

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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<http://www.montgomerycountymd.gov/content/council/boa/board.asp>

**Case No. CBA-2180-A**

**PETITION OF JOHNSON FAMILY ENTERPRISES LTD. PARTNERSHIP**

OPINION OF THE BOARD

(Effective Date of Opinion: March 24, 2004)

Case No. CBA-2180-A is an application for a special exception modification is to permit: (1) the renovation of approximately 9,990 square feet of existing indoor retail space and of 500 square feet of office space to approximately 7,050 square feet of indoor retail space and 3,440 square feet of office storage and product design space; (2) the building of 16,800 square feet of new indoor retail space to replace approximately 13,270 square feet of existing indoor retail space, the relocation of the existing greenhouse structure used for existing indoor retail to location on-site for greenhouse use; (3) the remodeling of 38,250 square feet of outdoor retail space; (4) the re-striping of the existing parking lot to create handicap parking and two pick-up areas; (5) the relocation of the exiting retail greenhouse to become a greenhouse for growing only and to permit no customer access; (6) the relocation of the existing gate to a new location; (7) the enhancement of the existing evergreen buffer with an 6-8 foot Norway Spruce along Mount Zion Road; (8) the replacement of the existing chain-link and split-rail fence with a 6-foot aluminum and black chain-link security fence; (9) the existing sales of propane gas; (10) the retention of the existing 2,250 square feet of outdoor retail sales; (11) the retention of the existing 5,250 square feet of outdoor retail sales; (12) addition of a 2,400 square foot hoop house; (13) reface existing signage with new sign; (14) retention of the two existing above ground diesel fuel tanks and one oil recycling tank; (15) the storage of dry chemicals in the Block Building No. 19; (16) the marking of all existing parking spaces to County standards; (16) the expansion of the existing retail and wholesale use to include landscape design/contracting, which has been an accessory use of this operation since its inception; (18) allow the existing sale of propane gas to retail customers.

Pursuant to the authority contained in Section 59-A-4.125 of the Zoning Ordinance, the Board of Appeals referred the case to the Hearing Examiner for Montgomery County to hold a hearing and submit a Report and Recommendation to the Board. The Hearing Examiner convened a hearing on November 4, 2003, closed the record on November 11, 2003, and on December 11, 2003, issued a Report and Recommendation for approval of the requested modifications.



- 5 dump trucks
- 2 trailers
- 1 skid steer loader
- 2 forklifts
- 1 Taylor-Dunn electric cart

8. All elements of the revised Site Plan (Exhibit 19(a)) and the revised Landscape Plan (Exhibit 19(b)) must be implemented, including but not limited to the following:
  9.
    - a. Moving the Mulch Bay to the rear of the existing shade house, with a setback of 96 feet from Mt. Zion Road, as indicated in the revised Site Plan, and
    - b. Planting 22 Norway Spruce trees along Mt. Zion Road as indicated in the revised Site Plan to serve as a buffer and screen for the landscape contractor's staging and storage area.
8. The Petitioner shall comply with any conditions imposed by the Maryland State Highway Administration at Site Plan Review.
9. At the time of Preliminary Plan, Petitioner shall dedicate additional right-of-way, as needed, along MD Route 108 and Mt. Zion Road.
10. Petitioner shall coordinate with the Montgomery County Department of Public Works and Transportation and the Maryland State Highway Administration to ensure adequate sight distance at the site access driveways.
11. Petitioner shall comply with storm water and sediment control regulations of the Montgomery County Department of Permitting Services, and prior to approval of a preliminary plan of subdivision, a Storm Water Management Concept Plan must be approved.
12. Petitioner shall comply with any noise study that may be required by the Montgomery County Department of Environmental Protection.
13. Petitioner shall see to it that the existing fuel storage tanks on site meet required technical standards as well as all county, state and federal permitting requirements.
14. Petitioner shall ensure that all chemicals stored on site for retail sale or for use in the business are stored in accordance with applicable Codes.

On a motion by Allison Ishihara Fultz, seconded by Donna L. Barron, with Louise L. Mayer, Angelo M. Caputo and Donald H. Spence, Jr., Chairman in agreement:

**BE IT RESOLVED** by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

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Donald H. Spence, Jr.  
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 24<sup>th</sup> day of March, 2004.

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Katherine Freeman  
Executive Secretary to the Board

**NOTE:**

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.



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## I. STATEMENT OF THE CASE

Petition No. CBA-2180-A, filed on June 26, 2003, seeks to modify two existing Special Exceptions to allow for numerous changes in the physical structures on the subject property, as well as modifications to some operational characteristics. All the proposed changes relate to Petitioner's current special exceptions (CBA-2180 and S-254) under which it operates as a horticultural nursery and landscape contractor, and those fundamental uses would continue. The property is located at 5011 Olney-Laytonsville Road (MD Route 108), at its intersection with Mt. Zion Road, about two miles from the town center of Olney, and it is zoned RDT (Rural Density Transfer). The property is in the Eighth Election District, contains 28.3449 acres and is under Tax Account No. 08-00703485.

The proposed modifications are a combination of new and relocated buildings, structures and use areas and changes to the operational characteristics of the existing nursery/landscape contractor operation. The Modification Petition refers to "existing horticultural nursery, landscape design and contracting business," but then references Code Sections 59-G-2.30.0 and 59-G-2.30.000, which currently pertain to "Nursery, horticultural – wholesale" and "Manufacture of mulch and composting," respectively, not Nursery, horticultural-retail, which is covered in Section 59-G-2.30, nor "Landscape contracting," which is covered in Section 59-G-2.30.00.

This apparent discrepancy was cleared up by Petitioner's counsel at the hearing. Mr. Abrams explained that prior to a text amendment to the Zoning Code, the current uses of horticultural nursery and landscape contractor were all subsumed under one special exception. The text amendment "broke out the various component uses into horticultural nursery, commercial greenhouse and then landscape contractor and gave very specific requirements for

each” (Tr. 5). According to Petitioner’s counsel, the actual use of the property as both a horticultural nursery and landscape contractor has remained essentially the same for over 35 years. Petitioner’s intent was to seek modification of its special exceptions for operation as a retail horticultural nursery, Section 59-G-2.30 and as a landscape contractor, Section 59-G-2.30.00.

The appropriate scope of the hearing on a petition for modification of a special exception is spelled out in Zoning Code § 59-G-1.3(c)(4). That subsection provides:

The public hearing must be limited to consideration of the proposed modifications noted in the Board's notice of public hearing and to (1) discussion of those aspects of the special exception use that are directly related to those proposals, and (2) as limited by paragraph (a) below, the underlying special exception, if the modification proposes an expansion of the total floor area of all structures or buildings by more than 25%, or 7,500 square feet, whichever is less.

(A)After the close of the record of the proceedings, the Board must make a determination on the issues presented. The Board may reaffirm, amend, add to, delete or modify the existing terms and/or conditions of the special exception. The Board may require the underlying special exception to be brought into compliance with the general landscape, streetscape, pedestrian circulation, noise, and screening requirements of 59-G-1.26, if (1) the proposed modification expands the total floor area of all structures or buildings by more than 25%, or 7,500 square feet, whichever is less, and (2) the expansion, when considered in combination with the underlying special exception, changes the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected.

Decisions of the Board to amend or modify the terms or conditions of a special exception must be by the affirmative vote of at least 4 members as indicated by the adoption of a written resolution reflecting its decision, opinion and order.

The public notices in this case (Exhibits 16 and 20) specified all the modifications proposed by Petitioner, as set forth in Part II.D, below. Petitioner's plans include expansion of the total floor area of all structures by 16,718 square feet (a sum derived by adding all the increases in proposed "building square footage" listed under item 5 of the "Site Development Criteria" in Exhibit 19(a), except for "outdoor retail"). This figure exceeds the statutory threshold of 7,500 square feet. Therefore, the scope of the hearing includes not just the matters related directly to proposed changes but also the impact of the special exception use upon the surrounding neighborhood.

Section 59-G-1.3(c)(4)(A) requires the Board to determine whether "the expansion, when considered in combination with the underlying special exception, changes the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected." If the Board were to determine that such adverse effects were present, then the statute authorizes it to require that the subject special exceptions be brought into compliance with the general landscape, streetscape, pedestrian circulation, noise, and screening requirements of §59-G-1.26. As will be seen below, neither the special exception use itself, nor the proposed changes, will have any non-inherent adverse effects on the neighboring area, and therefore no additional compliance steps will be recommended.

## **II. BACKGROUND**

### **A. History of the Special Exception and the Modification Petition**

The history of the special exceptions is described in Petitioner's Pre-hearing Statement (Exhibit 3). A retail horticultural nursery was established on the subject premises by J. H. Burton & Sons in late 1967 under special exception CBA. 2180 (approved 5/21/67) and

modified in special exception S-254 (approved 7/6/73). The current Petitioner acquired the property and use in 1997 with all the existing improvements, and the special exceptions were transferred to Petitioner, Johnson's Family Enterprises Limited Partnership, on July 8, 1997. The only subsequent modification to the property, approved on January 15, 1999, was to enclose a 5 foot wide, 70 foot long area between the retail store and greenhouse to the rear.

By resolution effective September 16, 2003, the Board of Appeals referred this matter to the Hearing Examiner for Montgomery County to conduct a public hearing and render a written report and recommendation to the Board. The Hearing Examiner thereafter noticed the hearing in this matter for November 4, 2003, at 9:30 a.m. (Exhibit 16).

