

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
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IN THE MATTER OF:
AXCOBAR TREE EXPERTS

Applicant

Melvin Alfaro, d/b/a Axcobar
Tree Experts
For the Petition

Sean P. Hughes, Esq.
Attorney for the Applicant

Before: Heard by Lynn Robeson Hannan, Hearing Examiner
Decision by Andrea LeWinter, Hearing Examiner

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OZAH Case No. CU 24-02

HEARING EXAMINER’S REPORT AND DECISION

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I. STATEMENT OF THE CASE

Filed on July 10, 2023, the applicant, Melvin Alfaro d/b/a Axcobar Tree Experts (“Axcobar”) seeks a conditional use for a Landscape Contractor at 20108 Zion Road, Gaithersburg, Maryland, pursuant to Section 59.3.5.5 of the Zoning Ordinance.¹ Exhibits 1. The Office of Zoning and Administrative Hearings (“OZAH”) held a public hearing on November 20, 2023. Exhibit 30.

On October 20, 2023, Staff of the Montgomery County Planning Department (“Planning Staff” or “Staff”) issued a report recommending grant of the application for a conditional use, Forest Conservation Plan, and variance with conditions. Exhibit 32. On November 9 and 17, 2023, respectively, the Planning Board unanimously recommended approval of the conditional use and approved the Forest Conservation Plan and associated variance. Exhibit 33 and 40.

On November 20, 2023, an electronic mail message was submitted by J.R. Smith opposing the application. He alleged that the traffic on Zion Road associated with the proposed Landscape Contractor use is dangerous and that the applicant had been utilizing the property without conditional use permission in violation of the Zoning Code. Exhibit 41.

Following the close of the hearing on November 20, 2023, the record was held open for ten days to receive the transcript and a more complete plan for the reconstruction of the existing, dilapidated residence on the premises. T. 81, 83. Axcobar submitted the revised plan on November 21, 2023. Exhibit 44. The record closed on December 1, 2023.

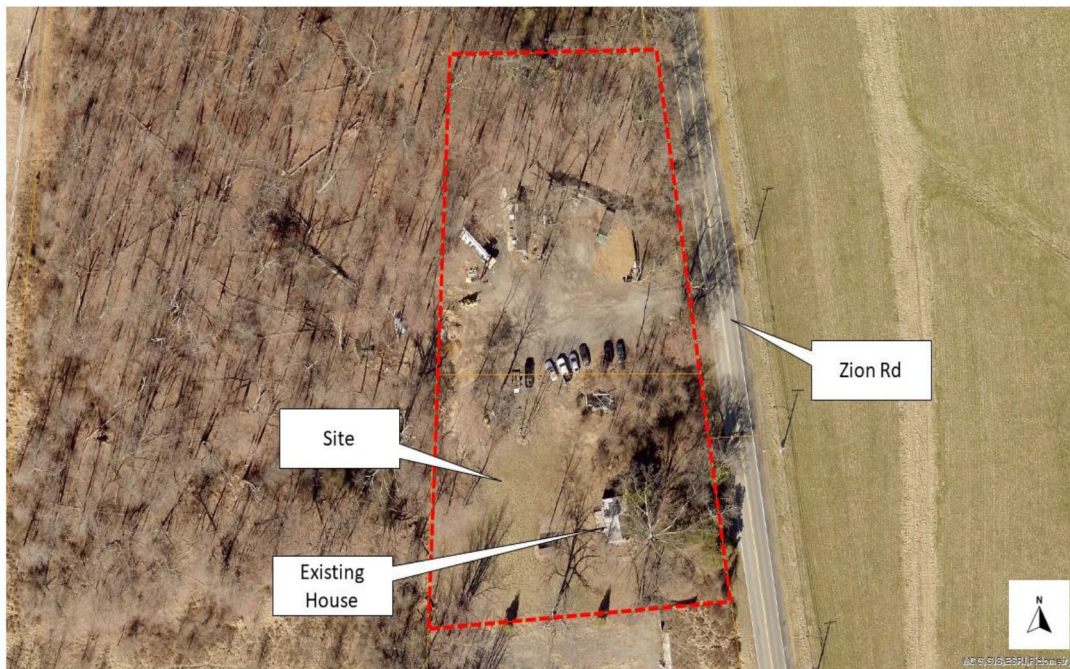
For the following reasons, the Hearing Examiner approves the conditional use application with conditions.

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.

II. FACTUAL BACKGROUND

A. The Subject Property

As set out in the Staff Report, the Subject Property is 2.01² acres in the R-200 Zone and is composed of two unplatted parcels (parcels 910 and 980, Tax Map #HU23). Exhibit 32, p. 5. The land is improved with a single-family residential structure and a gravel contractor's area. *Id.* The ariel photograph below, excerpted from the Staff Report, shows the location of the property and where the existing house is situated. Exhibit 32, p. 8.



