

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. S-2590

PETITION OF SCOTT D. BROWN

OPINION OF THE BOARD

(Effective Date of Opinion: May 7, 2004)

Case No. S-2590 is an application for a special exception to permit a landscape contractor.

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 to conduct a public hearing on the application. The Hearing Examiner convened a hearing on December 8, 2003, the record in the case closed on January 23, 2004, and on March 29, 2004, the Hearing Examiner issued a Report and Recommendation for approval of the special exception.

The subject property is 5.3 acres, located at 26721 Purdum Road, Damascus, Maryland, 20872, in the RDT Zone.

Decision of the Board: Request for Oral Argument **denied**.
Special Exception granted subject
to conditions enumerated below.

The Board of Appeals considered the Hearing Examiner's report and recommendation at its Worksession on April 21, 2004. The Board also had before it a request for oral argument on the report and recommendation, filed by Robert A. Meier, Jr., on behalf of Mr. Brown. The request is for argument on three points: 1) whether, as recommended by the Hearing Examiner, subdivision of the subject property should be required; 2) whether tractor trailers should be prohibited from entering the subject property; and 3) whether snow plows or snow removal equipment should be allowed to be store on the subject premises.

The Board has carefully considered the Hearing Examiner's report and recommendation, together with the record in the case. The Board finds that the Hearing Examiner has compiled a complete record. The Board agrees with Maryland National Capital Park and Planning Commission (MNCPPC) technical staff and the Hearing Examiner that the subdivision regulations of Chapter 50 of the County Code apply to the subject property and the instant application, and that subdivision of the property is required. The Board further agrees with the Hearing Examiner's finding that deliveries by tractor-trailer constitute a non-inherent adverse effect of this special exception, due to the character of Purdum Road, and that the record amply supports the recommendation that they be prohibited. With respect to storage of snow removal equipment on site, the Board differs with the Hearing Examiner, and finds that snow plows and snow removal equipment should be allowed to be stored inside the pole barn.

The Board, therefore, **denies** the request for oral argument, and, 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, adopts the following Resolution:

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.

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 7th day of May, 2004.

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.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four months' period within which the special exception granted by the Board must be exercised.

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I. STATEMENT OF THE CASE

Petition S-2590, filed on August 19, 2003, requests a special exception under the RDT Zone to operate a landscape contractor business on property located at 26721 Purdum Road in Damascus, Maryland. Technical Staff of the Maryland-National Capital Park & Planning Commission (“MNCPPC”) reviewed the petition and, in a report dated November 13, 2003, recommended *approval* with conditions.¹ See Ex. 19. The Montgomery County Planning Board (“Planning Board”) reviewed the petition on Thursday, November 20, 2003 and voted 4 to 0 to recommend *approval* with the conditions recommended in the Staff Report. See Ex. 20.

On October 9, 2003 the Board of Appeals (“BOA”) scheduled a public hearing for December 8, 2003. By Resolution effective October 16, 2003 the BOA, acting under the provisions of Code § 59-A-4.125, referred the petition to the Office of Zoning and Administrative Hearings to conduct a public hearing and submit a report and recommendation. See Ex. 14. The public hearing was convened as scheduled on December 8, 2003, at which time testimony and evidence were received in support of and in opposition to the petition. The record was held open for the receipt of supplemental submissions by the Petitioner, Technical Staff and opposition parties, and closed on January 23, 2004. By Order dated March 29, 2004 the Hearing Examiner extended the time for her report to March 29, 2004.

II. BACKGROUND

A. *Subject Property and Neighborhood*

The subject property contains approximately 5.3 acres of land located at 26721 Purdum Road in Damascus, just south of the intersection of Purdum Road and Bethesda Church Road, about five to six miles west of the Damascus town center.² It is classified under the RDT Zone. The property is currently developed with a two-story, wood paneled, single-family residence that sits

¹ The Staff Report is liberally paraphrased in Part II of this report.

² The distance from Damascus is based on the Hearing Examiner’s calculation from an ADC map and is provided for general geographic context. The Hearing Examiner takes official notice of the ADC Street Map Book for Montgomery County, 2001 edition.

close to Purdum Road, and three storage sheds slightly farther back on the property. Vehicular access is provided via a ten-foot-wide gravel driveway from Purdum Road, which is classified as an Exceptional Rustic Road. As may be seen in the photographs below, Purdum Road is a narrow, winding, hilly road with exceptional scenic vistas to the north and northeast.

Photograph of Purdum Road Looking North, from Staff Report, Ex. 20



Photograph of Purdum Road Looking South, from Staff Report, Ex. 20



The existing house and the entrance to the subject property may be seen in the photographs below, excerpted from the Staff Report.

