

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
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IN THE MATTER OF: *
GOSHEN ENTERPRISES, INC. *
* **OZAH Case No. CU 18-06 (Minor**
* **Amendment)**
* * * * *

REPORT AND DECISION APPROVING MINOR AMENDMENT
TO CONDITIONAL USE

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I. BACKGROUND

On September 20, 2018, Mr. Martin Grossman, formerly Director of the Office of Zoning and Administrative Hearings (OZAH), granted the conditional use application of Goshen Enterprises, Inc. (Goshen or Applicant) to operate as a landscape contractor under §59.3.5.5 of the 2014 Zoning Ordinance (Zoning Ordinance) on property located at 21201 Zion Road, Brookeville, Maryland, within the AR (Agricultural Reserve) Zone.¹ The area subject to the conditional use is part of a larger tract of unplatted land, identified as Parcel P490 on Tax Map HV31 (Addition to Brooke Grove). *Hearing Examiner's Report and Decision*, CU 18-06, p. 2.

On January 6, 2020, Goshen applied for a minor amendment to its approved conditional use. Exhibit 70. The following day, the Mr. Grossman referred the application to Staff of the Montgomery County Planning Department (Planning Staff or Staff) for a recommendation on whether the amendment was minor in nature.² Exhibit 71. On the same day, a neighbor who appeared at the original hearing, Mr. Emmet Tydings, informed Mr. Grossman that he had visited the site and was agreeable to the changes. Exhibit 72. Staff advised that there were some issues that needed review and they would not be able to submit their recommendation prior to the Hearing Examiner's retirement. Exhibit 72. Because part of the property fronts a portion of Riggs Road, which is designated as a Rustic Road under the *Rustic Roads Functional Master Plan* (December 1996), Staff also referred the amendment to the Rustic Roads Advisory Committee (RRAC). On March 31, 2020, Staff concluded their review and deemed the amendment to be minor. Exhibit 76. With its recommendation, Staff attached a letter from the RRAC recommending approval of

¹ Mr. Grossman retired as Director of the OZAH on February 1, 2020.

² As explained in Part III of this Report, minor amendments go through an abbreviated review process because, if determined to be minor, they do not have a significant adverse impact on the surrounding area.

the amendments requested by Goshen and a submission from the Department of Permitting Services that fire access remained adequate. Exhibit 76(b) and (c)).

II. PROPOSED AMENDMENT

A. Description of Changes

Goshen's attorney, Jody S. Kline, Esquire, described the revisions and explained why they were needed to operate the conditional use (Exhibit 70):

Since the Fall of 2018, Mr. Kevin Bohrer, the principal of Goshen Enterprises, Inc., has worked with the Department of Permitting Services to obtain approvals necessary to convert the existing large building on the property (constructed without the need for a permit because the building was deemed to be an "agricultural structure") and has readied the site for use by Goshen Enterprises. The conditional use holder opened for business on the site on December 16, 2019.

As is often the case when a successor user arrives on a piece of property containing existing improvements, Mr. Bohrer has learned that not all of his original assumptions in laying out a master plan for the site have proved to be practicable, a fact that has been demonstrated since Mr. Bohrer commenced formal operations in mid-December, 2019. The purpose for this letter, therefore, is to seek modest modifications in the physical improvements to be located on the site to facilitate the more efficient usage of the site. The changes requested include:

1. Bulk Storage Bins. When the Conditional Use Site Plan was prepared (showing three bins on either side of a concrete center wall), Mr. Bohrer thought that only the location and overall area of the bulk storage bins was specific and that the bins could be partitioned as necessary to accommodate his needs for bulk storage. Accordingly, when deliveries of soil, sand, gravel, mulch, woodchips, stone, bagged material, flagstone, etc. began to arrive on site Mr. Bohrer revised the bulk storage area to allow for up to 14 individual bins. The attached "Amended Detailed Area Conditional Use Plan" and the attached colored version of the same drawing show the Bulk Storage Bins with the number of "stalls" (14) needed to accommodate bulk materials rather than the six (6) shown on the approved conditional use site plan. The bulk storage area did expand but not significantly.