On September 22, 2003, the Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC) filed its Report (Exhibit 17)<sup>1</sup>, which recommended approval of the Modification Petition, with four conditions:

1. The applicant is bound by all submitted statements and plans.
2. This special exception requires approval of a preliminary plan of subdivision.
3. The existing mulch bay along Zion Road must be moved so that it is at least 50 feet from the nearest property line, which will bring its location into compliance with Section 59-G-2.30.00 (2).
4. The landscaping plan must be amended to include a hedge of similar size between the two existing hedges along Zion Road, to enhance screening of existing hoop houses, staging areas and storage buildings.

On September 29, 2003, the Planning Board voted unanimously to approve the Modification Petition with the same conditions as recommended by the Technical Staff (Exhibit 18).

As a result of the conditions recommended by the Technical Staff and the Planning Board, Petitioner moved, on October 24, 2003, to amend its Modification Petition to satisfy the concerns raised by the Technical Staff and to make a few other design modifications (Exhibit 19). The specifics of the amendment are spelled out in Part II.D, below.

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<sup>1</sup> The Technical Staff Report, Exhibit 17, is frequently quoted and paraphrased herein.

The Hearing went forward as scheduled on November 4, 2003. There was no opposition, and the record closed on November 11, 2003.

### **B. The Subject Property and Surrounding Neighborhood**

The Petitioner's business operates as Johnson's Flower and Garden Center, located on MD Route 108 (Olney-Laytonsville Road) at its intersection with Mt. Zion Road, about two miles from the town center of Olney. There are no other active special exceptions in the neighborhood, according to the Technical Staff report. The property, which slopes gently from east to west, is mostly cleared and has a stand of trees along its northern boundary.

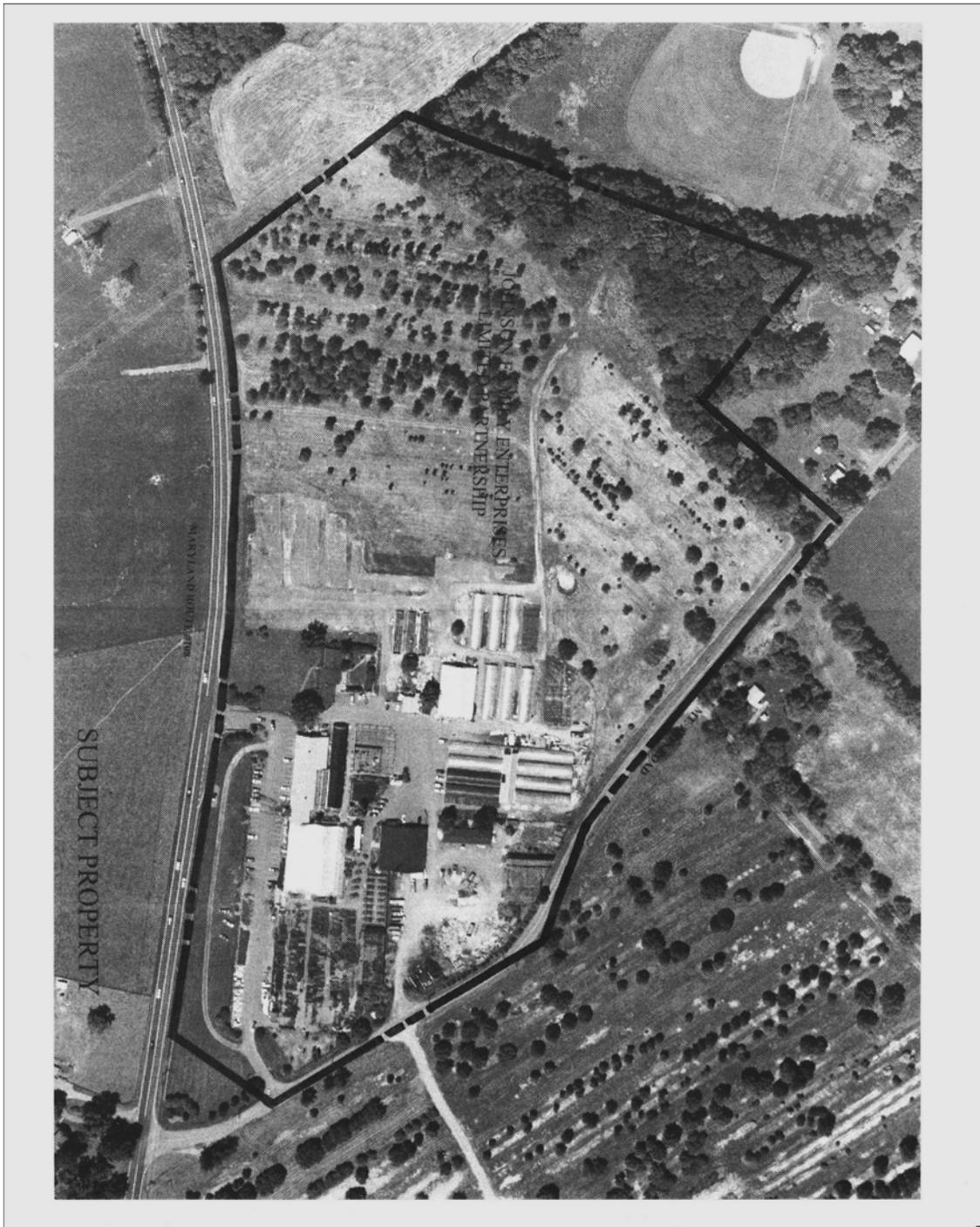
The main retail building and greenhouse front on Olney-Laytonsville Road (MD Route 108), with customer parking in front of the buildings and extending towards Mt. Zion Road. To the east and north of the main retail building are outdoor sales areas with plant stock. To the northwest of the outdoor retail area and south of a linear stock field, are 18 small greenhouses (a/k/a "hoop-houses") used for plant cultivation, maintenance and storage. In that same general area are loading areas, vehicle and equipment storage areas and additional parking.

To the west of the main building is a residential structure used as an office and storage area. Beyond that are fields containing trees and other nursery stock. Retail access to the site is available from both Route 108 and Mt. Zion Road. Company vehicles, equipment loading and unloading and employees have another entrance along Mt. Zion Road. A landscape contractor occupies a portion of the property nearest Mt. Zion Road and works from an existing block building. A second frame building is used for contractor storage, and a frame pavilion is used to store equipment and plants awaiting transport to project sites. Six photographs of the premises are displayed below (Exhibits 32(a), (b), (c), (e), (f) and (g)).



The subject property is located in an area that is devoted largely to agriculture. To the east of the property, across Mt. Zion Road, is a 71-acre property owned by a social service agency and used for agriculture. To the west is a Pepco right-of-way containing power transmission lines and additional open fields. To the north is Mt. Zion Local Park, a 12-acre

facility with playing fields, playgrounds and picnic areas. Immediately to the north of the subject site is one home in a small residential area, zoned R-200. There is also one residence to the northeast in an RE-1 Zone. To the south, across MD Route 108, is a 28-acre farm. The subject site (circumscribed with a black line) and its immediate surrounding area are depicted on an aerial photograph, which is reproduced below (Exhibit 25).



### C. The Master Plan

The property in question is located in the Olney Planning Area, which is covered by the *Olney Master Plan, Approved and Adopted, June 1980.*<sup>2</sup> Under the *1980 Olney Master Plan*, the subject site is part of the rural agriculture area which the Plan seeks to preserve as farmland. The applicable RDT zone permits only one dwelling unit for every 25 acres (Code § 59-C-9.41), thereby discouraging residential development. In fact, the RDT Zone is designed to allow farmers to transfer development rights from their land to other areas outside the agricultural preservation area, thus giving property owners an economically attractive option other than building non-agricultural improvements in their own area. See, *Olney Master Plan*, p. 61.

As noted in the Technical Staff report, the subject use as a horticultural nursery and landscaping contractor is akin to an agricultural use. In apparent recognition of this fact, horticultural nurseries and landscape contractors are permitted as special exceptions in the RDT Zone.

### D. Proposed Modifications

The specific modifications Petitioner sought in its original Modification Petition were spelled out in its Pre-Hearing Statement (Exhibit 3):

#### **Building/Structure/Landscaping Modifications Requested :**

- (1) Renovation of approximately 9,990 sq. ft. of existing indoor retail and 500 sq. ft. office to approximately 7,050 sq.ft. of indoor retail and 3,440 sq. ft. of office, storage, and product design.
- (2) Build 16,800 sq. ft. of new indoor retail in place of approximately 13,270 sq. ft. of existing indoor retail. Relocate existing greenhouse structure, used for existing indoor retail, to location [5] on-site for greenhouse use.
- (3) Remodel 38,250 sq. ft. of outdoor retail
- (4) Restripe existing parking lot to create handicap parking and two (2) pick-up areas

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<sup>2</sup> Although a revised *Olney Master Plan* is in the works, it has not yet been approved or adopted.

