

**BEFORE THE MONTGOMERY COUNTY  
BOARD OF APPEALS  
OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS  
Stella B. Werner Council Office Building  
Rockville, Maryland 20850  
(240) 777-6660**

**IN THE MATTER OF: ROBERT PACANO** \*

**D/B/A WOODSTONE GROUP, LLC** \*

Petitioner \*

Jose Roberto Pacano \*

Mohammad Razavi \*

For the Petitioner \*

David C. Gardner, Esquire \*

Attorney for the Petitioner \*

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Board of Appeals No. S-2761  
(OZAH Case No. 10-11)

Before: Martin L. Grossman, Hearing Examiner

**HEARING EXAMINER'S REPORT AND RECOMMENDATION**

**TABLE OF CONTENTS**

	<b>Page</b>
I. STATEMENT OF THE CASE .....	2
II. FACTUAL BACKGROUND .....	4
A. The Subject Property and the General Neighborhood .....	4
B. Proposed Use.....	7
C. The Environment .....	15
D. The Master Plan .....	19
E. Community Concerns.....	20
III. SUMMARY OF THE HEARING .....	20
IV. FINDINGS AND CONCLUSIONS .....	23
A. Inherent and Non-Inherent Adverse Effects .....	23
B. General Standards .....	26
C. Specific Standards: Landscape Contractor.....	31
D. General Development Standards.....	34
V. RECOMMENDATIONS .....	37

## I. STATEMENT OF THE CASE

On October 27, 2009, Petitioner, Robert Pacano, d/b/a Woodstone Group, LLC, filed a petition for a Landscape Contractor Special Exception pursuant to Zoning Ordinance §59-G-2.30.00.<sup>1</sup> Petitioner seeks the special exception to continue operating an established landscaping business<sup>2</sup> on a 4.5 acre site located at 28621 Ridge Road, Mt. Airy, Maryland, in the RDT Zone. The subject site is located on Parcel 233, in a Primary Management Area and is subject to the Damascus Master Plan. Landscape contractors are permitted by special exception in the RDT Zone.

The Board of Appeals initially scheduled a hearing in this matter for April 5, 2010, before the Hearing Examiner. Exhibit 13(b). At the request of the Petitioner (Exhibit 15), the hearing date was removed from the calendar by notice issued on February 18, 2010, so that Petitioner could amend the petition and work with the Technical Staff of the Maryland-National Capital Park and Planning Commission to satisfy environmental concerns. Exhibit 16. Because the case had not proceeded in a timely manner, the Hearing Examiner sent Petitioner's counsel a letter on October 11, 2013, indicating that the case must either proceed with a hearing or be withdrawn. Exhibit 17.

Petitioner elected to proceed with the case (Exhibit 18) and thereafter filed revised plans (Exhibit 19). On April 10, 2014, Petitioner filed further revisions in his plans and in his proposed Statement of Operations (Exhibits 30 and 30(a)-(f)). He further amended his Statement of Operations on April 22, 2014 (Exhibit 31(a)). With the consent of Technical Staff and the Petitioner, a new hearing date of June 27, 2014 was noticed, along with a motion to amend the petition. Exhibit 32.

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<sup>1</sup> The Petitioner's name is listed on the application as "Robert Pacano, d/b/a Woodstone Group, LLC." The property owner's name is listed as "Jose R. Pacano." Mr. Pacano confirmed in a writing (Exhibit 46) and under oath at the hearing (Tr. 7) that he is the property owner and that he is known both as Robert (sometimes "Roberto") Pacano and as Jose R. Pacano.

<sup>2</sup> The business has been operating without benefit of a special exception since 2006, when Mr. Pacano purchased the property. He filed the instant petition after being informed by the County that a special exception was required. Tr. 22-23.

Technical Staff filed its report recommending approval of the petition with conditions on May 30, 2014 (Exhibit 34).<sup>3</sup> By letter dated June 18, 2014 (Exhibit 38), the Montgomery County Planning Board advised the Board of Appeals that it had voted unanimously on June 12, 2014, to approve the Final Forest Conservation Plan for the site, and to recommend approval of the special exception petition, with the conditions listed by Technical Staff, as amended in the Planning Board letter and in an errata sheet (Exhibit 37(a)).<sup>4</sup>

The Hearing went forward as scheduled on June 27, 2014, with Petitioner represented by David Gardner, Esquire. The only witnesses were Petitioner and Mohammad (Mike) Razavi, a Civil Engineer. Petitioner submitted an Affidavit of Posting (Exhibit 39) and a copy of the amended consent agreement he proposes to sign with the Department of Permitting Services (DPS) regarding limits on the use of the property due to its inadequate septic system (Exhibit 40(a)). DPS's Manager of the Well and Septic Section, Gene von Gunten, has agreed to execute the agreement if the special exception is approved by the Board of Appeals. Exhibit 40(b).

There was no opposition at the hearing, but the record was held open until July 7, 2014 to give Petitioner an opportunity to file some additional documentation. On June 30, 2014, Petitioner filed the final revision to the Statement of Operations, as agreed at the hearing (Exhibit 46(a)), and on July 7, 2014, he filed the Planning Board's resolution approving the Final Forest Conservation Plan, with conditions, and a tree variance (Exhibit 47). The record closed, as scheduled, on July 7, 2014.

As will appear more fully below, Petitioner has met all of the requirements for this special exception, and the Hearing Examiner therefore recommends that it be granted.

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<sup>3</sup> The Technical Staff Report, Exhibit 34, as amended in Exhibits 37(a) and 38, is frequently quoted and paraphrased herein.

## II. FACTUAL BACKGROUND

### A. The Subject Property and the General Neighborhood

As mentioned above, the 4.5 acre subject site is located at 28621 Ridge Road, Mt. Airy, Maryland. It is on the east side of Ridge Road (MD 27), approximately 2,160 feet north of its intersection with Kemptown Road (MD 80), in the RDT Zone. The property is identified as Parcel P233 on Tax Map FY-53, and its location can be seen on the Vicinity Map provided by Technical Staff (Exhibit 34, p. 4).



The Property is located entirely within the Patuxent River Watershed Primary Management Area, and is bisected by a stream and wetlands. In fact, the majority of the Property is located within the stream buffer. Exhibit 34, p. 4.

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<sup>4</sup> To ensure clarity of the record, the Hearing Examiner entered those corrections by ink in the Technical Staff report in the file (Exhibit 34).

Technical Staff reports that the Subject Property is irregularly shaped and the topography slopes to the east (front to back) rising up at the eastern most (rear) portion of the Property where the forested area is located. The site is depicted in an aerial photograph from the Technical Staff report (Exhibit 34, p. 5):



The subject site is well-described in the Technical Staff report (pp. 5-6):

The Property contains 0.95-acre of forest and is currently utilized as a landscape contractor business. Existing improvements include a two-story frame house that serves as an office for the business, a two-story barn (30.5'X 40") that is used to store three trailers, an equipment storage shade (18'X12') and a smaller shed also used for storage purposes, gravel parking areas, and driveways.

The Property also contains an existing farm-pond. An unnamed stream enters the site along the north central Property line and flows in a southerly direction to the farm pond. The existing house on the Property is served by well and septic . . . [the use of which will be restricted if the special exception is granted]. The Property is accessed from Ridge Road by an 83-foot wide gravel driveway apron that is connected to the two parking spaces in front of the two-story house (located 50 feet from the street). The driveway apron narrows to a 24-foot wide driveway that extends to the rear of



the property and widens again as it approaches the area where most of the business activities are conducted. A gravel parking area for trucks, trailers and employee vehicles is located in this area. The large barn, the equipment storage, and the farm-pond are also located in the same area.

Technical Staff also provided photographs of existing improvements on the site (Ex. 34, p. 5):



Because this is a rural area, Technical Staff defined the general neighborhood as the uses within a 1,500 feet radius of the Subject Property, as shown below:



The Hearing Examiner accepts this definition of the neighborhood. Staff reports that “[t]he neighborhood is predominantly agricultural with single-family detached residential homes on large estate type lots and unimproved parcels, all in the RDT Zone. The Subject Property is surrounded with residential properties to the north, south, and east. To the west, across Ridge Road, are located a 137 acre farm and residential homes.” Exhibit 34, p. 6.