Ariel View of Subject Property with Subject Property outlined by dotted red line.

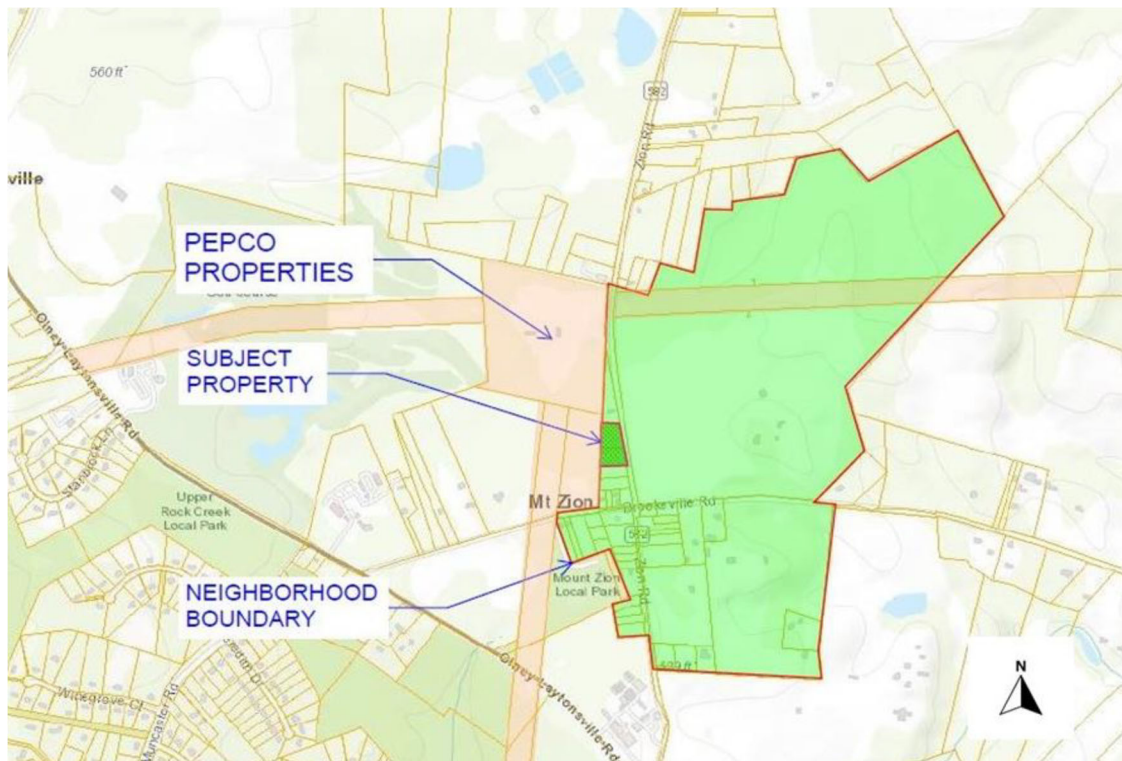
Access to the subject property is from Zion Road with three existing driveways, one to the residence, one to the north, and one to the south. T. 20.

² During the hearing, witness Michael Norris stated the property is 2.12 acres. T. 12. Likely he was referring to the Net Tract Area for Forest Conservation, although this is not specified. As the property is indisputably greater than 2.0 acres, the baseline for consideration for a conditional use, whether the property is 2.01 acres, as stated in the Staff Report, or 2.12, as testified by Mr. Norton, is irrelevant.

The Property is generally flat with a slight uphill slope from Zion Road. It is mostly open with approximately 0.81 acres of forest onsite. Exhibit 32, p. 7. There are no existing streams or wetlands onsite or known rare, threatened, or endangered species. *Id.*

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 Staff a definition of the neighborhood that included the area most likely to be affected by the use, comprised of property generally located within 1,200 feet to the west of the subject property; Staff concurred and accepted this definition, Exhibit 32, p. 5; T.14, and a map of the Staff defined neighborhood is excerpted below. Exhibit 32, p. 7.



Staff and Applicant Defined Neighborhood

During the hearing, the Hearing Examiner recommended that the defined neighborhood be amended to include the abutting area owned by Pepco as the proposed conditional use could have

implications to the west as well as the east, and the applicant did not object. T. 15. Therefore, this Decision defines the neighborhood as also including the Pepco Properties identified in the map on the previous page (page 5).