- (5) Relocate existing retail greenhouse to become greenhouse for growing only. No customer access.
- (6) Relocate existing gate to new location.
- (7) Enhance existing evergreen buffer with 6' - 8' Norway Spruce along Mt. Zion Road
- (8) Replace existing chain link and split rail fence with 6' aluminum and black chain link security fence.
- (9) Allow existing sales of propane
- (10) Retain existing outdoor retail sales, 2,250 sq. ft.
- (11) Retain existing outdoor retail sales, 5,250 sq. ft.
- (12) Add proposed hoop house, 2400 sq. ft.
- (13) Reface existing sign with new signage
- (14) Retain two existing above ground diesel fuel tanks and one oil recycling tank
- (15) Storage of dry chemicals in existing block building #19
- (16) Mark all existing parking spaces to County standards

**Operational Characteristics Modifications Requested:**

- (1) Expand existing retail and wholesale use to include landscape design/contracting which has been an accessory use to this operation since its inception.
- (2) Allow existing sales of propane gas to retail customers

**Hours of Operation Requested:**

- (1) Retail hours 8:00 a.m. - 8:00 p.m., 7 days/week during Spring season (April, May)
- (2) Retail hours 9:00 a.m. - 6:00 p.m., 7 days/week during Summer, Fall and Winter seasons

\* \* \*

**Employees Requested:**

50 Employees on-site at any one time (approximately 40 employees for retail and on-site work and 10 for off-site work).

**Vehicles and Equipment Requested:**

- 2 vans
- 4 pick up trucks
- 3 stake body trucks with dump
- 1 stake body truck

- 1 16' box truck
- 1 14' box truck
- 5 dump trucks
- 2 trailers
- 1 skid steer loader
- 2 forklifts
- 1 Taylor-Dunn electric cart

In addition, as mentioned above Petitioner moved, on October 24, 2003, to amend its Modification Petition to satisfy the concerns raised by the Technical Staff and to make a few other design modifications (Exhibit 19). Included with the motion were a revised Site Plan (Exhibit 19(a)), a revised Landscape Plan (Exhibit 19(b)), a revised Floor Plan (Exhibit 19(c-1)) and a revised Elevations Plan (Exhibit 19(c-2)). The specifics of the proposed amendment were set forth in Exhibit 19:

#### Amendments to Site Plan

1. Additional landscaping is provided along Mt. Zion Road as a natural buffer/screen. The planting of Norway Spruce has been increased from 6 to 22 trees.
2. The existing mulch bay along Mt. Zion Road has been relocated to the southwest to the rear of the existing shade house to meet required setback requirements.
3. A 13.25' x 42' space to the rear of the new greenhouse (i.e.: Area (2) on Site Plan) has been added to accommodate a boiler and mechanical supply room and retail checkout areas identified.

#### Amendments to Landscape Plan

1. Reflects the type, size and location of additional Norway Spruce trees to be planted along Mt. Zion Road as noted in (1) above.

#### Other Design Modifications [to the Retail Sales Building]

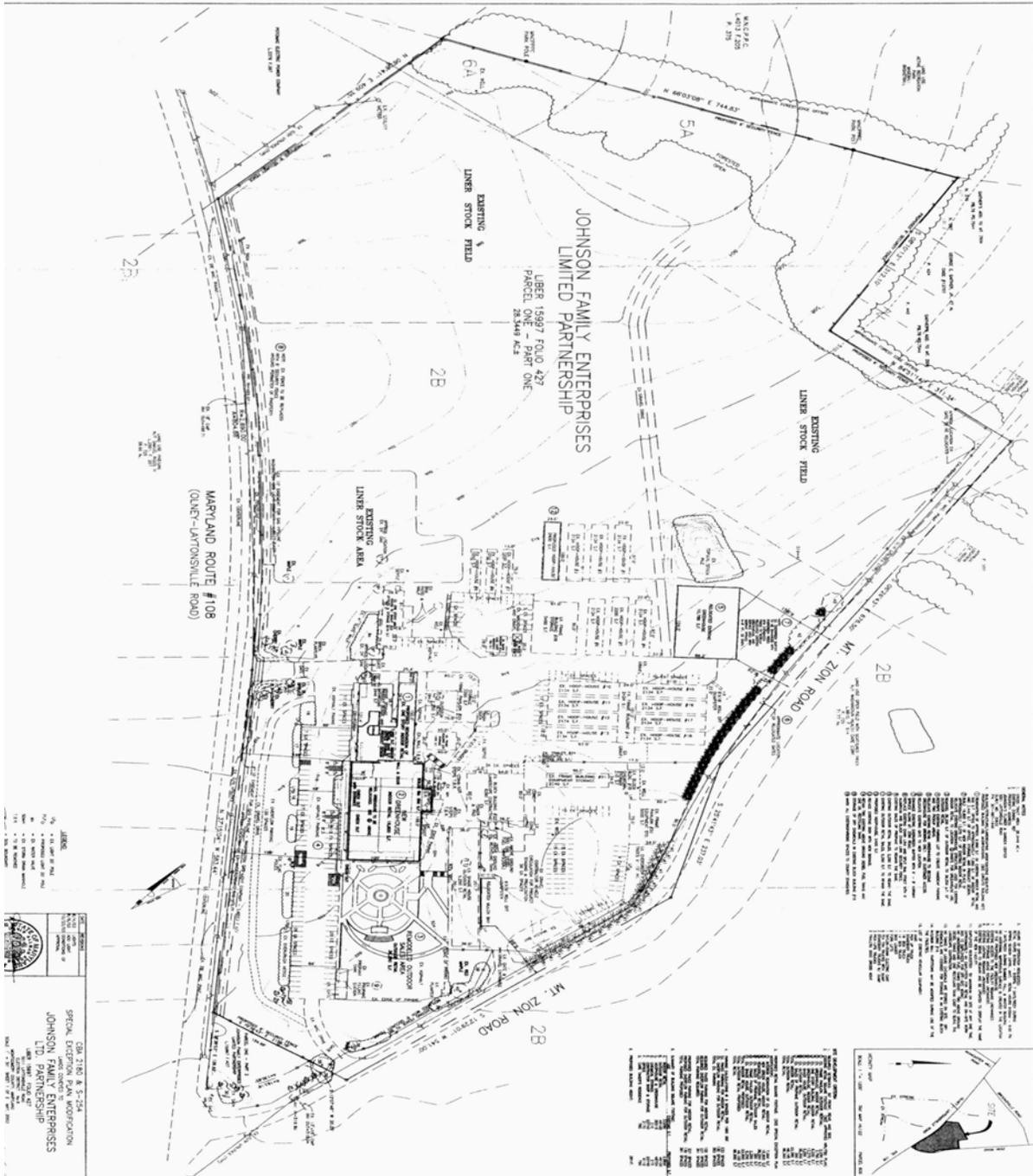
1. In lieu of a level floor, the floor will slope up 1½% away from the existing building in order to allow for drainage inside as well as better match the exterior grade. Thus, instead of the gutter height being a constant 13'-0", it will vary from 14'-6" above the floor at the existing building to 12'-0" above the floor at the far end. However, the gutters will still be level with each other.

2. Walls and doors have been added to separate the addition from the existing building.
3. Minor alterations to door locations have occurred within the existing building.
4. Overhead doors will be provided at all front bays except the entrance bay, as well as all along the side elevation. These doors allow for the space to be fully open to the exterior during good weather.
5. The second and third bays are separated by a wall with overhead doors, thus allowing the second bay to remain fully enclosed from the outside air while the third bay is treated as an open space. All bays have been considered as enclosed retail for future planning for issues such as fire suppression and parking counts.
6. The floor plan of the interior sales building has been relabeled as to floor area descriptions.

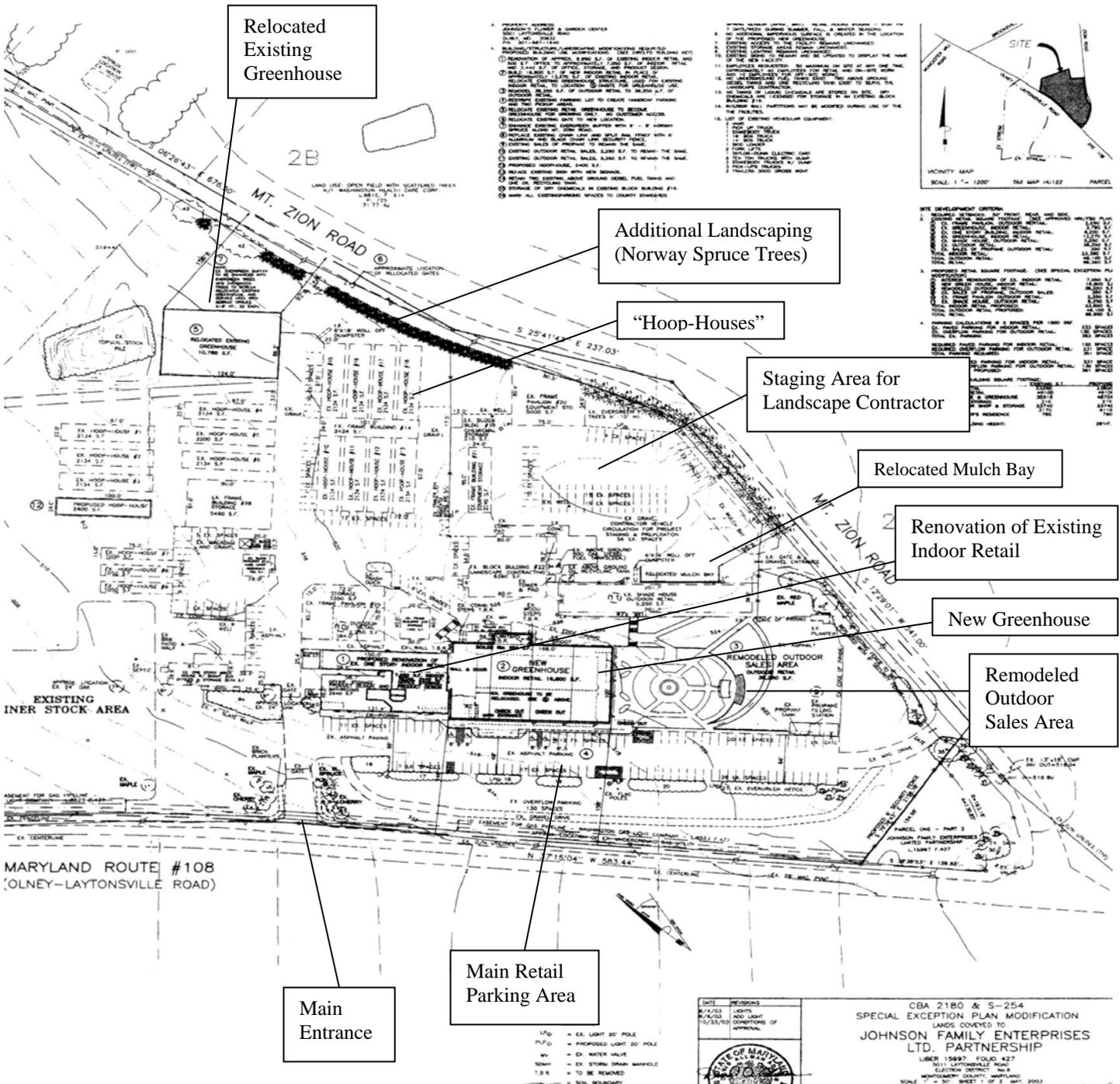
Notice of the motion to amend was mailed out on October 27, 2003 (Exhibit 20), and pursuant to that notice, any comments could have been filed until November 6, 2003. Given the lack of opposition in this case, the November 4, 2003 hearing was conducted under the assumption that the amendment would be granted, which it was when the notice period expired on November 6, 2003.