It should be noted that the expanded bulk storage bins overlap an area shown on the approved conditional use plan as a footprint for a "Proposed Building 1:2500 SF". Mr. Bohrer acknowledges that when he is ready to construct Building 1, he will have to reduce the size of the bulk storage bins in order to construct the new building

2. Dumpster. Mr. Bohrer has realized that his original site plan inadvertently did not include a dumpster and one is needed for disposal of waste from the landscape operations themselves (e.g., plastic bags for mulch and the like; empty cans resulting from equipment maintenance; etc.) as well as from the office uses (waste paper, shipping boxes, etc.) now located on the property. Accordingly, a dumpster is proposed to be located in a spot north of the existing principal building on the site. Said dumpster location is shown on the attached and on the annotated/colored Amended Site Plan and is sought to be approved by this application.

The dumpster maintenance is under a contract and the container will be unloaded on at least a weekly basis.

3. Sea Containers. The Hearing Examiner's Report and Decision noted that three sea containers previously located at the Petitioner's former Laytonsville site were to be moved to the subject Zion Road site but the location for placement of those sea containers was undetermined at the time of the public hearing on Case No. 18-06. Now that operations have commenced, Mr. Bohrer has determined that the optimum location for the sea containers is in a location where they can be easily accessed by vehicles for loading. The two attached Amended Detail Area Conditional Use Plans show the sea containers located in the northeastern corner of the property interspersed among employee vehicle and truck parking spaces.

4. Relocated Shed. The approved "Detailed Area Conditional Use Plan" shows the footprint of an "Existing Outbuilding to be Removed" located between the "Existing Building" and proposed Building 1. Upon investigation of the condition of that outbuilding, and based on an identified need for more storage space, retention of the shed has been determined to be a wiser course of action. Both the "Amended Detailed Area of Conditional Use Plan" and the annotated version of that Plan show a location north of "Future Building 2", between two parking areas, to which the shed will be relocated so that it can be easily accessed from the adjacent gravel driveway.

5. Office Employee Parking Relocation. The "Detailed Area Conditional Use Plan" attached shows drive lanes and parking within 20 feet of the south side of the "Existing Building (Principal)". The placement of those parking spaces failed to recognize that the south side of the "Existing Building" has large roll up doors and that the adjacent 20 foot drive aisle was not adequate for trucks to enter and exit the building without having to make multiple turning movements. Accordingly, the parking field to the south of the "Existing Building" has been revised. Of the six spaces originally located closest to the "Existing Building," three of them have been moved to the west side of the southeastern corner of the parking field allowing for a total of eleven (11) parking spaces south of the "Existing Building" in lieu of the fourteen (14) parking spaces shown on the original approved conditional use plan. The three spaces lost in this parking field

have been picked up elsewhere on site. One of those spaces has been added to a row of spaces immediately north of the “Future Building 2” raising the number of spaces in the row of parking in that location from three to four. Other parking spaces have been added in conjunction with the reorganization of parking in the large field located in the northeast corner of the site, described in the following paragraphs.

6. Revisions to Large Parking Field and Site Circulation. The commencement of operations on the Subject Property caused Mr. Bohrer to realize that the circulation patterns serving the 28 space parking lot in the northeast corner of the property was not working as well as had been anticipated. The circulation patterns and the radii for turning movements was deemed to be inadequate for some trucks particularly those towing trailers with equipment. The attached “Amended Detailed Area Conditional Use Plan” shows the reorganization that has occurred that results in improved circulation and turning movements for all vehicles. (Please note in the strip of ten (10) parking spaces located on the east side of the large parking field in the northeast corner of the site, the directional arrows shown on the east side of the large parking field are not intended to depict an actual drive lane but are simply “carry overs” from the printing of the “Approved Conditional Use Plan”. That drive lane reflected by those original directional arrows is now replaced by a row of ten (10) parking spaces).