The defined area consists of rural residential, public utility, and institutional uses and is predominantly unimproved farmland, a golf course (Blue Mash), M-NCPPC parkland, Blue Mash Nature Trail, churches, and semi-wooded parcels with some single-family residential dwellings, all in the AR and R-200 zone. Exhibit 32, p. 5; T. 12. As stated, to the west is property owned by PEPCO, as well including right-of-way and power lines. *Id.* To the south is a vacant, developed lot and to the east is Zion Road, with a large open field and a farm across the road. *Id.* Immediately to the north is a single-family residence. *Id.* Mr. Norton testified that the conditional use will not change the rural residential character of the area. T. 40. Staff characterized the surrounding area as consisting of “residential, public utility and institutional (churches)” that is “predominantly unimproved farmland, a golf course..., M-NCPPC parkland, Blue Mash Nature Trail..., and semi-wooded parcels with some single-family homes. Exhibit 32, p. 5.

There are currently three other conditional uses located near the Property, including BA-1819 and 1820 for Pepco at and around 20300 Zion Road for public utility-related uses on 35 acres; S-717 (CBA 867, CBA 2046, S-1187) for “Our House” operations at 4615 Brookeville Road and 19715 Zion Road on 139 acres; and BAS 254 and 254-A for M-NCPPC property at 5130 Brookeville Road for uses related to Mt. Zion local park consisting of 10.7 acres. Exhibit 32, p. 5-6. None of these other conditional uses are a landscape contractor or commercial. Exhibit 32, p. 6. Mt. Zion Local Park adjoins the defined neighborhood as does Blue Mash Nature Trail. Exhibit 32, p.7.

The undersigned Hearing Examiner finds that the surrounding area includes the area recommended by Staff and the Pepco property to the west. She agrees with Staff and Axcobar that the character consists of a mix of residential, agricultural, public utility and institutional uses.

C. Proposed Use

The applicant proposes improvement and enlargement to the existing residential structure which is dilapidated. Exhibit 44. Mr. Norton, testifying on behalf of the applicant, agreed that the enlargement will not exceed the square footage approved by the Department of Public Safety (“DPS”) for septic, T. 33 and 36, and Exhibit 44. The revised conditional use site plan (Exhibit 44) defines the maximum enlargement to 1,180 sq. feet.

The conditional use area proposed is comprised of 2.01 acres, pictured in the Area Detailed View below, excerpted from the Staff Report. Exhibit 32, p.11.

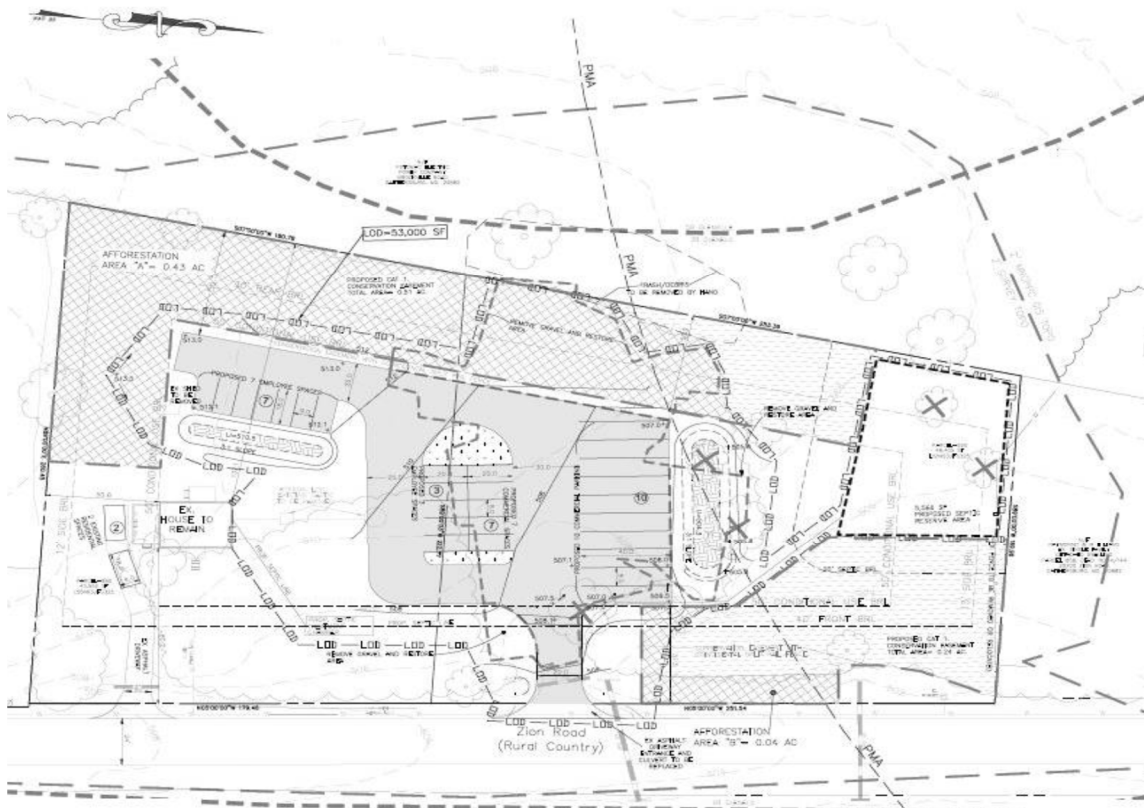


Figure 4: Subject property with Conditional Use Area Detailed View

The area includes the single-family residence to be rehabilitated and gravel contractor area as well as the proposed parking areas. The property is currently used for the tree care company and the residence is unoccupied. Exhibit 32, p. 5.