The proposed changes can best be understood by reference to the Revised Site Plan (Exhibit 19(a)) and the "General Notes" located in its upper right hand corner. Two copies of the Revised Site Plan are depicted below. The first is a reduced copy of the entire site plan, which is too small to see detail, but does show the large amount of field area on the property. The second is a copy of the built-up area of the Site Plan, on which some detail can be seen. The proposed changes enumerated in General Note 4 are keyed to circled numbers on the diagram portion of the Revised Site Plan. Because those notes are too small to read in the reduced versions copied below, readable versions of the notes and the "Site Development Criteria" are also reproduced, on page 16, below. The two changes requested by the Technical

Staff (additional landscaping and relocation of the mulch bay) are noted on the second copy of the Site Plan below (showing the built-up area):



Copy of Revised Site Plan



Copy of Built-up Portion of Revised Site Plan

**General Notes and Site Development Criteria**

**GENERAL NOTES**

1. GROSS TRACT AREA: 28.3449 AC.+
2. EXISTING ZONING: RDT
3. PROPERTY ADDRESS:  
JOHNSON'S FLOWER & GARDEN CENTER  
5001 LAYTONSVILLE ROAD  
OLNEY, MD. 20832  
PH: 301-987-1940
4. BUILDING/STRUCTURE/LANDSCAPING MODIFICATIONS REQUESTED:  
PROPOSED BUILDING USE MODIFICATIONS: (SEE CIRCLED BUILDING KEY)
  - ① RENOVATION OF APPROX. 9,990 S.F. OF EXISTING INDOOR RETAIL AND 500 S.F. OFFICE TO APPROXIMATELY 7,050 S.F. OF INDOOR RETAIL AND 3,440 S.F. OF OFFICE, STORAGE, AND PRODUCT DESIGN.
  - ② BUILD 16,800 S.F. OF NEW INDOOR RETAIL IN PLACE OF APPROXIMATELY 13,270 S.F. OF EXISTING INDOOR RETAIL. RELOCATE EXISTING GREENHOUSE STRUCTURE, USED FOR EXISTING INDOOR RETAIL, TO LOCATION ⑤ ONSITE FOR GREENHOUSE USE.
  - ③ REMODEL 38,250 S.F. OF OUTDOOR RETAIL TO 38,250 S.F. OF OUTDOOR RETAIL.
  - ④ RESTRIPE EXISTING PARKING LOT TO CREATE HANDICAP PARKING AND TWO PICKUP AREAS.
  - ⑤ RELOCATE EXISTING RETAIL GREENHOUSE TO BECOME GREENHOUSE FOR GROWING ONLY. NO CUSTOMER ACCESS.
  - ⑥ RELOCATE EXISTING GATE TO NEW LOCATION.
  - ⑦ ENHANCE EXISTING EVERGREEN BUFFER WITH 6' - 8' NORWAY SPRUCE ALONG MT. ZION ROAD.
  - ⑧ REPLACE EXISTING CHAIN LINK AND SPLIT RAIL FENCE WITH 6' ALUMINUM AND BLACK CHAIN LINK SECURITY FENCE.
  - ⑨ EXISTING SALES OF PROPANE TO REMAIN THE SAME.
  - ⑩ EXISTING OUTDOOR RETAIL SALES, 2,250 S.F. TO REMAIN THE SAME.
  - ⑪ EXISTING OUTDOOR RETAIL SALES, 5,250 S.F. TO REMAIN THE SAME.
  - ⑫ PROPOSED HOOPHOUSE, 2400 S.F.
  - ⑬ REFACE EXISTING SIGN WITH NEW SIGNAGE.
  - ⑭ RETAIN TWO EXISTING ABOVE GROUND DIESEL FUEL TANKS AND ONE OIL RECYCLING TANK.
  - ⑮ STORAGE OF DRY CHEMICALS IN EXISTING BLOCK BUILDING #19.
  - ⑯ MARK ALL EXISTING PARKING SPACES TO COUNTY STANDARDS.
5. HOURS OF OPERATION REQUESTED:  
RETAIL HOURS 8:00AM - 8:00PM, 7 DAYS/WEEK DURING SPRING SEASON (APRIL, MAY). RETAIL HOURS 9:00AM - 6:00 PM 7 DAYS/WEEK DURING SUMMER, FALL, & WINTER SEASONS.
6. NO ADDITIONAL IMPERVIOUS SURFACE IS CREATED IN THE LOCATION OF THE PROPOSED NEW GREENHOUSE.
7. EXISTING ACCESS TO THE FACILITY REMAINS UNCHANGED.
8. EXISTING STORAGE AREAS REMAIN UNCHANGED.
9. EXISTING LIGHTING REMAINS UNCHANGED.
10. EXISTING SIGNS TO REMAIN AND BE UPDATED TO DISPLAY THE NAME OF THE NEW FACILITY.
11. EMPLOYEES REQUESTED: 50 MAXIMUM ON SITE AT ANY ONE TIME. (APPROXIMATELY 40 EMPLOYEES FOR RETAIL AND ON-SITE WORK AND 10 EMPLOYEES FOR OFF-SITE WORK).
12. NO UNDERGROUND FUEL TANKS EXIST. TWO ABOVE GROUND DIESEL TANKS AND ONE RECYCLING TANK EXIST TO SERVE THE LANDSCAPE CONTRACTOR.
13. NO TANKS OF LIQUID CHEMICALS ARE STORED ON SITE. DRY CHEMICALS ARE LICENSED FOR STORAGE IN AN EXISTING BLOCK BUILDING #19.
14. INTERIOR WALL PARTITIONS MAY BE MODIFIED DURING USE OF THE FACILITIES.
15. LIST OF EXISTING VEHICULAR EQUIPMENT:
  - 2 VANS
  - 1 PICK UP TRUCK
  - 1 STAKEBODY TRUCK
  - 1 16' BOX TRUCK
  - 1 14' BOX TRUCK
  - 1 SKID LOADER
  - 2 FORK LIFTS
  - 1 TAYLOR-DUNN ELECTRIC CART
  - 5 TEN TON TRUCKS WITH DUMP
  - 3 STAKEBODY TRUCKS W/ DUMP
  - 3 PICK-UPS TRUCKS
  - 2 TRAILERS 3000 GROSS WGT

**SITE DEVELOPMENT CRITERIA**

1. REQUIRED SETBACKS: 50' FRONT, REAR, AND SIDE.
2. EXISTING RETAIL SQUARE FOOTAGE: (SEE APPROVED NRI/FSD PLAN)
 

① EX. FRAME PAVILION, OUTDOOR RETAIL:	2,250 S.F.
② EX. GREENHOUSE, INDOOR RETAIL:	3,790 S.F.
③ EX. ONE STORY BUILDING, INDOOR RETAIL:	6,200 S.F.
④ EX. GREENHOUSE, INDOOR RETAIL:	13,270 S.F.
⑤ EX. SHADE HOUSE, OUTDOOR RETAIL:	5,250 S.F.
⑥ EX. OUTDOOR RETAIL:	38,250 S.F.
⑦ EX. SALES OF PROPANE OUTDOOR RETAIL:	350 S.F.
TOTAL INDOOR RETAIL:	23,360 S.F.
TOTAL OUTDOOR RETAIL:	46,100 S.F.
TOTAL RETAIL:	69,360 S.F.
3. PROPOSED RETAIL SQUARE FOOTAGE: (SEE SPECIAL EXCEPTION PLAN MODIFICATION)
 

① INTERIOR RENOVATION OF EX. INDOOR RETAIL:	7,050 S.F.
② NEW GREEN HOUSE, INDOOR RETAIL:	16,800 S.F.
③ REMODELED OUTDOOR RETAIL:	38,250 S.F.
④ EX. SALES OF PROPANE, OUTDOOR SALES:	350 S.F.
⑤ EX. FRAME PAVILION OUTDOOR RETAIL:	2,250 S.F.
⑥ EX. SHADE HOUSE, OUTDOOR RETAIL:	5,250 S.F.
TOTAL INDOOR RETAIL PROPOSED:	23,850 S.F.
TOTAL OUTDOOR RETAIL PROPOSED:	46,100 S.F.
TOTAL RETAIL:	69,950 S.F.
4. PARKING CALCULATIONS @ 5 SPACES PER 1000 GSF.
 