Goshen believes that the above changes are *de minimis* (*Id.*):

The changes proposed in this request for minor amendment of the conditional use plan are *de minimis* in scope. The number of parking spaces remains the same; the landscaping to support the site remains in compliance with the requirements of the Montgomery County Zoning Ordinance. On-site circulation does change but not in a manner that would have any adverse effects on surrounding properties. Indeed, the only new features that occurs as a result of this request for a minor amendment are:

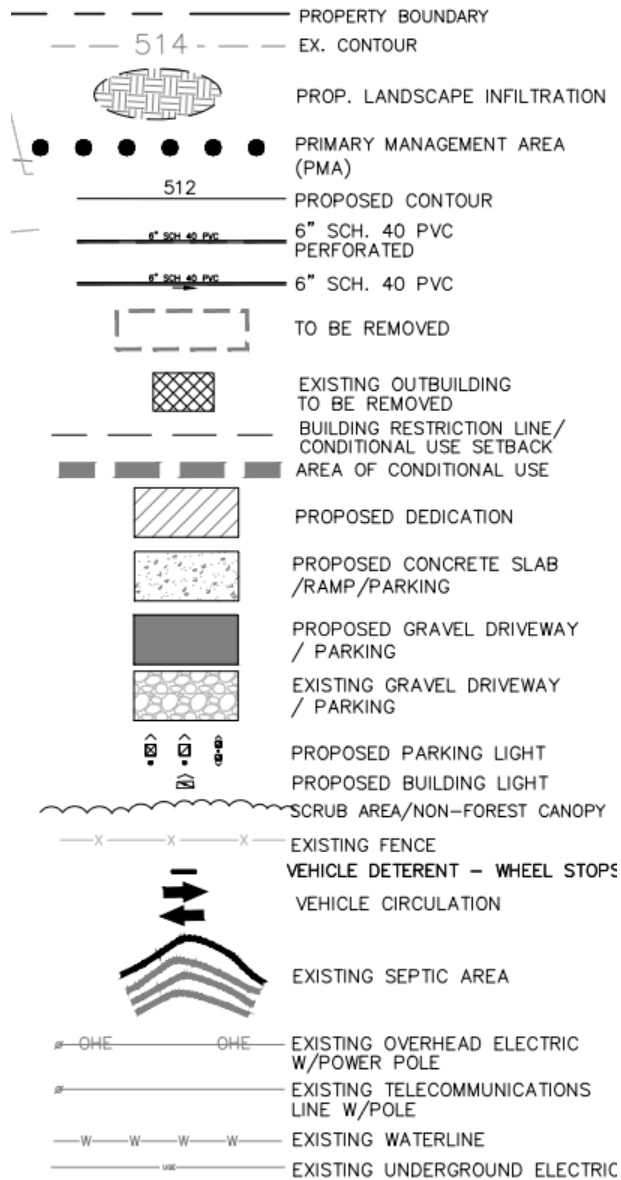
- (a) the retention, and relocation, of an existing outbuilding in good condition; and
- (b) the addition of a dumpster; and
- (c) a reorganized containment facility for bulk storage bins.

