

I. STATEMENT OF THE CASE	3
II. FACTUAL BACKGROUND	4
A. The Subject Property	4
B. Surrounding Area	5
C. Proposed Use	8
D. Community Response	15
E. Adequate Public Facilities	15
III. FINDINGS OF FACT AND CONCLUSIONS OF LAW	16
A. Necessary Findings (Article 59.7)	16
B. Development Standards of the Zone (Article 59.4)	27
C. Use Standards for a Landscape Contractor Business (59.3.5.5)	28

D. General Development Standards (Article 59.6)	30
1. Site Access Standards	30
2. Parking, Queuing, and Loading Standards	31
<i>a. Number of Parking Spaces Required by Section 59.6.2.4</i>	31
<i>b. Parking Lot Screening</i>	32
<i>c. Parking Lot Lighting</i>	35
3. Site Landscaping, Screening and Lighting	36
<i>a. Lighting</i>	36
<i>b. Site Screening and Landscaping</i>	36
<i>c. Signage</i>	39
IV. Conclusion and Decision	40
V. Decision	40

I. STATEMENT OF THE CASE

Filed on December 15, 2021, the applicant, Jose Alvarez for Chapingo Investments, LLC (“Chapingo”) seeks a conditional use for a Landscape Contractor under Section 59.3.5.5 of the Zoning Ordinance¹ at 12120 Prices Distillery Road, Damascus, Maryland, located in the Agricultural Reserve (“AR”) Zone. The Office of Zoning and Administrative Hearings (“OZAH”) initially scheduled a public hearing for June 17, 2022, which was continued to July 22, 2022 at the request of the applicant. Exhibits 32 and 36.

Staff of the Montgomery County Planning Department (“Planning Staff” or “Staff”) issued a report recommending denial of the application on May 20, 2022 (revised on June 27, 2022) due to lack of conformance to the general standards for approval of conditional uses of Sec. 59.7.3.1 and inconsistency with the *1996 Rustic Roads Functional Master Plan*. Exhibit 38. On July 18, 2022, the Planning Board also recommended denial citing the lack of on-site sanitary services in violation of Sect. 59.7.3.1.E.1.f; the negative impacts of the proposed use on the rural character and design of the County’s Rustic Roads; and the use’s lack of substantial conformance with the *1996 Rustic Roads Functional Master Plan* as required under Sect. 59.7.3.1.E.1.c. See Exhibit 67.

The July 22, 2022 public hearing proceeded as scheduled. The record was held open for ten days after the close of the hearing to receive the transcript and, in response to testimony presented at the hearing, the Hearing Examiners specifically allowed the additional submission of any response from the Department of Permitting Services (“DPS”) within the ten days before the record closed.² T. 253. Some parties took the opportunity to submit written testimony after the close of the hearing. Such submissions are included in the record and were reviewed by this

¹ All citations in this Decision are to the 2014 Zoning Ordinance for Montgomery County, adopted September 30, 2014 (Ordinance No. 17-52), as amended.

² Nothing substantive was received from DPS.

Hearing Examiner but were accorded limited weight due to the applicant's inability to cross-examine the written submissions. The record closed on August 1, 2022.

For the following reasons, the Hearing Examiner denies the conditional use application.

II. FACTUAL BACKGROUND

A. The Subject Property

As set out in the Staff Report, the Subject Property consists of 32.69 acres and is a single unplatted parcel (parcel 595, Tax ID# 02-103674207). Exhibit 38, p.5. The land is improved with two structures: a 7,200 sq. ft. structure, open on two sides with a roof and asphalt millings floor (the "Big Barn"); and a 2,640 sq. ft. older structure (the "Small Barn"). *Id.* The Small Barn is not part of the conditional use application. *Id.* Notably, the Small Barn is a Locational Atlas historic site (10/036-001A) listed as the John M. King Barn, built in the 1880s. Exhibit 38, p.7; T. 177. It is a bank barn with a fieldstone foundation. Exhibit 38, p.7. There is no residence on the Property. Exhibit 38, p.5. The arial photograph on page 5, excerpted from the Staff Report, shows the location of the property and where the barns are situated. Exhibit 38, p. 6.

Access to the subject property is from Prices Distillery Road via an approximately 1,200-foot-long gravel driveway that leads to a gravel parking area between the two barns. *Id.* The gravel drive was expanded by the applicant without a permit or stormwater management plan at some point after August 2019, substantially increasing impervious surface. T. 171, 181.

The Property slopes significantly from the northeast to the west, with a grade change of approximately 30 feet between the road and the barns. Exhibit 38, p.5. The Property is mostly open farm fields with approximately seven (7) acres of forest onsite, which is protected with a Category I Conservation Easement. *Id.* There is an existing stream and wetlands within the

forested area. *Id.* There are no rare, threatened, or endangered species known to exist on the property. *Id.*

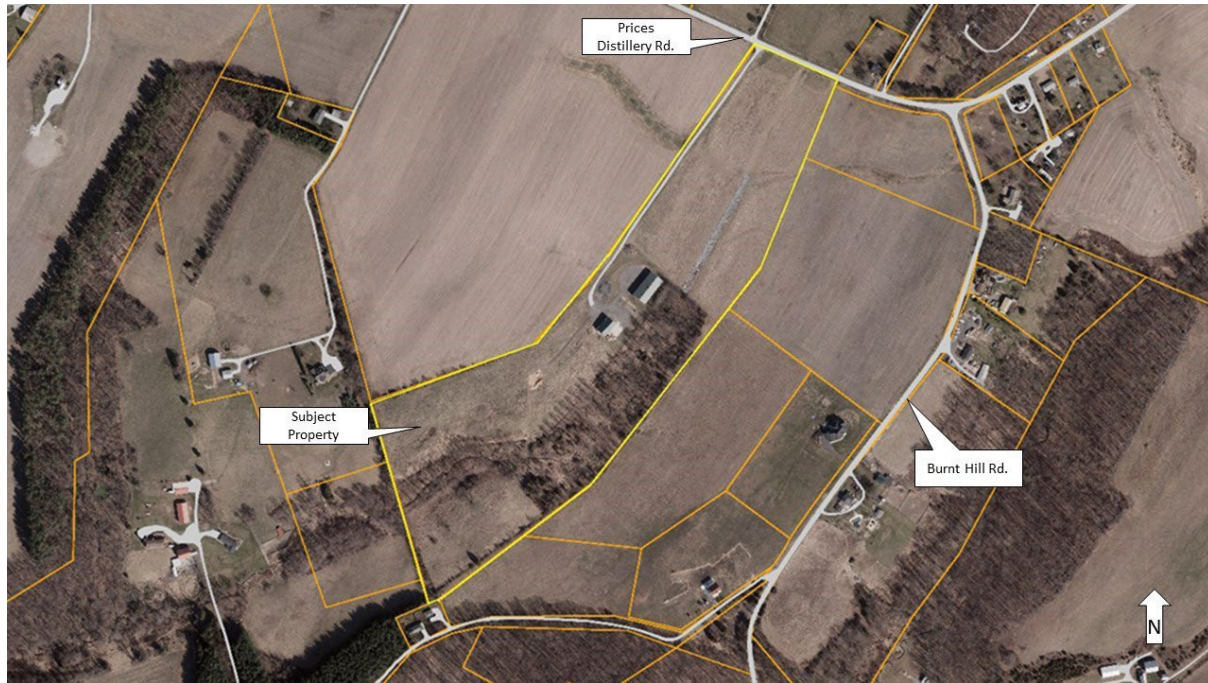


Figure 1: Aerial View of Subject Property with Subject Property outlined in solid yellow, neighboring properties outlined in orange, and major roads labelled and outlined in white.

B. Surrounding Area

To determine the compatibility of the proposed conditional use, it is necessary to delineate and characterize the surrounding neighborhood. The applicant proposed to Planning Staff a definition of the neighborhood that included the area most likely to be affected by the use, comprised of property generally located within 5,000 feet of the subject property; Staff concurred and accepted this definition. Exhibit 38, p.6. The map on page 6, excerpted from the Staff Report, shows the defined area outlined in red. Exhibit 38, p. 7.