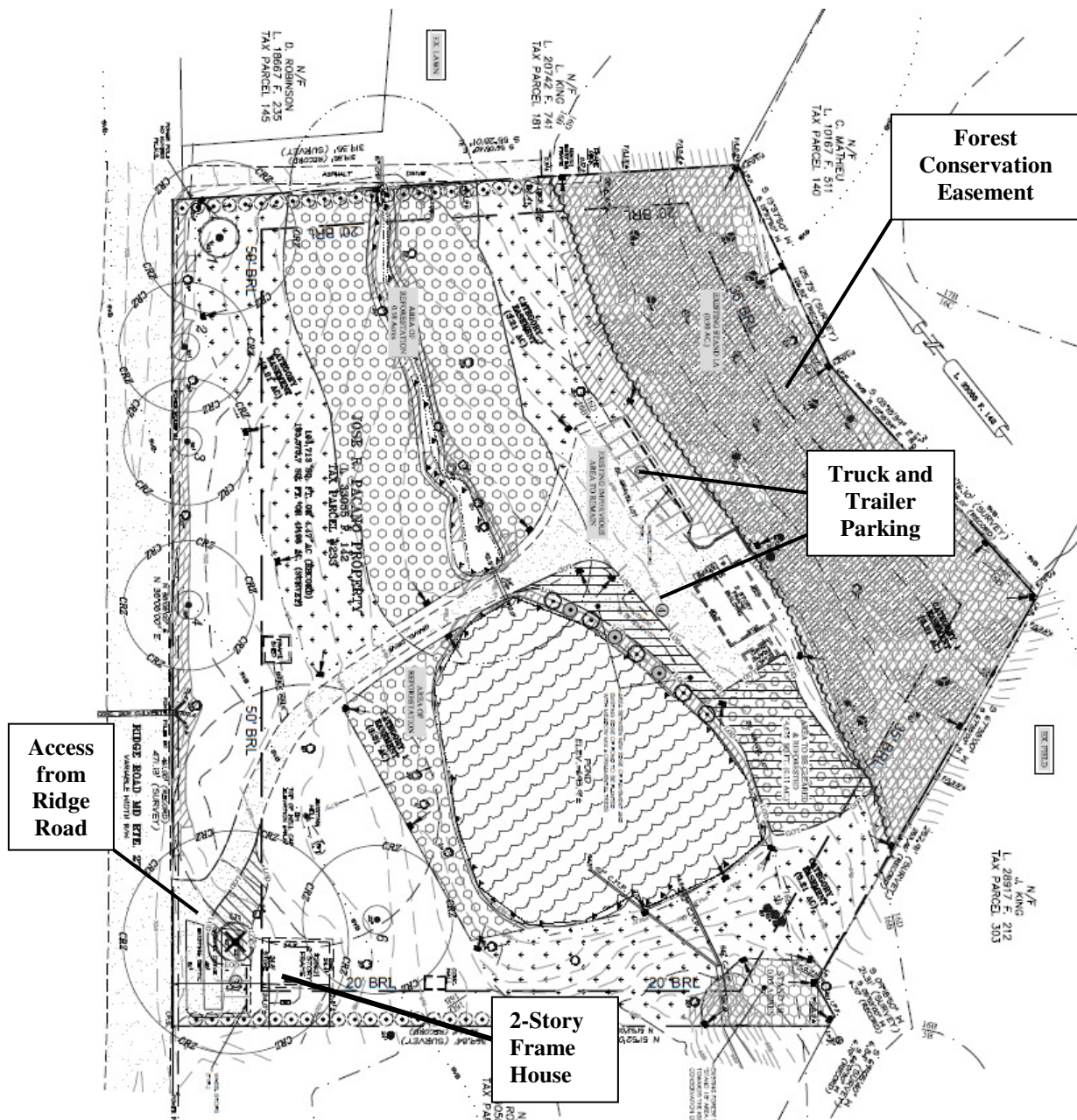
### **B. Proposed Use**

Petitioner seeks the special exception to continue operating an established landscaping contractor business, but he has revised the special exception site, landscape /lighting, and Forest Conservation plans to address issues and concerns that were raised by Technical Staff. The proposed operation is described in the Final Amended Statement of Operations (Exhibit 46(a)), which incorporated all the changes called for by Technical Staff. It is set forth, in its entirety, in Section II.B.3. of this report. In summary, the permitted vehicles, parking spaces, number of employees and hours of operations are as follows:

1. Five trucks and three trailers. The five trucks include two five-ton dump trucks, one one-ton and two two-ton work trucks.
2. The Special Exception proposes a total of 14 parking spaces, including 12 parking spaces located in a gravel area at the rear of the property and two existing spaces located in the front of the existing dwelling.
3. Petitioner will employ up to eight (8) non-resident employees, including the applicant, Jose R. Pacano; and his wife, Rita Pacano.
4. Hours of operation for the landscape contractor business are limited to 7:00 a.m. through 7:00 p.m. Monday through Friday and 8:00 a.m. through 5:00 p.m. on Saturdays.

#### **1. The Site, Landscape and Lighting Plan:**

These main features of the subject site are displayed on the revised Site, Landscape and Lighting Plan (Exhibit 30(f)), which is reproduced on the next page:

**DEVELOPMENT STANDARDS**

ZONE: RDT	REQUIRED/ALLOWED	PROVIDED
Minimum Net Lot Area	40000 Square Feet	195,596 Square Feet (4.5 Acres)
Building Height	50'	20' +/-
Maximum Building Coverage	10%	1. Building 1 - 837 S.F. 2. Building 2 - 1,220 S.F. 3. Shed 1 - 216 S.F. 4. Shed 2 - 240 S.F. Total - 2513 S.F. 1.28%
Minimum Lot Width: At Front Building Line At Street Front	125 Ft. 25 Ft.	460 Ft. 471 Ft.
Setbacks:		
Front	50'	54'
Side	20' 1 Side / 40' 2 Sides	20' / 40'
Rear	35'	35'
Accessory Building Yard Requirements:		
Front or Street Line	50' for any accessory setback	315' (Bldg. 2 & Shed 1) / 50' (Shed 2)
From The Side Lot Line	15'	125' / 678'
Rear	10'	125'

**NOTES:**

1. The development standards shown apply to both existing buildings
2. Accessory building standards are applied to existing shed.

**GENERAL NOTES:**

1. Parcel 233/Address: 28621 Ridge Road, Mt. Airy, MD. 21771
2. Deed Reference: L. 33055, F. 142
3. Zoning: RDT
4. Proposed Use: Landscape Contractor
5. Existing Site Area: 4.50 Acres ( 105,576 Square Feet)
6. Election District: 12th
7. Tax Map: FY53
8. WSSC 200 Map: 240 NW 09
9. Watershed: Patuxent River
10. Water Category: W-6
11. Sewer Category: S-6
12. Parking Spaces Provided: 15 (3 in the front for office, 12 in the rear for trucks)

**SPECIAL EXCEPTION NOTE:**

A SPECIAL EXCEPTION APPLICATION IS BEING FILED FOR THE USE OF THIS PROPERTY AS A LANDSCAPE CONTRACTOR'S BUSINESS. THE PROPOSED USE IS ALLOWED AS A SPECIAL EXCEPTION PER THE MONTGOMERY COUNTY ZONING CODE, CHAPTER 59, SECTION C-9.3, UPON APPROVAL BY THE MONTGOMERY COUNTY BOARD OF APPEALS.



The Petitioner plans to make no alterations or changes to the home, barn, and storage sheds on the property. The gravel area next to the barn will be substantially reduced in size. In particular, the Petitioner will remove all of the gravel area on the south side of the barn, as well as a portion of the gravel area that adjoins the pond on the north side of the barn. A total of 7,039 sq. ft. of gravel will be removed from these areas. When completed, there will be a total of 8,534 sq. ft. of gravel in the parking area next to the barn. There will be a forest conservation easement and considerable reforestation, as will be discussed in connection with the Final Forest Conservation Plan, in Section II. C. of this report.