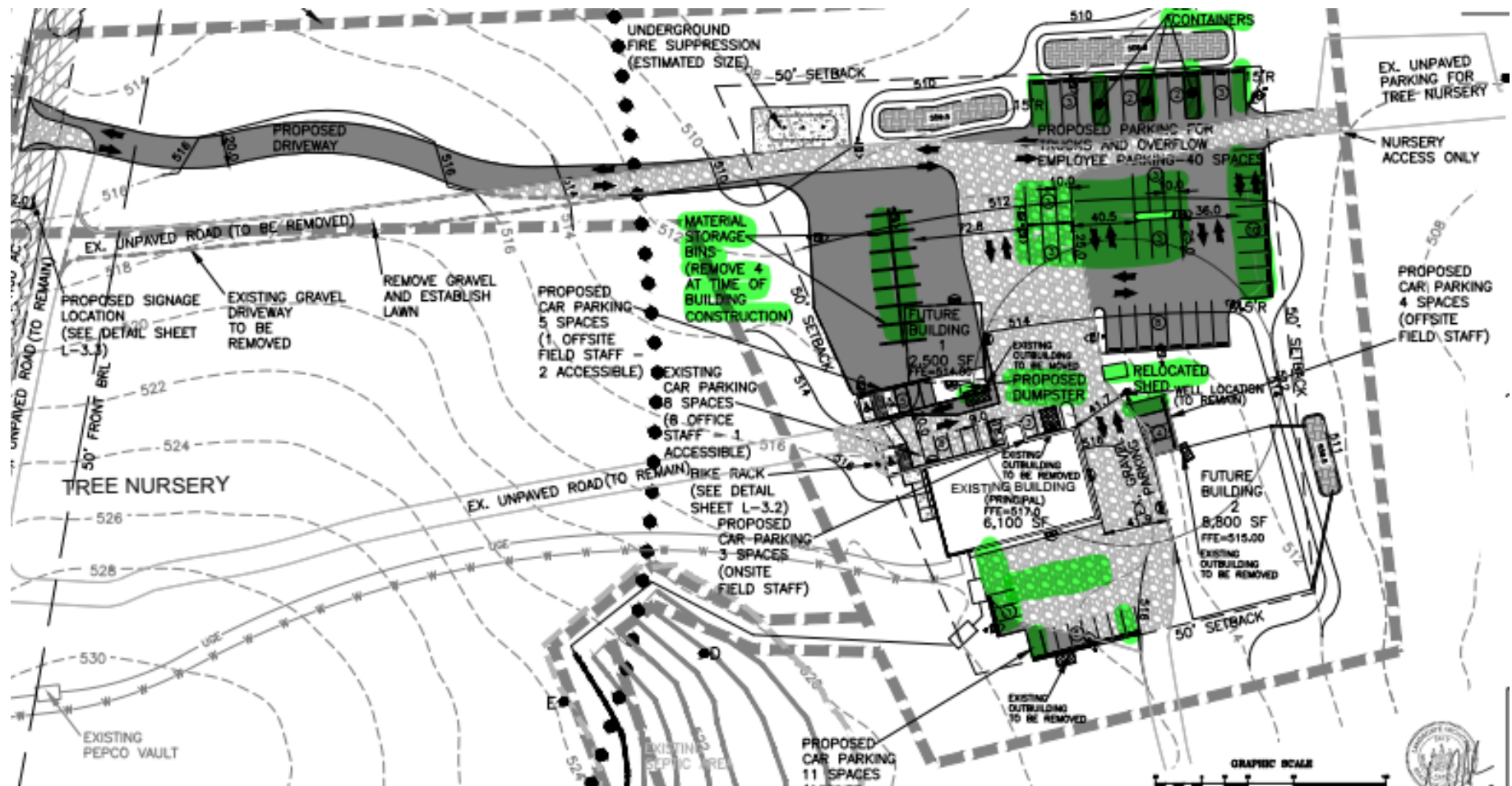
B. Amended Conditional Use Site Plan and Landscape Plan

Goshen submitted a conditional use and a landscape plan (highlighted in green and labeled) to show the location of the plan revisions. Exhibit 81. Excerpts of these are reproduced on the

below and on following pages. The revisions shown are consistent with the description of the proposed amendments submitted by the Applicant.

**Legend for Amended Conditional
Use Site Plan (Exhibit 81(b), below)**





**Amended Conditional Use Site Plan
Exhibit 81(b)
(Highlighted to Show Changes)**



LANDSCAPE PLANTING PLAN SCHEDULE								
KEY	BOTANICAL NAME	COMMON NAME	SIZE	FORM	20-YR CANOPY DIAMETER	SPACING	QUANTITY	COMMENTS
CANOPY TREES:								
AR	<i>Acer rubrum</i>	Red Maple	2" cal.	B&B	48'	AS SHOWN	16	
QC	<i>Quercus coccinea</i>	Scarlet Oak	2" cal.	B&B	26'	AS SHOWN	11	
QP	<i>Quercus prinus</i>	Chestnut Oak	2" cal.	B&B	35'	AS SHOWN	12	
QR	<i>Quercus rubra</i>	Northern Red Oak	2" cal.	B&B	35'	AS SHOWN	15	
UNDERSTORY TREES:								
AL	<i>Amelanchier laevis 'Cumulus'</i>	Comulus Serviceberry	7-8' ht.	B&B		AS SHOWN	23	SINGLE STEM
CC	<i>Cercis canadensis</i>	Eastern Redbud	7-8' ht.	B&B		AS SHOWN	16	SINGLE STEM
EVERGREEN TREES:								
IO	<i>Ilex opaca</i>	American Holly	6-8'	B&B	12'	AS SHOWN	49	SINGLE STEM
JV	<i>Juniperus virginiana</i>	Eastern Red Cedar	6-7'	B&B	10'	AS SHOWN	41	
GRASSES, PERENNIALS AND GROUNDCOVERS:								
SOD	SOD - Tall Fescue/Kentucky Bluegrass		SOD	SOD		SQAURE YARD	-	STABILIZATION