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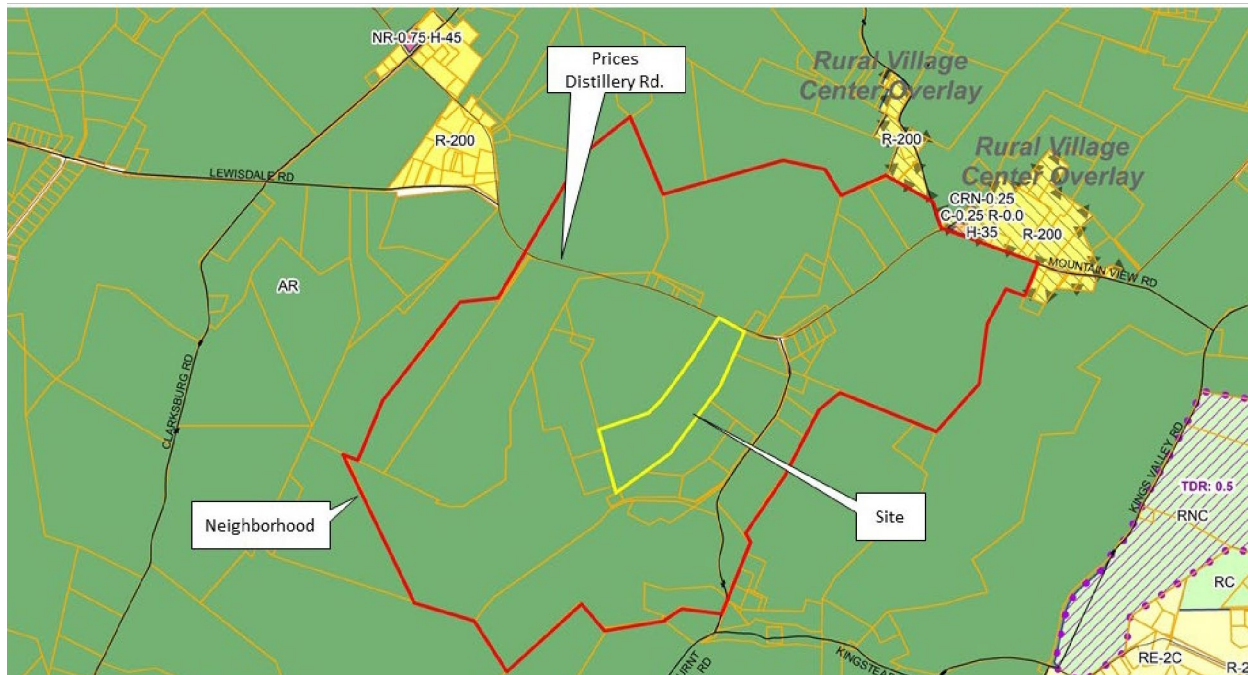


Figure 2: Zoning Map of area with defined neighborhood outlined in red and subject property outlined in yellow.

The defined area is predominantly unimproved farmland, parkland (Little Bennett Regional Park) and wooded parcels with some single-family residential dwellings, all in the AR zone. Exhibit 38, p.6. There are several residential dwellings across the street and to the west on Prices Distillery Road, as well as to the east near the intersection of Prices Distillery and Burnt Hill Roads. *Id.* The closest residence is estimated to be over 800 feet to the southeast. *Id.* The parking lot for Little Bennett Park is approximately 2,400 feet from the subject property's driveway entrance on Prices Distillery Road and about 1,200 feet from the subject property's two barns and proposed conditional use area. *Id.*

There are no prior conditional use applications associated with the Property. *Id.* There is one known conditional use application within the defined neighborhood, BOA Case No. S-2310 approved on February 6, 1998, which permits a Landscape Contractor/Wholesale Nursery (Wheaton Tree Service) at 11701 Prices Distillery Road, Damascus. *Id.*

Little Bennett Regional Park and the Purdum Trail are located approximately 1,500 feet south of the Property. Exhibit 38, p.7.

As stated, there is a Locational Atlas historic site (10/036-001A, John M. King Barn) located in the defined neighborhood, and the historic setting for the site comprises 135 acres, which includes the subject property and several other parcels. *Id.*

There are no proposed improvements with this application and thus no review from Historic Preservation Commission was sought or required. *Id.* However, testifying in opposition, current and prior members of the Rustic Roads Advisory Committee (“RRAC”) expressed concern that alteration of the Small Barn may be contemplated in the applicant’s application to DPS and Staff referred to DPS’s confirmation that both barns are eligible for alteration permits, which will be required to use either or both structures (although it appears that the Big Barn is already regularly used by the applicant). T. 181-82; Exhibit 38, p.9. There are no additional known designated historic sites on or near the subject property. Exhibit 38, p.7.

Prices Distillery Road, which runs along the northern boundary of the Property, is a designated as a Rustic Road in the *1996 Rustic Roads Functional Master Plan*, as is Burnt Hill Road, which intersects with Prices Distillery Road just east the subject property. Exhibit 38, p.7. Additionally, numerous other roads in the area qualify as Rustic Roads, Exhibit 38, p.16; T. 218-19, 224, including some that qualify as “Exceptional” Rustic Roads, which means that they are particularly fragile due to the way in which they were constructed. T. 186.

There are no known pending or proposed development applications within the defined neighborhood. Exhibit 38, p.7.

The property lies within the Bennett and Little Bennett Planning Area (P.A. 10) of the *1985 Damascus Master Plan* (Master Plan). *Id.* For reference, a map of the Planning Area, as included

in the Staff Report, appears below. Exhibit 38, p. 8. There are “no specific recommendations in the Master Plan for the Property. *Id.*

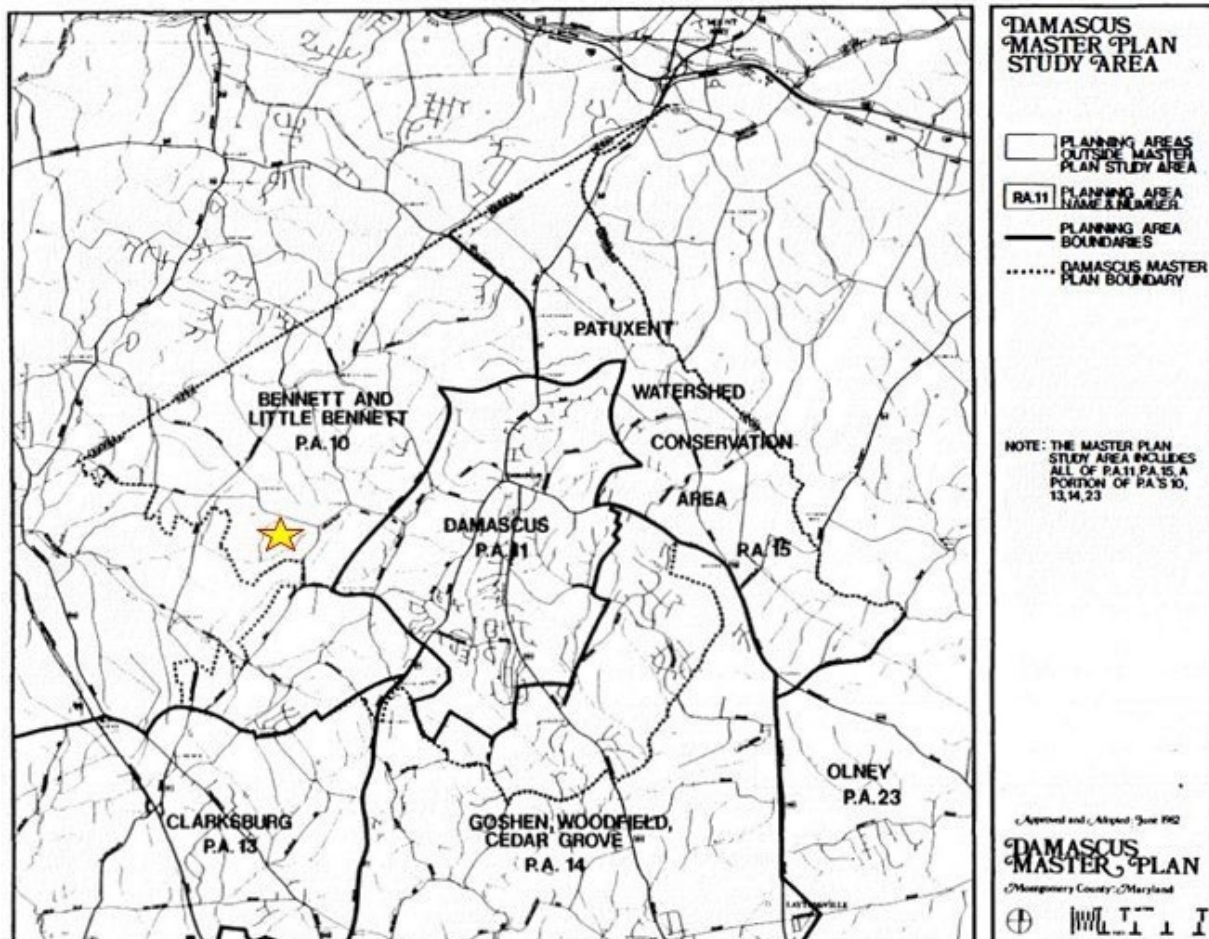


Figure 3: Map of Damascus Master Plan area boundary including the subject property

C. Proposed Use

The conditional use area proposed is comprised of 3.84 acres of the overall 32.7 acre property. Exhibit 38, p. 8. This area is outlined in red in the topological map on page 9, excerpted from the Staff Report. Exhibit 38, p. 9. The area includes the driveway and Big Barn as well as the gravel area around both the barns. Exhibit 38, p. 8. The property is currently used for agriculture and the landscape contractor business. Exhibit 38, p. 9. The applicant seeks conditional use approval to validate the current landscape contractor use. *Id.* and T. 151-52.