The applicant seeks conditional use approval to validate the current landscape contractor use. *Id.*

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 32, p. 11. The conditional use application is subject to the Forest Conservation Law and a Natural Resource Inventory/Forest Stand Delineation (NRI/FSD) was approved for the property on October 24, 2022, 420230060. *Id.* The Planning Board approved a Forest Conservation Plan for the property on November 15, 2023. Exhibit 40.

b. Buildings

As Staff reported and Mr. Norton testified, one vacant single-family residence building exists on site, located in the southwest part of the property on Parcel P980. Exhibit 32, p. 9; T. 13. This building pre-dates Mr. Alfaro's purchase of the property. Exhibit 32, p. 9. Mr. Alfaro proposes to renovate and expand the residence in accord with the conditional use approval conditions and use it himself or lease as a residence. Exhibit 32, p. 9; Exhibit 44; T. 72-73. Mr. Alfaro promises that whoever occupies the residence will be required to allow employees of Axcobar to use the restroom facilities. T.72-77. No new buildings are proposed. Exhibit 32, p. 9.

c. Access and Parking

The proposed conditional use area has frontage only on Zion Road. Exhibit 32, p. 10. The applicant proposes to use the existing entrance to Parcel P925 for commercial use and the

existing entrance to Parcel P980 for residential use and has no plans to modify any entrance. *Id.*

Parking will be provided on the property separately for both the commercial and residential uses. *Id.* The commercial operation will have 27 available spots amongst multiple locations, as shown on the Ariel Detailed View on page 7. *Id.* The residential use will have two (2) spaces available in a private driveway. *Id.*

Currently, given that many employees carpool, the applicant expects seven-to-eight (7-8) cars to travel to the commercial site daily and remain parked on the property through work hours. *Id.*

Mr. Norton testified that that the one building and all parking meet the applicable setback requirements for the R-200 Zone. T. 58.

The Planning Board unanimously approved granting the conditional use and raised no objection related to access or parking. Exhibit 33.

2. Site Landscaping, Lighting and Signage

The landscape plan submitted by the applicant and discussed by Staff, provides for two landscaped islands of approximately 951 square feet or 5.4% of the landscaped area located in the center of the parking area, which meets the regulatory requirement of 5% the parking area being landscaped. Exhibit 14; Exhibit 32, p. 16. The applicant further proposes 25.4% tree canopy coverage of the parking area, which also fulfills regulatory requirements. Exhibit 32, p. 17. Mr. Norton concurred with Staff that landscaping and canopy coverage are sufficient. T. 35. He testified that the landscape planning is tied to the Forest Conservation Plan, taking into account individual tree credits, and is compliant with all Zoning Code requirements. T. 35, 37.

Staff stated and the testimony of Mr. Norton confirmed that no new lighting or signage is proposed. Exhibit 32, p. 17; T. 25-26.

3. Operations

a. General Operations

According to Staff, Axcobar seeks to continue operation as a tree services company, Exhibit 32, p. 9, and this was confirmed by the owner, Mr. Alfaro, in his testimony, T. 61-77. Operations occur year-round and include tree removal, stump grinding, wood removal, yard cleaning, lot clearing, storm damage services, and emergency tree removal/assistance. Exhibit 32, p. 9. Proposed hours of operation are 7:00 a.m. until 8:00 p.m. Monday through Friday during Daylight Hours and 6:30 a.m. to 7:00 p.m. Monday through Friday during Daylight Savings Time as well as 9:00 a.m. to 3:00 p.m. on Sundays. *Id.*; T. 62. Mr. Alfaro testified that different hours are needed during different times of the year because there is less daylight available to work during the fall and winter months and his employees need time to take breaks during the hotter summer months, and so must be able to work more hours each day. T. 62. Axcobar does not operate on Saturdays. T. 63. Mr. Alfaro explained that having weekend hours allows his employees to make up for work missed due to rain or weather conditions and that his employees may not work every Sunday. T. 64.