Technical Staff notes that because the subject property is in an agricultural zone and surrounded with properties also within the agricultural zone, various provisions about screening and landscaping do not apply to the subject application. Exhibit 34, p. 14. Staff also found that there will be no light spillage to the adjacent properties. Outdoor lighting is limited to two motion sensor lights—one mounted (existing) on the existing dwelling to provide lighting for the parking area and another (proposed) to be mounted on the barn structure to provide lighting for the parking area at the rear portion of the Property. Exhibit 34, p. 18.

## **2. Signage:**

A condition agreed to by Petitioner provides that the existing wall sign on the side of the small barn will be removed and that there will be no sign on the property identifying the property as a landscape contractor. Thus, signage is not an issue in this case.

## **3: Operations:**

Operations for the site, as limited by recommended conditions, are set forth in the Final Amended Statement Of Operations (Exhibit 46(a)):

In connection with the business, the Applicant will employ up to eight (8) non-resident employees, including the applicant, Jose R. Pacano; and his wife, Rita Pacano. The business will be operated between the hours of 7:00 a.m. and 7:00 p.m., Monday through Friday. It will also be operated between the hours of 8:00

a.m. and 5:00 p.m. on Saturday. Mr. Pacano and his wife will come to the site, park by the house in the front of the property and operate the business from the office located in the house. Two spaces for parking will be located in front of the house, one of which will be a handicapped accessible space. These two spaces will be strictly used for parking by employees of the business and by customers who may visit the office. At no time will these spaces be used for the parking of trucks or other equipment associated with the landscape contracting operation. The other six off-site employees will come to the site, park in the spaces on the north side of the barn, and drive company vehicles from the site to their work sites each day. The employees car pool to the site with an average of two employees per car. The business will utilize up to five (5) trucks (the business currently has three trucks), which will include one F-150 truck (1 ton truck), two F-250 trucks (two ton trucks), and two F-550 trucks (five ton dump trucks). In addition, the business will utilize three trailers which include one sixteen foot enclosed trailer and two fourteen foot open trailers. The trucks and trailers will be parked outside in the spaces alongside the barn. Additionally, the business will utilize six (6) mowers, including three tractors and three walk behind lawn mowers, plus an assortment of trimmers, blowers, spreaders, aerators, shovels, chain saws, hoses and various and sundry landscaping tools. The business will also utilize one (1) snow plow for the one-ton pick-up truck. All of this equipment will be parked inside the barn.

There are a total of twelve parking spaces in the rear of the site, behind the pond in the gravel area near the barn. Eight of these are located north of the barn, and will be used for parking of the five trucks and three trailers used by the business. Curb stops will be placed at the end of each of these eight spaces. In addition, there are four parallel parking spaces next to the green area alongside the pond to the west of the barn. These will be used for parking by employees of the business, and no trucks or trailers will park in these spaces. The remaining two employees, if they have cars and do not carpool, will park in the spaces vacated by the trucks and trailers that leave the site during the day. This means that up to two of the spaces will be dual use spaces - they will be used for one of the trucks or trailers operated by the business, and when they leave the site for the day, the employee will park in the vacant space. The applicant does not anticipate that this will ever be a problem because most of his employees car pool to the site, and if he ever has six employees visit the site, at least two of his trucks and/or trailers will leave to visit jobs off-site.

A 30' x 40' barn is located in the center of the property and contains approximately twelve hundred square feet. The barn will be used for the storage of equipment used in the business. In addition, a 18' x 12' detached shed is utilized for the storage of equipment. A house is located in the front of the property which contains a toilet which will be available for the use of the employees of the business. This house will also be used as an office in connection with the business, and will not be rented or used as a residence while the property is being used as a landscape contracting business. This condition is necessary because the toilet in the house does not have an adequate septic area to service both a residential use and the landscaping contracting business to be located on the site. Accordingly, the applicant has agreed not to use the house for residential purposes unless the septic field currently on the site is upgraded, which the applicant has no present plans to do. A Consent Order is

already recorded among the Land Records for Montgomery County at Liber 17523, Folio 195, indicating that the existing residential home cannot be expanded because the septic system will not accommodate any expansion of the home. However, Gene Von Gunten, Manager of the Well and Septic Section of the Montgomery County Department of Permitting Services, has agreed that because the proposed use will have a lower projected sewage flow than the single family house use at present, that the agreement can be modified to allow the landscape contracting operation so long as the home is not used as a single family residence. Accordingly, an Amendment to the Consent Order will be recorded to indicate that the home will not be used as a residence for so long as the property is being used as a landscape contracting business. Once this Amendment has been approved by Gene Von Gunten, a copy will be submitted with this application.

The applicant plans to make no alterations or changes to the home, barn, and storage sheds on the property. These structures are shown on the survey attached to the original application in this case.

The gravel area next to the barn will be substantially reduced in size. In particular, the applicant will remove all of the gravel area on the south side of the barn, as well as a portion of the gravel area that adjoins the pond on the north side of the barn. A total of 7,039 sq. ft. of gravel will be removed from these areas. When completed, there will be a total of 8,534 sq. ft. of gravel in the parking area next to the barn. As notes above, parking will be accommodated in eight spaces along the northeast side of the barn, which will be marked by wheel stops at the end of the spaces. In addition, there will be four parallel parking spaces located alongside the meadow area next to the pond.

None of the trucks on the site will be seen from outside the property because of the forest stand at the rear of the property and the area to be reforested on the north side of the stream and the pond. The business will also maintain a small amount of plants and bulk goods for planting on customers' properties. Some mulch and topsoil will be stored on the site, but will be contained in bags and no loose materials will be stored on the site. All of this material will be stored on the gravel area on the north side of the barn at the rear of the site.

Any maintenance of the trucks and equipment utilized will take place within the 30' x 40' barn.

Both the planning Board's recommended conditions and Petitioner's Final Amended Statement of Operations have been incorporated into the Hearing Examiner's recommendations in Part V of this report.

#### **4. Public Facilities and Parking:**

##### *a. Public Facilities:*

The adequacy of transportation facilities was addressed by a letter from Petitioner's counsel (Exhibit 30(d)) and by Technical Staff (Exhibit 34, pp. 19-21). Mr. Gardner's "Traffic Statement" asserts that "the site will only generate a maximum of eight (8) trips during the morning and evening rush hours, [and therefore] no traffic study is required in connection with this application. In addition, at no time has the applicant experienced any traffic hazards or congestion where the driveways exit onto Ridge Road. This is a rural highway which does not experience the normal congestion levels of other roadways in Montgomery County."

Technical Staff reported (Exhibit 34, p. 19):

Existing public facilities—public roads, storm drainage, fire and police protection are adequate to serve the proposed use. The Application is exempt from the Local Area Transportation Review because it generates less than 30 peak hour trips. As an application in the Damascus Policy Area, it is not subject to Policy Area Mobility Review or Transportation Policy Area Mobility Review according to current Subdivision Staging Policies. The Applicant must obtain a sediment control permit. In addition, the Applicant must submit the approved amended concept agreement into the record of this Application. The Application meets all requirements under the Adequate Public Facilities test.

Staff also found "that the proposed access points and internal traffic/pedestrian circulation system shown on the Special Exception site plan . . . [is] adequate [and the] . . . requested Special Exception will not have an adverse effect on the nearby road system. . . . [Further t]he subject Special Exception is not likely to negatively impact the safety of vehicular or pedestrian traffic." Exhibit 34, p. 21.

With regard to water and sewer service, the issue is more complicated. As explained by Technical Staff (Exhibit 34, pp. 19-20)

The Property is in Water Category W-6 and Sewer Category S-6 indicating that . . . no . . . community water and sewer service is available or planned. The previous owner of the Property had installed a septic system in 1998 without a proper permit. The system was installed on the neighboring property without an easement.

