OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS

Stella B. Werner Council Office Building Rockville, Maryland 20850 (240) 777-6660

IN THE MATTER OF: JENNIFER FREEMAN	* *			
Applicant	*	Case No. CU 16-15 (Minor		
11	*	Amendment)		
Jennifer Freeman	*	,		
For the Application	*			
	*			
* * * * * * * * * * * * * * * * *	*			
	*			
Carol Rae Hansen, Ph.D.	*			
Greg Grigorian, Esquire	*			
	*			
Opposing the Application	*			
*********	* *			
Before: Lynn A. Robeson, Hearing Examiner				

REPORT AND DECISION APPROVING MINOR AMENDMENT

TABLE OF CONTENTS

I. STATEMENT OF THE CASE	3
A. Zoning Ordinance Regulations Governing Amendments to Conditional Uses	3
B. Procedural History of this Application	4
II. FACTUAL BACKGROUND	11
A. Original Conditional Use Approval	11
B. Proposed Amendment	14
C. Staff Comments on the Minor Amendment Application	21
D. Community Opposition and the Applicant's Responses	23
1. Need for a Nutrient Management Plan	24
2. Number of Horses Permitted	25
3. Amount and Quality of Pasture	26
3. Impact on the Sole Source Acquifer	
4. Approval of the Minor Amendment is Premature and Will	30
5. Opposition Concerns Regarding the Subdivision	

CU 16-15, J. Freeman (Minor Amendment) Hearing Examiner's Report and Decision	Page 2
6. Motivations of Ms. Freeman and the County	40
III. FINDINGS OF FACT AND CONCLUSIONS OF LAW	42
A. Governing Law	42
B. Analysis of Minor Amendment	47
C. Subdivision Issues	54
IV. CONCLUSION AND DECISION	61

I. STATEMENT OF THE CASE

A. Zoning Ordinance Regulations Governing Amendments to Conditional Uses

An overview of the Zoning Ordinance provisions governing the approval of a conditional use amendments helps to place the procedural history of this case in context.

The Zoning Ordinance has different procedures for approval of amendments to conditional uses depending on whether the amendment has a "minor" and "major" impact on the surrounding area. A minor amendment is one that, "does not change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use." *Zoning Ordinance*, §59.7.3.1.K.1.2.a. Applications for minor amendments may be approved administratively by the Hearing Examiner. If approved, the Hearing Examiner's decision must be sent to the "applicant, ... the Planning Board, DPS, the Department of Finance, all parties entitled to notice at the time of the original filing, and current abutting and confronting property owners." *Zoning Ordinance*, §59.7.3.1.K.2.a. Any party may object to the grant of the minor amendment by filing written reasons within 15 days of the administrative decision. *Id.*, §59.7.3.1.K.2.b. An objection triggers a public hearing on whether the amendment should be considered as a "minor" or a "major" amendment. *Id.* If the Hearing Examiner determines the application is minor, it may be approved administratively without additional review.

A major amendment is one that "changes the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use." *Id.*, §59.7.3.1.K.1.a. If the Hearing Examiner determines that the amendment is major, the application must follow the same review process as an original conditional use. Even then,

however, review is limited to the proposed modification and "to those aspects of the conditional use that are directly related to those proposals". *Id.*, §59.7.3.1.K.1.

B. Procedural History of this Application

Hearing Examiner approved Ms. Jennifer Freeman's application for a conditional use for an equestrian facility under Section 59.3.2.4.B.2 of the Montgomery County Zoning Ordinance (Zoning Ordinance) on September 26, 2016. *Hearing Examiner's Report and Decision*, CU 16-15, Application of Jennifer Freeman, September 26, 2016 (Hearing Examiner's Report.) The subject property consists of 7.65 acres in the R-200 Zone and is situated at 14957 Sugarland Road, Poolesville, Maryland. Exhibit 1.¹ T. 15.

In January 2020, Ms. Freeman applied for a minor amendment to her conditional use. The amendment sought to reduce the conditional use area from 7.65 acres to 4 acres so that she could subdivide the property into two lots. Under the amendment, the conditional use area would be limited to the lot on which she would continue to reside. Exhibit 28. The Hearing Examiner referred the Ms. Freeman's application to Staff of the Montgomery County Planning Department (Planning Staff or Staff) for a recommendation on whether they considered the amendment to be minor or major under the Zoning Ordinance. Exhibit 23. Planning Staff, on January 29, 2020, determined that the amendment was minor. Exhibit 31. Because the area of the conditional use would be reduced, Staff recommended reducing the number of horses that could be kept on the property from a maximum of 4 to a maximum of 3.

The Hearing Examiner asked Ms. Freeman to show the compost facility on the plan submitted. Exhibits 32, 33. Ms. Freeman did so and informed the Hearing Examiner that she agreed to a condition limiting the number of horses to 3. Exhibit 33. After receiving the revised

¹ The exhibits in the original case are included in this record with the same exhibit number assigned in the original case.

plan, the Hearing Examiner issued an Order approving the minor amendment on April 13, 2020. Exhibit 33. Within 15 days of issuing the Order, OZAH received an objection to the approval from Mr. Greg Grigorian, who owns the property directly across Sugarland Road from the subject property. Exhibit 35.

On May 1, 2020, Dr. Carol Rae Hansen, also weighed in opposing the application. She informed OZAH that she is the "County's designated letter, email, and telephonic contact of record for the Sugarland Forest Citizens in [sic] Association." Exhibit 37. She alleged that she has "ample documentation" of "deficiencies in procedure, measurements, precedents, regulatory law and overarching County regulations and policy on properties located on an Exceptional Rustic Road with ample forested land." *Id*.

On May 14, 2020, OZAH issued notice of a public hearing to be held on June 22, 2020, on whether the amendment considered major or minor. Exhibit 39. The same day, Mr. Grigorian sent OZAH an email stating that Dr. Hansen would like to testify as an individual and on behalf of the Sugarland Forest Citizen's Association and forwarded a link to testify at legislative hearings from the County Council's website. He also advised OZAH that Dr. Hansen might have a "proxy" to testify on behalf of neighbors. Exhibit 40. Dr. Hansen followed up with an email to OZAH Staff stating that she had been unable to sign up to testify because she'd unsuccessfully tried the link on OZAH's website twice. Exhibit 42. The Hearing Examiner responded that (1) OZAH does not have a form to sign up to testify at hearings in advance, (2) that its proceedings are quasijudicial (*i.e.*, testimony is taken under oath and subject to cross-examination) and therefore it does not accept "proxy" testimony, and (3) that a non-attorney cannot represent an organization because that is considered unauthorized practice of law under State law. The Hearing Examiner informed Dr. Hansen that they would accept Dr. Hansen's testimony as an individual and provided Dr.

Hansen with instructions on how to access the public hearing from OZAH's website. The Hearing Examiner reminded Dr. Hansen that the sole issue at the public hearing would be whether Ms. Freeman's proposed amendment would have minor or major impact under Section 7.3.1.K. of the Zoning Ordinance. Exhibit 43.

On May 15, 2020, the Hearing Examiner referred the objections from those in opposition to Staff for review. Exhibit 48. Staff responded that it still considered the proposed amendment to be minor. (*Id.*).

Dr. Hansen disagreed with Staff's comments. She informed the Hearing Examiner that Planning Staff's "stocking rates" for horses were inaccurate. She had consulted with Jeremy Criss, Director, Montgomery County Office of Agricultural Services, who had sent her the same statute relied upon by Staff. Exhibit 52. Dr. Hansen asserted that the horse stocking rates in the most recent iteration of the Zoning Ordinance would allow up to 7 horses on the property. *Id.*

In order to clarify the issue prior to the hearing, the Hearing Examiner explained to Dr. Hansen that the conditional use area proposed in the amendment was only 4 and not 7 acres and that the balance of the existing property would no longer be covered by the conditional use. Therefore, the maximum number of horses that could be on-site under the Zoning Ordinance, if approved, would be four: 2 horses for the first two acres and one for each additional acre. *Zoning Ordinance*, §59.3.2.4.B.1.a. The Hearing Examiner also attached a copy of the minor amendment conditional use plan and her 2016 Report and Decision approving the original conditional use. Exhibit 51.

Ms. Freeman filed a pre-hearing statement on May 22, 2020. Exhibit 53. Attached as an exhibit was an updated Nutrient Management Plan approved by University of Maryland Extension Service. Exhibit 53(a).

On June 16, 2020, Dr. Hansen queried OZAH Staff on whether there would be an online "test" of the virtual public hearing in advance of the scheduled date because she had been asked to participate in this test before in an "online conference event". She also requested the names of all parties who would be participating in the hearing. OZAH Staff informed Dr. Hansen that they do not convene a "test" in advance because they do not know who would be parties until the day of the hearing. Exhibit 58.²

On June 18, 2020, Ms. Freeman submitted a Conservation Plan, including a Maryland Pasture Condition Score Sheet for all of the pasture areas on the 7.65 acre property, approved by the Montgomery County Soil Conservation District. Exhibit 59.

Shortly before the public hearing, Dr. Hansen submitted written comments she had addressed to the Planning Department, dated January 13, 2020, that relate to Ms. Freeman's subdivision plan.³ Exhibit 61. Dr. Hansen and Mr. Grigorian submitted written comments urging the Hearing Examiner to leave the application "on the table" until a decision on the subdivision application. Exhibits 62-64.

The June 22nd hearing proceeded as scheduled via Microsoft Teams. Ms. Freeman testified in support of the application and Mr. Grigorian and Dr. Hansen appeared in opposition. Those in opposition challenged the Applicant's testimony that she had been instructed by government agencies to amend the conditional use prior to a decision on her subdivision plan. The Hearing Examiner left the record open to explore whether this could be documented by the Planning Department. T. 134-144. In order to "clarify" the issues in this proceeding, the Hearing Examiner

² OZAH's hearings are open to the public and any person that wishes to testify is automatically made a party to the proceeding. *OZAH Rules*, 3.1. Due to the COVID-19 pandemic, OZAH is currently conducting its hearings remotely via Microsoft Teams. OZAH's website is designed to enable anyone wishing to testify to join online either by clicking a link or by phoning in.

³ Dr. Hansen used this letter as the basis of her testimony at the June 22, 2020, public hearing. T. 52-53, 72-73, 78-79, 81, 87, 94.

also asked Ms. Freeman to submit a revised conditional use plan that did not contain all of the details relating to the subdivision. T. 117-118.

At the end of the public hearing, the Hearing Examiner set deadlines for submission of additional information and comments from Planning Staff and the parties. She asked Planning Staff to provide any documentation they had regarding the need to amend the conditional use before the subdivision approval by June 29, 2020. She asked Ms. Freeman to submit the revised conditional use site plan by July 3, 2020. She gave the parties until July 3, 2020 to comment on any information provided by Staff, and set the deadline for Ms. Freeman's final comments on July 7, 2020. T. 141-144.⁴

After the public hearing, Ms. Freeman asked to be able to respond further to Dr. Hansen's written submission dated January 13, 2020, with her final comments due on July 7, 2020. Exhibit 67. The Hearing Examiner asked her to submit any additional comments on June 29, 2020, so those in opposition would have an opportunity to respond. *Id*.

On June 25, 2020, Ms. Freeman requested an extension of the June 29th deadline due to a family emergency. Exhibit 68. Both Mr. Grigorian and Dr. Hansen agreed to the extension, but requested extensions of their deadlines for various reasons. On June 29, 2020, the Hearing Examiner revised the schedule for post-hearing submissions as follows (Exhibit 71, italics in original):

- 1. *Monday, July 6, 2020*: Ms. Freeman must submit any additional comments and may submit a revised conditional use plan removing subdivision-related structures and markings.
- 2. Monday, July 12, 2020: Dr. Hansen and Mr. Grigorian must submit their comments.
- 3. Monday, July 19, 2020: Final comments from Ms. Freeman must be submitted.

⁴ Mr. Grigorian opted to leave the hearing due to another meeting. The Hearing Examiner sent him an email with the deadlines the day of the hearing. Exhibit 65.

Ms. Freeman timely filed the submission required of her on July 6, 2020. Exhibit 72. As requested by the Hearing Examiner, this included a revised conditional use plan that eliminated all items related to the subdivision. Exhibit 72(c). The Hearing Examiner asked Ms. Freeman to (1) clarify whether a fenced areas shown on the revised plan would be used for the equestrian facility, and (2) show where existing fencing would be realigned to conform to the boundary of the conditional use area if approved. Ms. Freeman submitted both items. Exhibit 73, 74.

Dr. Hansen then requested an extension of her filing deadline. Exhibit 78. With the consent of the parties, the Hearing Examiner granted the extension request, requiring Mr. Grigorian's and Dr. Hansen's comments by July 20, 2020, and Ms. Freeman's final responses by August 3, 2020. Exhibit 82.