EX. PAVED PARKING FOR INDOOR RETAIL:	233 SPACES
EX. OVERFLOW PARKING FOR OUTDOOR RETAIL:	130 SPACES
TOTAL EX. PARKING	363 SPACES
REQUIRED PAVED PARKING FOR INDOOR RETAIL:	120 SPACES
REQUIRED OVERFLOW PARKING FOR OUTDOOR RETAIL:	231 SPACES
TOTAL PARKING REQUIRED:	351 SPACES
PROPOSED PAVED PARKING FOR INDOOR RETAIL:	231 SPACES
PROPOSED OVERFLOW PARKING FOR OUTDOOR RETAIL:	130 SPACES
TOTAL PARKING PROPOSED:	361 SPACES
5. SUMMARY OF BUILDING SQUARE FOOTAGE:
 

USE	EXISTING S.F.	PROPOSED S.F.
A. INDOOR RETAIL	23260	23850
B. OUTDOOR RETAIL	46100	46100
C. HOOPHOUSE & GREENHOUSE	35516	48704
D. CHEMICAL STORAGE	210	210
E. CONTRACTOR SHOP & STORAGE	23740	23740
F. OFFICE	3170	6110
G. CARE TAKER'S RESIDENCE	790	790
6. PROPOSED BUILDING HEIGHT: 28'HT.



As can be seen from the Revised Site Plan, the notes reproduced above and the other exhibits, Petitioner has done a very thorough job of depicting the existing use and all the proposed changes. None of the proposed changes fundamentally alters the nature of the use that has been existing on the subject site for many years.

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

At the beginning of the hearing, the Hearing Examiner raised a question with the Petitioner regarding Exhibit 21, an October 23, 2003 letter from the State Highway Administration, stating that “as a condition of approval, the applicant to be required to provide pre and post-hydraulic analysis.” The letter is signed by Gregory Cook for Kenneth A. McDonald, Jr., Chief of Engineering Access Permits Division. Petitioner’s counsel, Stanley Abrams, Esquire, stated that he had called Mr. Cook on October 30, 2003, to ask him the meaning of that provision, and Mr. Cook “authorized me to tell you that he has no objection because this property will have to go through subdivision process, that it be deferred until that time.” (Tr. 8-9) The Hearing Examiner accepts Mr. Abram’s on-the-record representations and concludes that the State Highway Administration does not object to the pending Modification Petition.

Petitioner called three witnesses at the hearing, David Adams, an expert in landscape architecture and land planning, Elvin Engel, an expert in architecture, and Russell Johnson, a part-owner of the Petitioner, Johnson’s Family Enterprises. There were no other witnesses at the hearing.

#### **A. Petitioner’s Case**

1. David Adams: Mr. Adams was called and accepted as an expert in landscape architecture and land planning. He began his testimony by describing the subject property as essentially “a retail

complex which includes an office, retail sales, commercial design for landscape uses, and a large greenhouse.” (Tr. 17-18) Mr. Adams noted that there is a substantial amount of parking for all retail use across the front of the site facing MD Route 108, and that the landscape contractor has a facility for his equipment and for staging of vehicles and storage of mulch along Mt. Zion Road. In addition to the contractor’s staging area, there are numerous “hoop houses,” which Mr. Adams described as temporary structures that have a flexible pole forming an arch, which is covered with plastic. Hoop houses are used for additional plant growing space. (Tr. 19).

Mr. Adams further testified that there are four points of access to the premises, the most common being Route 108. This point of entry serves most of the retail parking for customers and also allows service vehicles to enter into the core of the site. Additional retail parking may be accessed from Zion Road. The third point of access goes directly into the contractor’s yard, and a fourth point has an existing fence gate that provides for “incidental access to the nursery operations.” (Tr. 20). Mr. Adams noted that there are two residential dwellings close to the property. The closest one is at the north corner of the property in the R-200 Zone, and there is another property on the northeast edge of the site that is in the RE-1 Zone, located about 600 feet south of the northernmost point of the property on Mt. Zion Road (Tr. 23). There are no established residential communities, nor any subdivision development in the immediate area (Tr. 24).

Mr. Adams then testified as to all of the proposed changes that the Petitioner plans to make, which are described in Part II.D above. Each of the changes is listed in the General Notes on the revised site plan, Exhibit 19(a) (and its rendered version, Exhibit 26). The items circled under General Note 4 have corresponding circles directly on the diagram of the area, which thus

discloses the location of each of the proposed changes. Locations on that diagram which are indicated with dashes presently exist and will remain in place (Tr. 34).

There is an existing propane filling station at the south end of the parking lot (Circle 9) and there are two existing above-ground diesel fuel tanks and one oil recycling tank (Circle 14), all of which will remain on the site.

All the parking lots will be restriped to bring them up to County code (Tr. 36). Petitioner plans to increase the total retail area from 69,360 square feet to 69,950 square feet. Mr. Adams testified that for a retail space of that size, the Code requires 351 parking spaces, while Petitioner is proposing 361 parking spaces, 10 over the required minimum (Tr. 38). The highest building planned on the premises is 28 feet high, well below the maximum building height. All proposed uses are in excess of the required 50-foot setback from the road rights-of-way.

In response to the Technical Staff's observation, the mulch bay has been moved so that it is now setback 96 feet from the property line (Tr. 39). Petitioner then introduced Exhibit 28, which shows lighting levels across the road from the subject property. Mr. Adams expressed his opinion that there would be no adverse impact from lighting or glare from this site into adjoining properties (Tr. 42). Mr. Adams further testified that no residence would be closer than approximately 1,000 feet from any light pole on the subject property (Tr. 43-44).

Mr. Adams stated that in his opinion the existing well and septic systems are adequate to serve the existing uses and the modifications that are being proposed. In Mr. Adam's opinion, the proposed uses are consistent with the applicable *Olney Master Plan* and with the character of the area, including population density, design, scale, bulk of new structures, intensity, character of activity and traffic and parking conditions; nor would the proposed modifications be detrimental in any way to the peaceful enjoyment, economic value or development of the

surrounding area (Tr. 47). Mr. Adams also testified that the proposed use would not cause any objectionable noise, vibrations, fumes, odors, dust, glare or physical activity because the property is already located along a heavily traveled road that would probably generate “as much noise or more than what would be anticipated from this property, from this use.” (Tr. 47-48).

In response to the Hearing Examiner’s question about whether the improvements that are planned would cause an increase in the volume of business and a corresponding increase in the “hubbub” around the area, Mr. Adams testified that any such increase would not be adverse to the community since it is largely agriculturally related. In response to another Hearing Examiner question, Mr. Adams indicated that the Petitioner will definitely not be manufacturing mulch on the property. No trucks will be loading within 50 feet of any surrounding residential properties.

In response to cross-examination by Martin Klauber, People’s Counsel, Mr. Adams responded that the photometric study depicted on Exhibit 28 shows that “at all places both across Route 108 and Mt. Zion Road the foot candle lighting is zero.” (Tr. 54) (*i.e.*, lighting from the subject site will not adversely affect the surrounding area). Finally, Mr. Adams testified that inherent adverse impacts of a [horticultural] nursery could be “noise, could be dust, traffic, could be lighting”, as well as chemical applications. There are packaged chemicals for resale on the property. In Mr. Adams opinion, there would not be any non-inherent adverse impacts resulting from the requested modification of the special exception. (Tr. 57).

## 2. Elvin Engel.

The next witness called by Petitioner was Elvin Engel, accepted as an expert in architecture. Mr. Engel testified as to the elevations planned for the new buildings, depicted in Exhibit 19(c-2), as well as to their construction. Mr. Engel further testified that the new buildings will be 26 feet in height, which is two feet lower than the tallest building presently on

the subject site (Tr. 64). In Mr. Engel's opinion, the new buildings will be compatible and harmonious with the surrounding development and character of the area (Tr. 65). Mr. Engel also testified that these buildings and structures would not produce any adverse or detrimental impacts on the use and enjoyment of any of the neighboring properties (Tr. 65).

Mr. Engel noted that there will be the new design center, and new toilet rooms are being added which will be handicapped-accessible (Tr. 67). Mr. Engel characterized the changes as "an upgrade" and opined that the new greenhouses "will have a very pleasing aesthetic effect on the site." (Tr. 66). According to Mr. Engel, the upgrades will render the entire facility handicapped-accessible, which it is not now (Tr. 70).

### 3. Russell Johnson.

The final witness called by Petitioner was Russell Johnson, one of the owners of the business who has been involved with it for more than 30 years. Mr. Johnson testified that this business has three locations, in addition to the subject site – one in Gaithersburg, one in Kensington and one in Northwest Washington, D.C. (Tr. 72). Mr. Johnson further testified that the Petitioner acquired the subject property in 1998 from J. H. Burton and Sons and that there was already a plant nursery operating on the property under a special exception at that time. The special exception was transferred to Petitioner.