Inspection of the system indicated a malfunction that required a repair of the system based on a Consent Agreement between the owner and the Department of Permitting Services (DPS). In January of 2000, DPS issued a Certification of Sewage Disposal System to allow replacement of the malfunctioning system installed on the adjoining property. The certificate contains the following comments:

“Due to substandard percolation rates and inadequate septic reserve area, the septic system installed under this permit does not meet all current county and state standards. Although this is the best repair possible, there is a greater than normal risk of premature failure of this system. Use of this system and the dwelling it serves is governed by the terms of conditions of a Consent Agreement recorded in the Montgomery County Land Record at Liber 17523, Folio 195 et seq....”

The Application does not propose any exterior changes to the existing dwelling. The dwelling will be used exclusively as an office for the landscape contractor business. The Applicant has stated that the dwelling will not be rented or used as a residence while it is used as office for the business since the house does not have adequate septic service to serve both a landscape contractor's office and a residential use. A revised Consent Agreement has been submitted to DPS for approval [Exhibit 40(a)]. The Applicant has indicated that the amended Consent Agreement is intended to ensure that the existing septic field is not overwhelmed by the landscape contractor use. The septic field has been allowed to be 75 feet from the existing well by the Consent Agreement. The well is located in the north side yard approximately 70 feet from the existing dwelling. By e-mail dated May 20, 2014 the Well and Septic Section of DPS has indicated that the amended agreement is acceptable to the DPS, pending any revisions made necessary by the Hearing Examiner's decision. [Exhibit 40(b)].

The Hearing Examiner has proposed to modify the condition suggested by Technical Staff to ensure that any approval the Board of Appeals may give to special exception and the provisions of the modified Consent Agreement are carried out in the final Consent Agreement approved by DPS.

The wording of the proposed condition in Part V of this report is as follows:

The Applicant must submit a copy of the approved and executed amended Consent Agreement with the Department of Permitting Services (with no substantive change from draft in Exhibit 40(a)) into the record of this application within 30 days of the effective date of the Board of Appeals decision.

Based on the findings of DPS and Technical Staff, the Hearing Examiner is satisfied that the terms of the modified Consent Agreement will provide adequate sewer service and will sufficiently protect the environment.



b. Adequacy of Parking Provided:

Zoning Ordinance §59-D-2.30.00(3) provides:

*(3) The number of motor vehicles and trailers for equipment and supplies operated in connection with the contracting business or parked on site must be limited by the Board so as to preclude an adverse impact on adjoining uses. Adequate parking must be provided on site for the total number of vehicles and trailers permitted.*

In response to this requirement, Petitioner provided a listing in his Final Amended Statement of Operations (Exhibit 46(a)) of the motor vehicles and trailers he intends to park on site in connection with the contracting business: There may be up to five trucks and three trailers (although the business currently has three trucks). The five trucks would include an F-150 truck (1 ton truck), two F-250 trucks (two ton trucks), and two F-550 trucks (five ton dump trucks). The trailers would include one sixteen foot enclosed trailer and two fourteen foot open trailers. The trucks and trailers will be parked outside in the spaces alongside the barn.

The Special Exception proposes a total of 14 parking spaces, including 12 parking spaces located in a gravel area at the rear of the property and two existing spaces located in the front of the existing dwelling. The spaces to the rear will be used for parking of the five trucks and three trailers used by the business, as noted in the Site Plan depicted on page 8 of this report. The two spaces in front of the existing, 2-story dwelling will be strictly used for parking by employees of the business and by customers who may visit the office. They are depicted in a photo from the Staff report (Exhibit 34, p. 22):



Technical Staff states (Exhibit 34, pp. 22-23):

Areas for parking and loading of trucks and equipment as well as other on-site operations are located a minimum of 50 feet from any property line. With the exception of the existing dwelling that serves as an office for the business, most of business related activities including the parking areas are located deep into the interior of the Property removed from the views of passing motorists and adjoining properties.

The existing two-car space is part of the existing detached single family structure and will not be altered or changed except for a handicapped parking delineation of one of the spaces. The driveway access used by the trucks and trailers that leads to the parking area at the rear of the property is distanced from adjoining properties by over 50 feet. Adequate buffering and screening is provided in the form of existing forest, proposed reforestation, slopes, landscaping and substantial distance from nearest residential homes and roads.

Technical Staff concludes (Exhibit 34, p. 17):

The use would not generate a level of traffic that would raise concern for congestion on the streets. The access point is adequate to accommodate the site-generated traffic. The proposal provides for safe, sufficient and orderly internal traffic. Adequate off-street parking spaces are provided to satisfy the needs of the use. The parking areas for the trucks and trailers are adequately distanced and well screened from the adjoining properties and the adjacent road.

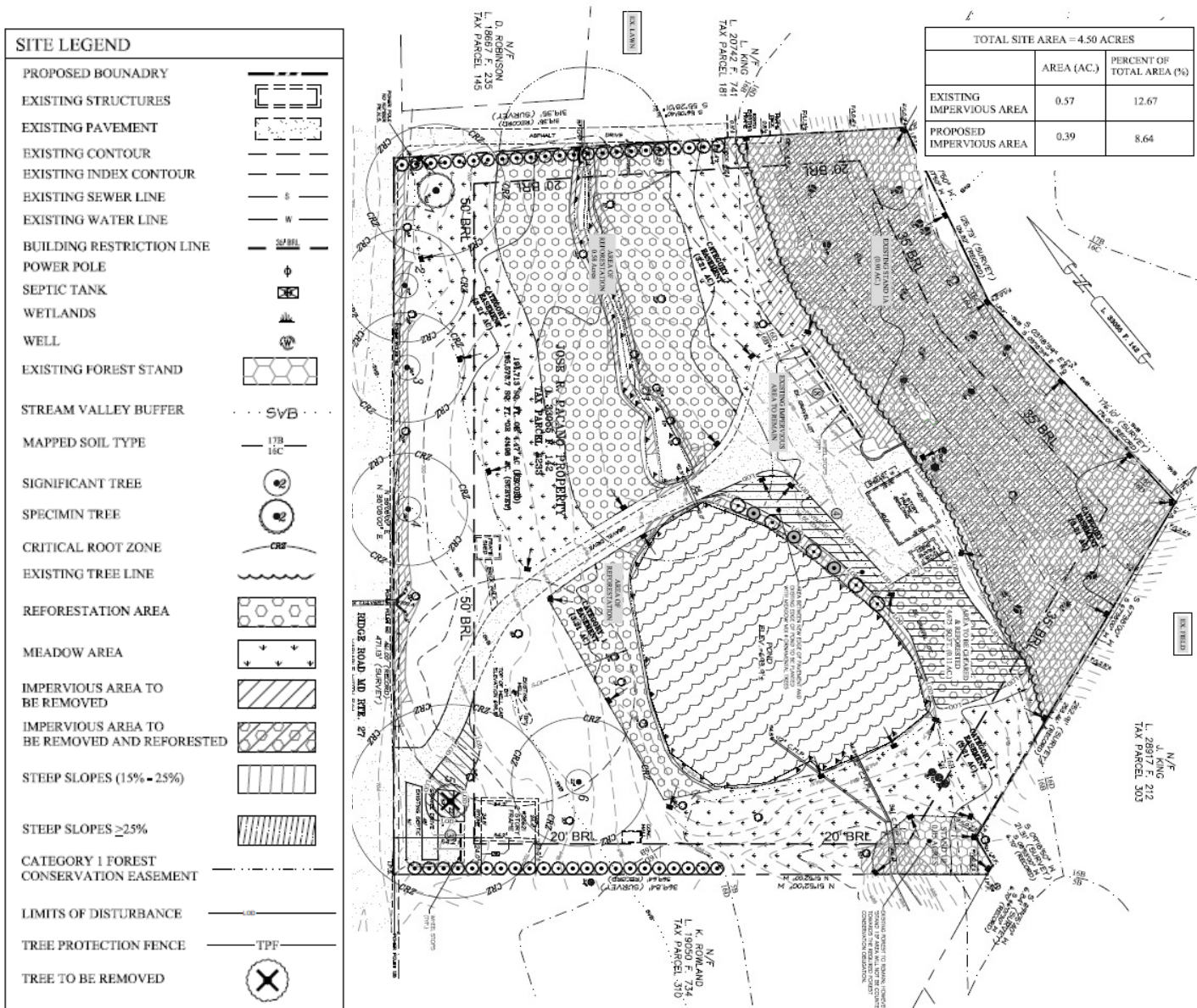
Based on this evidence, the Hearing Examiner finds that there is adequate on-site parking to accommodate the number of vehicles proposed by Petitioner, and that the parking conforms to applicable regulations. The number of permitted vehicles is specified in the conditions proposed in Part V of this report.