On Friday, July 17, 2020 (at 4:44 p.m.), Dr. Hansen emailed OZAH Staff informing them that she was "locked out" of OZAH's Exhibit List. Exhibit 83. OZAH Staff informed her the same day that they could forward the exhibit list, but had removed the exhibits from the public hearing link because they had to prepare for the next remote hearing. The following Monday, at 3:08 p.m., Dr. Hansen informed OZAH that she would be filing her statement late in the day because "I am waiting for answers from two County officials to questions that arose as a result of my inquiries first raised on June 25, and reiterated on July 10, and then again on July 15." Exhibit 84. Later that afternoon (at 3:48 p.m.), OZAH Staff received another email requesting the exhibit list because "all that came up...was a list of the documents, not the documents themselves." Exhibit 86. OZAH Staff indicated that they were unable to forward all 82 exhibits, but could forward specific exhibits. OZAH Staff forwarded the specific exhibits requested. *Id.* The Hearing Examiner informed Dr. Hansen that submission deadlines were typically 5:00 p.m., and asked Dr. Hansen to request an extension with a copy to Ms. Freeman. Dr. Hansen (at 4:29 p.m.) did submit

a request to extend her deadline to 11:59 p.m. on July 20, 2020, with a copy to Ms. Freeman, noting (Exhibit 86):

This time was NOT specified on any document that I received, and since I had three times before submitted material up until 11:59 p.m. on the date specified, I assumed with justification that I should be accorded the same previously-applied time, with no prohibition against receiving material on the correct date, but after 5:00 p.m.. You should also note that both Mr. Grigorian and I found that Ms. Johnson had removed documents from the OZAH website before the Hearing Process was completed, with NO advance notice to those of us who needed to use those 82 documents. Please note that I had to ask twice for them to be emailed to me for me to download, and that earlier Ms. Johnson had even removed from the website the application form for requesting participation in the June 22 hearing the previous Wednesday, while telling us that the deadline was Thursday, with, if I recall correctly, no specific time of the day. You will note that Mr. Grigorian also submitted documents after a non-specific 5:00 p.m. deadline.

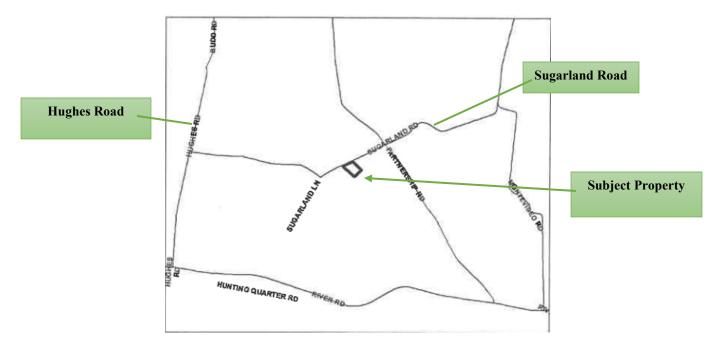
Ms. Freeman agreed to the extension request. Soon after (at 4:52 p.m.), Dr. Hansen sent an email to OZAH informing them that "page 10 of the transcript is missing." Exhibit 87. The Hearing Examiner sent her the page, noting that the transcript had at all times been posted on OZAH's website. Exhibit 87.

Ultimately, Dr. Hansen submitted additional comments on July 20, 2020, at 11:57 p.m. Exhibit 91. She followed up with more comments on July 21, 2020, at 12:17 a.m. (Exhibit 92). The Hearing Examiner did not accept because they were filed the day after the deadline specified in the scheduling order. Mr. Grigorian filed his final comments on July 20, 2021. Exhibits 88. Ms. Freeman filed her response on Monday, August 3, 2020. Exhibit 93. Mr. Grigorian filed responses to Ms. Freeman's submission, and the Hearing Examiner informed him that no further filings were permitted under the scheduling order. Exhibit 94. Mr. Grigorian's responses were not admitted into the record and the record closed with Ms. Freeman's comments on August 3, 2020.

II. FACTUAL BACKGROUND

A. Original Conditional Use Approval

In 2016, the Hearing Examiner granted a conditional use to operate an equestrian facility for Ms. Freeman's entire 7.65 acre property. A map from the Planning Staff Report in the original case shows the property's general location (Exhibit 24, below). An aerial photograph of the property from the same Report is on the following page.



The Hearing Examiner approved the conditional use application for an equestrian facility with up to three horses, although at the time, Ms. Freeman stated she would have only two horses on the property. Conditions imposed on the approval included the following (*Hearing Examiner's Report*, p. 27):

- 2. Physical improvements for the equestrian facility are limited to those shown on the Conditional Use Site Plan filed on July 28, 2016 (Exhibit 18(a)).
- 3. No more than four horses may be kept on the property.
- 4. All horses on site must belong to the owner(s) of the property.

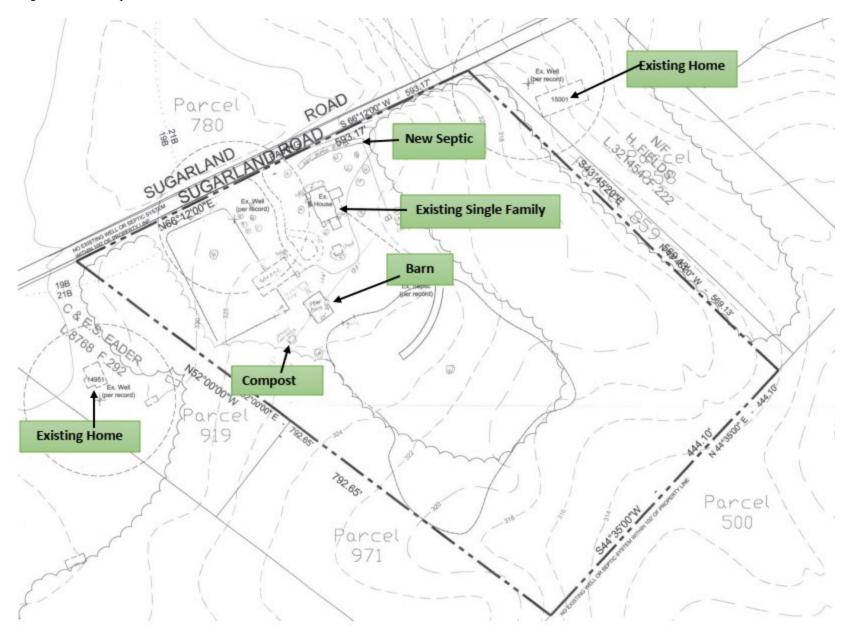


Aerial Photograph of Existing 7.65-Acre Property (Exhibit 24)

- 5. The Applicant must not rent out any of the horses in the equestrian facility.
- 6. No equestrian events may be held on the property.
- 7. No identification sign may be placed on the property.
- 8. The owner of the property must satisfy the state requirements for nutrient management concerning animal waste.

The original conditional use site approved by the Hearing Examiner is reproduced from the Hearing Examiner's Report (*Id.*, p. 8) on the next page.

Page 13



B. Proposed Amendment

The Applicant's sole modification to the original approval is to reduce the size of the conditional use area from 7.65 acres to 4 acres, which reduces the amount of pasture within the conditional use area by 15%. No other changes are proposed. Ms. Freeman explains (Exhibit 28):

The reason for this minor amendment request is due to my plans for Administrative Subdivision of the plot which is 7.65 acres into two lots (4.0 acres and 3.3 acres). I will keep ownership of both lots with no planned changes to either property for the foreseeable future.

The current barn for the horses, the small manure/compost pile and approx. 85% of the pasture for the horses will remain on the 4 acre lot. This same 4 acre lot also includes my house, and other minor outbuildings which will continue in use as they have been.

The proposed new lot is to the east of the current lot where we live, therefore, the barn and the compost are far on the other side of the property, away from the proposed new building site.

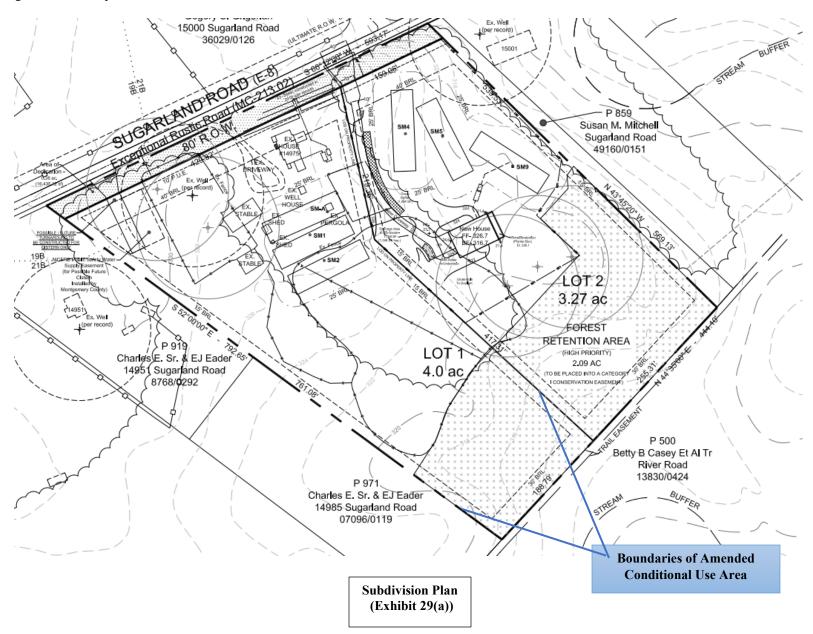
I have no plans to make any changes to the use of the property from how it is currently being used today. The only change is that administratively/on paper, there would be about a 15% decrease in the open pasture area for the horses. However, I still plan to keep only 2 horses, and the remaining acreage of pasture and paddocks is more than enough to provide for the two horses I have.

The conditional use site plan originally submitted for the minor amendment was (apparently) the preliminary plan of subdivision submitted to the Planning Department. Exhibit 29(a). An excerpt of the Subdivision Plan is shown on the next page.

Ms. Freeman testified that she has taken steps to maintain what has been good farm management. She originally had a nutrient management plan approved for the entire 7.65 acres. Recently, she obtained an approved addendum for the four acres proposed for the conditional use.

T. 15. The plan shows that she has a high rating in all categories of the assessment, including the

Page 15



health of the pasture, lack of erosion, and soil life quality. T. 15; Exhibit 53(a). The addendum to the Ms. Freeman's nutrient management plan was approved by the Agricultural Nutrient Management Program of the University of Maryland Extension Service on May 21, 2020. Exhibit 53(a). The Nutrient Management Plan shows the fields on the property (Exhibit 53(a), below):



Ms. Freeman submitted a Soil and Water Conservation Plan approved by the Montgomery County Soil Conservation District (USDA Natural Resources Conservation Service.) Exhibit 59. The Conservation Plan's stated objective is to (Exhibit 59(f)):

...identify specific Best Management Practices (BMPs) which, if implemented, will reduce the environmental impact of the operation while improving the productivity of the land.

The secondary objective of the plan is to assist the operator in meeting the minimum requirements to qualify for cost-share assistance in the installation of listed practices. This plan does not guarantee eligibility but is a prerequisite, along with other qualifying documentation, in order to enroll in reimbursement programs through State and County Government.

The approved Conservation Plan found that (*Id.*):

Pasture fields should be periodically renovated to ensure that cover is maintained and to produce high-quality forage. Fields 2, 3, and 4a have received an above-average pasture condition score and with proper management should not require additional reseeding for several years. Field 1 may require seeding sooner due to a depleted forage condition.

The Conservation Plan shows the fenced pasture on Ms. Freeman's current property with the acreage of each pasture listed (Exhibit 59(e), below):⁵



Ms. Freeman testified that her pastures received excellent scores and that the high ratings in all categories of the assessment -- health of the pasture, lack of erosion, and soil life quality.

⁵For convenience and clarity in this Report, the Hearing Examiner will refer to the different pastures by the numbers assigned in the Conservation Plan above.

The ratings support the conclusion that there is no negative impact as to how she manages the farm and can continue to support the animals, the land, water, and trees with the great care that she has shown since she moved to the property. T. 15-16. Ms. Freeman explained that Field 3 received lower scores than her other pastures because it is a "sacrifice field". T. 29. Forage there is purposefully kept low because both of her rescue horses are "easy keepers", which means that she has to watch their weight. The field lets the horses exercise and still maintain a healthy weight. The forage there is intended primarily to prevent erosion. T. 28. Ms. Freeman also submitted a letter from her the veterinarian who treats her two horses. He wrote (Exhibit 55):

Jennifer is a caring and competent horse owner. Both her horses are in good body condition and are well managed at her home on Sugarland road, Poolesville, Maryland.