No retail sales or retail nursery operations are proposed, so customers will not visit the site. Exhibit 32, p. 9; T. 43, 69. Staff reported and Mr. Norton and Mr. Alfaro testified that there will be little activity on-site during most of the day. Exhibit 32, p. 9; T. 47, 67. 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.*; T. 42. Team members will return at the end of the day -- likely different teams of workers will return at different times, store equipment, and retrieve personal vehicles. *Id.* Mr. Norton testified that because this is a tree service company and not a full landscaping business, no products will be delivered or materials stored on site. T. 44. Occasionally a manager may remain on site for the day or an

employee may return briefly to exchange or pick up equipment. Exhibit 32, p. 9. The only exceptions to the hours/days of operation proposed are if emergency tree services need to be performed. *Id.*

b. Staffing

Staff reported and Mr. Norton and Mr. Alfaro testified that the site will be used by up to 19 employees. Exhibit 32, p. 9; T. 46, 69. Mr. Norton and Mr. Alfaro testified that the operation has two peak activity times: morning and afternoon when staff arrive and leave site. T. 47, 67. Mr. Norton testified that the morning peak period is typically less than 45 minutes and the evening peak period is 30-45 minutes. T. 50.

c. Vehicles and Equipment

Staff reported that Axcobar currently owns a fleet of fourteen (14) vehicles including: nine (9) work trucks, two of which weigh over 26,000 pounds; four (4) small pickup trucks; and one (1) sedan car. Exhibit 32, p. 10. Staff noted and Mr. Norton and Mr. Alfaro confirmed that application requests the addition of one vehicle to allow for growth of the business. *Id.*; Exhibit 1; T. 47, 69. Staff reported that the applicant also has equipment, including: woodchippers, loaders, trailers, stump grinders, and other similar equipment used in tree care operations, and plans to store this equipment and the company vehicles on the property when not in use. Exhibit 32, p. 10.

D. Community Response

One neighbor, Mr. Raymond Liang, submitted a letter in support of granting of the conditional use, Exhibit 19, and one community resident, Mr. J.R. Smith, submitted a letter in opposition primarily concerned about traffic safety and the Applicant's operation as a landscape contractor prior to applying for the Conditional Use. Exhibit 41. No one appeared to testify at the hearing in person.

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 satisfies all of the general and specific requirements for the use.

A. Necessary Findings (Article 59.7)

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 32, p. 12. 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;*

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

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.

Conclusion: This subsection requires an analysis of the standards of the R-200 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 *2005 Olney Master Plan* and the *1993 Functional Master Plan for the Patuxent River Watershed*. Exhibit 32, p. 18.

Very broadly, the Master Plan supports agricultural preservation, watershed protection, and maintaining the rural character of the area. *Id.* There are no site-specific recommendations for the Subject Property; the Master Plan describes the community as being “stable” and that it “now includes some vacant lots that can be redeveloped under current zoning ... The current zoning and land use policies in and around Mt. Zion are appropriate and should be retained.” *Id.* The *1980 Olney Master Plan* provides context for the *2005* plan, discussing the Mt. Zion area specifically (p. 72-76) and cited the need “to allow for natural expansion and to provide affordable building sites for residents” (p. 72) and to permit “new development consistent with the historical character and community lifestyle in rural settlements.” *Id.* The *1980 Master Plan* specifically recommends rehabilitating dilapidated structures and planning that will “facilitate the orderly expansion of rural communities and allow the mix of residential lot sizes and commercial uses that characterize rural settlement.” (p. 74-75). *Id.*

Further, while the *2005 Olney Master Plan* recommends limited conditional uses, especially such uses’ nonresidential impacts, like parking lots, large buildings, intrusive lighting, and impervious surfaces, the Subject Property either does not create these impacts or can be modified to minimize these impacts, for example with screening and changes to the amount of

impervious surface required for the parking lot. *Id.* Further, the rehabilitation of the existing house should not detract from the rural character of the area. Exhibit 32, p.18-19.

The *2005 Olney Master Plan* provides numerous recommendations aimed at protecting the regional drinking water supply as well as habitat and forest protection, wetland restoration, and protection throughout the *Plan* area as well as the use of environmentally sensitive development techniques to minimize impervious surfaces and control run-off. Exhibit 32, p. 19. These general recommendations do apply to the Subject Property, but there are no site-specific environmental recommendations.

Staff found that a tree care company and rehabilitated house are consistent with the historical character and community lifestyle of Mt. Zion and with the zoning and land use policies set out in the *2005 Olney Master Plan*. *Id.* Additionally, while the *2005 Olney Master Plan* discourages commercial uses outside of the Town Center, the specific uses proposed in this application are not appropriate for the Town Center, while they are appropriate for the more rural area surrounding the Subject Property. *Id.* Additionally, the proposed forest retention and planting, additional screening, and minimization of impervious surfaces should ensure the environmental protections the *2005 Olney Master Plan* requires.