### **C. The Environment**

Processing of this application was long delayed over environmental concerns resulting from the fact that the Property is located entirely within the Patuxent River Watershed Primary Management Area, the majority of the property is located within the stream buffer, and the property is bisected by a stream and wetlands. Exhibit 34, p. 4. However, Petitioner ultimately revised the

Special Exception site, landscape /lighting, and Forest Conservation plans to address these issues, and both Technical Staff and the Planning Board now recommend approval, with conditions.

Technical Staff discusses the environmental issues on pages 8 to 11 of its report (Exhibit 34). Staff concluded that “The Application meets the requirements of Chapter 22A of the Montgomery County Forest Conservation Law,” and the Planning Board approved the Final Forest Conservation Plan (Exhibits 30(b)(5) and 43), as well as a tree variance allowing removal of one specimen tree, on June 12, 2014 (Exhibit 47). Significant portions of the Forest Conservation Plan are reproduced below:



Staff reports that the property currently has 0.95 acres of forest of which 0.90 acres is one contiguous stand that encompasses steep slopes on highly erodible soils, and is located along the eastern property boundary. Approximately 0.05 acres of forest which is contiguous to larger off-site forest, is located along the southern Property boundary, south of the pond. Six large trees were identified outside of the existing forest, including two specimen trees. Because the subject site is located entirely within the PMA and approximately 90% of the site is located within the stream buffer, there are severe limits on the use of the property. The property is currently developed and no additional construction is proposed. It contains approximately 25,200 square feet of impervious surfaces, and approximately 19,500 square feet of this impervious area is located within the stream buffer. That includes a barn, two sheds, a gravel parking area and the majority of the gravel driveway. Approximately 5,700 square feet of impervious area is located outside the stream buffer, within the transition area. and includes a house, gravel parking area, and the remainder of the gravel driveway. Exhibit 34, pp. 8-9.

As reported by Technical Staff (Exhibit 34, pp. 9), Petitioner has agreed to reduce the amount of impervious surfaces for the project by removing approximately 8,300 square feet of existing impervious area, including 7,039 square feet of gravel parking area from within the stream buffer and 1,262 square feet of gravel parking area from the transition area. The remaining 16,900 square feet of impervious area is necessary for the continued operation of the landscape contractor business. Thus, the impervious area for the site will be reduced from approximately 12.9 percent to 8.6 percent. “Staff finds that the Applicant has made significant strides to reduce impervious coverage given the constraints of the Property.” Exhibit 34, p. 9.

Petitioner’s Final Forest Conservation Plan calls for 0.70 acres of reforestation and 0.70 acres of native meadow plantings within the stream buffer. These plantings are in addition to the requirements being met for the forest conservation law which include 0.90 acres of forest retention

and 0.10 acres of reforestation within the stream buffer. The Plan protects the portion of the stream buffer that contains the stream, pond, retained forest, planted forest and planted meadow in a Category I conservation easement. The area proposed as a meadow habitat will be protected in a modified easement to allow for annual mowing necessary for the success of this habitat. The remaining stream buffer area will not be protected in a conservation easement and includes the existing impervious features to remain for the landscape contractor business to operate, the area of the embankment for the existing pond, and an area maintained in grass near the house/office along Ridge Road. The area maintained in grass includes the existing well. Exhibit 34, p. 10.

As mentioned previously, the septic system serving the property is not built to current standards; however, the Montgomery County Department of Permitting Services, by Consent Agreement, has allowed the system to continue to serve the existing house provided that the use of the house is limited to serving as an office to the landscape contractor business. Residential use would not be allowed while the house is being used as an office for the business since the septic system does not have the capacity to serve both uses. The Applicant has submitted a revised Consent Agreement to DPS agreeing to the restriction placed on the use of the house. By e-mail dated May 20, 2014, DPS has stated that the amended agreement is acceptable pending any revisions made necessary by the Hearing Examiner's decision. The Hearing Examiner does not recommend any modification of that proposed amended consent decree (Exhibit 40(a)).

Finally, Technical Staff mentions that Petitioner must obtain a sediment control permit because land disturbance will exceed 5,000 square feet. However, DPS has indicated that stormwater management is not required for this application because the proposed disturbance is for the sole purpose of removal of impervious surfaces. Exhibit 34, p. 11.

Based on this record, the Hearing Examiner finds that all environmental issues have been appropriately addressed by Petitioner, and that the actions proposed in support of this application



will result in an improvement for the environment over existing conditions.

#### **D. The Master Plan**

The property in question is subject to the Damascus Master Plan, approved and adopted in June 2006. Since the site is located in the “rural area,” the Master Plan reaffirms the RDT Zone for the area. Master Plan, p. 37. As noted by Technical Staff (Exhibit 34, p. 7), the Master Plan does not have specific recommendations regarding special exceptions for landscape contractors; however, it provides the following recommendations with respect to special exceptions in general within the rural areas (Master Plan, pp. 37-38):

- Endorse and support criteria for evaluation of agriculturally related special exceptions.
- When evaluating compatibility with surrounding land uses, the impact of agricultural related special exceptions in agricultural zones do not necessarily need to be controlled as stringently as the impact of a similar special exception in a residential zone.
- Establish Special Exception guidelines for rural vista protection in the Rural Area of Damascus.

The last bullet point receives special attention in the Master Plan, which provides the following guideline for rural vista protection (page 103):

The visual character of the Rural Areas surrounding Damascus are unique as they are the highest elevations in the County. When special exceptions are proposed in Transition and Rural Areas within the Damascus Master Plan area, their review should take into special consideration the preservation of these long vistas that are part of the unique character of the community. Any proposed land use that would impede those vistas should be discouraged unless it serves an important public purpose.

Petitioner does not propose further development on the subject site, and therefore the subject special exception will do nothing to impinge the rural vistas. Moreover, the special exception use is located in a heavily forested area at the rear of the site and at an elevation lower than the surrounding residential uses. As pointed out by Technical Staff (Exhibit 34, p. 8), the possibility of viewing a long vista from the road is already restricted due to topographical nature of the property and existing forest. Moreover, the use is buffered from the very few adjacent residences by substantial distance, natural topography and wooded areas.

Based on this record, and the fact that the RDT Zone permits landscape contractors as special exceptions (Zoning Ordinance §59-C-9.3(c)), the Hearing Examiner finds that the proposed special exception is consistent with the applicable Master Plan.

### **E. Community Concerns**

Technical Staff reports that no communications have been received from the community either in support or in opposition of the proposed special exception. Exhibit 34, p. 25. This office also did not receive any communications from the public, pro or con; however, Petitioner attached a letter from a neighbor, Lee A. King, Jr., owner of 28701 Ridge Road, Mt. Airy, indicating support. Exhibit 30(b)(7).

## **III. SUMMARY OF THE HEARING**

Petitioner called two witnesses at the hearing, Petitioner Jose Roberto Pacano, and Mohammad (Mike) Razavi, a licensed civil engineer. No support or opposition witnesses appeared at the hearing. At the beginning of the hearing, Petitioner clarified that he is the property owner and that he is known both as Robert (sometimes “Roberto”) Pacano and as Jose R. Pacano. Tr. 7. Petitioner and his attorney, David Gardner, agreed to the conditions set forth by Technical Staff, as amended both by Staff and the Hearing Examiner. Tr. 17-21. Mr. Gardner also introduced the Affidavit of Posting (Exhibit 39), as well as the amended Consent Agreement draft (Exhibit 40(a)), and the e-mail of May 20, 2014, from Gene von Gunten, Manager of the Well and Septic Section of DPS, saying that the Amended Agreement is acceptable to the Department of Permitting Services pending any revisions made necessary by the Hearing Examiner’s decision (Exhibit 40(b)). Tr. 15-16. Petitioner’s attorney also adopted the findings made by Technical Staff and the Planning Board as Petitioner’s own evidence. Tr. 40.