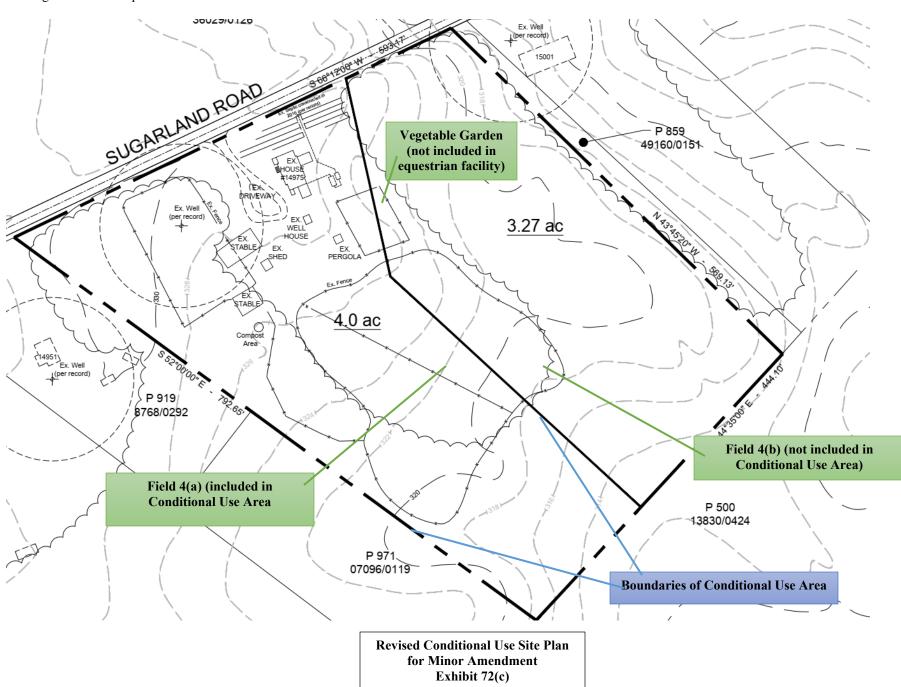
Jennifer's property provides more than enough pasture for the wellbeing of both horses.

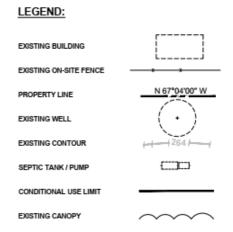
Ms. Freeman testified that she has had no complaints about the conditional use until she applied for a subivision to create two lots. After that, complaints started coming about having an excessive animal load on the property, manure spreading, forest destruction, destruction of migratory bird habitats, overusing the Poolesville aquifer and various other issues. T. 14. She believes that she has addressed the concerns, including updating her nutrient management plan and obtaining a conservation pasture management plan. She believes that the complaints arise because of the subdivision approval rather than her conditional use. T. 15.

The Hearing Examiner asked Ms. Freeman to submit a revised conditional use plan with the information needed for the subdivision (Exhibit 72(c), on the next page).

⁶ In comments received after the public hearing, Ms. Freeman states that one of her horses is blind, and therefore should not be removed from the property without a significant reason. Exhibit 94.

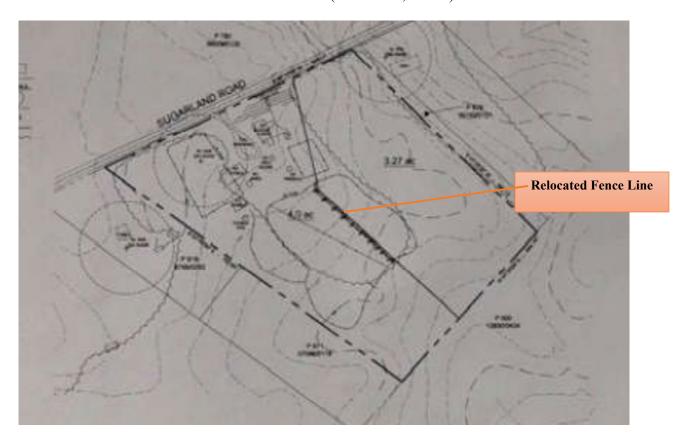
Page 19





Legend for Revised Conditional Use Site Plan (Exhibit 72(c), above)

The area straddling the conditional use boundary is a vegetable garden that is not used for the equestrian facility conditional use. Exhibits 76, 77. At the Hearing Examiner's request, Ms. Freeman submitted a copy of the condition use plan showing the location of proposed fencing to conform the boundaries of the minor amendment (Exhibit 74, below):



C. Staff Comments on the Minor Amendment Application

Due to the evolving concerns expressed by the opposition in this case, the Hearing Examiner sought Staff's recommendation on the application three times during this amendment process. After the initial application for the minor amendment was filed, she referred it to Staff for their expert opinion on whether it constituted a major or minor amendment under Section 59.7.3.1.K of the Zoning Ordinance. Exhibit 30. Staff responded (Exhibit 31):

It's my professional opinion that the proposed modification falls within the definition of a minor amendment to the existing conditional use provided that Condition #3 of the Zoning Hearing Examiner's report of September 23 [sic], 2016, Page 27, is amended to read as follows:

3. No more than four three horses may be kept on the property.

Staff also recommends that Condition #2 of the ZHE report shall be revised to reflect the changes shown on the proposed amended plan.

After Mr. Grigorian objected to the Hearing Examiner's initial approval (Exhibit 46, summarized in II.Part D of this Report), the Hearing Examiner asked Staff to review the application again in light of the opposition's concerns (Exhibit 46). Staff determined again that the application was minor (Exhibit 47):

Staff's Findings:

• An equestrian facility is an agricultural use that is allowed in the R-200 Zone with an approval of a conditional use application. The Zoning Code (Section 59.1.4.2 defines Conditional Uses as follows:

Conditional Use: A use that must meet the conditional use standards in Division 3.2 through Division 3.7 and requires approval by the Hearing Examiner, under the findings in Section 7.3.1. In zoning codes effective before October 30, 2014, a conditional use was referred to as a special exception.

• When the application was filed originally back in 2016, the Subject Property comprised of 7.65 acres of land, and therefore could accommodate up to seven horses. However, the Applicant was requesting to keep only two horses. Staff recommended to restrict the number of horses to four, in case the applicant wishes to increase the number of horses at some future time. With the current proposal for

4-acre property, the applicant can have four horses on the property. Staff has recommended to amend the condition of approval to restrict the number of horses to three. The applicant maintains then and now that she only plans to keep two horses. If the applicant wishes to proffer to restricting the number of horses to only two, staff will not object to such a condition.

- At the time of the original application in 2016, our Environmental staff reviewed the environmental conditions on the property as well as the environmental resources and found that the proposed equestrian facility to be consistent with the Environmental Guidelines. The Application did not propose any development, clearing or grading activities that generate the need for a sediment control permit on the Conditional Use site. Therefore, the property was not subject to the Forest Conservation Law as defined in Chapter 22A of the Montgomery County Code. The proposed amendment which results with a reduction of about 15% of the pasture area is not likely to change this finding so long that there will not be clearing or grading activities on the four-acre portion of the property that is the subject of the proposed amendment. The Property is not within a Special Protection area
- Adequacy of the septic system was established in 2016, at the time of the original application. At the time, a new septic system was being installed to replace the old system that was not found to meet standard to accommodate the proposed equestrian facility. Consequently, the applicant obtained the necessary permit from the Montgomery County Department of Public Services, Well and Septic Section and was working with the Department on the installation of the system. The new septic system has since been completed and is now operational. The proposed amendment will not affect the functionality of the septic facility that is currently on the property.
- Regarding the nutrient system, pursuant to Section 59-3.2.4.B.1.c, meeting or addressing County and State nutrient management, water quality, and soil conservation standards is required for equestrian facilities that keep or board more than 10 horses. Therefore, the Applicant is not required "to have a nutrient management plan prepared by a Maryland certified nutrient management consultant." as suggested by Mr. Grigorian.
- Regarding the "significant number of chickens and rabbits which are currently kept at the Subject Property by the Applicant (but were not mentioned in her application)", Staff 's review is limited to the proposed Conditional use to allow an equestrian facility for two horses. The animals and poultry mentioned as part of the existing farm use that is permitted by right in the Zone, therefore, restriction on the animals mentioned would be outside the scope of the Conditional Use review process.

Staff review of the pending application is limited to only the proposed amendment of the approved conditional use plan. The intended subdivision of the property is a separate procedure that requires a Preliminary Plan of Subdivision application review process with a final action and decision to be taken by the Montgomery County Planning Board. At this point, the Conditional Use application review staff has no knowledge of the possible outcome of the Preliminary Plan review process. However, Mr. Grigorian and Dr. Hansen could participate in the Preliminary Plan Subdivision review process as interested parties or *parties of record* when the application is filed at the Planning Department. (Emphasis in original).

At the public hearing, both Mr. Grigorian and Dr. Hansen questioned Ms. Freeman's testimony that Planning Staff had advised her she needed to modify the conditional use before the Planning Board could decide on the subdivision plan. T. 132, 138. The Hearing Examiner asked Staff if they could document that advice. Exhibit 81. Staff provided a copy of agency comments from the Development Review Committee (DRC) meeting held for the subdivision. *Id.* Included among the comments were the following (*Id.*; highlighting in original):

AREA MASTER	Joshua Penn	Revisions	Conditional USE still active CU16-15 and uses the entire property as justification for approval. Preliminary plan can not be approved if it would cause the CU to become non-conforming. CU needs to be abandoned or amended. Master plan has no specific comments about this property, however the MP does list this a the Rural Community of Sugarland and has specific recommendations on pages 71 and 72 that will need to be addressed.
PLAN	joshua.penn@montgomeryplanning.org	Requested	
	Melissa Goutos Melissa.Goutos@montgomerycountymd.gov	Revisions	Conditional use shall be abandoned or modified prior to approval. Please provide documentation. Please note that the existing house will be nonconforming if it is within the 40' BRL

Staff interpreted the comments to mean (*Id.*):

...If the subdivision review resulted in a change that affects some elements of the amended CU, the Applicant will have to return back to OZAH to amend the CU Plan again.

D. Community Opposition and the Applicant's Responses

Dr. Hansen and Mr. Grigorian believe the conditional use amendment should be either (1) deferred until after the subdivision approval, (2) dismissed, or (3) denied,. While their objections are wide-ranging, the primary one is that approval of the minor amendment is premature because too much is unknown about impact of the subdivision plan. They also believe that approval of the conditional use amendment implicitly supports approval of the subdivision plan. Dr. Hansen

warned that, if this plan is approved, it will constitute a massive taking and neighbors will have to bring suit. She doesn't think the County wants a suit. T. 89. Her neighbors will not bring suit if this application is deferred until after the subdivision is reviewed or if this case is considered a major amendment that will be denied. T. 89.

Ms. Freeman believes that the testimony and evidence presented by those in opposition demonstrate a "clear pattern of false claims" that evolve each time an issue is addressed. Exhibit 93. She explains (*Id.*):

First, the primary claim was that my pets were draining and contaminating the the Poolesville aquifer and therefore Mr. Grigorian's water was at times 'a drip'. False.

Next, Dr. Hansen stated that my subdivision maps were all wrong and there were numerous inconsistencies that could not enable a decision to be made about the Conditional Use. False.

The next claim from both parties was that I don't have enough or adequate acreage or pasture for the horses. False.

Following this, came the claim from both parties that there is no need to get the Conditional Use amended prior to continuing with the subdivision process. False.

The detailed issues raised by those in opposition, and Ms. Freeman's responses are set out below.

1. Need for a Nutrient Management Plan

a. Opposition Concerns. Mr. Grigorian initially objected because he was concerned about runoff polluting the Potomac. According to him, the reduced conditional use area would "host not only the proposed number of horses, but also a significant number of chickens and rabbits which are currently kept at the Subject Property by the Applicant (but were not mentioned in her application)." *Id.* Mr. Grigorian asserted that the nutrient management plan was necessary because Ms. Freeman spreads manure from her horses, chickens and rabbits around the property.

He believes that the plan would ensure this would be done "responsibly" and in accordance with State requirements. Exhibit 35.

b. Applicant's response. The Applicant provided an updated Nutrient Management Plan for the proposed conditional use area. Exhibit 53.

2. Number of Horses Permitted

1. Opposition's Concerns. Dr. Hansen initially disagreed with Staff's assessment that the amendment would allow a maximum of four horses on the property. She believed that up to seven horses could be housed on the property. Exhibit 51. She supported that by providing the County regulation setting the "stocking rate" for horses. The regulation she forwarded was the Zoning Ordinance section governing this case. After the Hearing Examiner explained that the Zoning Ordinance would not permit seven horses on the property because the conditional use area would be reduced to 4 acres, Dr. Hansen did not raise this issue at the public hearing. Exhibit 51.

Dr. Hansen renewed her claim after the public hearing for different reasons. According to her, a "decision" has been made by the Planning Department to put 2.09 acres on the southeast corner of proposed Lot 1 into a Forest Conservation easement. Thus, Dr. Hansen argues, this acreage is "out of her [Ms. Freeman's] control and she does not have sufficient acreage to support her two horses. Exhibit 91.

2. Applicant's response. The Applicant contends that the Zoning Ordinance measures the maximum number of horses permitted by the size of the conditional use area. All of the pasture within the conditional use area is outside the Forest Conservation Easement shown on the subdivision plan. She further points out that only .78 acres of the proposed Forest Conservation Easement is located within the conditional use area shown on Exhibit 72(c). Exhibit 93, pp. 7-8.