Conclusion: The Hearing Examiner finds that as the commercial aspects of the use are relatively minimal and the existing small residence will be retained, contributing to the *2005 Olney Master Plan* goal to provide affordable sites for residences, the Conditional Use Plan substantially conforms with the *2005 Olney Master Plan* and the *1993 Functional Master Plan for the Patuxent River Watershed*. Additionally, employee traffic to the site is minimal and parking will be appropriately screened. Thus, there is no evidence in this record that the use will adversely affect the existing natural environment. The Hearing Examiner determines that this standard is met.

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

Staff determined this finding to be satisfied because the proposed use will not alter the predominantly rural residential and agricultural character of the surrounding area and is located away from sensitive land uses and dwelling units. Exhibit 32, p. 17-18. Exhibit 16 and testimony from Mr. Norton describing the surrounding properties, T. 11-13, corroborate Staff's findings, considering large rural tracks and a Pepco right-of-way are adjacent properties. The one letter objecting to the proposed use expresses concern about traffic safety, not about changing that character of the neighborhood.

Conclusion: For the same reasons set out above, the Hearing Examiner finds that the proposed landscape contractor use will not alter the character of the neighborhood in a manner inconsistent with the *2005 Olney Master Plan* and the *1993 Functional Master Plan for the Patuxent River Watershed*.

- 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 found this standard to be satisfied as the project substantially conforms to the policies and recommendations of the *2005 Olney Master Plan* and the *1993 Functional Master Plan for the Patuxent River Watershed*; no residential areas will be adversely affected or altered because the project is sufficiently buffered and located away from existing residential uses. Exhibit 32, p. 20. Although there are three other conditional uses in the vicinity, two are for public uses – Pepco and Mt. Zion Local Park – and the third is for a group vocational home and is not

commercial in nature, so granting the application will not create an overconcentration of commercial conditional uses in the area. *Id.*

Conclusion: The Hearing Examiner agrees with Staff and finds that the proposed use satisfies this standard. The proposed project conforms with the recommendations of *2005 Olney Master Plan* and the *1993 Functional Master Plan for the Patuxent River Watershed* and is sufficiently removed from residential areas. The three other active conditional uses in the area are substantially different and not commercial. Therefore, this use 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 advises that a Preliminary Plan of Subdivision is not required. Staff concluded that there are adequate public facilities to serve the site. Exhibit 32, p. 20. Staff noted that because the area if located in a Rural Road Code Area, is over two acres, and is zoned R-200, it is exempted from bicycle and pedestrian frontage improvement or infrastructure construction requirements. Exhibit 32, p. 21. Staff also reported that due to limited staffing and the lack of retail operations, the site will generate less than 50 new person vehicle trips during morning and evening peak hours and so is not subject to a Transportation Impact Study. *Id.* Additionally, the site is located within water and sewer categories W-6 and S-6 and served by private well and septic and all other utilities and public facilities are within the standards set by the Montgomery County Growth and

Infrastructure Policy in effect at the time of application submission. Exhibit 32, p. 22. In his testimony, Mr. Norton concurred that the conditional use proposed meets Adequate Public Facilities review standards. T. 45. The Planning Board recommended approval of the application. Exhibit 33.

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, and because of the limited number of vehicle trips generated by the proposed use, no traffic study was required. See Section II (e).

Conclusion: A preliminary plan of subdivision is not required for approval of the conditional use, and the Hearing Examiner must determine the adequacy of public facilities to serve the use. The adequacy of transportation, transit, and pedestrian facilities are determined under the Planning Board's Guidelines for Local Area Transportation Review (July 2021) (LATR). Projects that generate fewer than 50 "total net new weekday peak-hour person trips" do not need to submit the analysis (traffic study) required by the Guidelines. Instead, they must submit a "traffic exemption statement" describing why the project is exempt from LATR.

Staff agreed with Axcobar that the project will generate approximately 10 morning peak hour trips and 17 p.m. peak hour trips. Exhibits 15, 32. This is confirmed by Mr. Alfaro's testimony regarding the operation of the business, where employees will come in once in the morning and spend most of the day off-site, and return in the evening. Mr. Alfaro also testified that the septic associated with the house has been upgraded and meets standards necessary for employees to use on a periodic basis.

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.

Therefore, the Hearing Examiner finds that this application meets 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 22 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 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 32, p. 23. Surrounding residential uses are well-buffered from the area intended from the conditional use by distance, existing and proposed landscaping, and forest conservation. *Id.* The one letter in opposition objected to the use based on the adverse effect of traffic related to vehicular trips of landscape contractor trucks and equipment. Exhibit 41.

Staff identified no non-inherent characteristics unique to the proposed site, operation, or size of the proposed use. *Id.* Mr. Norton agreed with this conclusion in his testimony. T. 58.