In his opening statement, Mr. Gardner emphasized that a total of 8,301 square feet of impervious surfaces will be removed by Petitioner, “substantially improving the environmental

impact of this property by not only adding forest, adding native meadow, but [by] remov[ing] impervious surfaces. Tr. 25. He also explained that Gene von Gunten, DPS's Manager of Well and Septic stated that he would agree to amend the consent agreement to allow Petitioner to continue to use the house on the subject site as a special exception, with the condition that it not be used for more than eight employees of the business, and that's what is in the amendment to the consent agreement, which is now offered and introduced as Exhibit 40(a). Tr. 29-30.

Mr. Gardner also noted that the Petitioner would use the minimum amount of impervious surfaces necessary to conduct the business. There will be five trucks and three trailers. Those five trucks and three trailers will be parked on the parking area, the eight spaces -- which will be designated with wheel stops, as shown on the site plan. Tr. 35. Two employees are going to park at the house, six are going to go to the back of the property, although Petitioner does not expect six to come and go because the employees almost always carpool. He's likely to have two or three cars, but in the unlikely eventuality that actually all six have a separate vehicle, there are four parallel spaces for them to park, as designated on the site plan. Currently Petitioner has three trucks and three trailers, but he's seeking a maximum of five. Tr. 36-37. Petitioner is not making any changes to any of the structures. The only thing he's doing, construction-wise, is removing gravel, which improves the environmental condition of the site and lessens its impact because he's removing impervious surfaces and adding forest. Tr. 39-40.

1. Mohammad (Mike) Razavi (Tr. 42-90):

Mohammad Razavi testified as an expert in civil engineering. He is a professional engineer, registered in the State of Maryland (License No. 22742). He stated that he provided plans and consulting services in relation to obtaining approval of the forest stand delineation and forest conservation plan, and that he also prepared site plans for this special exception application request.

The NRI/FSD and FCP were also certified by a qualified environmental expert, Michael J. Klebasko. Tr. 42-51.

Mr. Razavi described the history of the application, and testified that the plans evolved to satisfy the environmental concerns raised by Technical Staff. The forest conservation plan was modified to show absolutely what was needed by the applicant to use the site for his business, and the amounts of reforestation, meadow and impervious areas were determined, bringing the remaining impervious area down to about 8.64 percent. Mr. Razavi detailed the environmental features on the subject site and introduced a copy of the forest conservation plan with the easement area outlined in pink (Exhibit 43) and an Impervious Area Exhibit (Exhibit 44). Tr. 51-90.

In Mr. Razavi's expert opinion, Petitioner's proposal conforms to all the applicable engineering requirements and regulations for a landscape contracting special exception and the development standards under the RDT Zone. Tr. 89-90.

2. Jose Roberto Pacano (Tr. 7, 17-21, 91-134):

As noted above, Petitioner Jose Roberto Pacano testified that he is the property owner and that he is known both as Robert (sometimes "Roberto") Pacano and as Jose R. Pacano. Tr. 7, 92. He also agreed to the conditions set forth by Technical Staff, as amended both by Staff and the Hearing Examiner. Tr. 17-21.

Mr. Pacano further testified that he intends to use the subject site for a landscape contracting business. The subject site is where he keeps his trucks and equipment. His employees would come in the morning, drive in -- and they carpool, for the most part -- take their designated trucks and go off the property to perform the work, and return at the end of the day, park the trucks and equipment, and then they drive off on their cars. Mr. Pacano described his trucks, trailers, equipment and parking spaces. He also stated that he sought the tree variance to remove a deteriorated tree that was a threat to the house on site. Tr. 91-102.

[In response to questions from the Hearing Examiner, Mr. Gardner agreed to amend the Statement of Operations to note that only two cars will park in front of the house and to modify the Saturday hours of operation to 8:00 a.m. to 5:00 p.m., in accordance with Technical Staff's recommendation. Tr. 103-105.] Mr. Pacano agreed to the Statement of Operations, as modified, and stated that the sign on the property had already been removed. Tr. 106-118.

Mr. Pacano identified photographs in the file, and indicated that only two trucks currently leave in the morning; however, he would like to be able to expand to up to five trucks. Tr. 119-134. [Thereafter, Mr. Gardner made his closing argument. Tr. 134-138.]

#### **IV. FINDINGS AND CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning ordinance establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards.

Weighing all the testimony and evidence of record under a "preponderance of the evidence" standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the proposed use will successfully avoid significant non-inherent adverse effects and will meet the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

##### **A. Inherent and Non-Inherent Adverse Effects**

The standard for evaluation prescribed in Zoning Ordinance § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed



location, on nearby properties and the general neighborhood. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a landscape contractor use. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed use that are not consistent with the characteristics thus identified, or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects thus identified must be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff describes the inherent characteristics of a landscape contractor as including (Exhibit 34, p. 11):

- (1) buildings, structures, outdoor areas for the storage of plants and gardening-related equipment;
- (2) outdoor storage of mulch, soil and landscaping materials in bulk and in containers;
- (3) on-site storage of business vehicles and equipment including small trucks and landscaping trailers;
- (4) traffic associated with the trips to the site by employees, suppliers and customers [and with] trips to and from the site by employees engaged in off-site landscaping activities;
- (5) adequate parking areas to accommodate customers and Staff;
- (6) dust and noise associated with the movement of landscaping products and the loading and unloading of landscaping equipment; and

(7) long hours of operation.

Technical Staff concluded (Exhibit 34, p. 12):

With the recommended conditions of approval, the inherent and non-inherent impacts associated with the proposed use do not rise to a level sufficient to warrant a denial of the Application.

Staff reached this conclusion based on the following findings (Exhibit 34, pp. 11-12):

The proposed landscape contractor is small in scale and does not have many of the characteristics that might produce adverse effects on adjoining neighbors or the surrounding area. Vehicular traffic is limited to those generated by employee of the operation. With the exception of the existing dwelling which will be utilized as an office, most of the activities related to the operation of the business are conducted about 300 feet from the road behind a farm pond and surrounded with existing trees and areas that will be reforested as part of this Application. Most of the business is conducted off-site and there will be no customers coming to the site. The site is strictly used for storage of equipment, few bagged mulch items, and vehicles associated with the business. The business will generate minimal noise since mulch is not manufactured on site. Many of the characteristics of the Special Exception are inherent. The scale of the existing structures, the internal vehicular circulation system, and the on-site parking areas shown on the Special Exception site plan are operational characteristics typically associated with a landscape contractor business.

Staff noted, and the Hearing Examiner agrees, that the restrictive condition under which the existing septic facility is utilized and the associated Consent Agreement are non-inherent characteristics of the site. The Hearing Examiner would add that the entire environmental situation on this site, as outlined in Part II.C. of this report, is a non-inherent site condition. Nevertheless, the Hearing Examiner agrees with Technical Staff that the non-inherent site conditions do not warrant denial of the special exception, because the revised Consent Agreement will alleviate the septic facility issues and the Final Forest Conservation Plan will leave the site in a much improved environmental condition, while still allowing Petitioner to run his business.

The Hearing Examiner therefore concludes that the inherent and non-inherent adverse effects caused by the physical and operational characteristics of the proposed use on this site, as conditioned, will be compliant with the requirements of the Zoning Ordinance.

## **B. General Standards**

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report and the Petitioner's written evidence and testimony provide sufficient evidence that the general standards would be satisfied in this case, as outlined below.

### **Sec. 59-G-1.21. General conditions:**

*(a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

*(1) Is a permissible special exception in the zone.*

Conclusion: A landscape contractor is permitted by special exception in the RDT Zone, pursuant to Zoning Ordinance §59-C-9.3(c).

*(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed modification would comply with the standards and requirements set forth for the use in Code §59-G-2.30.00, as detailed in Part IV. C., below.