3. Amount and Quality of Pasture

1. Opposition Concerns. Both of those in opposition contend that there won't be enough pasture to support Ms. Freeman's two horses if this minor amendment is granted. According to Mr. Grigorian, the pasture shown on the aerial photograph in the Conservation Plan will be cut in half if the conditional use is approved. T. 56-57. In his closing statement, Mr. Grigorian states there is "quantitative support" for Ms. Freeman's representation that the pasture will be reduced by only 15%. Exhibit 88. Mr. Grigorian believes that the right-of-way and improvements such as a cistern and access turnaround, will reduce the amount of pasture further. *Id*.

Dr. Hansen alleged that the Conservation Plan demonstrated that Ms. Freeman's pasture scores were low. She testified that there is only .78 acres of pasture because "everything else is covered by trees." T. 40. According to her, the "consistent position" of the Department of Agriculture recommends two full acres per horse, with full feed in the morning and night. When the lower-rated pastures are subtracted from the total pasture, the area of pasture is well below the requirements "asked for" by the Department of Agriculture. T. 35-36. She also believes that the Conservation Plan demonstrates that the pastures are not healthy and have lower scores of 1, 2 and 3. T. 36.

2. Applicant's Response. Ms. Freeman points to the aerial photograph in the Conservation Plan (on page 17 of this Decision), that lists the acreage of all pastures on the entire 7.65 acre property. If one subtracts the acreage that will outside of the proposed conditional use area, she believes the Conservation Plan demonstrates that only 15% of the total will be lost.

Ms. Freeman states that a "simple glance" at the subdivision map demonstrates that the turnaround and cistern do not overlap with the pasture land. She adds (Exhibit 93):

... I have been told that the building of such a fire/rescue cistern is quite a low possibility of ever happening as it would need to be funded by the county and this

would certainly not be a priority that the county would use funds for such a cistern. However, if it ever were to be built, this would be of benefit to all the neighbors as it would be the nearest water source for fire extinguishing.

She further responds that the amount of right-of-way that encroaches into Field 1 (as marked on the Conservation Plan) is only 0.12 acres or 528 square feet. According to her, she has much more available pasture within the 4-acre conditional use area should she need it. At present, she does not need the additional acreage due to her horses eating habits. She points to the Addendum to the Nutrient Management Plan that shows that acreage of both fenced and unfenced pasture amounts to 2.11 acres "just on the 4 acre area." Exhibit 93.

Ms. Freeman testified that her pastures have more acreage than apparent on one of the aerial photographs from the Conservation Plan. Trees cast shadows in the aerial photograph, making it appear that the open areas are smaller than they actually are. Her pastures have 75%-80% open sunlight. There is a small area in the back corner that has some trees but also grass. The aerial photograph from the original staff report more accurately shows the amount of open area because it was taken in winter. T. 54-55.

In her post-hearing comments, Ms. Freeman further stated that she has "far more than enough open high-quality pasture for the horses, as evidenced by the Conservation Plan, and the Nutrient Management Plan, and supplemented by the statement from my vet and my own testimony under oath." Exhibit 72.

3. Impact on the Sole Source Acquifer

a. Opposition Concerns. Another of Mr. Grigorian's concerns was the impact of the subdivision on the acquifer that feeds most wells in the community. Mr. Grigorian felt that Ms. Freeman must demonstrate that an aquifer providing water supply to the area has enough capacity to support the proposed use to maintain horses, agricultural, and "existing and planned"

improvements." Exhibit 35. Mr. Grigorian stated, "any property owner wanting to load up their property with animals beyond the number permitted by the zoning code should be required to present written evidence that the common aquifer can support the otherwise prohibited use. I can personally attest to the fact that on numerous occasions during the past 10 years I have had a mere trickle of water coming from my faucets." *Id.* The Poolesville area and everything to the north and west of it relies on the Piedmont Sole Source Aquifer for its water supply. Therefore, he believes that preserving the safety and potability of the water is very important. T. 96-97.

Dr. Hansen asserted that there have been previous spills of petroleum distillate on Ms. Freeman's property. A former owner (now deceased) was unable to use the property for a year because the well and septic fields were contaminated by a leaking underground fuel tank. It took her a year to find a safe water source because she wanted to have two horses as well. T. 97-98.

From her visits when the former owner was alive, Dr. Hansen knows that there was subterranean water leakage into the basement due to a high water table. When the former owner returned to the home, she was able to renovate and put a stackable washer and dryer by the back door. That was also part of the reason that the former neighbor was unable to "do anything" with her buildings and the barn footings were wet and unstable. T. 98. In Dr. Hansen's opinion, it's unlikely that Ms. Freeman will be able to place appropriate well and septic facilities on the property. T. 98. Dr. Hansen believes that Ms. Freeman has already recognized this because Ms. Freeman has already had to construct remedial devices that may well exhaust capacity on the property. T. 99.

Dr. Hansen believes there is a lot of standing water on the property. She does not know how Ms. Freeman will direct that water because she does not have the 8% grade required. The

water will drain onto adjacent properties, potentially sending contaminates onto those properties.

T. 100.

b. Applicant's Response. The Applicant asserts there is no evidence to support Dr. Hansen's claim that there is subterranean leakage on the property. She states, "[f]or Dr. Hansen to make such a claim about this property, I would request evidence." Exhibit 72(a). Ms. Freeman further states (Exhibit 72(a)):

This previous owner is now deceased and lived on the property more than 10 years ago. It is unclear how this has any relevance to the issue of the Conditional Use, if in fact it is even true. Further, there are no signs or evidence of any residual negative affect about some oil spill that may or may not have happened on my property more than a decade ago.

She repeats this point in her closing comments. Exhibit 93. She states (*Id.*):

Water on my property is not contaminated and never has been as long as I've been here. I have no knowledge of any of the allegations about contamination that Dr. Hansen claims. It is false that Dr. Hansen claims that I have found the drinking water to be contaminated.

Ms. Freeman does not believe that the number of animals on the property is excessive for properties in the Ag Reserve. Exhibit 53. She lists her animals as follows (Exhibit 53):

- I have 13 chickens (usually about 12 over the last 3 years) and my daughter has 2 pet bunnies, Beena and Bun-Bun. Last year, Mrs. Grigorian asked us to take their bunny, Snowy, too so now we have 3, including Mrs. Grigorian's bunny. I assume she asked me to take their bunny based on her knowledge of how well I care for all of our animals. The chickens and bunnies combined drink about 3 gallons of water every 5-6 days. I have no further plans to increase the number of chickens or pet bunnies.
- We have 1 indoor cat.
- We have two rescue horses (which are technically ponies) meaning they produce a bit less waste and use a bit less water than larger horses.
- I live here alone (with my daughter ½ the week) so in terms of human usage of water and septic, even this is substantially lower than if 4people lived in this 2 bedroom house. The new septic system has been functioning perfectly since it was installed about 4 years ago.
- The number of additional animals on the property is within the allowed levels for the Zoning Code.

4. Approval of the Minor Amendment is Premature and Will Support Approval of the Subdivision

a. Opposition's Position. The primary thrust of the opposition's position is that the Hearing Examiner cannot approve the conditional use because there are too many issues outstanding in the subdivision approval (which are set out in the next subsection of this Report). Both Mr. Grigorian and Dr. Hansen believe that approval of the minor amendment could have a "detrimental impact" on the willingness of the Planning Board to consider changes to the subdivision. T. 66. Mr. Grigorian believes that the conditional use approval will be presented as supporting the subdivision in its current form. T. 67. In his opinion, there has already been an administrative investment in the layout of the subdivision plan. *Id*.

To illustrate the uncertainties regarding the subdivisioin, he believes that Ms. Freeman must place a fence on along the boundary of the proposed 4-acre conditional use area. If she doesn't, the horses could violate the amended conditional use by wandering into the proposed Lot 2. The subdivision, however, could change the lot line between Lots 1 and 2 and make this condition superfluous. T. 122. In his opinion, it was an error for government agencies to state that the minor amendment to the conditional use had to be approved prior to the subdivision plan. The decision on the conditional use shouldn't be made based on an agency error. T. 62.

Dr. Hansen believes that the unknowns related to this application are caused by the Planning Staff actions. Planning Staff did not require a full forest "floor" review, a full assessment under the Rustic Roads Functional Master Plan, or an opinion by the Rustic Roads Advisory Committee because she assumed that they would not need to do any of those things or add a sediment and erosion control requirement. Staff assumed there would be no need for a prohibition on grading and soil removal because they existed in 2016. According to Dr. Hansen, that

assumption is false because the conditional use plan submitted was designed for the subdivision and didn't even correct the inaccuracies that existing on the subdivision plan. T. 71-72.

In his closing comments, Mr. Grigorian. reiterates this argument. He asserts again that the Hearing Examiner cannot approve the conditional use because she does not know "with certainty" the final impact of the subdivision (Exhibit 88):

The H.E. is on actual notice of the applicant's planned changes to the property and has received copies of applicant's filed subdivision plans. The pendence of those changes renders it an impossibility for the H.E. to conclude with any certainty whether or not the amendment will change the nature, character or intensity of the CU to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected.

Mr. Grigorian interprets the DRC's comments about the need to obtain an amendment to the conditional use before approval of a subdivision plan to mean that the original conditional use should be abandoned rather than modified. Instead, according to him, the DRC comments are a "mere suggestion" that the conditional use should be modified. This suggestion, he continues, should not give the Hearing Examiner "cover" for inappropriately approving a conditional use for a "hypothetical lot based on what is essentially non-existent, or at least rapidly changing set of facts and assumptions." Exhibit 88.

Dr. Hansen agrees that the Hearing Examiner cannot approve the conditional use without knowing the outcome of the subdivision approval. She has a Ph.D. in political science; she is aware that old, wealthier counties like Montgomery County tend to fractionalize decision-making between different agencies. T. 70. She has both jurisdictional and bureaucratic concerns about the minor amendment to the conditional use. She stated (T. 70):

And after all my reading of all of this testimony and taking into account administrative law, as well as county law, as well as state law, as well as law that pertains to jurisdictions that encompass the District of Columbia and Maryland, it seems to me that your office, even though you're trying idly to do this, can't really do what — make a decision on a minor or a major amendment, and that you can

categorize this Freeman applications either way, leaving you with one of three options.

Either leaving it on the table, which was the solution that I offered in the testimony that I submitted by 4:00 p.m. last Thursday, or have it voluntarily withdrawn by Ms. Freeman or the third option, which may be least attractive to everyone potentially is that you can categorize it as a major amendment.

In her closing statement, Dr. Hansen asserts that the Hearing Examiner's failure to dismiss, deny, or defer the conditional use amendment "locks" the parties into a "forced march" to approval of the subdivision. *Id.* Until Ms. Freeman retracts her statement that she filed the amendment to achieve the subdivision approval, any argument that the two matters are not related is "false". *Id.* Exhibit 91(a).

2. The Applicant's Response. The Applicant believes that the DRC comments are clear that she is required to obtain the minor amendment to the conditional use before the Planning Board may approve her subdivision plan. Exhibit 93. She also states that one of her rescue horses is blind and would not adopt easily to moving to another location if she abandoned the conditional use. *Id.*

5. Opposition Concerns Regarding the Subdivision

Dr. Hansen submitted a letter she had written to the Planning Department objecting to the subdivision plan. Exhibit 61. The letter formed the basis of much of her testimony at the public hearing in this case. *See*, *e.g.*, T. 72, 73, 75, 78, 81, 87, 89, 94, 107.

a. Tree Clearing and Impact on Rustic Road

1. Opponent's Concerns. Mr. Grigorian believes that the subdivision plan calls for substantial forest clearing trees on both lots, potentially impacting the Potomac River. He disagreed with Staff's determination that the amendment is minor, referencing the Forest Conservation Plan submitted in Ms. Freeman's subdivision case, which, according to him, "clearly indicates" that a substantial portion of the new 3.27-acre lot (i.e., proposed Lot 2) would be cleared.

Exhibit 50. It will remove a lot of trees along Sugarland Road, which is one of only 19 exceptional rustic roads in Montgomery County. T. 61-62. He testified that there is a notation on the forest conservation plan for the subdivision that states, "Trees to be cleared." Exhibit 88. Mr. Grigorian is less concerned with the potential forest clearing on proposed Lot 1 than Lot 2. On both lots, the forest should only be cleared as needed. T. 65.

In his closing arguments, Mr. Grigorian alleged that the "significant tree" inventory from the subdivision plan was flawed because,"at least to the naked eye", there are large trees visible from the street that are not shown on the inventory. Exhibit 88. He believes that it is relevant to the conditional use because it will impact drainage, and thus will affect the environmental impact of the use. *Id*.