Front View of Subject Property

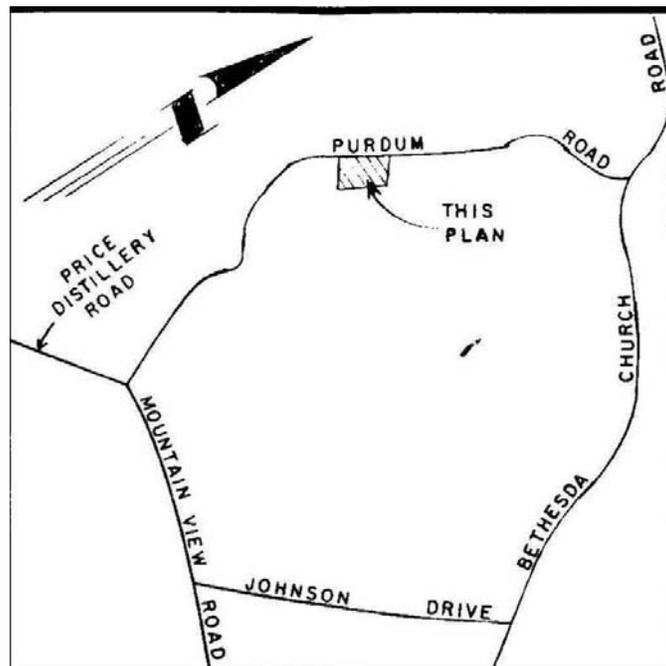


View from Subject Property Looking out Entrance Drive



The subject property is fairly level in the area of the existing house and gradually slopes down to the east and west. Approximately three acres of the property are forested, including many specimen trees in predominantly fair condition. The property is roughly diamond-shaped, with one point facing north and the other facing south. It abuts single-family residences on large lots to the south/southwest, Purdum Road to the northwest and agricultural land to the northeast and southeast. Property confronting directly to the northwest is agricultural. A single-family residence, set back a considerable distance from the road, is located diagonally across the street from the subject property to the west/southwest. The general location of the subject property may be seen on the vicinity map below, although its shape of the property is not depicted accurately. The property's shape and relationship to other land uses may be seen on the aerial photograph reproduced on the next page.