Conclusion: The undersigned Hearing Examiner agrees with Staff's determination of the inherent characteristics of this use, based on the evidence and testimony identifying the operations. She also agrees that there are no unusual physical or operational characteristics in this property that render these non-inherent. The inherent characteristics are well-buffered and do not exacerbate any non-inherent characteristics, as no non-inherent characteristics are identified. The one neighbor in opposition expressed concern about the inherent effect of traffic and did not establish that this effect was beyond the adverse effect anticipated for this conditional use in the Subject Zone or Master Plan area. Both Staff and Axcobar agree that estimated vehicle trips are low because there is no retail component and employees visit only twice daily. Therefore, the Hearing Examiner finds that this standard is met as the proposed Landscape Contractor conditional use will not cause undue harm to the neighborhood.

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.*

Staff described and the witnesses testified to the existence of one dilapidated residence on the property that is to be rehabilitated and will retain its residential character. Exhibit 32, p. 23; Exhibit 44; T, 20, 72-73.

Conclusion: The Hearing Examiner finds this provision satisfied. No new buildings are to be constructed and the renovation of the existing building will retain its residential purpose.

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 not create any non-inherent adverse impacts on the surrounding area.

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 R-200 Zone. Staff compared the minimum development standards of the R-200 Zone to those provided by the application in the following table, included in the Staff Report (Exhibit 32, p. 14-15):

Table 1 – Development Standards

Development Standard	Permitted/Required	Provided
Minimum Net Lot Area	2 acres	2.01 acres
Minimum Lot Width at Front Building Line	100 ft.	331 ft.
Minimum Lot with at Front Lot Line	25 ft.	431 ft

Maximum Density	1 dwelling unit per 20,000 sf.	1 dwelling units
Maximum Coverage	25%	1.3%
Minimum Setback from all Lot Lines	50 ft.	80.2 ft. front, 50.8 ft. side, 137.1 ft. rear
Maximum Height, Principal Building	50 ft.	< 50 ft.
Maximum Height, Accessory Structure	35 ft.	NA
Vehicle Parking Spaces Required	27 spaces 0.5 per employee 1.0 per commercial vehicle 2 per single-family detached house	29 spaces (0.5 * 19 = 9.5 required) 10 provided (1.0 * 15 = 15 required) 17 provided 17 + 10 + 2 = 29
Bicycle Parking Space Required	0	0

Conclusion: Based upon the above table, and having no evidence to the contrary, the Hearing Examiner concludes that the application meets all of the development standards of the R-200 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 2.01 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.*

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. Exhibit 32, p. 12, Exhibit 10. 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 32, p. 12. 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.*

Staff concluded that the proposed operating hours, from 7:00 a.m. until 8:00 p.m. Monday through Friday during Daylight Hours and 6:30 a.m. to 7:00 p.m. Monday through Friday during

the remainder of the year and 9:00 a.m. to 3:00 p.m. on Sundays, are consistent with the agricultural activities conducted on farms surrounding the subject property and typical landscape contractor operations. Exhibit 32, p. 13. 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, Axcobar's tree operations occur off site, thus reducing the impact on abutting properties. *Id.*

Conclusion: The Hearing Examiner agrees with Staff and 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 the R-200 zone, the site access standards do not apply.

Current access is via Zion Road, with one entrance for commercial use on Parcel P925 and one entrance for residential use on Parcel P980. Exhibit 32, p. 15. The applicant does not propose and does not need to modify the entrances. *Id.*

Conclusion: This standard is inapplicable so no finding need be made.

2. Parking, Queuing, and Loading Standards

The standards for the number of parking spaces required, parking setbacks, and parking lot

screening are governed by 59.6.2.9, 59.6.4.3, and 59.6.5.2 of the Zoning Ordinance.

a. Parking Lot Requirements of 10 or More Spaces under Section 59.6.2.9.C

The proposed use includes a parking lot of 27 spaces for employees' personal vehicles, work trucks, trailers, and equipment within 17,683 square feet of parking as shown on the submitted Landscape Plan. Exhibit 32, p. 15; Exhibit 14.

Conclusion: The Hearing Examiner finds that this standard is met as the applicant provides 27 spaces for vehicles of the commercial operation, the minimum required under the Development standard.

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 percent 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.*

The current application provides for two landscaped islands comprising approximately 5.4% of the proposed parking area and does not exceed the maximum of 20 spaces between islands.
Id.

Conclusion: The Hearing Examiner finds that this standard is met as the landscaped island area proposed in the application exceeds the minimum of 5 percent required and does not exceed the maximum of 20 spaces between islands.