Dr. Hansen professes that the subdivision plats submitted by Ms. Freeman are "inaccurate, not corrected, does not portray accurately the hedgerow habitat, the mature forest, the intermediate forest, and the secondary forest." T. 92. Dr. Hansen believes that Ms. Freeman's property holds 70% of the protected forest along Sugarland Road. About 55% of the forest is located on proposed Lot 1. T. 92-93. The Sugarland community has learned that it may have to defend tree preservation through lawsuits. A Mr. Faud El-Hibri attempted to clear four forests in order to operate a polo field 23 hours a day. The community hired a tree expert and measured every tree. Two County Staff people were subsequently fired. In Montgomery County, there is a "good ol' boy" assumption that you can take down any tree you want to. There were two County Planners who spoke with Ms. Freeman and encouraged her to protect those trees formally, which Ms. Freeman refused to do. This gives the community the idea that something underhanded is going on. She believes that County planners told her that the subdivision plan was not updated and corrected to preserve the trees, which has not occurred. T. 94.

The subdivision is flawed because the forest clearing on Ms. Freeman's property and completely decimate the hedgerow habitat. She took pictures of the "decimation" that occurred when Comcast began to clear the habitat and forwarded them to the Planning Department. She never received a response. Therefore, she's communicated her concerns about the subdivision to Leslie Saville of the Planning Department. T. 96.

If, as Dr. Hansen believes, the County's ulterior motive is to establish an "Outer Beltway", and the conditional use and subdivision are approved, the last intact section of major forest on Sugarland Road, an exceptional Rustic Road, will be torn down during migratory bird nesting season. This will cause an environmental organization, such as the Audobon Society, to sue the County. With the trees torn out, there may be no road buffer, no filtration, and the acquifer may be contaminated.

She is also concerned about legal expenses for the neighbors. She testified, "The minute this is passed, this goes right into the land sale issue for all of us. And that becomes a taking." T. 87. She told of the time when Comcast came and tore down trees on either side of the road. Finally, Comcast agreed that the adjacent property owners owned to the mid-point of the road. The County fined Asplundh, the tree removal company, because most of the employees who drive the trucks are not American citizens and have no legal right to work in this County. They cannot read the forestry or Pepco maps prepared by their foresters, which marked the areas not to be touched. The surrounding property owners sued Comcast to prevent them from entering their properties. T. 88-89.

2. Applicant's Response. In her Pre-Hearing Statement, Ms. Freeman acknowledges that the Forest Conservation Plan contains a a note about possible tree clearing on the western side of proposed conditional use area (proposed Lot 1). Exhibit 53. She explains (*Id.*):

...these trees are **not** going to be cleared. I discussed this issue with Jeff Server and Doug Johnson at M-NCPPC on 5/22/20 who explained to me that the law reads such that there are only two possibilities to designate existing forest – either To Be Cleared, or it is to be put into an Easement. It apparently can't just be left as forest [on the subdivision plan] without further designation. However, to alleviate concern about this treed area, I have discussed with my Planners about adding a Note onto the plans that would further clarify that this treed area would not be cleared – along the language of:

Area to be Cleared ## Ac

(this area shown as clearing for forest conservation worksheet purposes only;

This area is not proposed to be cleared at

This time and is not within the project LOD)

There is no need for any clearing (or grading) of any forest on the 4 acre lot, nor do I have any desire to take any trees down. I would be comfortable if the Hearing Examiner added language to this effect into the Minor Amendment decision – that there will be no clearing or grading and that the tree buffer, as it currently stands, will remain intact on the 4-acre lot.

Ms. Freeman's engineer submitted also commented "[n]ot all of the trees designated as "clearing" will be actually cleared. However, this matter and the matter of any changes along Sugarland Road will be vetted during the subdivision review process." Exhibit 72(b).

b. Impact of the Right of Way

Dr. Hansen interprets the subdivision plan as establishing an 80-foot right of way southeast of centerline of Sugarland Road on Ms. Freeman's property. She testified that the right-of-way shown on the subdivision plan will constitute a "massive taking" that will destroy several other homes along Sugarland Road. She accuses the County of planning an "outer beltway" along Sugarland Road. She contends that the County has chosen this route because friends of the County Executive live in the other possible alignment for the Outer Beltway. T. 71, 79; Exhibit 91.

In Dr. Hansen's opinion, many adverse impacts on the neighborhood stem from the 80-foot right-of-way as she interprets it. Ms. Freeman's house sits entirely within the 80-foot

easement, so if the subdivision is approved, her entire house is gone. T. 74. When the Hearing Examiner pointed out that the house shown on the plan did not sit within the right-of-way dedication, Dr. Hansen testified that "somebody's moved her house". T. 74. According to her, if you measure 80 feet from the road, Ms. Freeman's house sits within the 80 feet. Id. She believes that every house along Sugarland Road is within the 80-foot easement, which is why this amendment should not be approved. T. 74-75. That was error that was supposed to have been fixed in the subdivision plan. T. 75. She believes that it would be a major impact if every house along Sugarland Road lost half the house, particularly for those families with children. *Id.* Most of the houses along Sugarland Road, including hers, are within the right-of-way. In response to questions from the Hearing Examiner, Dr. Hansen testified that she had never surveyed the property because she didn't need to. T. 74-76.

Dr. Hansen asserted that there is no prescriptive easement for the public on Sugarland Road because it predates the formation of Montgomery County. Therefore, she and neighbors own to the middle of the road. In response to questions from the Hearing Examiner, she acknowledged that the public uses the road for travel. T. 77.

Dr. Hansen believes that the subdivision plan leaves open the possibility that there will be a second 80-foot right-of-way on the northern side of Sugarland Road. In her opinion, the Master Plan in this case sets a right-of-way of 13-15 feet. She does not know where the 80-foot requirement comes from. T. 78.

If the 80-foot right-of-way is extended along Sugarland Road, there will also be a taking of part of Sugarland Forest Community Church, which is a national and State registered historic structure. She believes that the subdivision sets the precedent for doing a "massive taking of an exception rustic road, which has been 12-15 feet wide since 1996. T. 79-80.

In her opinion, an 80-foot right-of-way would bring commercial interests to Sugarland Road. Not only would this damage the hedgerow habitat, it will damage the fragile underground water diversion that is intended to occur along these roads to filter dangerous chemical runoff. Harmful chemicals are dispersed from vehicles and County anti-ice trucks among other items. T. 91-92.

Dr. Hansen testified that she knew the subject property well because she had been very close friends with "two owners back." T. 69. She also knew the property from when she was getting her doctorate in political science at Harvard. Everyone at Harvard was "agog" at the "world set-aside program for agricultural land in the only country on the planet that actually routinely paved over a prime farmland." T. 69. Dr. Hansen testified that the conditional use plan submitted is not consistent with the Rural Roads Functional Master Plan because, according to Dr. Hansen, it will destroy the hedgerow habitat along Sugarland Road. T. 90. She served on the historic district board for the upcounty for 12 years and was tasked with documenting all 12 roads proposed for rustic designation. She measured the hedgerow habitat and trees on both sides of these rows. The 80-foot right-of-way is inconsistent with preserving the hedgerow habitat, which in her opinion is a vital component of a rustic road. The habitat is important to migratory birds because it provides shelter and food. T. 90-91.

In her closing arguments, Dr. Hansen stated she "stands by" her testimony that the right-of-way will be 80 feet southeast of the centerline of Sugarland Road. Exhibit 91. Because the subdivision plan establishes an 80-foot easement, Dr. Hansen believes that the entire plan is not to scale because it shows that Ms. Freeman's home is outside of the 80-foot right-of-way. But, she testified, Ms. Freeman's home is only 50 feet from Sugarland Road. T. 81. Dr. Hansen postulates

that the subdivision plan establishes a stream valley buffer near every house on Sugarland Road that borders the Casey property (adjoining to the southeast.) T. 82.

2. Applicant's Response. The Applicant submitted a letter from David W. McKee, a principal of the engineering firm that prepared the subdivision plan. Exhibit 72(b). Mr. McKee states that subdivision plan dedicates only a 40-foot right of way southeast of the centerline of Sugarland Road along Ms. Freeman's property. The subdivision plan references an 80-foot right of way because that is the "ultimate" right-of-way that includes both sides of Sugarland Road. Id. Mr. McKee points out that the 40-foot right-of-way on Ms. Freeman's property is noted on the plan. The subdivision plan includes a detail for County standard MC-213.02, which is a standard for open-section roadways with a right-of-way width of 80 feet. According to Mr. McKee, the road cross-section detail on the subdivision plan also shows that the total 80-foot right-of-way is divided equally on both sides of the centerline. Mr. McKee states that the 80-foot ultimate right-of-way is designated by the "Master Plan for Sugarland Road." Id.

d. Miscellenous Issues Regarding the Subdivision

Another problem with the subdivision, according to Dr. Hansen, is that it shows a septic facility within the right-of-way, which she believes contravenes established County procedures. T. 80.

Dr. Hansen also noted that the subdivision plan sets up a trail easement property abutting the southeast (rear) side of Ms. Freeman's property where none currently exists. If the minor amendment is approved, it will cause a taking the adjoining property owned by the Caseys and properties along where the trail could be extended to the northeast and southwest. T. 82. She also believes it establishes a stream buffer on the adjacent property. T. 82-83.

She has consulted with the management of the Casey property. She consults with them often because there is a lot of illegal hunting and joyriding there. There have been car stripping rings and open air drug markets. She has had to close 14 open air drug markets since 1992. If the trail easement is recorded, it will open up the rear of all of the properties along Sugarland Road to dangerous activities and permit illegal hunters, joyriders, birders, and potential criminals, particularly on the Casey property. T. 86. According to Dr. Hansen, there has been a "fair amount" of "nefarious" property damage in the area. She has had to install an alarm system. People using illegal trails have stolen a tremendous amount of ferrying equipment. There is a lot of illegal activity now; if a formal trail system is established, this will become a "major transit point" for illegal activities. T. 85-86.

2. Applicant's Response. The Applicant's engineer states (Exhibit 72(b)):

Our plan denotes the location of an existing trail based upon observations made in the field. The designation was not intended to propose a new trail easement. We observed signs indicating a trail in the location shown. However, upon contact with a representative of the Casey property and further research, we plan to remove the trail from all future plans. Public records do not indicate a trail easement exists in the area.

* * *

In accordance with M-NCPPC policy, we are required to depict the location of stream and stream buffer areas within 100 feet of a property which is proposed for subdivision. The depiction of stream buffer areas on properties to the northeast and southeast of the site is for this reason only. Since only the Freeman property is included in the subdivision application, the depiction of stream buffer areas on neighboring properties has no bearing on the use of the adjacent properties by the owner's of those properties.

e. Subdivision's Impact on Well on Adjacent Property

Mr. Grigorian believes that another issue with the subdivision stems from the location of the sand mounds that are are directly upgrade from the adjoining property to the east. The subdivision proposes to build sand mounds very close to a well head on that adjoining property.

T. 65.

6. Motivations of Ms. Freeman and the County

a. Opposition Concerns. Dr. Hansen finds Ms. Freeman "disingenuous" when she states that she does not intend to sell the lot in the foreseeable future. This leads Dr. Hansen to question whether "excessive pressures" have been "brought to bear" on "breaking" the Ag Reserve and increasing development. Exhibit 91(a). In her closing arguments, Dr. Hansen also posits that Sugarland Road is the most likely candidate for an "Outer Beltway" because individuals close to the County Executive live in other potential locations. She suggests that the Hearing Examiner place the amendment "on the table" and take it off the table when the Planning Board approves the subdivision application. *Id*.

Dr. Hansen believes that Ms. Freeman is subdividing the property to sell the second lot in the short-term. She argues that Ms. Freeman would not have had a "mystery man", that used "spyware" to listen to the remote hearing on the conditional use. The "mystery man", according to her, is a title attorney, an insurance broker, and an attorney specializing in "Agricultural Preservation, Land Use, and Zoning Law…" *Id*. She believes that Ms. Freeman's representation she will not develop in the "foreseeable future" is a misrepresentation under oath. *Id*.

Dr. Hansen does not know whether bureaucratic inertia, corrupt business practices, worry about Ms. Freeman's financial state, or an Outer Beltway is driving the Hearing Examiner's refusal to table the conditional use application. *Id.* In her opinion, the Functional Master Plan for Rustic Roads (Rustic Roads Plan) legally preempts the 1980 Preservation of Agricultural and Rural Open Space Plan (1980 Plan). She urges consideration of language she asserts is in the 1980 Plan section on the Preservation of a Rural Village "whose nature, character, or intensity of the conditional use

is changed to such an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use." *Id.* If the Hearing Examiner grants this conditional use, she is "just playing into the hands of the farmer-developers, who intend to destroy the Ag Reserve with 'a thousand cuts' like Ms. Freeman's Sub-Division." *Id.*

Like Dr. Hansen, Mr. Grigorian also questions Ms. Freeman's motives in subdividing the property. He believes that Ms. Freeman is planning to sell the lot in the short term. *Id.* He finds signs on her lawn stating "We Will Rise" and "A Good Neighbor is a Priceless Treasure" to be "disingenuous." *Id.* Instead, he accuses Ms. Freeman of "gaslighting" her neighbors by refusing to listen to their concerns. *Id.* He charges that, "[t]he applicant is a profiteer, just like any forprofit developer, and should (and will) be treated as such." *Id.* According to him, the applicant's statement that the lot is for her daughter is "completely incongruous" with an email sent to him in December, 2019. Mr. Grigorian reproduced excerpts from the email in which Ms. Freeman cited personal reasons for selling the lot.