Figure 4: Subject property with Conditional Use Area outlined in red

1. Site Plan, Access, On-Site Parking

a. Required Plans

No Preliminary Plan of Subdivision is required for this conditional use because no new buildings are proposed. Exhibit 38, p. 11. The conditional use application is subject to the Forest Conservation Law and the subject property has an existing Final Forest Conservation Plan (FFCP), SC2009002, which was approved when the overall farm was originally subdivided (Minor Subdivision # 720040400). Exhibit 38, p. 12. The applicant submitted an amended FFCP. *Id.*

b. Buildings

As stated, two buildings exist on site, located in the center of the property, which pre-date Chapingo purchase of the property. Exhibit 38, p. 9. The applicant includes the Big Barn as part of the proposed conditional use. *Id.* The Small Barn is not within the proposed conditional use area and will continue to be utilized for farm operations that are not related to the landscape contractor use. *Id.* DPS has confirmed that the buildings are eligible for filing of an Alteration Permit to allow the use of either or both structures. *Id.*

The Big Barn has a roof but is open on the sides and has asphalt milling flooring with a height of 30 feet, well below the maximum height limit for the zone of 50 feet. *Id.* The applicant proposes to use it as cover for stored equipment and material and as the site for the crews' daily morning safety and assignment meetings. *Id.* It currently has electricity, but no restrooms. *Id.*

c. Access and Parking

The proposed conditional use area has frontage only on Prices Distillery Road. Exhibit 38, p. 11. The applicant proposes to retain the existing entrance at 12120 Prices Distillery Road and does not anticipate a need and does not plan to further modify the entrance. *Id.* The driveway runs over 1,000 feet to the center of the property to the designated conditional use area. *Id.*

Opposition testimony highlighted that the driveway apron and driveway road itself were altered considerably by the placement of millings by the applicant without a permit. T. 180-81. Ms. Laura Van Etten, member of the RRAC testified that the RRAC should have been consulted, T. 180, and alleged that the applicant was disingenuous in his representations of the driveway to the Fire Department. T. 179, 185.

The applicant proposed to provide parking in the Big Barn and in multiple exterior locations around the two barns, as shown below in the drawing excerpted from the Staff Report. *Id.*

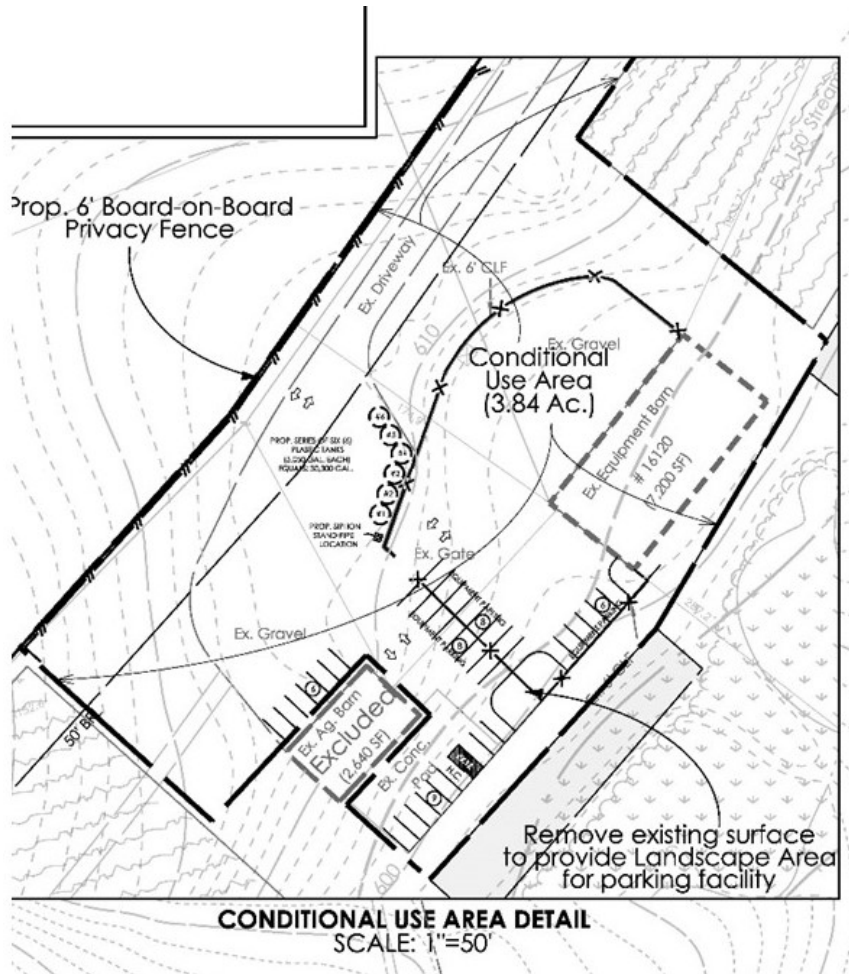


Figure 5: Conditional Use Area detailed view showing parking areas

Staff disputed the accuracy of the applicant's parking calculations. Exhibit 38, p. 20-21. Applicant's witness, Mr. John Sekerak, an expert land use planner and architect, disputed Staff's findings, asserting that the applicant's work vehicles, including bobcats, should not be included in the calculations. T. 54-57. Mr. Sekerak testified that the parking plans could be modified to conform with Staff calculations if need be. T. 58.

Significant opposition testimony raised concerns about property access related to primary access to the site being via designated Rustic Roads. As mentioned, both Prices Distillery Road and Burnt Hill Road are Rustic Roads, and the Staff Report includes a full list of surrounding Rustic Roads, as well as Exceptional and Nominated Rustic Roads, on p. 16. Ms. Saville testified

that a weight limit of 10,000 pounds applies to the entirety of Burnt Hills Road, T. 191, and that the subject property is also directly accessed by the 30,000-pound weight limit, 18-foot concrete bridge Burnt Hills Road runs over, a bridge that applicant's large landscaping vehicles must travel down the middle of to traverse safely. T. 190. Ms. Saville noted that the bridge dates from 1949 and requires RRAC approval for repairs. T. 177. Neighbors Mr. Thomas Hartsock and Mr. James Ryan testified how difficult it is to access the subject property without using a Rustic Road, T. 218-19, 222-230, and Mr. Ryan stated that the roads are hilly and narrow, increasing the likelihood of vehicle collisions. Mr. Ryan estimated that alternative routes could add approximately 15 minutes to Chapingo landscape vehicle travel times, T. 229, and even Mr. Alvarez admitted to ten (10) minutes of extra travel time if his vehicles avoid the Burnt Hill Road bridge, T. 123.

The Planning Board concluded that imposing conditions requiring Chapingo to avoid Rustic Roads would be unenforceable since abuses of road usage could occur daily. T. 183. Mr. Ryan testified to the on-going and current use of the Rustic Roads by Chapingo's larger landscaping vehicles. T. 227. All of the opposition witnesses spoke to Mr. Alvarez's lack of credibility, citing failures to produce requested information and flagrant violation of ordinances, such that compliance with prospective restrictions on Rustic Road usage is highly dubious. See T. 178-82, 185, 191, 219-220, 231, 239.

2. Site Landscaping, Lighting and Signage

Mr. Sekerak testified as to the proposed landscaping, including extensive tree planning to block the industrial views of equipment and vehicles, T.64-65; Exhibits 54i and 54ii, as well as the aid the rolling topography provides in terms of screening the site. T. 66-67. Additionally, the applicant proposes a six (6)-foot board-on-board privacy fence. T.52-53.

Staff, however, found the proposed screening to be insufficient from the western property line. Exhibit 38, p. 22.

Opposition witness Saville of the RRAC testified to significant concerns about the impact of the proposed landscaping on the viewshed, specifically its blockage of the historic John M. King Barn. T. 196-97. Ms. Saville detailed that without the proposed screening, the current view looks like an “industrial site dropped inside a bucolic landscape” but that if the proposed screening is placed, there will be a “big green wall [and] you would lose historic viewshed into the knoll and [of the] historic barn especially.” T. 197.

Staff stated and the testimony of Mr. Sekerak confirmed that no new lighting or signage is proposed. Exhibit 38, p. 24; T. 60.

3. Operations

a. General Operations

Chapingo seeks to continue operation as a full-service tree care company, Exhibit 38, p. 10, as was confirmed by the owner, Mr. Jose Alvarez, in his testimony, T. 123. Operations occur year-round and include pruning, tree removal, mulching, consulting, replacements, cabling and bracing, lighting protection, and ornamental plantings. Exhibit 38, p. 10. Proposed hours of operation are 6:00 a.m. until 6:30 p.m. Monday through Saturday. *Id.*

The applicant also proposes to utilize the land outside of the proposed conditional use area for agricultural uses permitted in the AR zone. *Id.*, T. 122.