Legend
Amended Landscape Plan
Exhibit 81(a)

C. Agency Recommendations

Staff concluded that the amendment was minor in nature and should be approved (Exhibit 76):

Staff believes that the Applicant has addressed and clarified issues and concerns raised by staff. Staff recommends that the Applicant must submit the revised plan that included the changes recommended by the RRAC concerning the sea containers. Staff has no objection to the proposed minor amendment as further amended to include the changes made to address the RRAC concerns.

With its recommendation, Staff forwarded the RRAC's recommendation. Exhibit 76(b). The RRAC supported the amendment with the following comments (*Id.*):

1. The addition of sea containers on the property: as shown in the photos provided, such containers have been painted brown which is supported by the Committee and shall be located only where shown on the Amended Plan, Sheet No. L-3.2, Dec. 2019.
2. The Committee wishes to state its appreciation for the cooperation we received from the applicant in response to the proposed tree plantings as screenings, although we have been advised that those were deleted from the plan by the Fire Access Plan as part of its review.
3. The Committee confirms our previous agreement that no access shall be taken from Riggs Road, an unpaved rustic road (note that the segment of Riggs Road west of Zion Road is not a rustic road and we are not making recommendations for that road segment).

4. The Committee confirms our previous recommendation that trucks shall enter and exit only from the entrance on Zion Road (this includes both work trucks and delivery trucks).

Staff also asked the Department of Permitting Services (DPS) to review the revised site circulation to ensure that fire access remained adequate. With its recommendation, Staff forwarded an email from Marie LaBaw, Ph.D, P.E., a plans reviewer for DPS, stating that the changes were acceptable. Exhibit 76(c).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Requests to amend a conditional use are governed by Zoning Ordinance §59.7.3.1.K. The characterization of an amendment as “major” or “minor” amendment is significant because a *major amendment* application must “*follow[] the same procedures, must meet the same criteria, and must satisfy the same requirements as the original conditional use application . . .*” Zoning Ordinance §59.7.3.1.K.1.b. However, an application for a *minor amendment* need not go through those extensive procedures. Rather, “. . . *it may be approved administratively by the Hearing Examiner.*” Zoning Ordinance §59.7.3.1.K.2.a.

Zoning Ordinance Section 59.7.3.1.K. defines major and minor amendments:

§59.7.3.1.K.1.a. *A major amendment to a conditional use 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.*

§59.7.3.1.K.2.a. *A minor amendment to a conditional use 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.*

IV. Evaluation and Decision

The Hearing Examiner agrees with the Applicant and Planning Staff that the changes proposed are *de minimis* and constitute a minor amendment to the conditional use under Section

59.7.3.1.K.1.b. The most prominent new feature proposed is the specific location of the three sea containers in the northeastern part of the site. The location chosen is far from both Zion and Riggs Roads and is well-landscaped. As recommended by the RRAC, the containers will be painted brown to better blend with the landscaping and minimize visual impact on the area. The other “new” structures proposed (*i.e.*, the dumpster and retention of the existing storage shed) are both internal to the site and will not have a significant visual impact on surrounding properties. The addition of the dumpster can only benefit existing site operations, eliminating stray trash and waste products left on the property.

The remaining items consist primarily of reconfiguring or subdividing existing uses to make the site operate more efficiently and safely. The revisions to the larger parking area improve the safety of on-site circulation while at the same time maintaining adequate fire access. The reconfiguration of the employee parking area enables full utilization of the existing building on the property. The division of the storage bins into smaller units to accommodate a larger variety of materials (although slightly expanding the overall area) has little effect on the surrounding properties as the bins generally remain in the same area. The site perimeter is heavily landscaped, minimizing the impact of these changes.