2. Applicant's Response. Ms. Freeman found it "extremely inappropriate" for Mr. Grigorian to have made her personal reasons for possibly selling the lot in the future a matter of public record and asked the Hearing Examiner to strike the information from the record.⁷ She accused Mr. Grigorian of "cherry-picking" excerpts from her email and quoted other portions in which she stated that her dream was to be on the property for a very long time. Exhibit 99.

Ms. Freeman denies knowing the "mystery man" identified by Dr. Hansen who attended the remote hearing on her conditional use amendment. *Id*.

⁷The information disclosed is not protected from disclosure by law. As set forth *infra*, the Hearing Examiner does not find Ms. Freeman's motivations subdividing or selling the property relevant to the application for a minor amendment to a conditional use. Therefore, she does not repeat the accusations in this Decision.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The primary argument of those in opposition is that the Hearing Examiner cannot approve the minor amendment to the conditional use because she knows of the pending subdivision, but does not know its outcome. Therefore, the argument goes, the Hearing Examiner cannot know whether the conditional use amendment is major or minor until the subdivision and its impacts are decided. The opposition's second premise is that approval of this minor amendment somehow supports or forces the Planning Board to approve the subdivision.

A. Governing Law

The Hearing Examiner finds both arguments both factually and legally flawed. The short answer is that a condition of approval of the minor amendment will restrict the Applicant to the improvements shown on the conditional use site plan (Exhibit 72(c) with the fence realigned as shown on Exhibit 74. If anything on the 4-acre conditional use area changes due to the subdivision, Ms. Freeman must return to the Hearing Examiner to amend the plan. Changes to proposed Lot 2 do not affect the amendment requested here because Ms. Freeman is removing the conditional use from that area. Therefore the impact on the surrounding area from her conditional use amendment is definitively known, regardless of the outcome of the subdivision plan.

The longer answer reveals that the opposition's arguments have no foundation in Maryland law or the factual evidence in this record. Contrary to Dr. Hansen's contention that a multi-agency approval process for land development is reserved to "older, wealthier" counties, it is well established in Maryland that local governments control land development through three separate functions: planning, zoning and subdivision regulations. *Coffey v. Maryland-National Capital Park & Planning Com.*, 293 Md. 24, 27 (1982); Board of County Commissioners of Cecil County v. Gaster, 285 Md. 233, 246 (1979); Miller v. Forty West Builders, Inc., 62 Md. App. 320, (1985);

Mayor & Council of Rockville v. Rylyns Enters., 372 Md. 514, 529-530 (2002); People's Counsel for Baltimore County. v. Surina, 400 Md. 662, 688-89 (2007). While these functions have a common goal to achieve the County's policies for land development, each is distinct, governed by separate legislative authority, and often administered by separate agencies. Surina, 400 Md. at 690.

The Court of Appeals has recognized the different purposes and different standards governing zoning and subdivision regulations:

There are three integral parts of adequate land planning, the master plan, zoning, and subdivision regulations. The need for subdivision regulations as a part of that planning is well illustrated by the case here. As it is put in 4 R. Anderson, American Law of Zoning § 23.03 (2d ed. 1977), '[Z]oning ordinances are not calculated to protect the community from the financial loss which may result from imperfect development. Some of these purposes are sought through the imposition of subdivision controls.' Id. at 47. 4 A. Rathkopf, *The Law of Zoning and Planning Ch. 71 § 2 (4th ed. 1979)*, gives reasons for subdivision control:

Planning enabling acts and the requirements for plat approval are based upon the realization that homes are no longer generally constructed one at a time for individual owners, resulting in a gradual development which can be controlled by zoning ordinances and local health, building, plumbing, and electrical codes alone. Vacant lots suitable for single homes in already developed communities have all but disappeared. The great increases in population and the unprecedented demand for homes has necessarily resulted in opening up undeveloped land in outlying areas, and the development thereof by large numbers of homes which may be said to be built all at one time. Where such development takes place without restriction other than zoning restrictions, it is the developer who designs the community in respect to the number, length, width, condition, and location of streets. The developer also determines where the newly arrived inhabitants of the community shall reside, without consideration of the necessity for, or existence of, schools, fire protection, parks, playgrounds, and other public facilities. If subdivisions develop too rapidly, or before the community is ready for the added burdens which an increased population imposes, and without adequate control, the result too often is the creation of deteriorating neighborhoods which create a blight upon the community and a drain upon the municipal purse. [Id. at 71-6 -- 7.]

Coffey v. Maryland-National Capital Park & Planning Com., 293 Md. 24, 27-28 (1982). Zoning, as opposed to subdivision, performs other purposes:

Zoning ordinances...do not create lots. Zoning does not create parcels of real property. What zoning ordinances normally do, with respect to residential districts, is establish dimensional minimums, such as minimal lot, parcel or tract size, yard sizes (the distance between buildings and property lines), and the height of structures. In addition, such ordinances specify the number of residential units that may be placed upon the area of a tract or parcel (density), ancillary requirements such as parking minimums, bathroom minimums, and square footage minimums of buildings. Additionally, zoning ordinances can, to some extent, regulate uses of property, as distinct from dimensional requirements.

Friends of the Ridge v. Balt. Gas & Elec. Co., 352 Md. 645, 650-651 (1999). Without legislative authority incorporating the standards of one process into the other, an agency may not exercise the authority vested by an enabling act in another agency. West Montgomery County Citizens Assn. v. Md.-National Capital Park & Planning Com., 309 Md. 183, 522 A.2d 1328 (1987)(Planning Board could not assign zoning densities through Master Plan because it did not have legislative authority to zone).

The Montgomery County Zoning Ordinance and the subdivision regulations govern two different functions and have different standards for approval of applications. *Compare, Zoning Ordinance,* §59.7.3.1.E.1 and *Montgomery County Code,* §59.4.2.D. For this reason, a zoning approval like a conditional use does *not* dictate the outcome of a subdivision application. In fact that opposite is true:

If planning boards had no alternative but to rubber-stamp their approval on every subdivision plat which conformed with the zoning ordinance, there would be little or no reason for their existence. While planning and zoning complement each other and serve certain common objectives, each represents a separate municipal function and neither is a mere rubber-stamp for the other...(Citations omitted.)

Coffey, 293 Md. at 27-28.

Maryland courts have been clear that zoning requirements should be met before approval of a subdivision application. The Court of Appeals instructs:

A subdivider, seeking approval of a subdivision plat, must first meet applicable zoning regulations and then must comply with state and county subdivision regulations. Thus, where a preliminary plat indicates on its face that it is violative of zoning ordinances, the denial of approval of the plat will be sustained. (Citations omitted).

Miller v. Forty W. Builders, Inc., 62 Md. App. 320, 334-35 (1985). Both the DRC comments in the subdivision case and Planning Staff's comments in this case correctly acknowledge the well-established relationship between the subdivision process and this conditional use (Exhibit 47):

Staff review of the pending application is limited to only the proposed amendment of the approved conditional use plan. The intended subdivision of the property is a separate procedure that requires a Preliminary Plan of Subdivision application review process with a final action and decision to be taken by the Montgomery County Planning Board. At this point, the Conditional Use application review staff has no knowledge of the possible outcome of the Preliminary Plan review process. However, Mr. Grigorian and Dr Hansen could participate in the Preliminary Plan Subdivision review process as interested parties or *parties of record* when the application is filed at the Planning Department.

Mr. Grigorian tortures the plain language of the DRC comments by interpreting them to mean that Ms. Freeman must abandon her conditional use in order to obtain the subdivision approval. The DRC comments plainly use the disjunctive "or" to separate two options—amending the conditional use *or* abandoning it.

Maryland courts make clear that the Hearing Examiner not only *may* decide the zoning issue prior to approval of the subdivision plan, but *should* do so, as Planning Staff advises. If the Planning Board approved the subdivision application before the minor amendment is approved, the property will immediately be in violation of the conditional use. If the Hearing Examiner cannot approve the minor amendment before consideration of the subdivision, Ms. Freeman is caught in a perpetual "Catch-22" and cannot proceed with either application.

Aside from the law, no fact in this record supports the opposition's argument that approval of this application somehow makes approval of the subdivision a *fait accompli*. Dr. Hansen posits unsupported theories that the County wants to make Sugarland Road an "Outer Beltway", or that "bureautic inertia" will cause the Planning Board or the Hearing Examiner to approve their respective applications. Mr. Grigorian believes that there is already an "administrative intent" to approve the subdivision. This type of pure speculation cannot create probative facts that make it true. Approval of the conditional use will restrict the *Applicant's* use of the property because she must conform to its terms. *Zoning Ordinance*, §59.7.3.1.L. It will not restrict the *Planning Board's* ability to make changes to the subdivision plan.

Mr. Grigorian argues that the initial conditional use site plan submitted (which was the subdivision plan) would be "recorded" and every notation outside of the subject property will become an "encrumbance" on neighboring properties. T. 83-84. The Hearing Examiner is unaware of any provision in County law requiring a conditional use approval to be recorded and the parties have not directed her to any. Similarly, the Hearing Examiner is unaware of any County or State law or regulation that makes off-site notations on a subdivision plan binding on other properties. Again, the parties have directed her to none. As indicated by the Applicant's engineer, these are notations of off-site conditions, *not* legal encumbrances on adjoining properties.

In his closing statement, Mr. Grigorian again urges the Hearing Examiner to consider the subdivision because she is on "actual notice" that changes are pending. Exhibit 88. The Hearing Examiner disagrees. The zoning approval is a prerequisite for the subdivision application and, even if the subdivision is approved, no changes may be made to the conditional use plan submitted for this application without further amending the conditional use.

If anything, it is the subdivision approval that is not ripe for review through this conditional use application. The decision on Ms. Freeman's subdivision application rests in the expertise of the Planning Board and the Hearing Examiner leaves it in their capable hands. The parties will have full opportunity to renew the concerns they've expressed in this proceeding during the Planning Board's hearing on Ms. Freeman's preliminary plan application.

B. Analysis of Minor Amendment

The Hearing Examiner returns to the Zoning Ordinance provisions that govern this decision. Upon review of this record, the Hearing Examiner finds that the amendment is minor, with the conditions of approval listed in Part IV of this Decision.

Of the many contentions in this case, the Hearing Examiner finds that the amendment will make only three changes to the existing conditional use: (1) the conditional use area will be reduced from 7.65 acres to 4 acres, (2) the existing amount of pasture will be reduced by 15%, and (3) the maximum number of horses that can be kept will be reduced from seven to four. All other operations will remain the same.

The reduction in the maximum number of horses permitted does not impact the surrounding area because Ms. Freeman has agreed to a condition of approval limiting the number of horses to two--the same she has had since the conditional use was established. If anything, the reduction of the maximum number of horses permitted will have less impact on the surrounding area.

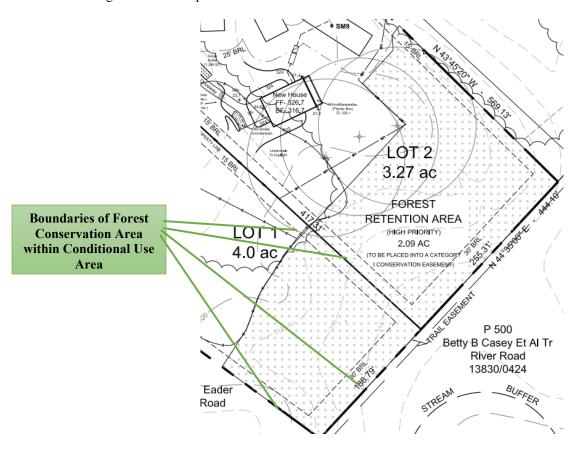
The Hearing Examiner finds that two horses fall well within the limits in the Zoning Ordinance. The Zoning Ordinance calculates the maximum number of horses for an equestrian facility by the "gross acreage" of the property. *Zoning Ordinance*, § 59.3.2.4.B.1.a. For two horses, the Zoning Ordinance requires a minimum of two gross acres. For three horses, the Zoning Ordinance mandates a minimum of one gross acre per horse. The proposed conditional use area

will be 4 acres, permitting a maximum of four horses on the property, which will be limited by condition to two horses.

There's no foundation for Dr. Hansen's argument that the Hearing Examiner should deduct from the gross acreage the 2.09 acres shown on the forest conservation easement. The Hearing Examiner is required to apply the "plain language" of the Zoning Ordinance, *Minh-Vu Hoang v. Lowery*, 469 Md. 95, 119 (2020), which clearly assesses the maximum number of horses by "gross acreage" rather than areas that may or may not be useable to the owner. Moreover, the subdivision plan has not yet been decided, so the testimony is speculative. Finally, Dr. Hansen's argument is factually wrong, as the subdivision plan makes clear that less than half the 2.09 acres of Forest Conservation easement lies within the conditional use area (Exhibit 29(a), excerpt on the next page). Whether the maximum number of horses is capped at 3 or 2, the minor amendment meets area requirements of the Zoning Ordinance for this conditional use.