No retail sales or retail nursery operations are proposed, so it is unlikely a customer would visit the site. Exhibit 38, p. 10; T. 134. The applicant testified that there will be little activity on-site during most of the day. Exhibit 38, p. 10; T. 114, 147-48. Landscape team members will report to the site in the morning, park their personal vehicles on site, receive assignments and pick up

equipment, and then leave to perform tree care work at off-site locations. *Id.* Team members will return at the end of the day to store equipment and retrieve personal vehicles. *Id.* Management may remain on and/or return to the site at times during the day; team members may return if additional or replacement equipment is needed. *Id.* There is no office proposed on site. Exhibit 38, p. 10; T. 116-18. The only exceptions to the hours/days of operation proposed are if emergency tree services need to be performed to address a road blockage or hazardous condition. Exhibit 38, p. 10

b. Staffing

During the hearing, the applicant amended the staffing request to include up to 19 on-site employees. T.18. The operation has two peak activity times: morning and afternoon when staff arrive and leave the landscape contracting yard. Exhibit 38, p. 10. Both peak periods are typically less than two (2) hours total per day. *Id.*

No specific time frame was noted in the applicant's Statement of Justification and no binding elements were proposed to limit when an employee or others could be onsite. *Id.* During the hearing, the applicant did reiterate that employees would typically arrive between 6:00-6:30 a.m., depart for work sites, and return in the late afternoon to store equipment and vacate the site for the day by 6:30 p.m. T.18, 114, 123.

c. Vehicles and Equipment

The applicant amended his proposal at the start of the hearing to request storage of only fourteen (14) Class B vehicles on site with a maximum of ten (10) vehicles to be used – leaving the site -- on any given workday. T.18, 133-34. The 14 vehicles include: three (3) pickup trucks with a weight limit of 7,000 pounds, some of which may not be stored at the subject property overnight, T.132, 138; three (3) chip or landscape trucks with a weight limit of 14,000 pounds, T.126-7; two (2) bucket trucks with a weight limit of 22,000 pounds, T.126; three (3) trucks with

a weight limit of 25,001 pounds that can pull trailers with weights up to 10,000 pounds, T.124; one (1) wood loader CDL truck with a weight limit of 37,000 pounds, T.139; one (1) wood loader CDL truck with a weight limit of 48,000 pounds, T.144; and one (1) crane CDL truck with a weight limit of 56,000 pounds, T.139. Other equipment and trailers will also be stored overnight on site in the Big Barn and parking areas. Exhibit 38, p. 10.

D. Community Response

Three sets of neighbors, one couple and two individuals, and two members of the RRAC testified in writing and/or orally against the granting of the conditional use. No non-applicant witnesses testified in support. Four sets of neighbors submitted letters of support asserting that they felt the proposed use was compatible with the area. Exhibit 45; T. 25-26.

E. Adequate Public Facilities

Both Staff and the Planning Board recommended denial of the application due to the lack of sanitary facilities on site, finding that such facilities are required for a conditional use under Article 59-7.3.1.E.1.f. and are necessary for health and welfare. Exhibit 38, p. 18; Exhibit 67. The applicant argued that such facilities should not be required because, as employees are on site for such short periods, the need for such facilities should not arise. Exhibit 38, p. 17, T. 27-28. The applicant cited other types of uses that have staff on site only for short periods and are not required to have sanitation facilities. Exhibit 38, p. 17; T. 88-89. Mr. Sekerak testified that there are at least seven (7) restroom facilities within a ten (10)-minute drive of the site which should be sufficient to provide sanitary access should an emergency need arise. T. 82-83.

However, both Ms. Saville and Mr. Hartsock testified to seeing a portable toilet at the subject property. T. 190-91, 195, 216-17. Ms. Saville testified to the portable toilet being present when she traveled to the site with Ms. Van Etten in April or May 2022, potentially as early as

March 2022, T. 195, and Mr. Hartsock testified that he saw the portable toilet in March 2022 and as recently as late June or early July 2022, T. 217. It is a violation of county regulations to have a portable toilet on site in lieu of connect to sewer lines for more than 10 days. See §90.16 and § 90.17.

Concerns about the adequate public facilities of schools, police and fire protection, and water access were not raised. As discussed previously, concerns were raised regarding the adequacy of the roads and storm drainage, since most surrounding roads are Rustic Roads, including Exceptional Rustic Roads, and a permit for the milling of the 20,000 square foot driveway, which impacts impervious surface and stormwater management, was not obtained.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW³

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both general and specific. General standards are those findings that must be made for all conditional uses. *Zoning Ordinance*, §7.3.1.E. Specific standards are those which apply to the particular use requested, in this case, a landscape contractor. *Id.*, §59.3.5.5.

Weighing all the testimony and evidence in the record under a “preponderance of the evidence” standard (*see Zoning Ordinance* §7.1.1), the Hearing Examiner concludes that the conditional use proposed in this application does not satisfy all of the general and specific requirements for the use.

A. Necessary Findings (Article 59.7)

³ All findings of fact are based on a preponderance of the evidence. *Zoning Ordinance*, §7.1.1.

The general findings necessary to approve a conditional use are found in Section 59.7.3.1.E of the Zoning Ordinance. Standards pertinent to this approval, and the Hearing Examiner's determination for each finding, are set forth below.⁴

1. *To approve a conditional use application, the Hearing Examiner must find that the proposed development:*

a) *satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended;*

Conclusion: There are no prior conditional use applications or approvals associated with this property. Exhibit 38, p. 6. Therefore, the Hearing Examiner finds that this application satisfies this standard.

b) *satisfies the requirements of the zone, use standards under Article 59-3, and to the extent the Hearing Examiner finds necessary to ensure compatibility, meets applicable general requirements under Article 59-6;*

Conclusion: This subsection requires an analysis of the standards of the AR Zone contained in Article 59-4; the use standards for a Landscape Contractor in Article 59-3; and the applicable development standards in Article 59-6. Each of these Articles is discussed below in separate sections of this Report and Decision (Parts III. B, C, and D, respectively).

c) *substantially conforms with the recommendations of the applicable master plan;*

The subject property is located within the area subject to the *1985 Damascus Master Plan* and the *1996 Rustic Roads Functional Master Plan*. Exhibit 38, p. 13.

This area has always been agricultural and the *1966 Damascus Master Plan* placed it within the AR land use category. *Id.* The *1982 Damascus Master Plan*, as amended in 1985, retained the area within the AR and the subsequent Sectional Map Amendment placed it in the

⁴Although §59.7.3.1.E. contains six subsections (E.1. through E.6.), only subsections 59.7.3.1.E.1., E.2. and E.3. contain provisions that apply to this application. Section 59.7.3.1.E.1. contains seven subparts, a. through g.

Rural Density Transfer Zone (now AR zone). Exhibit 38, p. 14. The area remains agricultural in nature to the present day. *Id.*

The *1982 Damascus Master Plan*, as amended in 1985, does not have a specific recommendation for a Landscape Contractor use or any conditional uses in general. *Id.* For 12120 Prices Distillery Road there is no site-specific recommendation. *Id.* However, the *1982 Damascus Master Plan* does recognize the importance of farming to the character of Damascus (see *1982 Damascus Master Plan*, p. 35) and retained the subject property within in the AR land use category (see *Id.*, p. 33). Exhibit 38, p. 14. Under the Agricultural and Open Space Preservation Section, the *1982 Damascus Master Plan* states that "Agricultural preservation in Damascus and the Master Plan Study Area as a whole is important not only in terms of maintaining the County's agricultural base, but in strengthening the role of Damascus as the rural commercial focal point of Upper Montgomery County." *1982 Damascus Master Plan*, p. 79, as cited in Exhibit 38, p. 14.

The property is located in an outlying area away from the center of Damascus. Exhibit 38, p. 14. Viewed from Prices Distillery Road, the perception of the landscape contractor operations, with the screening proposed, will be one of significant green space with buildings that are rural/agricultural in style. *Id.* Therefore, while the proposed conditional use is not one of farming or agriculture, maintaining agricultural land uses on 28.85 acres of the Property in the front and rear of the Conditional Use area, will support the rural and agricultural nature of the property. *Id.*

With respect to the 1996 Rustic Roads Functional Master Plan, however, credible testimony established that the proposed conditional use will violate this master plan, both in

terms of the integrity of Rustic Roads themselves and the viewshed the roads are designated to protect. See Part II.C.1.c; C.2; E.

All Rustic and Exceptional Rustic Roads are protected under the Rustic Roads Program. Exhibit 38, p. 14. These roads are historic and scenic roadways that reflect the agricultural character and rural origins of the county. *Id.* They are narrow, low-volume roads. *Id.* Preservation of rustic roads must be achieved by retaining certain physical features of Rustic Roads and by certain right-of-way maintenance procedures. (*Id.* referencing 1993 L.M.C., ch. 9, §1; 2007 L.M.C., ch. 8, §1.) The RRAC is the county-level executive branch committee assigned to review and make recommendations on all projects impacting Rustic Roads. *Id.*

As discussed, the subject property is located on a Rustic Road, Prices Distillery Road, and the most direct access from major highways to the property is over Burnt Hills Road to Prices Distillery Road. Burnt Hills Road is also a Rustic Road and has a 10,000 pound weight limitation, with a 30,000 pound weight limit over the 18-foot wide historic bridge. The *1996 Rustic Roads Functional Master Plan* specifies Prices Distillery Road as having outstanding wide-open farm and rural views, and historic value. (*1996 Rustic Roads Functional Master Plan*, p. 134-35.)

