the location of a proposed single-family detached dwelling, in the same format and including the same information as the Conditional Use petition. The Petitioner did not indicate which condition is to be modified. However, DPZ finds that modifying Condition of Approval #1 to allow a single-family dwelling is consistent with BA-16-016C because single-family detached dwellings are permitted as a matter of right in the RC zoning district *and the location of the building does not appear to impact the approved Landscape Contractor use.*

Emphasis added. This is topsy-turvy reasoning. If Mr. Zirk decided to build his house within the approved conditional use site, he would be required to petition for an amendment to the approved conditional use plan. Even more, DPZ's position is at odds with its recent standpoint in BA 16-026C, a modification of conditions of approval petition where DPZ staff recommended denial, wrongly, in pertinent part because the petition included a plan modifying the area of the conditional use site.

For these reasons, the Hearing Examiner conferred with Mr. Zink during the hearing to devise a practical solution to accommodate his desire to construct a residence on the dwelling without incurring additional costs. One alternative was to dismiss the petition, but this offers Mr. Zirk no relief. The agreed upon equitable alternative was to modify the conditions of approval as set forth in the Order section below.

## **II. REVIEW FOR COMPLIANCE WITH HCZR § 131.0.H.4**

The purpose of this review is accommodate the proposed modified conditions of approval

as an equitable alternative to a dismissal of the petition, which was filed on DPZ's instruction.

**a. A petition for modification of conditions shall be submitted in the same format and include the same information as a Conditional Use petition, clearly indicating the approved Conditional Use, the requested modifications, and the reasons for the request.**

The petition for modification of conditions was submitted in the same format and includes the same information as a conditional use petition.

**b. A petitioner shall certify that a copy of a request for modification of a condition to a Conditional Use Decision and Order has been sent by certified mail to adjoining property owners identified in the records of the Maryland Department of Assessments and Taxation and the parties of record, whose addresses shall be maintained by the secretary to the Hearing Authority.**

Petitioner submitted copies of certified mail sent to adjoining property owners and the parties of record. These are located in the official file.

**c. The Hearing Authority shall hold a public hearing in accordance with the procedures for a Conditional Use petition. The public hearing shall be limited to consideration of the modification requested by the petitioner.**

A public hearing was held on September 19, 2017 and limited to consideration of the modifications requested by Mr. Zirk.

**d. The Hearing Authority shall issue a written decision either upholding or modifying a condition imposed in the original Decision and Order.**

For equitable reasons, the Hearing Examiner has determined to grant the petition to modify multiple conditions of approval specific to the Landscape Contractor conditional use granted in BA 16-016C&V.

**e. After a decision is made, a new petition requesting modification of any of the conditions of approval shall not be accepted for at least 24 months after the date of the decision modifying or upholding the conditions of the original Decision and Order.**

This standard is included as a condition of approval.

**ORDER**

Based upon the foregoing, it is this **30<sup>th</sup> Day of October 2017**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of Chad Zirk to modify conditions of approval and the approved conditional use and variance plan granted in BA 16-916C&V for a Landscape Contractor conditional use in an RC-DEO (Rural Conservation: Density Exchange Option) is **GRANTED**;

**Provided, however, that:**

1. The Conditional Use and Variances shall apply only to the Landscape Contractor use and structures as described in the petition, the Amended Plan in BA 16-016C&V, and the Findings of Fact in that decision and order, and not to any other activities, uses, structures, or additions on the Property and as subject to all conditions of approval.
2. The approved hours of operation for the Landscape Contractor operation are 6:30am to 6:00pm, Monday through Saturday.
3. A maximum of 15 employees, including the Petitioner, is approved.
4. The entire perimeter of Area 1 shall be fenced. The fence shall be compliant with HCZR § 128.0.A.9 and shall be erected no later than 30 calendar days upon final inspection of the building in Area 1.
5. Equipment and vehicles to be used and/or stored on the site will include only the following, or similar machinery: two chip trucks, two chippers, a spare chipper, two trailers, and a mini-skid stored on the trailer attached to the truck, a log truck, and a log trailer. When the work crew increases to 15, two additional trucks are approved.
6. The plan submitted for post-conditional use approval processing shall denote Areas 1 and 2 and their square footage, which shall be noted as the Conditional Use Site, the location of all parking areas, paving surface materials, and the location of all vehicle and equipment parking/storage areas. Seven employee parking spaces shall be noted on the plan. The plan shall also specify the type of materials/supplies to be stored within Area 1, their location and manner of storage and the location of all chipped wood materials brought back to the site for long-term storage. All storage areas and the manner of all materials/supplies storage shall comply with state



and county laws and regulations.

7. Petitioner shall provide an appropriately sized dumpster within Area 1. The size and location of the dumpster shall be depicted on the post-conditional use approval processing plan.

8. A residential structure is a permitted use on Parcel 362. It is not part of the approved Landscape Contractor conditional use site or use and is shown on the BA 17-017C Conditional Use Plan for informational purposes only.

9. The petitioner is eligible to submit an Alternative Compliance petition in lieu of a Site Development Plan.

10. Petitioner shall obtain all permits, including a building permit for the equipment repair structure in Area 1 and any required fence permit.

11. The Landscape Contractor operation shall comply with the Howard County Noise Ordinance.

12. Any mulching or wood chipping or any type of chipping or processing of wood shall comply with state and county laws and regulations.

13. No Bulk Firewood Processing shall be conducted within the Conditional Use site or on Parcels 362 or 504.

14. Pursuant to Howard County Zoning Regulations § 131.0.I.2, the approved Conditional Use shall not commence until all required building permits are issued.

15. The use-in-common easement shall be recorded in the Land Records of Howard County prior to submission of the Site Development or Alternative Compliance Plan. The plan shall reference the easement recording liber and folio.

**HOWARD COUNTY BOARD OF APPEALS  
HEARING EXAMINER**



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**Michele L. LeFaivre**

**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.**