The rationale behind the proposed changes is to make the business more "customer friendly," making it easier for all customers to shop, including handicapped patrons.

Mr. Johnson identified various photographs, Exhibits 32 (a) through (g), and testified that the only change that has already been made to the property is that Petitioner has erected a fence along Zion Road to cut down on theft. For the remainder of the changes, Petitioner is awaiting approval of the special exception modification request.

The business will operate seven days a week from 8:00 a.m. to 8:00 p.m. in April and May, but will operate from 9:00 a.m. to 6:00 p.m. through most of the rest of the year. There will be little if any change from the present workweek. There will be approximately 50 employees, and there may be anywhere from the upper 30s to the low 40s on the site at any given time (Tr. 77). The vehicles listed on the proposed modification are already existing vehicles on site. Landscape design and installation services will continue as a minor part of the business, as they have been since the 1960's (Tr. 78).

Petitioner is requesting approval for the sale of propane, which has been occurring on the property since the early 1980's. The propane tank, as well as the diesel fuel tanks and recycling tanks on the property, according to Mr. Johnson, comply with all fire, safety and other code requirements (Tr. 79). Chemicals such as pesticides, insecticides and fertilizer are stored in a brick building on the subject site both for retail sale and for growing of the products on the site. (Tr. 80). Mr. Johnson testified that these chemicals do not present a safety or health hazard as long as they are handled within code.

The vehicle staging area located along Mt. Zion Road on the southeast portion of the property is used for landscape contractor staging and receiving, and some design production work. The two existing signs at each end of the property frontage will not be changed, but the one located near the main retail entrance will be refaced (Tr. 82). Mr. Johnson testified that the proposed changes would not alter the character of the surrounding area nor have any adverse effects from the standpoint of noise, fumes, dust, lights or odors. He also stated that they would not adversely impact on the use and enjoyment of the surrounding properties or the value of those properties. The modifications will be compatible and harmonious with the surrounding neighborhood, and even during peak sale periods, there have been no problems with respect to

adequacy of parking. Mr. Johnson has received no indication of opposition from the Greater Olney Citizens Association (Tr. 85).

In response to a question from the Hearing Examiner, Mr. Johnson stated that he did not expect a large increase in the volume of traffic from the modifications, but he did expect that his revenue would increase because customers would be able to see things more easily when they are on the property.

4. Lee Cunningham.

Mr. Lee Cunningham, an expert in traffic engineering, was too ill to appear at the hearing, but without objection, Petitioner submitted Mr. Cunningham's supplemental statement, Exhibit 23, explaining his opinion about traffic impact in the case. Mr. Cunningham's supplemental statement concludes that the proposed modification would generate an additional nine peak hour trips, thereby resulting in a total of 48 peak hour trips from the subject use. Under the Local Area Transportation Review (LATR) provisions of the Adequate Public Facilities Ordinance (APFO), the threshold for requiring additional traffic studies is 50 peak hour trips. Therefore, no further LATR traffic study need be done in this case.

Finally, Mr. Cunningham examined the potential effect of the proposed modifications upon traffic flow and access to the subject property. He noted that the proposed modification does not change the existing access points for the facility, and the entrance to the site from MD 108, which has a 50 mph speed limit, also has a deceleration lane for traffic turning right into the site. Sight distance exceeds 500 feet in both directions from the entrance and, in Mr. Cunningham's opinion, "is adequate to accommodate speeds in excess of 55 miles per hour." (Exhibit 23, p.2)

Mr. Cunningham's report indicates that the posted speed limit on Mt. Zion Road is 25 miles per hour, and sight distance along Mt. Zion Road to the north exceeds 500 feet. To the south there is clear sight distance from the entrance to the MD 108/Mt Zion Road intersection. Based on these observations, Mr. Cunningham opined that the proposed modifications will not interfere with traffic flow along MD Route 108 or Mt. Zion Road.

### **B. People's Counsel**

Martin Klauber, the People's Counsel, did not present any witnesses at the hearing, but he did participate, and he recommended approval of the requested special exception modifications, subject to the appropriate conditions (Tr. 93-94).

## **IV. FINDINGS AND CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. The special exception is also evaluated in a site-specific context because there may be locations where it is not appropriate. A special exception use is deemed presumptively compatible within the zoning district in which it is authorized, unless specific adverse conditions at the proposed location are shown to overcome the presumption. Pre-set legislative standards are both specific and general.

Petitions to modify the terms or conditions of a special exception are authorized by §59-G-1.3(c)(4) of the Zoning Ordinance. As mentioned in Part I of this report, because Petitioner is proposing to increase total floor area by more than 7,500 square feet, we must evaluate whether "the expansion, when considered in combination with the underlying special exception, changes the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected." Section 59-

G-1.3(c)(4)(A). As demonstrated below, the record in this case establishes that the proposed modifications would neither change the nature or character of the special exception nor adversely affect the surrounding neighborhood.

#### **A. Standard for Evaluation**

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

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

The following may be considered inherent characteristics of a combined horticultural nursery and landscape contractor use: buildings, greenhouses, “hoop houses” and other structures, as well as outdoor areas for the growth, storage, display and sale of plants and gardening-related equipment; outdoor storage of mulch, soil and other landscaping materials, in bulk or in containers; on-site storage of business vehicles and equipment including small trucks and landscaping trailers; traffic associated with trips to the site by employees, suppliers and customers; trips to and from the site by employees engaged in off-site landscaping activities; adequate parking areas to accommodate customers and staff; dust and noise associated with the movement of nursery and landscaping products and the loading and unloading of landscaping equipment; and long hours of operation.

Technical Staff observed that retail horticultural nurseries “need not necessarily grow the plants they offer on-site,” and many nurseries buy the plants they sell from growers located elsewhere. (Exhibit 17, p. 8) Therefore, Technical Staff concluded that the decision to maintain relatively extensive areas to cultivate and maintain plants may be considered a non-inherent adverse effect. The Technical Staff felt that two factors mitigated this effect in the present case. First, Johnson’s grows and cultivates its plants in an agricultural zone, where similar activities are already taking place on neighboring properties. Second, there is sufficient space on the 28-acre property to accommodate growing and cultivating activities as well as the retailing and landscape contracting activities without negative impacts on adjoining properties. In any event, the Technical Staff concluded that any non-inherent adverse effects were not sufficient to warrant denial of the Modification Petition.

The Hearing Examiner views the “non-inherent effects” analysis somewhat differently, but comes to the same conclusion. The Hearing Examiner does not see the growth of plants on

site in a “horticultural nursery” as being a non-inherent effect; after all, as its descriptive title implies, the subject use is a plant nursery, which means that growing plants is the essence of its business. This is especially true in the agricultural setting of the subject property. Thus, the Hearing Examiner finds no non-inherent adverse effects from the horticultural nursery use.

Both the Technical Staff and the Hearing Examiner agree that there are no non-inherent adverse effects associated with the landscape contracting activities. The number of employees, operating hours and other aspects of the operation are consistent with the characteristics of landscape contractors generally.

### **B. General Standards**

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

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

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

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

Conclusion: A horticultural nursery and a landscape contractor are both permitted special exceptions in the RDT Zone.

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

Conclusion: The proposed modification would comply with the standards and requirements set forth for the two uses in Code §§59-G-2.30 and 2.30.00, as detailed below.

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

Conclusion: Under the applicable *1980 Olney Master Plan*, the subject site is part of the rural agriculture area which the Plan seeks to preserve as farmland. The subject use as a horticultural nursery and landscaping contractor is akin to an agricultural use. Moreover, as noted in the Technical Staff Report, the *Public Hearing Draft Olney Master Plan*, now under review, confirms the agricultural land use and the RDT zone, which permits retail horticultural nurseries and landscape contractors as special exceptions. The Technical Staff opined that both the existing nursery and the proposed modifications are “in keeping with the recommendations of the *Olney Master Plan*.” In sum, the evidence supports a finding that the proposed modification would be consistent with the general plan and the recommendations of the *1980 Olney Master Plan*.

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

Conclusion: The proposed modifications would be in harmony with the general character of the neighborhood, as testified to by Petitioner's witnesses (Tr. 65 and 85). The surrounding properties are generally agricultural and recreational. The subject

use has been operating in the area for many years without any complaints from neighbors, and the proposed modifications will not change the fundamental uses in any way; rather they are improvements to make the facilities more “customer friendly.” An increase in customer volume is not anticipated (Tr. 90-91). As will be seen below, both the traffic generated and the on-site parking are within required limits.

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

Conclusion: The evidence supports the conclusion that with the operational limitations and proposed landscaping buffers, the requested modifications would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site.

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

Conclusion: As noted in the Technical Staff Report (Exhibit 17, pp. 6-7), existing forest separates the nursery from residences on Mt. Zion Road and is sufficient to screen those homes from nursery activities, which take place more than 400 feet away. Existing landscaping at the main entrance to Johnson’s and at the parking lot exit on Mt. Zion Road sets off those areas and provides an aesthetically inviting setting that emphasizes the use to entering and exiting customers. An existing series of four-foot hedges at the edge of the main parking area screens parking

from MD 108. Additional Norwood Spruce Trees will further screen the operation from Mt. Zion Road.