Prior to the hearing, the RRAC was unable to make an official recommendation on the application. Exhibit 38, p. 15. The RRAC noted in an electronic mail message to the DPS Staff coordinator that the applicant had failed to provide the RRAC all the documents requested and to answer certain questions posed, leaving multiple concerns about the application unaddressed and preventing the RRAC from taking an official vote regarding the application. *Id.*

The RRAC highlighted that it has considered issues related to this applicant four separate times, including on: June 27, 2017, discussing complaints from neighbors regarding operations at

Chapingo's previous location, 22930 Old Hundred Road,⁵ although DPS closed its investigation based on the applicant's statement that he was filing for a conditional use;⁶ March 25, 2021, discussing complaints from neighbors regarding operations at the current location, specifically tree debris dumping on the property; and January 22, 2022 and April 27, 2022, to provide information regarding the pending conditional use application, although, as stated, complete information was not provided by the time of the conditional use hearing, specifically regarding permission to apply for an Alteration Building Permit letter.⁷ *Id.*

The RRAC also shared the concern that as the easiest and most direct access to the property involves travel over a number of Rustic, Exceptional Rustic, or "Nominee" Rustic Roads including Prices Distillery Road (Rustic Road with property frontage), Burnt Hill Road (Rustic, with weight limits), Mountain View Road (Rustic, and part of a significant historic Black community), Purdum Road (Exceptional Rustic Road), Kingstead Road, Kingsley Road (Exceptional Rustic Road), Kings Valley Road (Exceptional Rustic Road Nominee), and Lewisdale Road (Rustic Road Nominee), the commercial vehicles utilized by the applicant will inevitably damage the roads and/or cause safety problems. *Id.*

During the hearing, RRAC members detailed that the landscaping proposed by the applicant to hide the industrial use will obscure the scenic views of the Small Barn, interfering with the viewshed rustic roads were identified to protect. T. 196-197. Opposition witnesses cited the weight limit on Burnt Hills Road and that it would be impossible for all but the lightest of the

⁵ A Rustic Road.

⁶ No conditional use application was filed regarding the applicant's prior location.

⁷ The RRAC has concerns that the Alteration Permit that the applicant could apply for would include the ability to make external changes to the historic Small barn. The RRAC believes any alterations to the exterior of the Small barn would impact the viewshed which is a protected characteristic of this Rustic Road. Furthermore, a Historic Area Work Permit would be required for any alterations to this structure, and potential alterations have not been coordinated with Historic Preservation staff or the Historic Preservation Commission during review of this application. Exhibit 38, p. 14.

applicant's trucks to use this road. T. 191, 222. As alternative routes are time consuming and inconvenient, opposition witnesses testified to grave doubts that the applicant would in fact avoid using Burnt Hills Road, especially considering the applicant's history of violations and failure to observe weight limitations to date. See T. 178-82, 185, 191, 219-220, 231, 239.

Conclusion: Based on the testimony presented during the hearing and in accord with Staff's determination, the Hearing Examiner finds that, while this application substantially conforms with the general recommendations of the *1985 Damascus Master Plan*, it does not conform with the goals and parameters of the *1996 Rustic Roads Functional Master Plan*. Even if landscaping changes could be proposed that would protect the viewshed of the Small Barn, which seems unlikely, given the applicant's history of disrespecting regulations and road weight limits and the difficulty of enforcing weight-limit compliance, the applicant poses too great a risk to the integrity of the numerous county Rustic Roads to be entrusted with a conditional use for which Rustic Roads offer the most direct access.

d) is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan;

On page 29 of the Staff Report, Staff determined this finding to be satisfied based on compliance with the *1985 Damascus Master Plan* and other compatibility considerations. The character of the surrounding area is predominantly rural residential and agricultural, and the proposed use is located a sufficient distance away from sensitive land uses or dwelling units; thus, the proposal will not alter the character of the surrounding neighborhood. Additionally, as only 3.84 acres of the total 32.69-acre property will be used for the landscape contractor business, 85% of the site's character will be maintained, including approximately 28 acres remaining in agricultural use. See Exhibit 38, p. 29.

Conclusion: For the reasons stated by Staff, the Hearing Examiner finds that the proposed landscape contractor use will not alter the character of the neighborhood in a manner inconsistent with the *1985 Damascus Master Plan*.

- e) *will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area;*

Staff also found this standard to be satisfied as the project substantially conforms to the policies and recommendations of the *1985 Damascus Master Plan*; no residential areas would be adversely affected or altered because the project is sufficiently buffered and located away from existing residential uses; and the majority of the property is proposed to remain in agriculture use or forest conservation. *Id.* Additionally, as there is only one other active conditional use in the vicinity, there would not be an overconcentration of conditional uses in the area. *Id.*

Conclusion: The Hearing Examiner agrees with Staff and finds that the proposed use satisfies this standard. There is only one other active conditional use in the area and, as the proposed project conforms with the recommendations of *1985 Damascus Master Plan*, is sufficiently removed from residential areas, and will remain majority agriculture and forest conservation, it will not increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area.

- f) *will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:*
 - i. *if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by*

adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage;

Staff found no issue and no testimony was presented raising concerns regarding the adequate public facilities of schools (as there is no residential impact), police or fire protection, or water supply. See Section II.E. However, both Staff and the Planning Board found that the application does not meet the standard for sanitary sewer as there are no restroom facilities on site and testimony confirmed that no sanitation can be installed. Exhibit 38, p. 17-19; Exhibit 67. As Staff found, the applicable regulation should be read to require sanitation. Exhibit 38, p. 17. The applicant asserted that employees will be on site for such abbreviated periods that having no sanitation does qualify as adequate and is compliant with the regulation. T. 27-28. However, opposition testimony established that a portable toilet has been on-site for approximately six months, T. 190-91, 195, 216-17, in violation of §90.16 and §90.17. Thus, even if the applicant's interpretation of the regulation is accurate, the fact that the applicant has brought to and continues to maintain on the site a portable toilet fundamentally belies the applicant's position that no sanitary facilities are necessary.

Because of the limited number of vehicle trips generated by the proposed use, no traffic study was required. Exhibit 38, p.19. However, as discussed previously, concerns were raised regarding road capacity, given that the weight limit on Burnt Hills Road will not accommodate the majority of the applicant's vehicles; Burnt Hills Road serving as the most direct access to the subject property; and the overwhelming number of Rustic Roads in the area. Opposition testimony also challenged storm drainage asserting that the applicant's milling of 20,000 square feet of driveway required a stormwater management permit. T. 181.

Conclusion: A preliminary plan of subdivision is not required for approval of the conditional use because the use is located on an existing lot. Evidence in the record demonstrates that the

application does not require a traffic study and there are no adequate public facilities concerns related to schools, police, fire, and water. The concerns regarding road capacity and stormwater are legitimate and concerning. However, even if they could be ameliorated by the placement of conditions on the use (which appear unlikely in the case of road usage), the fact that there is no sanitary sewer on the property and one cannot be installed, yet clearly such facilities are needed, requires the Hearing Examiner to find that this applicant does not meet the adequate public facilities standard.

- ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage;*

Conclusion: This provision is not applicable.

- g) will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:*
 - i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;*
 - ii. traffic, noise, odors, dust, illumination, or a lack of parking; or*
 - iii. the health, safety, or welfare of neighboring residents, visitors, or employees.*

This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. Inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations.” *Zoning Ordinance*, §1.4.2. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site.” *Id.* Non-inherent adverse effects alone, or in conjunction with inherent effects, are a sufficient basis to deny a conditional use.

On page 29 of the Staff Report, Staff identified seven inherent adverse effects necessarily associated with Landscape Contracting, including:

1. Vehicular and pedestrian trips to and from site;
2. Parking for employees;
3. Varied hours of operation;
4. Noise or odors associated with vehicles;
5. Noise or odors associated with landscaping trucks and equipment;
6. Work yard area; and
7. Lighting.

Staff determined that these characteristics are typically associated with similar uses and do not exceed what is normally expected. Exhibit 38, p. 31. Surrounding residential uses are well-buffered from the area intended for the conditional use by distance, existing and proposed landscaping, and forest conservation. *Id.*

Staff identified two non-inherent characteristics: topography and lack of on-site sewer facilities. *Id.* Staff found topography to lessen the impact of the property by reducing the visual impact of the industrial equipment and because most of the site will remain in agriculture use and/or protected by a forest conservation easement. See *Id.* However, testimony established that the landscaping proposed to hide the industrial equipment and protect the scenic vistas will in fact obstruct views of the historic Small Barn, thus interfering with the use and peaceful enjoyment of the area by abutting and neighboring properties and the general neighborhood. T. 196-97.

Staff found the lack of on-site sewer facilities to also be problematic in terms of the health, safety, and welfare of employees. Exhibit 38, p. 31. Staff noted that there are no approved conditional landscape contractor uses in the County that do not offer sanitation services, *Id.*, and testimony established that such services are needed on the site, since a portable toilet has been on site for a period of months. T. 195, 216-17.

Conclusion: While the inherent characteristics do not exacerbate any non-inherent characteristics, the two identified non-inherent characteristics do cause undue harm to the neighborhood. The topography of the surrounding area will cause the proposed landscaping necessary to screen the unsightly industrial equipment from scenic views to also obscure the scenic vista of the Small Barn. The lack of on-site sewer facilities will negatively impact the health, safety, and welfare of the employees. Based on this evidence, the Hearing Examiner finds that the proposed Landscape Contractor conditional use will cause undue harm to the neighborhood due to non-inherent adverse effects alone.

2. *Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must be compatible with the character of the residential neighborhood.*

Conclusion: This provision is not applicable. The subject property is not in a Residential Detached zone and no structure is planned to be constructed, reconstructed, or altered as part of the application.

3. *The fact that a proposed use satisfies all specific requirements to approve a conditional use does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require conditional use approval.*

Conclusion: The appropriateness of application approval is not reliant on whether the application satisfies all specific requirements for the conditional use, but on the substantial factual support for the proposed use having no known adverse impact on the surrounding area. As stated, the proposed use will create adverse impacts on the surrounding area in terms of both scenic views and the health and safety of employees in ways that cannot be mitigated.