The opposition also charges that the amount of pasture left in the 4-acre conditional use area is not enough to support two horses. The Hearing Examiner is not persuaded. As with many of the opposition's arguments in this case, this position plainly contradicts the documents in the record.

For properties less than 5 acres in the R-200 Zone that require a conditional use, the Applicant "must establish through a pasture maintenance plan, feeding plan, and any other documentation the Hearing Examiner requires, that the site contains sufficient open pasture to ensure proper care of the horses and proper maintenance of the site." *Id.*, §59.3.2.4.B.2.c.ii. Mr. Grigorian first asserts that the amount of pasture would be reduced by half, rather than the 15% stated by Ms. Freeman, without providing a basis for his position. Even in his closing, he asserts



Excerpt from Subdivision Plan Depicting Forest Retention Area Exhibit 29(a)

that there is no "quantitative" evidence in the record to support Ms. Freeman's assertion that pasture would be reduced by only 15%. This is simply incorrect. Ms. Freeman correctly points to the Conservation Plan, which lists the acreage of each field (shown on page 17 of this Report.) The Conservation Plan supports Ms. Freeman's position that the pasture will be reduced by approximately 15%. Even with the sacrifice lot deducted from the total, the amount of pasture decreases by only 16%.

^{8.43} ac. (Field 1) + .17 ac. (Field 3) + .90 ac. (Field 2) + .44 ac. (Field 4a) + .34 ac. (Field 4b) = 2.28 ac. Exhibit 59(e). .34 acres (Field 4b) divided by 2.28 (Total Pasture) = .149 or 15%.

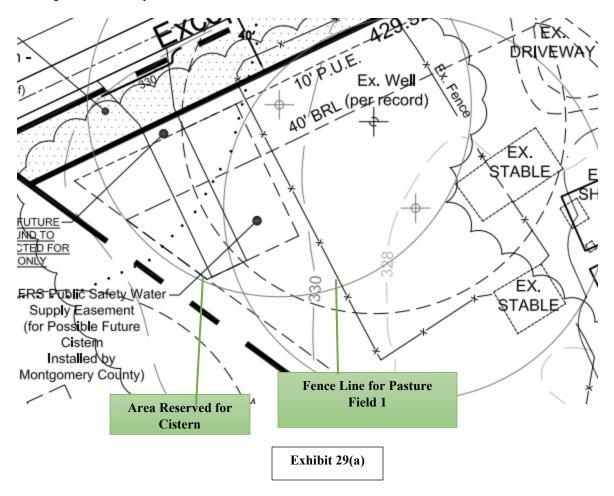
⁹2.28 acres (Total Pasture) - .17 acres (Field 3 or Sacrifice Lot)=2.11 acres (Total Pasture without Sacrifice Lot). .34 ac. (Field 4(b))/2.11 (Total Pasture Without Sacrifice Lot)=0.16.

Dr. Hansen believes the Conservation Plan shows that Ms. Freeman has only .78 acres of pasture because the rest is covered by trees. T. 40. Her testimony does not explain how she reached this conclusion. Another aerial photograph in the Conservation Plan, taken in the summer, contains trees that are casting shadows. Ms. Freeman suggested that this makes the pasture area less visible. Even that aerial photograph, however, clearly labels the areas considered pastures and the areas considered forest. Exhibit 59(d).

Mr. Grigorian further alleges that the size of pasture remaining after subdivision will be reduced due to the cistern and turnaround and right-of-way shown in the subdivision plan. While this is premature, as the subdivision hasn't been approved, it is obvious that the subdivision plan shows the cistern and turnaround located outside of Pasture Field 1 (Exhibit 29(a),on the next page).

The right-of-way does appear to encroach into Field 1, but Mr. Grigorian provided no specific information about how much land would be lost. Ms. Freeman states that it would be .012 acres or 528 square feet. Exhibit 93. Ms. Freeman also indicates that she can add additional pasture if and when the right-of-way is ever developed. This is supported by the Nutrient Management Plan.

Dr. Hansen also testified that Ms. Freeman's Conservation Plan assigned poor scores on the health of Ms. Freeman's pastures. The Conservation Plan flatly contradicts her testimony. It plainly rates the majority of the pasture above average. Exhibits 59(g), (h). The one pasture that received lower scores was the "sacrifice lot" (*i.e.*, Field 3), where the amount of forage is intentionally kept low for the health of the horses.



Dr. Hansen at one point in the hearing stated that the USDA recommends two acres per horse. T. 35-36. The Hearing Examiner does not find all of Dr. Hansen's unsupported assertions credible. The Nutrient Management Plan, Conservation Plan, and the letter from Ms. Freeman's veterinarian are from from independent entities and demonstrate that the amount and health of the pasture on the 4 acres in the proposed conditional use area will be sufficient for the two horses that she will have. The Hearing Examiner finds from this record that the weight of evidence in this case supports a finding that amount of pasture remaining on the four-acre conditional use area will be sufficient to support two horses on the property.

Mr. Grigorian's initial objection expressed concerns about pollution drainage from the conditional use area and called for Ms. Freeman to obtain a nutrient management plan. This has

been addressed by Ms. Freeman, who submitted an amended Nutrient Management Plan Addendum for the 4-acre conditional use area. Exhibit 53. She has also submitted the Conservation Plan designed to minimize the environmental impact of the use by implementing approved management practices. Mr. Grigorian's further arguments relating to drainage stem from the subdivision plan. Based on this evidence before her, the Hearing Examiner finds that that drainage from the conditional use area will not will not adversely affect the surrounding area.

Another objection within the realm of a conditional use amendment is whether minor amendment will adversely affect the acquifer that feeds neighboring properties. Mr. Grigorian asserts that Ms. Freeman has "loaded up" the property with animals in "excess" of Zoning Ordinance requirements. He states that he has experienced low water pressure for the last 10 years.

The uncontroverted evidence demonstrates that, in addition to herself and her daughter, there are are 13 chickens, 3 rabbits, and 2 horses on the property that would impact the draw on the acquifer. Ms. Freeman's nutrient management plan, the conclusions of which Mr. Grigorian does not challenge, addresses pollution from the animal waste. As far as water pressure, his 10-year tenure predates approval of the conditional use only 4 years ago. Mr. Grigorian does not provide evidence to correlate any relationship between the low water pressure he's experienced with the conditional use. Ms. Freeman stated that total water draw from the chickens and bunnies is around 3 gallons a week. Mr. Grigorian's position is entirely unsupported. A condition of approval will limit the number of horses to two, the same amount she has had since 2016. Moreover, Staff correctly advises that agriculture is a permitted use in the R-200 Zone, which does not regulate the number of animals on the property.

Dr. Hansen charges that petroleum distillate leaked on the property in the past and still remains in pockets. Her only basis for this is hearsay consisting of conversations from a now-

deceased former owner that is not available for cross-examination. Ms. Freeman denies that there is such leakage and states that the former owner lived on the property 10 years ago. As Ms. Freeman currently lives at the property and would be more familiar with current conditions, the Hearing Examiner finds that the weight of evidence does not support Dr. Hansen's contentions.

In the same vein, Dr. Hansen alleges that the property has a high water table and water leaks into Ms. Freeman's basement. For this reason, she believes that it will be impossible to construct buildings with stable footings and will impact the ability to provide well and septic. As Ms. Freeman has already constructed a new barn on the property (approved in the original conditional use) and does not propose additional structures on the four-acre area, the Hearing Examiner cannot glean whether this argument pertains to the subdivision or this conditional use. In any event, Ms. Freeman's still-standing barn contradicts Dr. Hansen's testimony and no one has reported that it has structural problems. During the original conditional use, the record showed that Ms. Freeman installed a new well and septic system on the property, approved by the Montgomery County Department of Permitting Services. Ms. Freeman reports this is working well. Again, Dr. Hansen's testimony is based on her visits to the same former owner mentioned above. The weight of evidence supports a finding that there will be no leakage from subterranean water on the subject property.

To allay Mr. Grigorian's concerns that Ms. Freeman's two rescue horses may wander outside of the proposed conditional use area, violating the conditional use, the Hearing Examiner imposes a condition of approval requiring Ms. Freeman to remove the fencing outside of the conditional use area and realign it as shown on Exhibit 74. Based on the weight of evidence before her, the Hearing Exainer finds that the proposed amendment to Ms. Freeman's original conditional use will not change the nature, character, or intensity of the conditional use to an extent that

substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use.

C. Subdivision Issues

Even were the subdivision issues somehow before her, this record is bare of factual support for the oppositions' arguments that this application should be deferred due to the potential harm it presents. *See, Miller v. Kiwanis Club of Loch Raven, Inc.,* 29 Md. App. 285, 296 (1975)(mere possibility, as opposed to probability, that feared conditions presently exist is insufficient to deny a conditional use.)

The "80-foot" right of way that Dr. Hansen believes will extend southeast of the centerline of Sugarland Road forms much of her opposition. She does not know why the subdivision shows an 80-foot right of way. Exhibit 91. She disagrees with the engineer's statement that it stems from the "County's Master Plan for Sugarland Road", which she claims does not exist. Exhibits 72(b), 91. For this reason, she urges that all of the engineer's comments be dismissed as a "misnomer."

Two master plans are applicable to this property: The 1980 Functional Master Plan for the Preservation of Agriculture and Rural Open Space in Montgomery County (Agricultural Master Plan) and the 1996 Rustic Roads Functional Master Plan (Rustic Roads Master Plan). While the latter isn't formally titled the "Master Plan for Sugarland Road", it is a master plan for, or governing, Sugarland Road. The Rustic Roads Master Plan studied the roadway improvements, classifications, and the appropriate rights-of-way for rustic roads to maintain their rural character. *Rustic Roads Master Plan*, p. 3. Consistent with the statement of Ms. Freeman's engineer, the Rustic Road Master Plan recommends a *total* 80-foot right-of-way for Sugarland Road (*Rustic Road Master Plan*, p. 193, highlights supplied, below):

Roadway Classifications (cont.)

Table 4

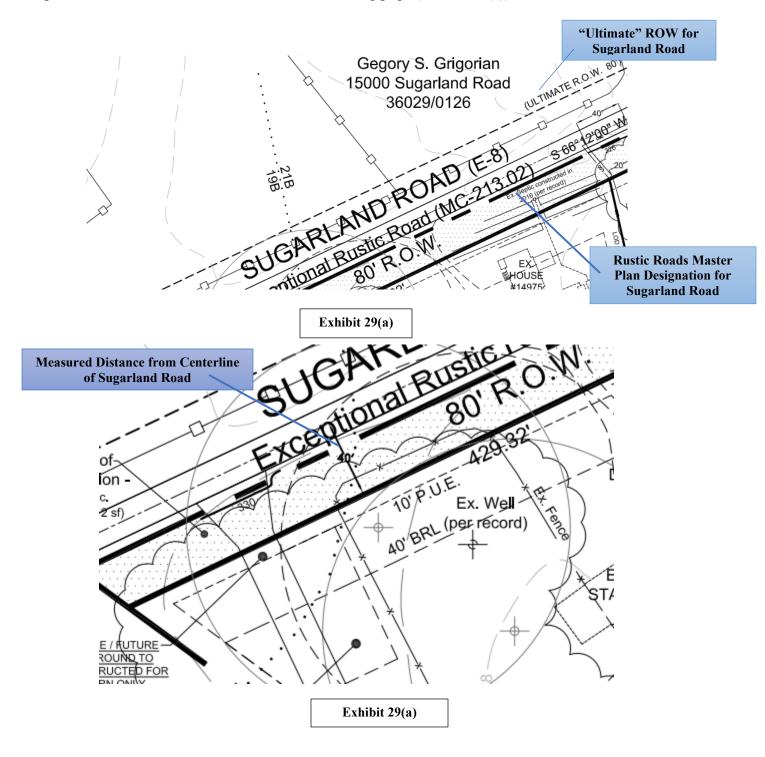
Master Plan Designation	Name	Limits	Minimum Right-of-Way Width
Exceptional F	Rustic Roads		
E-1	West Old Baltimore Road	Planning Area Boundary to Barnesville Road	80°
E-2	Hunting Quarter Road		80'
E-3	Kingsley Road	Burnt Hill Road to Stringtown Road	80'
E-4	Martinsburg Road	Whites Ferry Road to north PEPCO entrance	80'
E-5	Montevideo Road		80'
E-6	Mouth of Monocacy Road	C&O Canal to MD 28 Mt. Ephriam Road to bridge over Little Monocacy Ri	80' ver
E-7	River Road	Edwards Ferry Road to Whites Ferry Road	80'
E-8	Sugarland Road	Sugarland Lane to MD 107	80'
E-9	Swains Lock Road		80'
E-10	West Harris Road		80'
E-11	Edwards Ferry Road	West Offutt Road to Canal	80'
E-12	Hoyles Mill Road	White Ground Road to Planning Area Boundary	70'

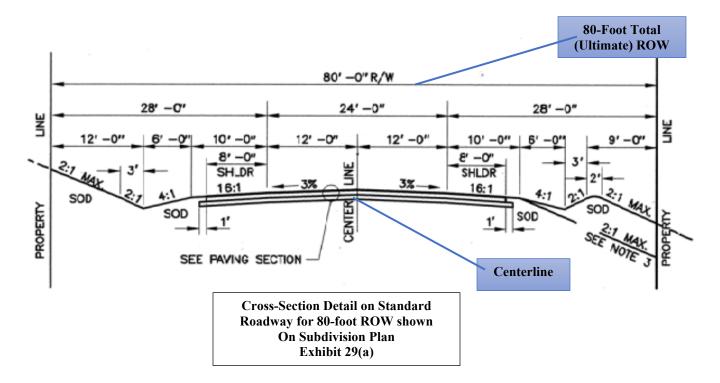
Rustic Roads Master Plan, p. 193 (highlighting supplied)

Thus, Ms. Freeman's subdivision has *no impact* on the right-of-way established for Sugarland Road because it is established by the Rustic Roads Master Plan. The subdivision may dedicate the land for the right-of-way, but any subdivision along that portion of Sugarland Road would require the same right-of-way. There is no basis for the Hearing Examiner to reject a minor amendment to a conditional use because a pending subdivision conforms to the recommendations of the governing master plan. In fact, the opposite is true. *Zoning Ordinance*, §59.7.3.1.E.1.c.