Existing lighting illuminates the main parking area and landscape contractor's staging and preparation area. Light poles are 20 feet high. The petition proposes to add three new 20-foot light poles. One will enhance illumination of the main parking area; the other two are to be located at the main entrance on MD 108 and the Zion Road parking exit, respectively. Photometric studies done at the suggestion of the Technical Staff showed that there is a reading of zero foot-candles across both MD Route 108 and Mount Zion Road, according to the testimony of David Adams (Tr. 54).<sup>3</sup>

In sum, the evidence supports the conclusion that, with the operational characteristics, setbacks and screening requirements agreed to by Petitioner for this property, the proposed modifications would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site.

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

Conclusion: The evidence supports the conclusion that the proposed special exception would not increase the number, intensity or scope of special exception uses sufficiently

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<sup>3</sup> The Hearing Examiner's review of the photometric study (Exhibit 28) reveals some non-zero (but very low, *i.e.*, under 1 foot-candle) readings across Mt. Zion Road near its intersection with Rt. 108; however, the difference appears to be insignificant since this area is very far away from the nearest residence.

to affect the area adversely; nor is the area predominantly residential.

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

Conclusion: The evidence supports the conclusion that the proposed modification would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

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

(i) *If the special exception use requires approval of a preliminary plan of subdivision the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review[LATR] and the Policy Area Transportation Review[PATR], as required in the applicable Annual Growth Policy.*

(ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: The evidence supports the conclusion that the subject property would continue to be served by adequate public facilities. None of the proposed changes should impact schools, police and fire protection, water, sanitary sewer, storm drainage and other public facilities, with the possible exception of public roads.

As to public roads, traffic engineer Lee Cunningham's supplemental report (Exhibit 23) concluded that the proposed modifications might yield 9 additional peak hour trips (based on the addition of floor space), resulting in a

total of 48 peak hour trips. Under Code § 59-G-1.21(a)(9)(i), the Board of Appeals need not reach the LATR and PATR issues in this case because Subdivision approval will be required, and that will be a recommended condition for granting the Modification Petition. Nevertheless, both Mr. Cunningham and the Technical Staff (Exhibit 17) found that the proposed use, as modified, will not generate more than 49 peak hour trips, and therefore will not require further traffic studies under the LATR standards. Moreover, the Policy Area Transportation Review (PATR) standards for the Olney Policy Area have a net remaining staging ceiling of 1,924 jobs as of July 31, 2003 (Exhibit 17, p. 6), well below the number of jobs which will be generated by Petitioner's use.

Based on Mr. Cunningham's report, the Hearing Examiner also finds that the proposed use will not reduce the safety of pedestrian or vehicular traffic.

### **C. Specific Standards: Retail Horticultural Nursery**

The specific standards for a retail horticultural nursery are found in Code § 59-G-2.30. The Technical Staff report and the Petitioner's written evidence and testimony provide sufficient evidence that the proposed modification would be consistent with these specific standards, as outlined below.

#### **Sec. 59-G-2.30 Nursery, horticultural retail.**

*This use may be allowed together with incidental buildings upon a finding by the Board of Appeals that the use will not constitute a nuisance because of traffic, noise, hours of operation, number of employees, or other factors. It is not uncommon for this use to be proposed in combination with a wholesale horticultural nursery, a landscape contractor, or a mulch/compost manufacturing operation. If a combination of these uses is proposed, the Board opinion must specify which combination of uses is approved for the specified location.*

Conclusion: The retail horticultural nursery use is proposed in combination with a landscape contractor use, as permitted.

- (1) *The sale of the following materials and equipment directly related to residential gardening is allowed:*
  - (i) *Plants, trees, shrubs, seeds, and bulbs, whether or not grown or produced on site;*
  - (ii) *Fertilizers, plant foods, and pesticides; and*
  - (iii) *Hand tools, hand spraying, and watering equipment.*

Conclusion: Petitioner has been selling, and will continue to sell, the listed materials and equipment.

- (2) *The incidental sale of seasonal items may also be allowed.*

Conclusion: Petitioner has been selling, and will continue to sell, seasonal items incidental to their business.

- (3) *The following restrictions on operations apply:*
  - (i) *Tools and equipment for sale must not be displayed outdoors.*
  - (ii) *The sale of general hardware or power equipment is not allowed.*
  - (iii) *The board may limit hours of operation and number of employees to prevent adverse impact on adjoining uses.*
  - (iv) *The manufacture of mulch, other than by composting of plant material, is not allowed.*

Conclusion: Technical Staff notes that Petitioner displays gardening tools and equipment in its indoor retail area and does not sell general hardware items (Exhibit 17, p. 5 of attachment). The Modification Petition seeks hours of 8 a.m. to 8 p.m. daily

during April and May and hours of 9 a.m. to 6 p.m. daily during the rest of the year. This is unchanged from Petitioner's past practice, and the hearing Examiner concludes that these hours will have no adverse effect on the surrounding rural community. Petitioner produces mulch by composting only, consistent with the statutory restriction.

(4) *Location and development standards are as follows:*

(i) *The minimum area of the lot is 2 acres.*

(ii) *The minimum building setback from any property line is 50 feet.*

(iii) *Adequate parking must be provided on site in accordance with the requirements for general retail sales under Article 59-E.*

(iv) *The property must front on and have direct access to a public road built to primary or higher standards, with the possible exception of properties in the Rural, Rural Cluster, and Rural Density Transfer zones. In the Rural, Rural Cluster, and Rural Density Transfer zones, frontage on and access to a public road built to primary or higher standard is not required if the Board makes the following findings:*

*—Road access will be safe and adequate for the anticipated traffic to be generated; and*

*—The use at this location will not be an intrusion into an established residential neighborhood.*

*These requirements apply only to petitions filed on or after March 25, 1986. A nursery or commercial greenhouse special exception for which a petition was filed with the Board prior to March 25, 1986, is a conforming use and may be amended in accordance with the modification provision of Section 59-G-1.3(c).*

Conclusion: The requirements of this section apply to Petitioner because, as discussed in Part I of this Report, Petitioner is seeking to expand the total floor area of all structures by more than 7,500 square feet, the statutory threshold specified in Code Section

59-G-1.3(c)(4). Nevertheless, Petitioner meets all of the specifications of this section. The subject property measures approximately 28.3449 acres, well above the 2 acre minimum; all buildings exceed the 50 foot setback requirement (Exhibit 17, p. 6 of attachment); the Revised Site Plan provides for 361 parking spaces which is 10 more than required for general retail sales under Article 59-E; and the parking lot will be restriped to meet County standards for handicapped spaces.

As to item “(iv)” (public road access), the subject property is located in a Rural Density Transfer zone, and therefore it will not be an intrusion into an established residential neighborhood. The property fronts on and has direct access to Maryland Route 108, which is designated as a major highway. As mentioned above, both traffic engineer, Lee Cunningham’s supplemental report (Exhibit 23) and the Technical Staff Report (Exhibit 17) indicated that the proposed use, as modified, will not generate more than 49 peak hour trips, and therefore will not unduly impose on the neighborhood under LATR standards. Further evidence for this conclusion is the fact that the Policy Area Transportation Review (PATR) standards for the Olney Policy Area have a net remaining staging ceiling of 1,924 jobs as of July 31, 2003 (Exhibit 17, p. 6), well below the number of jobs which will be generated by Petitioner’s use. Based on Mr. Cunningham’s report, the Hearing Examiner also finds that road access will be safe and adequate for the anticipated traffic. The Technical Staff also notes that the requirement for Petitioner to dedicate the necessary rights-of-way at preliminary plan of subdivision will help insure safe and adequate access.

(5) *Any retail nursery or garden center established as a permitted use before October 22, 1985, and any retail nursery established*

*pursuant to a building permit application filed before October 22, 1985, is not required to obtain a special exception, for any future expansion or diversification beyond the scope of paragraphs (1) and (2).*

Conclusion: This subsection is not applicable since Petitioner has been operating under special exceptions (as distinguished from a “permitted use”) transferred from the previous owner.

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

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

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

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

Conclusion: The landscape contractor use is proposed in combination with a retail horticultural nursery, as permitted. As is documented below, this use will not constitute a nuisance because of traffic, noise, hours of operation, number of employees, or other factors.

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

Conclusion: The lot size is approximately 28.3449 acres, well above the 2 acre minimum.

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

Conclusion: Parking and loading areas for trucks and equipment, as well as other on-site operations for the landscape contractor use, are located more than 50 feet from all property lines. The Technical Staff and the Planning Board had conditioned their approvals upon Petitioner moving a mulch bay to locate it more than 50 feet from the property line and adding additional landscaping to buffer the contractor's staging and storage areas. To satisfy these concerns, Petitioner moved the proposed location of the mulch bay to a spot which is set back 96 feet from the property line (See Revised Site Plan, Exhibit 19(a)) and increased the planned landscape buffer from 6 Norway Spruce trees to 22 Norway Spruce trees. The evidence supports the conclusion that distance, fencing and landscaping are adequate to protect adjoining uses from noise, dust, odors and other objectionable effects of these operations, given that some amount of noise, dust and odors is inherent in the use.

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

Conclusion: The Revised Site Plan (Exhibit 19(a)) specifies the vehicles which will be on the subject property, and Mr. Johnson testified that those vehicles are ones that are already in use in the business (Tr. 78). The Technical Staff notes that there is a separate area for staging and parking the contractor's trucks and equipment. The

Hearing Examiner finds that adequate parking has been provided to avoid adverse impacts on adjoining uses.

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

Conclusion: The landscape contracting business is operated in conjunction with a retail nursery.