- 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.***

According to Staff and the Landscape Plan submitted, the proposed tree canopy is 25.4% of the parking area. Exhibit 32, p. 16-17; Exhibit 14.

Conclusion: The Hearing Examiner finds that this standard is met as the proposed tree canopy exceeds the 25% minimum required.

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.*

Conclusion: According to Staff and the Landscape Plan, the perimeter planning proposed by the applicant meets this standard. *Id.* The Hearing Examiner agrees with Staff that this standard is met.

b. Parking Lot Screening under Section 59.6.5.2.B

The Hearing Examiner finds that this Section does not apply to this application because there is no building beside the single-family detached house.

c. Signage

The applicant is not requesting any signage, so no Zoning requirements are applicable.

d. 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. Mr. Norton testified that no new lighting is proposed and that any replacement lighting for the renovation of the residence will be compliant with applicable standards. T. 25-26.

Conclusion: The Hearing Examiner finds that the standard is inapplicable as no new lighting is proposed.

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 and replacement lighting for the residence.

Conclusion: No new lighting is proposed, so no finding is made regarding this standard.

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.*

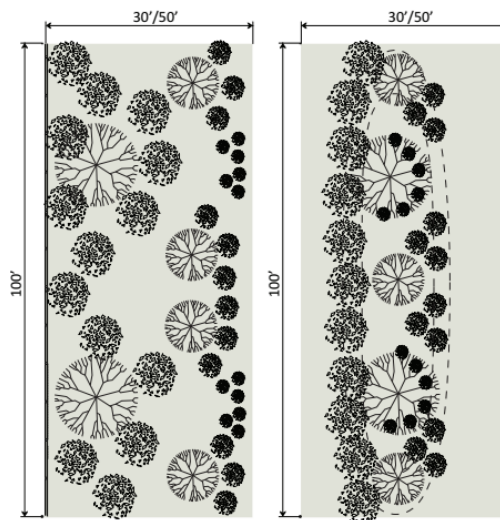
Section 6.4.3.B specifies and defines the types of plant materials, canopy trees, understory trees, and evergreen trees. The applicant submitted a Landscape Plan that Staff found to satisfy the General Landscape Requirements as defined and specified under Section 59-6.4.3.B. This section of the Code 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 32, p. 16-17; Exhibit 14.

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 landscape screening shown on the submitted Landscape Plan meets the requirements under Section 6.5.3.C.7. Exhibit 32, p. 16.

Conclusion: Upon review of the Landscape Plan submitted, the Hearing Examiner agrees with Staff that the application meets the landscape requirements for this section.

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 Rezzone 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 inapplicable as the applicant is not asking for any signage.

IV. Conclusion and Decision

Based on the foregoing findings and conclusions and a thorough review of the record, the application of Axcobar Tree Experts for the conditional use of a landscape contractor, on property located at 20108 Mt. Zion Road, Gaithersburg, Maryland, is APPROVED subject to the following conditions:

1. Physical improvements to the Subject Property are limited to those shown on the Applicant's Conditional Use and Landscape Plan (Exhibits 14 and 44).
2. The hours of operation are limited to 7:00 a.m. to 8:00 p.m. Monday through Friday and 9:00 a.m. to 3:00 p.m. Sundays (excluding emergency situations).
3. The maximum number of employees on-site is limited to 19.
4. No non-employees shall be on the commercial portion of the site at any time.

5. The applicant's trucks, skid-steers, trailers, and equipment associated with the Landscape Contractor use may be stored on the property; however, the stored equipment may not be used within the Conditional Use area except in emergency situations. For the 15 commercial vehicles requested, including nine (9) work trucks, two of which weigh over 26,000 pounds; four (4) small pickup trucks; and one (1) sedan car, as well as one future vehicle to be added to the fleet, as well as all commercial equipment, including: woodchippers, loaders, trailers, stump grinders, and other similar equipment used in tree care operations, all maintenance and repair must be performed off-site at a commercial facility.
6. The Applicant must not allow commercial trucks or other vehicles that use engine brakes or "jake brakes" use them on-site or while entering the property.
7. The Applicant must comply with the approved Forest Conservation Plan for the Subject Property.
8. Within three (3) months of the approval of the Conditional Use, the Applicant must obtain a written lease agreement or license for employees to use the restroom facilities of the existing residence for so long as the Conditional Use exists, unless a separate facility is provided.

9. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the conditional use premises and operate the special exception as granted herein.

Petitioner shall at all times ensure that the conditional use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.



Andrea LeWinter
Hearing Examiner

Issued this 2nd day of January 2024.

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:

Sean Hughes, Esquire
Barbara Jay, Executive Director
Montgomery County Board of Appeals
Patrick Butler, Planning Department
Joshua Penn, Planning Department
Victor Salazar, Department of Permitting Services
Michael Coveyou, Director of Finance