*(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The property in question is subject to the Damascus Master Plan, approved and adopted in June 2006. For the reasons set forth in Part II. D. of this report, the

Hearing Examiner finds that the proposed special exception is consistent with the applicable Master Plan.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: Technical Staff found that the design, scale and intensity of the proposed special exception will not be in conflict with the general character of the neighborhood for the following reasons (Exhibit 34, p. 17):

The landscape contractor use on the site was established prior to the Applicant acquisition of the Property in 2006. The use would not generate a level of traffic that would raise concern for congestion on the streets. The access point is adequate to accommodate the site-generated traffic. The proposal provides for safe, sufficient and orderly internal traffic. Adequate off-street parking spaces are provided to satisfy the needs of the use. The parking areas for the trucks and trailers are adequately distanced and well screened from the adjoining properties and the adjacent road.

The Hearing Examiner so finds for the reasons stated by Technical Staff. This standard must be read in conjunction with the fact that landscape contractors are permitted in the RDT Zone in spite of the fact that they have certain inherent characteristics that are more commercial than agricultural. With that in mind, the subject proposal minimizes any adverse effects produced by its inherent operational characteristics.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: As noted by Technical Staff (Exhibit 34, p. 17), the Petitioner does not propose to increase or expand the existing improvements on the Property. Rather, he proposes to retain 0.90 acres of existing forest, and plant 0.80 acres of additional forest. Petitioner also proposes to create 0.70 acres of native meadow habitat within the

stream buffer onsite. The Forest Conservation Plan indicates that these areas as well as the stream and inline pond will be protected in a Category I conservation easement. For these reasons, and those stated in response to the previous subsection, the evidence supports the conclusion that the proposed use, as limited by recommended conditions and recommended buffering, would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: A certain amount of noise and other activities are inherent in the operation of a landscape contractor business; however, as noted by Technical Staff (Exhibit 34, pp. 17-18), those impacts will be minimized on this site because it is used for the storage of equipment and vehicles which are involved in off-site tasks. Debris from that work will be taken directly to the County Transfer Station. No mulch will be manufactured on site, and no composting of debris will be conducted on site. Moreover, no sale of plant material or garden supplies will be conducted on the property. Regarding illumination and glare, Technical Staff reported (Exhibit 34, p. 18):

There will be no light spillage to the adjacent properties. Outdoor lighting is limited to two motion sensor lights—one mounted (existing) on the existing dwelling to provide lighting for the parking area and another (proposed) to be mounted on the barn structure to provide lighting for the parking area at the rear portion of the Property.

Given these circumstances, Technical Staff concluded that “[t]he proposed use is not expected to cause any objectionable noise, vibrations, fumes, odors, dust,

illumination, glare, or physical activity at the site.” Exhibit 34, p. 17. Based on this record, the Hearing Examiner finds that this provision has been satisfied.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: There are no other special exceptions in the area according to Technical Staff. Exhibit 34, p. 18. The site is located within an agricultural zone, not a residential zone, and the proposed special exception use is consistent with the recommendations of the Master Plan. The evidence thus supports the conclusion that the proposed special exception would not increase the number, intensity or scope of special exception uses sufficiently to affect the area adversely.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed modification would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. The landscape contractor use has been present for many years, and Technical Staff reports that there is no indication of negative impacts from the existing use. Exhibit 34, p. 18. Petitioner does not intend any changes to the existing operation except for the addition of a couple of trucks. Moreover, the FCP provides for preservation of existing forest and reforestation; lowering of existing impervious surface levels; and an improved stream valley protection.

(9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

(A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*

(B) *If the special exception:*  
 (i) *does not require approval of a new preliminary plan of subdivision; and*  
 (ii) *the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception's impact;*

*then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision at the present time, and there is no currently valid determination of the adequacy of public facilities for the site, taking into account the impact of the proposed special exception. Therefore, the Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. These standards ordinarily include Local Area Transportation Review (LATR) and Policy Area Mobility Review (PAMR) or Transportation Policy Area Review (TPAR); however, Technical Staff reports that the facility would generate a maximum of four peak-hour trips during the weekday morning peak periods (6:30 a.m. to 9:30 a.m.)

and a maximum eight peak-hour trips during the weekday evening peak periods (4:00 p.m. to 7:00 p.m.), and therefore no traffic study is required to satisfy the Local Area Transportation Review test. Exhibit 34, p. 20. Moreover, because this Application is located in the Damascus Policy Area, there are no PAMR or TPAR mitigation requirements. As discussed in Parts II. B. 4. of this report and in the Technical Staff report (Exhibit 34, pp. 19-21), the evidence supports the conclusion that the subject property would continue to be served, as well, by other adequate public facilities. The Hearing Examiner concludes that the instant petition meets all the applicable Growth Policy standards.

- (C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Technical Staff found that “The subject Special Exception is not likely to negatively impact the safety of vehicular or pedestrian traffic.” Exhibit 34, p. 21. Based on the evidence of record, the Hearing Examiner finds that the proposed development will not reduce the safety of vehicular or pedestrian traffic.

### **C. Specific Standards: Landscape Contractor**

The specific standards for a landscape contractor are found in Code § 59-G-2.30.00. The Technical Staff report and the Petitioner’s written evidence and testimony provide sufficient evidence that the proposed landscape contractor use would be consistent with these specific standards, as outlined below.

#### **Sec. 59-G-2.30.00 Landscape Contractor.**

*This use may be allowed together with incidental buildings upon a finding by the Board of Appeals that the use will not constitute a nuisance because of traffic, noise, hours of operation, number of employees, or other factors. It is not uncommon for this use to be proposed in combination with a wholesale or retail horticultural nursery, or a mulch/compost*



*manufacturing operation. If a combination of these uses is proposed, the Board opinion must specify which combination of uses is approved for the specified location.*

Conclusion: The landscape contractor use is not proposed in combination with a retail horticultural nursery or a mulch/compost manufacturing operation. As is documented elsewhere in this report, this use will not constitute a nuisance because of traffic, noise, hours of operation, number of employees, or other factors. The design, scale and the intensity of the use, as conditioned, will not conflict with the neighborhood. Petitioner will also reduce the amount of imperviousness on the site and add significant reforestation. The existing facilities, including parking, will be used, and Petitioner will not be adding any significant traffic to the roadways.

(1) *The minimum area of the lot must be 2 acres if there are any on-site operations, including the parking or loading of trucks or equipment.*

Conclusion: The lot size is approximately 4.5 acres, well above the 2 acre minimum.

(2) *Areas for parking and loading of trucks and equipment as well as other on site operations must be located a minimum of 50 feet from any property line. Adequate screening and buffering to protect adjoining uses from noise, dust, odors, and other objectionable effects of operations must be provided for such areas.*

Conclusion: Parking and loading areas for trucks and equipment, as well as other on-site operations for the landscape contractor use, are located more than 50 feet from all property lines. The two parking spaces in front of the existing residential building are restricted to cars, by a condition specified in Part V of this report. The evidence supports the conclusion that setbacks, topography, and the proposed additional landscaping are adequate to protect adjoining uses from noise, dust, odors and other objectionable effects of these operations, given that some amount of noise, dust and odors is inherent in the use.

- (3) *The number of motor vehicles and trailers for equipment and supplies operated in connection with the contracting business or parked on site must be limited by the Board so as to preclude an adverse impact on adjoining uses. Adequate parking must be provided on site for the total number of vehicles and trailers permitted.*

Conclusion: Recommended Conditions in Part V of this report and the Final Statement of Operations (Exhibit 46(a)) specify the vehicles and equipment which may be on the subject property – 5 trucks; 3 trailers (one sixteen foot enclosed trailer and two fourteen foot open trailers); 6 mowers (including three tractors and three walk behind lawn mowers); one snow plow (which attaches to one of the trucks); and an assortment of trimmers, blowers, spreaders, aerators, shovels, chain saws, hoses and various landscaping tools. All of the equipment will be parked inside the barn. The special exception proposes a total of 14 parking spaces. Eight parking spaces are provided in the gravel area on the north side of the barn, and four parallel parking spaces are located in the gravel area along the edge of the pond, west of the barn. In addition, the existing two parking spaces in front of the dwelling are retained for the exclusive use of the office.. Technical Staff found that there is adequate parking for employee vehicles and equipment. Exhibit 34, p. 23. The Hearing Examiner so finds.