There is no evidence in this record demonstrating that the changes proposed will substantially and adversely affect the surrounding area. Mr. Tydings, a neighbor that initially opposed the original application, indicated his agreement with the proposed changes. Exhibit 72.

For these reasons, the Hearing Examiner concludes that the proposed modification is properly characterized as a minor amendment – one which 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. Thus, the statutory standard for an administrative modification to allow a minor amendment.

Approval of this amendment requires that one of the original conditions of approval be modified. Condition No. 8 is will be revised as follows (additions are underlined, and deletions are stricken):

8. All improvements, landscaping and lighting on the property must comply with the Applicant's Amended Conditional Use Site Plan (Exhibit ~~37(d)~~ 81(b)), Amended Landscape Plan (Exhibit 81(a)), and other approved plans in this case (Exhibits ~~37(a)~~ (i)-(o)), with the exception of the height of the light poles, which may be reduced to 15 feet if the Applicant files an amended plan showing the change and Technical Staff approves it. All lighting fixtures on the site must be designed to avoid any light spillage or glare off of the site and must be turned off after hours, except for safety lights activated by motion sensors.

The Hearing Examiner also adds one new condition of approval requiring the sea containers to be painted brown as relied upon by the RRAC. All other conditions of the original approval remain in full force and effect unless later amended.

ORDER

Based on the foregoing, it is this 16th day of July, 2020,

ORDERED: That the request for a minor amendment to Conditional Use CU 18-06, as represented in the Applicant's letter of January 6, 2020 (Exhibit 70), the Amended Conditional Use Site Plan (Exhibit 81(b)), the Amended Landscape Plan (Exhibit 81(a)), be **APPROVED**, and it is further

ORDERED: That the language of Condition No. 8 of the original conditional use is hereby modified to read as follows:

8. All improvements, landscaping and lighting on the property must comply with the Applicant's Amended Conditional Use Site Plan (Exhibit 81(b)), Amended Landscape Plan (Exhibit 81(a)), and other approved plans in this case (Exhibits 37(i)-(o)), with the exception of the height of the light poles, which may be reduced to 15 feet if the Applicant files an amended plan showing the change

and Technical Staff approves it. All lighting fixtures on the site must be designed to avoid any light spillage or glare off of the site and must be turned off after hours, except for safety lights activated by motion sensors.

And it is further,

ORDERED, that this amendment and the continued use of the conditional use are subject to all terms and conditions imposed in connection with the initial approval, except as specifically amended by the Hearing Examiner in this Opinion and Order. The Conditional Use holder is directed to comply fully with all applicable county, state and federal regulations; and it is further

ORDERED: That pursuant to Section 59.7.3.1.K.2.b. of the Zoning Ordinance, any party may request a public hearing on the Hearing Examiner's action within 15 days after this decision is issued. The request for public hearing must be in writing and must specify the reason for the request and the nature of the objection or relief desired. If a request for a hearing is received, the Hearing Examiner must suspend his administrative amendment and conduct a public hearing to consider whether the amendment substantially changes the nature, character, or intensity of the conditional use or its effect on the immediate neighborhood. If the Hearing Examiner determines that such impacts are likely, then the amendment application must be treated as a major amendment application. A decision of the Hearing Examiner may be appealed based on the Hearing Examiner's record to the Board of Appeals.



Lynn Robeson Hannan
Hearing Examiner

COPIES TO:

Jody S. Kline
Attorney for the Applicant
Emmet and Diana Tydings

Walter A. Roman

Barbara Jay, Executive Director

Montgomery County Board of Appeals

Elsabett Tesfaye, Planning Department

All parties of record

Victor Salazar, Department of Permitting Services

Alexandre A. Espinosa, Director, Finance Department

Charles Frederick, Esquire, Associate County Attorney

Current abutting and confronting property owners

All parties entitled to notice at the time of the original filing:

Abutting and Confronting Property Owners (or a condominium's council of unit owners
or renters, if applicable)

Civic, Renters' and Homeowners' Associations within a half mile of the site

Any Municipality within a half mile of the site