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

Conclusion: The Hearing Examiner finds that Petitioner's proposed hours of operation, as described above, will not adversely impact adjoining uses. Petitioner's business has been operating with the same hours for years, and no opposition to the Petition was filed.

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

Conclusion: Because Petitioner's business is located in an agricultural zone, it has little, if any adverse impacts on its surroundings.

### **E. General Development Standards**

In addition to the other general and specific standards set forth above, "*Special exceptions are subject [under Code § 59-G-1.23(a)] to the development standards of the applicable zone where the special exception is located [in this case, RDT – Rural Density Transfer] except when the standard is specified in Section G-1.23 or in Section G-2.*" For this special exception, the applicable development standards specified in Sections 59-G-2.30 and 2.30.00 include minimum lot area, minimum setbacks, adequate parking, adequate screening and certain frontage requirements. These requirements and Petitioner's compliance with them have been discussed in

Part IV.C, above. The RDT Zone also includes requirements for minimum lot width, maximum lot coverage and maximum building height. Under § 59-G-1.23(a), we must also consider consistency with the forest conservation and water quality plans, signs that comply with Code § 59-F and appropriate lighting under Code § 59-G-1.23(h).

**1. Development Standards Specified in the Special Exception and in the Zone:**

The Table below sets forth all the Development Standards spelled out in the Special Exceptions (Horticultural Nursery, Retail and Landscape Contractor), as well as those specified for the RDT Zone. As is evident, Petitioner meets all Development Standards.

<b>ITEM</b>	<b>REQUIRED/ALLOWED</b>	<b>PROPOSED</b>
<b>Lot Area</b>	2 acres minimum	28.3449 acres
<b>Building setback</b> 1. Existing Buildings 2. Relocated Greenhouse 3. New Greenhouses 4. Existing Mulch Bay	50 feet minimum	1. All Existing over 50 feet 2. Relocated Greenhouse 92 feet 3. New Greenhouses 158 feet 3. Relocated Mulch Bay 96 feet
<b>Parking Requirements</b>	351 spaces minimum (5 per 1000 sq. ft)	361 spaces to be provided
<b>Adequate Screening</b> (Required for Landscape Contractor)	Additional screening required by Technical Staff	22 Norway Spruce being added to screen Landscape Contractor operation
<b>Frontage Requirements</b>	None, if Board finds road access safe and adequate and no intrusion into established residential neighborhood	As noted in Part IV.C. of this Report, road access is safe and adequate; there is no intrusion into an established residential neighborhood
<b>Lot Width</b>	1. Minimum of 125 feet along front building line 2. Minimum of 25 feet along front street line	Over 1500 feet on both measures
<b>Lot Coverage</b>	1. Maximum of 40% of lot may be covered by buildings, but increases over 10% must be all greenhouse area 2. Site Plan approval required	1. A total of 8.37% of the property will be covered by buildings <sup>4</sup> 2. Site Plan approval will be a required condition

<sup>4</sup> The 8.37% figure was derived in the following manner: The total square footage of structures on the property was calculated by adding the figures (excluding "Outdoor Retail") specified as "Proposed S.F." in Item 5 of the "Site Development Criteria" on the Revised Site Plan (Exhibit 19(a)). That figure is 103,404 square feet. That

<b>Building Height</b>	50 feet maximum	28 feet
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## **2. Development Standards Specified in Section 59-G-1.23**

The remaining development standards in Code §59-G-1.23 which are applicable to this case concern forest conservation, water quality plans, signs and lighting.

### Forest Conservation and Water Quality Plans:

*Sec. 59-G-1.23(d) Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

*Sec. 59-G-1.23(e) Water quality plan. If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: Technical Staff addressed any potential environmental concerns which might arise from the proposed use, stating (Exhibit 17, pp. 6-7) that the subject property has “an approved Natural Resource Inventory and Forest Stand Delineation” and that “the proposed modifications are exempt from the requirements of the Forest Conservation Law because they will not result in the cumulative clearing of more than 5,000 additional square feet of forest. No clearing of specimen or champion trees is planned.”

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figure was then divided by the total area of the property, which is 1,234,703.8 square feet (28.3449 acres X 43,560 sq.ft. per acre = 1,234,703.8 sq.ft.). That division reveals that 8.37% of the property will be covered by buildings, well within the maximum standards.

The Technical Staff also stated that Petitioner must comply with storm water and sediment control regulations of the Montgomery County Department of Permitting Services, and that prior to approval of a preliminary plan of subdivision (a recommended condition of approval of this petition), a Storm Water Management Concept Plan must be approved.

The Technical Staff observed that the existing fuel storage tanks on site must meet required technical standards as well as all county, state and federal permitting requirements, and that Petitioner may be required by the Montgomery County Department of Environmental Protection to conduct a noise study at a later time.

Nevertheless, the evidence at this juncture supports the conclusion that Petitioner is in conformity with all applicable regulations and that their special exception uses do not pose an environmental hazard. In order to ensure that all applicable regulations are observed, the Hearing Examiner's recommendations include conditions requiring compliance.

### Signs and Lighting

59-G-1.23(f) *Signs. The display of a sign must comply with Article 59-F.*

59-G-1.23(g) *Building compatibility in residential zones. Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

59-G-1.23(h) *Lighting in residential zones. All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following*

*lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

- (1) Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*
- (2) Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: There are three signs on the subject property, one large one at the main entrance, one at the juncture of MD Route 108 and Mt. Zion Road and one at the far northwest end of the property on MD Route 108. The only sign Petitioner seeks to change is the main entrance sign, which will be refaced. No structural change will be made to any of the signs (Tr. 34-35). Nothing in the proposed refacing of the one sign would violate the provisions of Code Section 59-F-4.2(d), which sets forth the requirements for signs in rural zones. Because the instant case involves a Modification Petition on an existing special exception and because the proposed modifications will not change “the nature and character of the special exception,” Code Section 59-G-1.3(c)(4) does not require further inquiry into the propriety of the signage. The Technical Staff also did not mention any problem with the Petitioner’s signage.

As to lighting, Section 59-G-1.23(g) does not apply in the instant case because the property in question is not in a residential zone. The lighting concerns of subsection (h) are dealt with in the discussion in Part IV.B of this report under “General Standards” specified in Code Section 59-G-1.21(a)(6). The evidence is clear that no obtrusive light from the Petitioner’s operation reaches the few nearby residences.

Based on the testimony and evidence of record, I conclude that, with the recommended conditions, the changes proposed by Petitioner meet the specific and general requirements for the use, and that the Modification Petition should be granted, with the conditions recommended in the final section of this report.

## V. RECOMMENDATIONS

Accordingly, based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petition No. CBA-2180-A, which seeks to modify two existing special exceptions for a horticultural nursery on property located at 5011 Olney-Laytonsville Road (MD Route 108), Olney, Maryland, be **granted** with the following conditions:

10. The Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and representations of counsel identified in this report.
11. All terms and conditions of the approved special exceptions (CBA-2180 and S-254) shall remain in full force and effect, except as modified by the Board as a result of this Modification Petition.
12. Approval of a Preliminary Plan of Subdivision is required, and plats must be recorded before building permits can be issued for this proposed modification.
13. The Petitioner shall continue to operate as a combined retail horticultural nursery and landscape contractor.
14. The hours of operation for the combined nursery and landscape contractor shall be 8:00 a.m. to 8:00 p.m., 7 days/week during Spring season (April and

May) and 9:00 a.m. - 6:00 p.m., 7 days/week during Summer, Fall and Winter seasons.

15. The total number of employees for the combined nursery and landscape contractor on site at any one time shall be not exceed 50 employees.
16. Business vehicles and equipment stored or parked on-site shall be limited to the following items or their replacements:
  - 2 vans
  - 4 pick up trucks
  - 3 stake body trucks with dump
  - 1 stake body truck
  - 1 16' box truck
  - 1 14' box truck
  - 5 dump trucks
  - 2 trailers
  - 1 skid steer loader
  - 2 forklifts
  - 1 Taylor-Dunn electric cart
17. All elements of the revised Site Plan (Exhibit 19(a)) and the revised Landscape Plan (Exhibit 19(b)) must be implemented, including but not limited to the following:
  - a. Moving the Mulch Bay to the rear of the existing shade house, with a setback of 96 feet from Mt. Zion Road, as indicated in the revised Site Plan, and
  - b. Planting 22 Norway Spruce trees along Mt. Zion Road as indicated in the revised Site Plan to serve as a buffer and screen for the landscape contractor's staging and storage area.

8. The Petitioner shall comply with any conditions imposed by the Maryland State Highway Administration at Site Plan Review.
9. At the time of Preliminary Plan, Petitioner shall dedicate additional right-of-way, as needed, along MD Route 108 and Mt. Zion Road.
10. Petitioner shall coordinate with the Montgomery County Department of Public Works and Transportation and the Maryland State Highway Administration to ensure adequate sight distance at the site access driveways.
11. Petitioner shall comply with storm water and sediment control regulations of the Montgomery County Department of Permitting Services, and prior to approval of a preliminary plan of subdivision, a Storm Water Management Concept Plan must be approved.
12. Petitioner shall comply with any noise study that may be required by the Montgomery County Department of Environmental Protection.
13. Petitioner shall see to it that the existing fuel storage tanks on site meet required technical standards as well as all county, state and federal permitting requirements.
14. Petitioner shall ensure that all chemicals stored on site for retail sale or for use in the business are stored in accordance with applicable Codes.

Dated: December 11, 2003

Respectfully submitted,

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Martin L. Grossman  
Hearing Examiner