- (4) *No sale of plant materials or garden supplies or equipment is permitted unless the contracting business is operated in conjunction with a retail or wholesale nursery or greenhouse.*

Conclusion: No retail activity will occur on the property, and therefore Petitioner will not sell plant materials, garden supplies, or equipment on site.

- (5) *The Board may regulate hours of operation and other on-site operations so as to prevent adverse impact on adjoining uses.*

Conclusion: The Planning Board recommended and Petitioner agreed to the following hours of operation to prevent adverse impact on neighbors: 7:00 a.m. to 7:00 p.m., Monday

through Friday, and 8:00 a.m. to 5:00 p.m. on Saturdays. The Hearing Examiner recommends a condition restricting the hours as specified above.

*(6) In evaluating the compatibility of this special exception with surrounding land uses, the Board must consider that the impact of an agricultural special exception on surrounding land uses in the agricultural zones does not necessarily need to be controlled as stringently as the impact of a special exception in the residential zones.*

Conclusion: The proposed use is an agricultural zone, and it meets all specific and general special exception requirements. It is in conformance with the recommendations of the Master Plan, and it will not intensify or exacerbate existing traffic and parking noise or adversely affect the immediate rural neighborhood.

#### **D. General Development Standards**

##### **Section 59-G-1.23. General development standards.**

*(a) Development Standards. Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: Zoning Ordinance §59-G-2.30.00 specifies some development standards, but others are dictated by the RDT zone. The proposed use meets all those standards, as shown in the following table from the Technical Staff report (Exhibit 34, p. 14)::

<b>Development Standards</b>			
<b>RDT-</b>	<b>Required</b>		<b>Proposed/Existing</b>
	<b>59-C-9.4</b>	<b>59-G-2-30.00</b>	
<b>Minimum Lot Area</b>	40,000 SF	87,120 SF (2AC)	196,020 SF (4.5 AC)
<b>Minimum Lot width:</b>			
▪ at street line	25 ft		461 ft
▪ at building line	125 ft		461 ft
<b>Maximum Building Height</b>	50 ft		20± ft
<b>Maximum Building Coverage</b>	10%		1.28% total

<b>Minimum Building Setback:</b> a. From street b. From Adjoining lot Side yard: ▪ One side ▪ Sum of both sides c. Rear yard	50 ft   20 ft 40 ft 50 ft		54.2+   23.5 ft 435.70 ft 273 ft
<b>Minimum Setback for parking and loading</b>		50 ft	50+ft(excluding parking for the existing dwelling) <sup>5</sup>
<b>Yard Requirement-Accessory building</b>  a. Front lot line  b. From side lot line c. Rear lot line	  50 ft  15 ft 10 ft		  315ft-Barn and shade; 50 small shade  226 ft min 150 ft min

*(b) Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: As discussed in Part II.B.4.b. of this report, parking provided on the site will be adequate to meet the requirements of Zoning Ordinance §59-G-2.30.00. Technical Staff found that the proposed use meets the applicable requirements of Article 59-E, including 59-E-2-21: Arrangement and Marking; 59-E-2-22: Size of spaces; 59-E-2-23: Space for Handicapped; 59-E-2-4: Access and circulation; 59-E-2-6: Lighting; and 59-E-2-7: Landscaping. Exhibit 34, p. 14. Staff also noted that because the subject site is in an agricultural zone and surrounded with properties also within the agricultural zone, Sections 59-E.2-8 and 59-E-2-83 do not apply.

*(c) Minimum frontage. In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*

\* \* \*

<sup>5</sup> Zoning Ordinance §59-G-2.30.00(2) provides that areas for parking and loading of trucks and equipment as well as other on site operations must be located a minimum of 50 feet from any property line. The Hearing Examiner concludes, as did Staff, that the use of the two parking spaces located in front of the house for ordinary cars (*i.e.*, non-landscaping vehicles) will not violate this provision, and a condition is therefore proposed in Part V of this report to so limit the use of those spaces.

Conclusion: This section is not applicable, and in any event, the property meets the zone's frontage requirements.

*(d) Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: The use is subject to Chapter 22A, the Montgomery County Forest Conservation Law. The Planning Board voted to approve the Final Forest Conservation Plan and Tree Variance on June 12, 2014, as indicated in Exhibit 47, and the Hearing Examiner has recommended a condition in Part V of this report requiring Petitioner to comply with its conditions.

*(e) Water quality plan. If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: This site is not in a special protection area (SPA), and thus a water quality plan is not required. Exhibit 34, p. 15.

*(f) Signs. The display of a sign must comply with Article 59-F.*

Conclusion: As indicated earlier in this report, there will be no sign on the site, and the previously existing sign has been removed. Tr. 106.

*(g) Building compatibility in residential zones. Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: The subject site is not in a residential zone, so this section is not applicable.

*(h) Lighting in residential zones. All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

*(1) Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*

*(2) Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: The subject site is not in a residential zone, and as stated above, Technical Staff found that there will be no light spillage to the adjacent properties. Exhibit 34, p. 18.

Based on the testimony and evidence of record, I conclude that, with the recommended conditions, the use proposed by Petitioner meets the specific and general requirements for a landscape contractor special exception, and that the Petition should be granted, with the conditions recommended in the final section of this report.

## V. RECOMMENDATIONS

Accordingly, based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petition No. S-2761, which seeks a special exception to operate a landscape contractor business at 28621 Ridge Road, Mt. Airy, Maryland, be **granted** with the following conditions:

1. The Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and representations of counsel identified in this report.
2. The maximum number of employees on the site, including the Petitioner and his wife who are operating out of the office, must be limited to eight (8).
3. Hours of operation for the landscape contractor business are limited to 7:00 a.m. through 7:00 p.m. Monday through Friday, and 8:00 a.m. through 5:00 p.m. on Saturdays.

4. The Petitioner must remove approximately 8,300 square feet of impervious surfaces as specified on the Impervious Area Exhibit dated April 8, 2014.
5. The Petitioner must limit impervious surfaces to no more than 8.7 percent.
6. The use must comply with the conditions of the approved Final Forest Conservation Plan.<sup>6</sup>
7. The landscape contractor business must not have more than five trucks and three trailers.
8. The existing single-family detached structure must be used only as an office for the landscape contractor business. It must not be used as a residence.
9. Eight parking spaces shall be located in the gravel area on the north side of the barn and four parallel parking spaces shall be located in the gravel area along the edge of the pond west of the barn. The existing two driveway parking spaces in front of the single-family detached structure must not be modified for additional parking.
10. Vehicles servicing the landscape contractor business may use only the parking spaces at the rear portion of the Property. Trucks, trailers, or other equipment associated with the operation must not use the two driveway parking spaces in front of the existing single-family detached structure.
11. There must be no sign identifying the property as a landscape contractor on the Property. Existing wall sign on the side of the small barn must be removed.
12. No wholesale or retail horticultural nursery, or mulch/compost manufacturing operation, shall be conducted on the Property.
13. Plants, mulch and topsoil are to be stored on site in bags on the designated area on the east side of the barn. There shall be no storage of chemicals, pesticides, manures or debris on site.
14. Landscaping and lighting on the site must be in accordance to the Landscape & Lighting plans submitted to M-NCPPC Development Review Division on May 19, 2014.
15. No debris from customers' homes or properties may be stored on site.
16. The Petitioner must submit a copy of the approved and executed amended Consent Agreement with the Department of Permitting Services (with no substantive change from draft in Exhibit 40(a)) into the record of this application within 30 days of the effective date of the Board of Appeals decision.
17. Petitioner must comply with the provisions of the Final Amended Statement Of Operations (Exhibit 46(a)), except that if there is any conflict with these conditions, these conditions will prevail.

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<sup>6</sup> The Hearing Examiner notes that the Planning Board voted to approve the Final Forest Conservation Plan and Tree Variance on June 12, 2014, as indicated in Exhibit 47.

18. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: July 25, 2014

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Martin L. Grossman". The signature is fluid and cursive, with a long horizontal stroke at the end.

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Martin L. Grossman  
Hearing Examiner