4. *In evaluating the compatibility of an agricultural conditional use with surrounding Agricultural or Rural Residential zoned land, the Hearing Examiner must consider that the impact does not necessarily need to be controlled as stringently as if it were abutting a Residential zone.*

Conclusion: This finding is not applicable as the proposal is for a conditional use of a Landscape Contractor, not an agricultural conditional use, and the property outside the proposed conditional use area, while agricultural in nature, is excluded from the proposed use.

5. *The following conditional uses may only be approved when the Hearing Examiner finds from a preponderance of the evidence of record that a need exists for the proposed use to serve the population in the general neighborhood, considering the present availability of identical or similar uses to that neighborhood:*
- i. *Filling Station;*
 - ii. *Light Vehicle Sales and Rental (Outdoor);*
 - iii. *Swimming Pool (Community); and*
 - iv. *the following Recreation and Entertainment Facility use: swimming pool, commercial.*

Conclusion: The finding is not applicable as the project is not any of the categories listed.

6. *The following conditional uses may only be approved when the Hearing Examiner finds from a preponderance of the evidence of record that a need exists for the proposed use due to an insufficient number of similar uses presently serving existing population concentrations in the County, and the uses at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood:*
- i. *Funeral Home; Undertaker;*
 - ii. *Hotel, Motel;*
 - iii. *Shooting Range (Outdoor);*
 - iv. *Drive-Thru*
 - v. *Landfill, Incinerator, or Transfer Station; and*
 - vi. *a Public Use Helipad, Heliport or a Public Use Helistop.*

Conclusion: This finding is not applicable as the application does not include a request for the uses listed.

B. Development Standards of the Zone (Article 59.4)

To approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the zone where the use will be located – in this case, the AR Zone. Staff compared the minimum development standards of the AR Zone to those provided by the application in the following table, included in the Staff Report (Exhibit 38, p. 11-12):

Conclusion: Based upon the above table, the Hearing Examiner concludes that the application meets all of the development standards of the AR Zone.

C. Use Standards for a Landscape Contractor Business (59.3.5.5)

The specific use standards for approval of a Landscape Contractor business are set out in Section 59.3.5.5 of the Zoning Ordinance. Standards applicable to this application are set forth below, along with the Hearing Examiner's findings of fact and conclusions of law on each standard.

Where a Landscape Contractor is allowed as a conditional use, it may be permitted by the Hearing Examiner under Section 7.3.1, Conditional Use, and the following standards:

- 1. In the Agricultural, Rural Residential, and Residential Detached zones the minimum lot area is 2 acres. The Hearing Examiner may require a larger area if warranted by the size and characteristics of the inventory or operation.*

Conclusion: The area accorded for the proposed conditional use is 3.84 acres, exceeding the minimum requirement. This standard has been met.

- 2. Building and parking setbacks, including loading areas and other site operations, are a minimum of 50 feet from any lot line.*

Development Standard	Permitted/Required	Provided
Minimum Net Lot Area	2 acres	3.84 acres
Minimum Lot Width at Front Building Line	125 ft.	384 ft. (Prices Distillery Rd.)
Minimum Lot width at Front Lot Line	25 ft.	365.8 ft. (Prices Distillery Rd.)

Maximum Density	1 dwelling unit per 25 acres	0 dwelling units
Maximum Coverage	10%	0.5%
Minimum Setback from all Lot Lines	50 ft.	174.9 ft.
Maximum Height, Principal Building	50 ft.	27 ft.
Maximum Height, Accessory Structure	50 ft.	21 ft.
Vehicle Parking Spaces Required	34.5 spaces 0.5 per employee 1.0 per commercial vehicle	37 spaces (0.5 * 25 = 12.5) 14 (1.0 * 22 = 22) 23 14 + 23 = 37
Bicycle Parking Space Required	0	0

Conclusion: Staff concluded that building and parking areas are a minimum of 50 feet from any lot line, and this is evidenced on the site plan. The Hearing Examiner finds that the application meets this standard.

3. *The number of motor vehicles and trailers for equipment and supplies operated in connection with the contracting business or parked on-site must be limited by the Hearing Examiner to avoid an adverse impact on abutting uses. Adequate parking must be provided on-site for the total number of vehicles and trailers permitted.*

Conclusion: Staff found that parking was adequate to accommodate both the equipment and the number of employees proposed. Exhibit 38, p. 34. The Hearing Examiner finds that this standard has been met.

4. *Sale of plant materials, garden supplies, or equipment is prohibited unless the contracting business is associated with a Nursery (Retail) or Nursery (Wholesale).*

Conclusion: The Hearing Examiner finds this standard satisfied as no retail or wholesale operations are proposed.

5. *The Hearing Examiner may regulate hours of operation and other on-site operations to avoid adverse impact on abutting uses.*

Conclusion: Staff concluded that the proposed operating hours, from 6:00 a.m. to 6:30 p.m., are consistent with the agricultural activities conducted on farms surrounding the subject property and typical landscape contractor operations. Exhibit 38, p. 34. Employees typically arrive and depart in the morning prior to peak traffic hours and have staggered return and exit times in the afternoon/evening. *Id.* In addition, Chapingo's tree operations occur off site, thus reducing the impact on abutting properties. *Id.* Based on this information, the Hearing Examiner finds that the hours of operation proposed will not have an adverse impact on abutting uses.

D. General Development Standards (Article 59.6)

Article 59.6 sets requirements for site access, parking, screening, landscaping, lighting, and signs. The applicable requirements, and whether the proposed use meets these requirements, are discussed below.

1. Site Access Standards

Section 59.6.1 of the Zoning Ordinance imposes site access standards on conditional uses only in Residential Multi-Unit, Commercial/Residential, Employment, Industrial, and Floating zones, with the intent of “to ensure safe and convenient vehicular, bicycle, and pedestrian circulation within and between lots on the same block face and to reduce traffic congestion.” Because this property is within an Agricultural zone, the site access standards do not apply.

Current access is via a 1,200-foot gravel driveway. Exhibit 38, p.5. Significant concern was raised by Staff and in testimony regarding the widening and expansion of the driveway and driveway apron, particularly that the expansion was completed without requisite approvals, led to a substantial increase in impervious surface, and had a negative impact on the designated Rustic Road Prices Distillery Road. Exhibit 38, p. 25, T. 181, 209-11. However, no concern regarding the adequacy of the modified driveway to serve traffic to and from the site was raised.

Conclusion: The conditional use is being denied for other reasons. This standard does not apply but the applicant should determine whether a stormwater management permit was necessary and remedy any issues raised by the unpermitted expansion, and work with the RRAC to ensure that the driveway apron accords with the RRAC’s scenic parameters.

2. Parking, Queuing, and Loading Standards

The standards for the number of parking spaces required, parking setbacks, and parking lot screening are governed by 59.6.2 of the Zoning Ordinance.

a. Number of Parking Spaces Required by Section 59.6.2.4

The applicable standards along with a comparison of what is provided are included in a table from the Staff Report, reproduced below. Exhibit 38, p. 13.

Vehicle Parking Spaces Required	34.5 spaces 0.5 per employee 1.0 per commercial vehicle	37 spaces (0.5 * 25 = 12.5) 14 (1.0 * 22 = 22) 23 14 + 23 = 37
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Conclusion: The Hearing Examiner finds that application meets vehicle parking space standards as the parking availability on site exceeds requirements.

b Parking Lot Screening

Section 59.6.2.9.C sets out the screening requirements for conditional use parking lots having 10 or more spaces:

C. Parking Lot Requirements for 10 or More Spaces

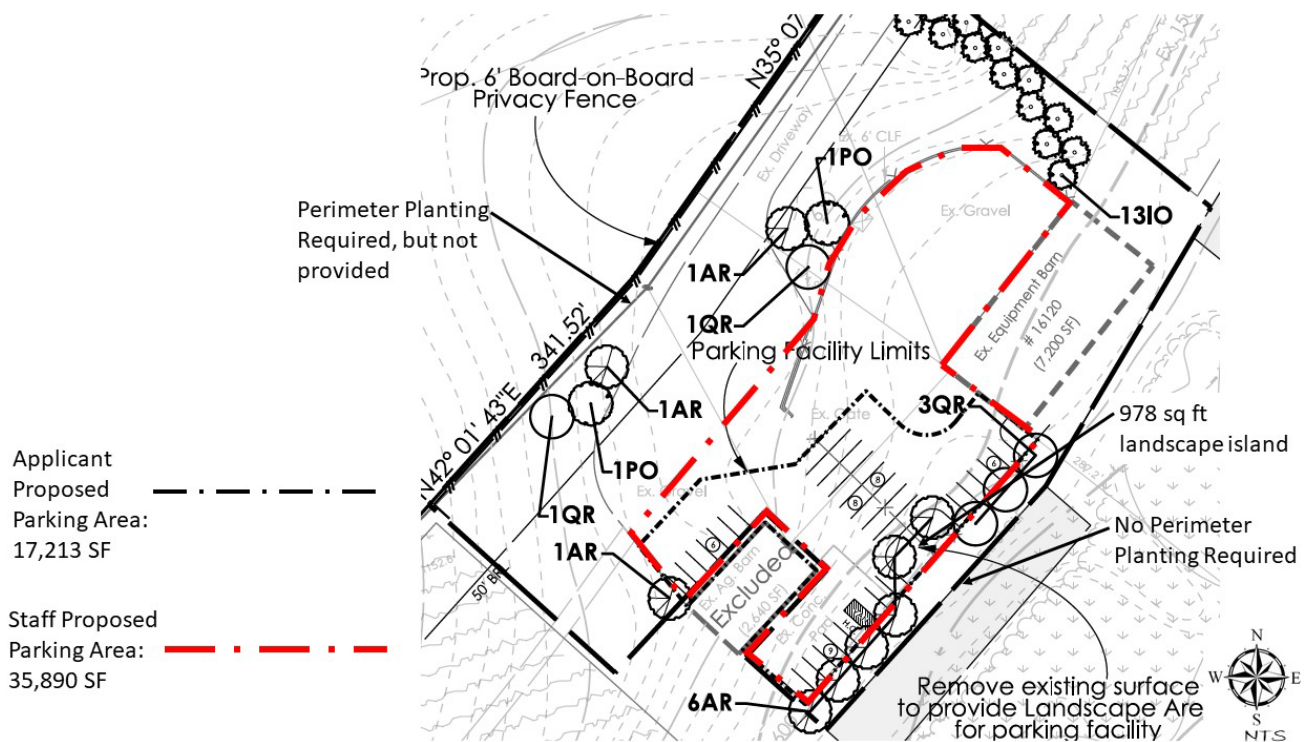
1. Landscaped Area

- a. A surface parking lot must have landscaped islands that are a minimum of 100 contiguous square feet each comprising a minimum of 5% of the total area of the surface parking lot. Where possible, any existing tree must be protected and incorporated into the design of the parking lot.*
- b. A maximum of 20 parking spaces may be located between islands.*
- c. A landscaped area may be used for a stormwater management ESD facility.*

Staff set out that the application proposes to maintain the one existing parking lot, detailed in Figure 7 on page 30, extracted from the Staff Report. It includes 37 parking stalls for employees' personal vehicles, work trucks, trailers, and equipment; is located adjacent to and between the two barns; and consists of a packed gravel surface. Exhibit 38, p. 30. The applicant's Statement of Justification does not propose to pave the area or stripe the individual parking stalls. *Id.* Staff assert that the proposed Parking Facility Limit of 17,213 square feet, as shown on the submitted plan, is inaccurate since parking of personal vehicles, work vehicles, trailers, and equipment will most likely occur throughout the existing gravel parking area and that the Parking Facility Limit should

be more accurately calculated as 35,890 square feet, which will encompass the entire existing gravel area including the area adjacent to the barns. *Id.*

The applicant asserted that Staff calculations were improper because they included work vehicles, T. 54-57, but that adjustments could be made to comply with Staff calculations if Staff calculations were deemed accurate.



Staff also disputed the accuracy of the size of applicant's proposed parking island. Exhibit 38, p. 21. The application includes one landscape island of approximately 978 square feet located adjacent to 31 of the 37 parking stalls. *Id.* Based on the Applicant's proposed Parking Facility Limit of 17,213 square feet, this parking island meets the intent of Section 6.2.9.C.1. *Id.* However, if the Staff proposed Parking Facility Limit of 35,890 square feet is used, Staff determined that this proposal would not meet the standard of Section 6.2.9.C.1 because the percentage of square footage would only be 2.7%, not the required 5%. *Id.*

Conclusion: The Hearing Examiner agrees with Staff that the entire area will most likely be used for parking and that the current proposal does not meet the requisite standard. If the application were not being denied, the Hearing Examiner would impose conditions requiring the applicant to adopt Staff's Parking Facility Limit and extend the parking island to 1,795 square feet.

2. Tree Canopy

Each parking lot must maintain a minimum tree canopy of 25 percent coverage at 20 years of growth, as defined by the Planning Board's Trees Technical Manual, as amended.

The applicant's proposed tree canopy is pictured in Figure 8, excerpted from page 22 of the Staff report.

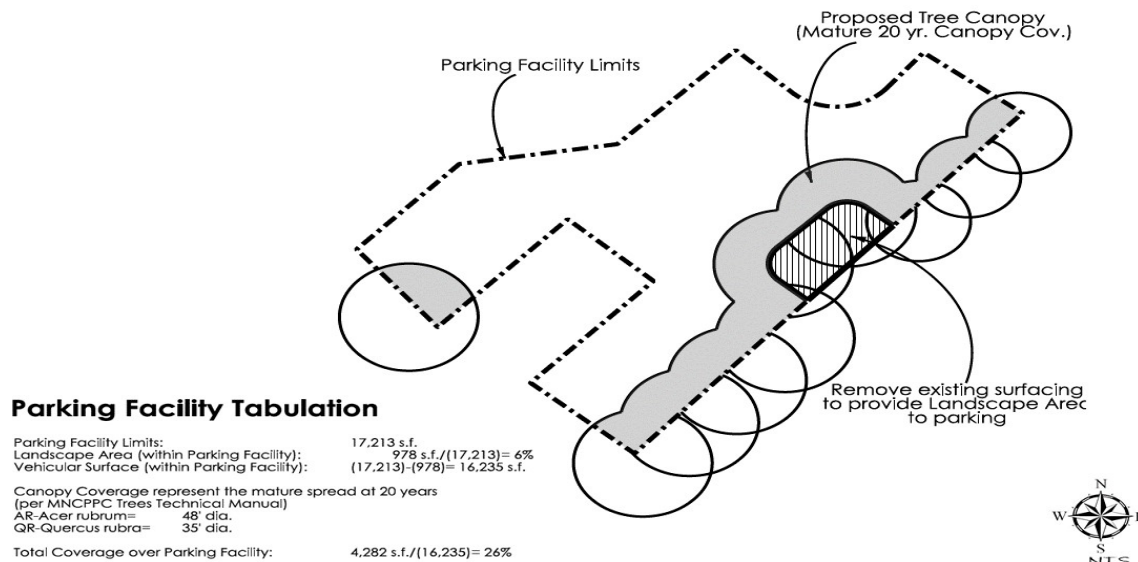


Figure 8: Tree Canopy Coverage

Consistent with Staff's findings regarding the insufficiency of the Parking Facility Limit, Staff found that the application met the tree canopy coverage standard only if the Parking Facility Limit proposed by the applicant was adopted, as the coverage would equal 26% of the parking area; but if the Parking Facility Limits proposed by Staff were adopted, then only 12% canopy

coverage would be achieved and the proposal would not meet the Section 6.2.9.C.2 standard. Exhibit 38, p. 21-22.

Conclusion: The Hearing Examiner agrees with Staff that the entire area will most likely be used for parking and, thus, that the current tree canopy proposal will not meet the requisite standard. If the application were not being denied, the Hearing Examiner would impose a condition requiring the applicant to increase the canopy to the requisite 25%.

3. Perimeter Planting

- a. The perimeter planting area for a property that abuts an Agricultural, Rural Residential, or Residential Detached zoned property that is vacant or improved with an agricultural or residential use must:*
 - i. Be a minimum of 10 feet wide;*
 - ii. Contain a hedge, fence, or wall a minimum of 6 feet high;*
 - iii. Have a canopy tree planted every 30 feet on center; and*
 - iv. Have a minimum of 2 understory trees planted for every canopy tree.*

Staff set out that perimeter planting along the eastern edge of the parking area is not required because the parking lot does not abut a neighboring property that is zoned Agricultural, Rural Residential, or Residential Detached that is vacant or improved with an agricultural or residential use, but that no perimeter planting along the western property line is proposed and this area does abut neighboring properties, resulting in the area not meeting the requirements under Section 6.2.9.C.3.

Conclusion: The Hearing Examiner agrees with Staff.

c Parking Lot Lighting

Parking lot lighting must satisfy Section 6.4.4, General Outdoor Lighting Requirements. Section 59.6.4.1 exempts existing lighting from the specific standards, although Section 59.6.4.4.C.5 requires new lighting to be 0.1 footcandles or less at any lot line that abuts a lot with a detached house building type. Staff note that no new or replacement lighting is proposed but that

the applicant included lighting information on the plans to demonstrate that even the existing lighting complies with Section 59.6.4.4.C.5. Exhibit 38, p. 24.

Conclusion: The Hearing Examiner finds that the proposed use meets the lighting standard.

3. Site Landscaping, Screening and Lighting

Standards for perimeter site landscaping and site lighting are set forth in 59.6.4 and 59.6.5 of the Zoning Ordinance. The stated intent of 59.6.4 is “*to preserve property values, preserve and strengthen the character of communities, and improve water and air quality.*” §59.6.4.1. The stated intent of 59.6.5 is “*to ensure appropriate screening between different building types and uses.*” Zoning Ordinance §59.6.5.1. These site screening and landscaping requirements are in addition to those that apply to screening and landscaping of parking facilities discussed above.

a. Lighting

This issue is discussed above in the context of parking lot lighting.

Conclusion: Staff advises that the application meets the standard of §59.6.4.4.E requiring illumination from the proposed use not exceed 0.1 foot-candles at the property lines. Having no evidence to the contrary, this standard is met.

b. Site Screening and Landscaping

Zoning Ordinance §59.6.5.2.B and 59.6.5.2.C contain the standards for perimeter site screening and landscaping:

In the Agricultural, Rural Residential, and Residential Detached zones, a conditional use in any building type must provide screening under Section 6.5.3 if the subject lot abuts property in an Agricultural, Rural Residential, or Residential Detached zone that is vacant or improved with an agricultural or residential use.