Nor does anything in this record support Dr. Hansen's surmise that the right-of-way extends 80 feet southeast of the centerline of Sugarland Road. Certified by a professional engineer, the subdivision plan clearly reflects the Rustic Road Master Plan's recommendation for the "ultimate" or total right-of-way to be 80 feet and references the E-8 designation in the Plan. A measured distance on the subdivision plan shows that the right-of-way on the subject property

extends 40 feet from the centerline of the road into Ms. Freeman's property. The subdivision plan depicts the standard cross-section for this road's classification. The cross-section plainly shows that the centerline of Sugarland Road in the middle of the 80-foot right-of-way, half of which extends in both directions from the centerline. Excerpts from the subdivision demonstrating these points are shown on the below and on the following page (Exhibit 29(a)).





Dr. Hansen is not a professional engineer. The Hearing Examiner finds the subdivision plan, certified by a professional engineer, has far more probative weight than Dr. Hansen's testimony, particularly as the right-of-way shown on the subdivision plan conforms to the recommendations of the Rustic Roads Master Plan. Weighing the evidence in the record, the Hearing Examiner finds that the right-of-way for Sugarland Road extends 40-feet southeast of the centerline of Sugarland Road.

With this finding, the probative value of Dr. Hansen's testimony that the right-of-way will result in various "takings" falls well short of the weight needed to defer or deny the conditional use amendment. Ms. Freeman's house clearly falls outside of the right-of-way on the subdivision plan. There is *no* evidence in this record that the other homes or the church mentioned by Dr. Hansen are inside the 40-foot right-of-way. The Hearing Examiner asked Dr. Hansen if she had surveyed the property. She responded that she had not because she did not need to. As Dr. Hansen

based her testimony on the assumption that the right-of-way would be twice the distance called for by the Master Plan and the subdivision plan, it has little probative value.

Neither is Dr. Hansen's assertion that the "hedgerow habitat" for migratory birds will be destroyed is not supported by probative evidence. Nothing in this record establishes where the hedgerow habitat lies in relation to the right-of-way or whether some habitat will remain even if the right-of-way is ever constructed. The probative value of Dr. Hansen's testimony is further undermined by the fact that she incorrectly assumed that the right-of-way extends 80 rather than 40 feet from the centerline of Sugarland Road.

In fact, there is little in this record to demonstrate that the full roadway cross-section shown on the subdivision plan will ever by constructed. ¹⁰ The Agricultural Master Plan explains (*Agricultural Master Plan*, pp. 62-63):

Right-of-way requirements for roadways are generally based on the need to provide adequate width to accommodate typical ultimate paving cross sections plus abutting features such as sidewalks, drainage, and utilities. In most areas in the <u>Agricultural Reserve</u> and Rural Open Space, *the ultimate paving cross section may never be required*. However, the extra right-of-way should not be discarded because it can serve very important auxiliary needs.

If sufficient right-of-way is available as a result of dedication through the subdivision process, many highway <u>safety</u> projects can be accomplished without the cumbersome and expensive process of acquiring right-of-way. Safety projects which are particularly important on rural roadways, which would include reduction of crest vertical curves, straightening of horizontal curves, provision of shoulders and left turn storage lanes, drainage improvements and removal of roadside obstructions. Extra right-of-way is important when air quality and noise standards are in question. By having a wide right-of-way and minimum residential setbacks, the noise and air pollution impacts will be minimized. The additional house separation from the roadway provides the secondary benefits of opportunities for scenic setbacks and landscaping. (Underlining in original, italics supplied by the Hearing Examiner).

¹⁰ The Hearing Examiner does not have full agency comments on the subdivision plan in the record of this case.

Ms. Freeman relays that she was informed by Planning Staff that the cistern may not be needed, which is supported by a notation on the subdivision plan labelling the cistern as "MCFRS Public Safety Water Supply Easement (for *Possible* Future Cistern Installed by Montgomery County") (emphasis supplied by the Hearing Examiner.) Exhibit 29(a). Ms. Freeman states that the right-of-way won't be constructed until the second lot is sold, which she says will not occur in the foreseeable future. The full record of the subdivision plan is not before the Hearing Examiner. Even if the right-of-way was constructed tomorrow, however, this record doesn't factually support the oppositions' vision of the harms that will occur.

Ms. Freeman's response, however, generated much back-and forth between the parties about her ultimate intentions, culmanating in an accusation that she is no different than a for-profit developer who will sell in the short-term, destroy the Agricultural Preserve and is not a good neighbor. Aside from its speculative nature, an individual's motives for subdividing property are not legally relevant to this decision. There is nothing in the Zoning Ordinance that puts personal motivations on trial along with a conditional use application.

Dr. Hansen also asserts that the subdivision plan establishes a taking by showing a trail easement and a stream valley buffer outside of Ms. Freeman's property. The Hearing Examiner finds that these are notations of existing conditions only, as indicated by Ms. Freeman's engineer, as the subdivision of one person's property may not legally impose encumbrances on another property. Further, the Applicant's engineer states that the notation of the trail will be removed from the subdivision plan.

One of Mr. Grigorian's primary objections to the subdivision plan is that trees will be cleared on the proposed Lot 2. He bases his belief that trees *will* be cleared on a notation on the Forest Conservation Plan that says "Trees to be cleared." Dr. Hansen alleges that the tree cover

on Ms. Freeman's existing 7.65-acre property amounts to 70% of all the tree cover on Sugarland Road, 55% of which is the conditional use area.

Ms. Freeman states that she does not plan to remove trees on the conditional use area. She acknowledges that a note on the Forest Conservation Plan exists, but explains that this designation only distinguishes the treed area outside of the forest conservation easement. Ms. Freeman's engineer reiterates that not all areas "designated as clearing will actually be cleared". The Forest Conservation Plan is not in this record. When or where trees should be retained and cleared on Lot 2 is speculative at this point and is a matter for the Planning Board. The evidence applicable to the conditional use indicates that trees in the conditional area will not be cleared by Ms. Freeman. Any clearing or grading for improvements to be constructed within the conditional use area would necessitate an amendment to this conditional use.

Dr. Hansen gives no reason for her contention that 70% of the forest on Sugarland Road is on Ms. Freeman's property or that 55% of the that amount is on the conditional use area. Given the opposition's propensity to attack this application with virtually no probative evidence, the Hearing Examiner is reluctant to give these unsupported claims credence. Along the same lines, Mr. Grigorian's claims that the Forest Stand Delination prepared for the subdivision fails to identify all specimen trees on the property. He bases this solely only on the fact that he can see large trees on the property from across the road. Ms. Freeman refutes his contention, stating that only one specimen tree is located outside the proposed forest conservation easement and that her forest standand delineation was prepared by a professional arborist. The Hearing Examiner is skeptical that specimen trees can be eyeballed from across a road. Specimen trees are "a tree that is a particularly impressive or unusual example of a species due to its size, age, or any other trait that epitomizes the character of the species." *Guidelines for Environmental Management of*

Development in Montgomery County, January 2000. Not every "large" tree is a specimen tree. Mr. Grigorian does not purport to be a certified arborist and his undocumented testimony has little probative value, as does his testimony that the sand mounds on proposed Lot 2 will adversely impact a well on the adjoining property.

Thus, even were the Hearing Examiner required to consider the subdivision issues in conjunction with this minor amendment request, which she is not, there is little probative evidence that the harms alleged will occur and justify denial of this conditional use minor amendment.

This record is replete with conjecture about the County's motivations, the Hearing Examiner's motivations, Ms. Freeman's motivations, and the "mystery" man attending the remote public hearing in this case. In her closing statement, Dr. Hansen wants to know the "back story" behind this minor amendment application. The Hearing Examiner knows of no back story, nor does anything in the record reveal any. For that reason, the Hearing Examiner does not add to this lengthy Report by addressing these arguments.

IV. CONCLUSION AND DECISION

For the foregoing reasons, the Hearing Examiner hereby approves the application for a minor amendment to the conditional use approved in CU 16-15, Application of J. Freeman, to operate an equestrian facility at 14975 Sugarland Road, Poolesville, Maryland, subject to the following conditions:

- 1. All conditions of approval contained in the Hearing Examiner's Report and Decision dated September 26, 2016, remain in full force and effect except as modified by this Decision.
- 2. Condition No. 2 in the Hearing Examiner's Report and Decision dated September 26, 2016 is modified to read as follows:

Physical improvements for the equestrian facility are limited to those shown on the Conditional Use Site Plan filed on July 6, 2020 (Exhibit 72(c)), except that the fence around surrounding Pasture 4(b) shall be removed from outside the conditional use area and relocated to the alignment shown on Exhibit 74.

3. Condition No. 3 of the Hearing Examiner's Report and Decision dated September 26, 2016 is modified to read as follows:

No more than two horses may be kept on the property.

Issued this 1st day of September, 2020.

Lynn Robeson Hannan Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Any party of record may file a written request to appeal the Hearing Examiner's Decision by requesting oral argument before the Board of Appeals, within 10 days issuance of the Hearing Examiner's Report and Decision. Any party of record may, no later than 5 days after a request for oral argument is filed, file a written opposition to it or request to participate in oral argument. If the Board of Appeals grants a request for oral argument, the argument must be limited to matters contained in the record compiled by the Hearing Examiner. A person requesting an appeal, or opposing it, must send a copy of that request or opposition to the Hearing Examiner, the Board of Appeals, and all parties of record before the Hearing Examiner.

Additional procedures are specified in Zoning Ordinance §59.7.3.1.f.1.Contact information for the Board of Appeals is:

Montgomery County Board of Appeals 100 Maryland Avenue, Room 217 Rockville, MD 20850 (240) 777-6600

http://www.montgomerycountymd.gov/boa/

PLEASE NOTE THE FOLLOWING BOARD OF APPEALS FILING REQUIREMENTS DURING THE COVID-19 PANDEMIC:

The Board of Appeals website sets forth these procedures for filing documents:

Because remote operations may not always allow us to promptly date-stamp incoming U.S. Mail, until further notice, all time-sensitive filings (administrative appeals, appeals of conditional use decisions/requests for oral argument, requests for public hearings on administrative modifications,

requests for reconsideration, etc.) should be sent via email to BOA@montgomerycountymd.gov, and will be considered to have been filed on the date and time shown on your email. In addition, you also need to send a hard copy of your request, with any required filing fee, via U.S. Mail, to the Board's 100 Maryland Avenue address (above). Board staff will acknowledge receipt of your request and will contact you regarding scheduling.

If you have questions about how to file a request for oral argument, please contact Staff of the Board of Appeals.

The Board of Appeals will consider your request for oral argument at a work session. Agendas for the Board's work sessions can be found on the Board's website and in the Board's office. You can also call the Board's office to see when the Board will consider your request. If your request for oral argument is granted, you will be notified by the Board of Appeals regarding the time and place for oral argument. Because decisions made by the Board are confined to the evidence of record before the Hearing Examiner, no new or additional evidence or witnesses will be considered. If your request for oral argument is denied, your case will likely be decided by the Board that same day, at the work session.

Parties requesting or opposing an appeal must not attempt to discuss this case with individual Board members because such *ex parte* communications are prohibited by law. If you have any questions regarding this procedure, please contact the Board of Appeals by calling 240-777-6600 or visiting its website: http://www.montgomerycountymd.gov/boa/.

NOTIFICATION MEMORANDUM SENT TO:

Ms. Jennifer Freeman
Mr. Greg Grigorian
Dr. Carol Hansen
Barbara Jay, Executive Director
Montgomery County Board of Appeals
Elsabett Tesfaye, Planning Department
Benjamin Berbert, Planning Department
Victor Salazar, Department of Permitting Services
Michael Coveyou, Director, Finance Department