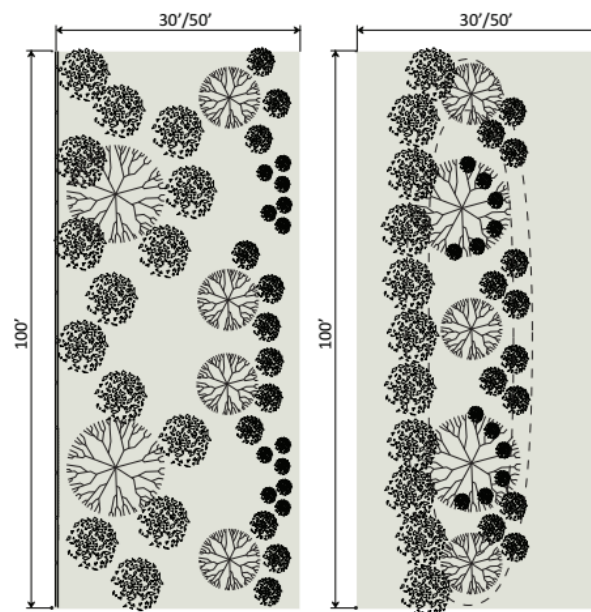
- 1. The conditional use standards under Article 59-3 may exempt the development from this requirement.*
- 2. The Hearing Examiner may increase the amount of screening required for conditional use approval under Section 7.3.1.*

Section 6.4.3.B specifies and defines the types of plant materials, canopy trees, understory trees, and evergreen trees. In response to Staff's comments, the applicant submitted a revised Landscape Plan, which Staff found to satisfy the General Landscape Requirements as defined and specified under Section 59-6.4.3.B. This section of the Code defines the types of landscape plant material that are allowed and specifies plant sizes at time of installation. The plant material shown on the Applicant's Landscape Plan meets these general requirements. Exhibit 38, p. 23.

In terms of the requirements of Section 6.5.3., referenced in the above-quoted section, the subject site is covered by Subsection 6.5.3.C.7., which provides:

General Building with a Non-Industrial Use; Conditional Use in the Agricultural, Rural Residential, or Residential Detached Zones; and Conditional Use in a Detached House or Duplex in Any Other Zone

	Option A	Option B
Dimensions (min)		
Depth	8'	12'
Planting and Screening Requirements		
Trees (minimum per 100')		
Canopy	2	2
Understory or Evergreen	2	4
Shrubs (minimum per 100')		
Large	6	8
Medium	8	12
Small	8	--
Wall, Fence or Berm (min)	4' fence or wall	--



Section 6.5.3.C.7 gives two options, but within those options, the minimums are strictly prescribed by numbers and sizes of trees and shrubs.

As Staff noted with respect to parking, the applicant did not provide landscape screening along the western property line and found that the landscape screening shown on the submitted Landscape Plan did not meet the requirements under Section 6.5.3.C.7. Exhibit 38, p. 23. Staff explained that the applicant had been requested in previous reviews to provide landscape screening that met the requirements under this section of the Code and the applicant ultimately proposed to install a six (6)-foot board-on-board fence along the entire west property line, but no landscape screening. *Id.* This was confirmed by the testimony of Mr. Sekerak. T. 52-53. The proposed plan, excerpted from the Staff Report, appears on the following page as Figure 9. Exhibit 38, p. 23. Staff found that the proposed alternative compliance pursuant to Section 6.8.1 as an option to meet the criteria of Section 6.5.3.C.7 did not satisfy the four necessary requirements set out under Section 6.8.1 to permit alternative compliance. *Id.*

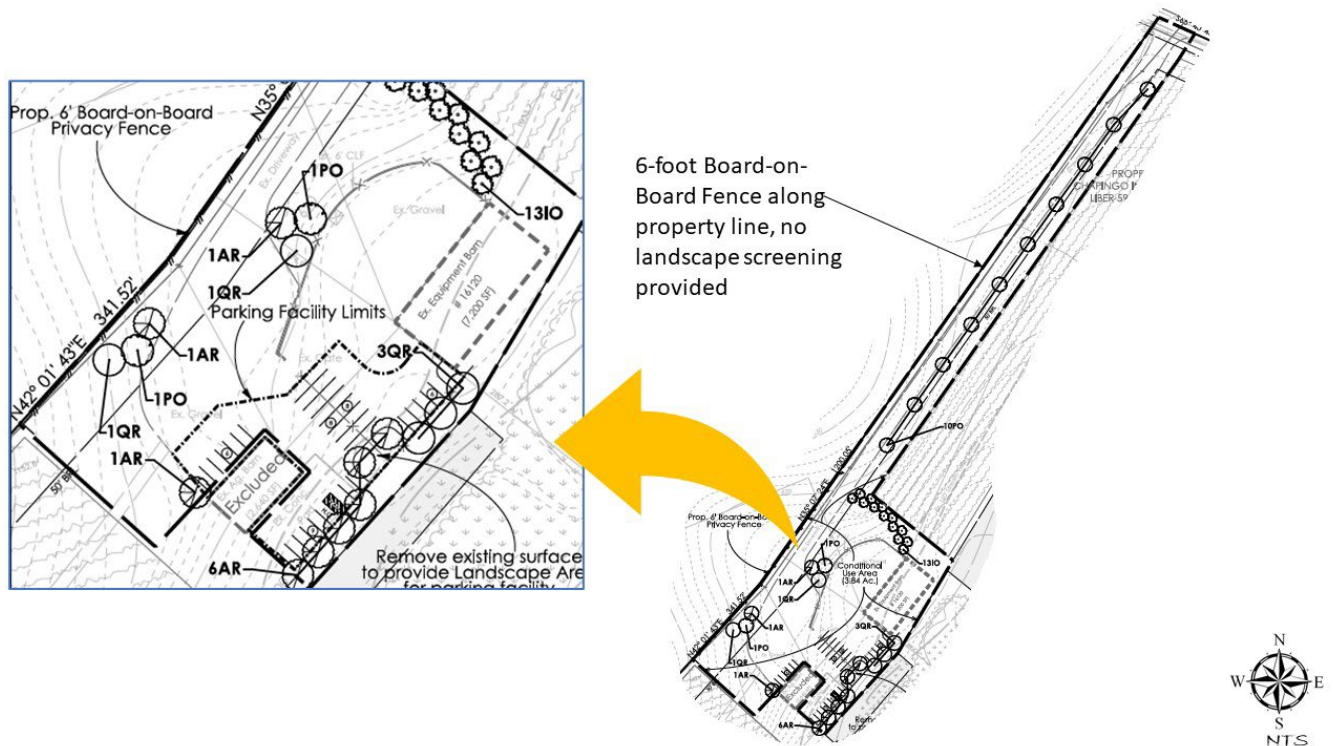


Figure 9: Perimeter Landscape Screening

Conclusion: The Hearing Examiner agrees with Staff and finds that the applicant has not satisfied the standard for alternative compliance under Section 6.8.1, as the applicant provided no evidence of a unique situation or constraint precluding compliance with Section 6.5.3.C.7. Additionally, the alternative proposed does not satisfy the four prongs of Section 6.8.1; specifically, a board-on-board fence is not appropriate alternative compliance to ensure compatibility with the scenic vistas of a Rustic Road, in this instance, Prices Distillery Road.

c. Signage

Signage for the use is governed by Division 6.7. Zoning Ordinance §59.6.7.8.A.1 sets the standards for signs in Residential Zones:

A. Base Sign Area

The maximum total area of all permanent signs on a lot or parcel in a Residential zone is 2 square feet, unless additional area is permitted under Division 6.7.

1. Freestanding Sign

- a. One freestanding sign is allowed.*
- b. The minimum setback for a sign is 5 feet from the property line.*
- c. The maximum height of the sign is 5 feet.*
- d. Illumination is prohibited.*

Conclusion: The Hearing Examiner finds that the criteria for signage is met as the applicant is not asking for any additional signage.

IV. Conclusion and Decision

As set forth above, the application does not meet all the standards for approval, specifically General Standards 59.7.3.1.E.1.c; 59.7.3.1.E.1.f.i; and 59.7.3.1.E.1.g.i and g.iii. If the application had met these standards, significant conditions would still need to be imposed regarding standards 59.6.2. to permit approval of the application.

V. Decision

Based on the foregoing findings and conclusions and a thorough review of the record, the application of Chapingo for the conditional use of a landscape contractor is DENIED.



Andrea LeWinter
Hearing Examiner

Issued this 8th day of September 2022.

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/>

Any party wishing to appeal this decision should visit the [Board of Appeals'](#) website, review the [Notice of Re-Opening](#) or contact Board of Appeals Staff for office hours and filing instructions, as these may change.

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.

NOTIFICATIONS SENT TO:

Jody Kline, Esquire
Sean Hughes, Esquire
Barbara Jay, Executive Director
Montgomery County Board of Appeals
Parker Smith, Planning Department
Matthew Folden, Planning Department
Carrie Sanders, Planning Department
Victor Salazar, Department of Permitting Services
Michael Coveyou, Director of Finance
Cliff Royalty, Esquire, Office of the County Attorney