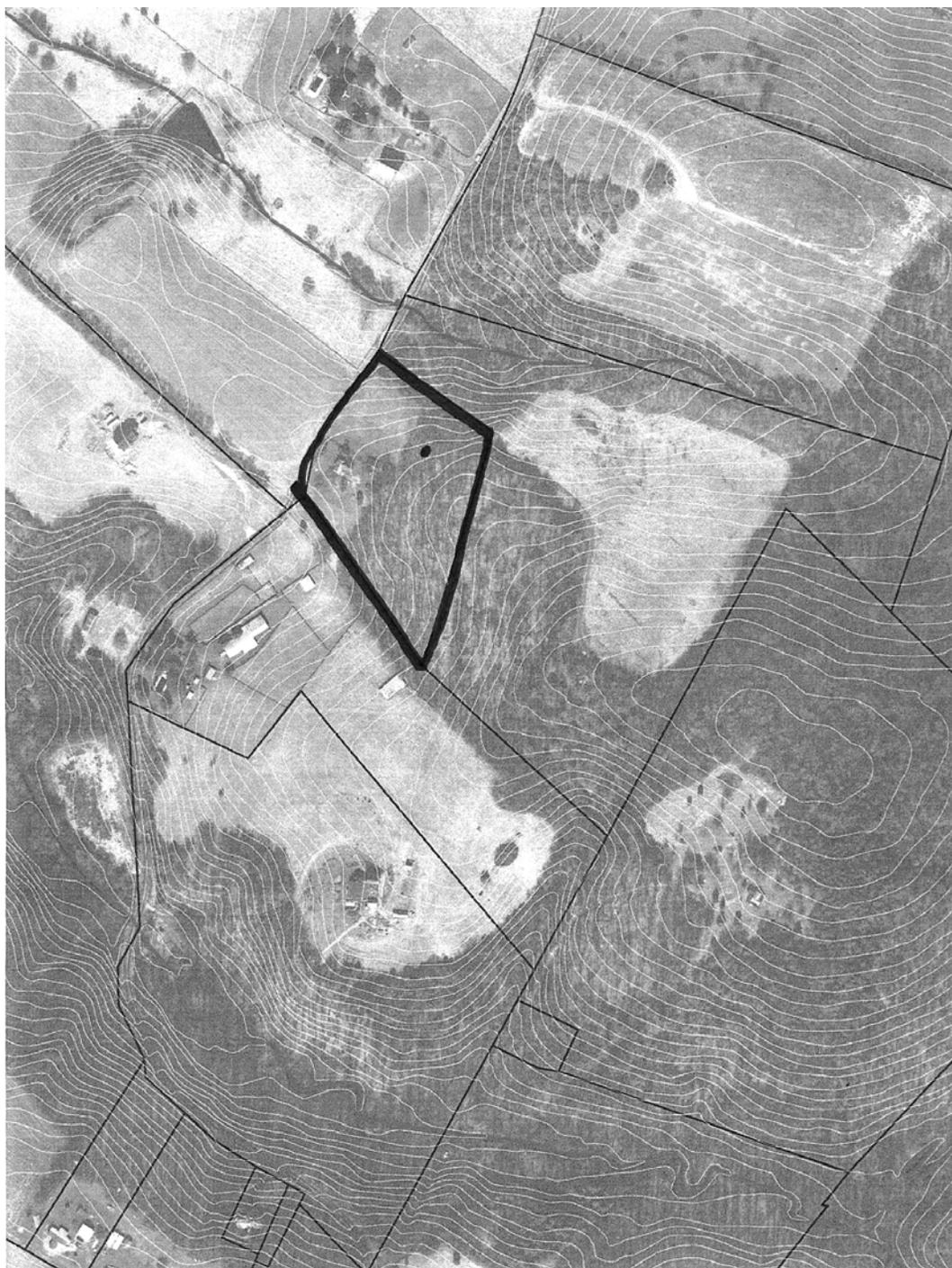
Vicinity Map, Excerpted from Ex. 25



The general neighborhood for purposes of evaluating a special exception should include the geographic area that is within sight of the subject property or reasonably could be expected to be affected by the proposed use. Technical Staff limited its discussion of the neighborhood to the properties abutting the subject property, which appears to be an appropriate

neighborhood definition in a rural area like Purdum Road. The aerial photograph and the zoning map, Exhibit 11(a), indicate that the general neighborhood of the subject property has a mix of agricultural and rural residential uses.

Aerial Photograph, Exhibit 24



B. Proposed Use

The Petitioner, Scott Brown, proposes to conduct a landscape contracting business on the subject property. The Zoning Ordinance defines “landscape contractor” in relevant part as follows:

The business of designing, installing, planting or maintaining lawns, gardens, or other landscaping and snow removal services, including tree installation, maintenance or removal, at off-site locations with vehicles, equipment, and supplies that are stored, parked, serviced, or loaded at the business location.

Mr. Brown currently runs his business, Damascus Enterprises, Inc., from another location, providing lawn and landscape maintenance, landscape installation and snow removal services. Ex. 3(b) at 1. His company specializes in the design and installation of water gardens. His clients include homeowners’ associations, shopping malls, office parks and individual homeowners. Mr. Brown proposes hours of operation at the subject property of 7:30 a.m. to 6:30 p.m. Monday through Friday and 9:00 a.m. to 3:30 p.m. on Saturdays. In general, on-site activities would consist of employees arriving in the morning, parking their cars on site, loading up a trailer and leaving the site between 8:00 and 8:30, then returning in the evening, storing the equipment and leaving for the night. Activity during the day generally would be limited to deliveries, either by Mr. Brown’s employees using his trucks, or by an outside company. Deliveries would be limited to normal business hours, Monday through Friday. There would be no sale of products of any kind from the subject property, nor would any customers come to the property.

Mr. Brown proposes a maximum of six employees in addition to himself. Up to three of these employees would be employed for ten months of the year rather than twelve.

The Petitioner proposes to build a pole barn in the eastern corner of the property to house six trucks and five landscape trailers for use in his business, as well as hand tools and one piece of heavy machinery. The pole barn would measure 50 feet by 50 feet, according to the “Special Exception Plan” (site plan), Exhibit 25. The Petitioner also submitted a building section drawing from the commercial lumber yard 84 Lumber, which depicts a pole barn measuring 40 feet by 64 feet. See Ex. 5(a). If the special exception is granted, the Petitioner will be bound by the representation on the site plan that the pole barn will measure no more than 50’ x 50’. The record is

somewhat inconsistent about the height of the pole barn. The Petitioner testified that the pole barn would be 12 feet high to the gutters and 15 feet to the roof ridge line. Later, he testified that the security light attached to the roof ridge line would be 20 to 25 feet high, depending on final grading. The Hearing Examiner recommends limiting the pole barn to a height of 20 feet as a condition of approval, to establish a definite height limitation. The pole barn would have red sides with a white roof and doors.³ See Ex. 10(a).

Mr. Brown submitted a list of specific vehicles, complete with model and year numbers, which he currently owns and proposes to use in connection with the proposed special exception. See Ex. 15. During the hearing he provided a more generic description of the type of vehicles, trailers and heavy equipment he proposes, as summarized below and incorporated in the recommended conditions of approval:

- One 24,000 pound flat-bed truck
- Two standard pick-up trucks
- One pick-up truck with crew cab
- One medium-duty pick-up truck
- One heavy-duty pick-up truck
- Five 16-foot landscaping trailers
- One skid-loader (heavy equipment, transported on the back of a trailer)

As a general matter, all of the vehicles and heavy equipment would be stored in the pole barn. If one of his vehicles breaks down and needs a minor repair, Mr. Brown would like to have the flexibility to leave that vehicle outside the pole barn for one or two days while he secures necessary parts and makes the repair. He does not plan to do oil changes or anything else involving fluids on the site. He requested a condition allowing him to store one vehicle at a time outside the pole barn, for minor repairs, for no more than two days at a time. Tr. at 40.

³ At one point Mr. Brown's testimony suggested that he planned to select the final colors at a later date. Later in the hearing, apparently after consultation with counsel, Mr. Brown stated more definitively that the colors would be consistent with the color samples provided in Exhibit 10(a).

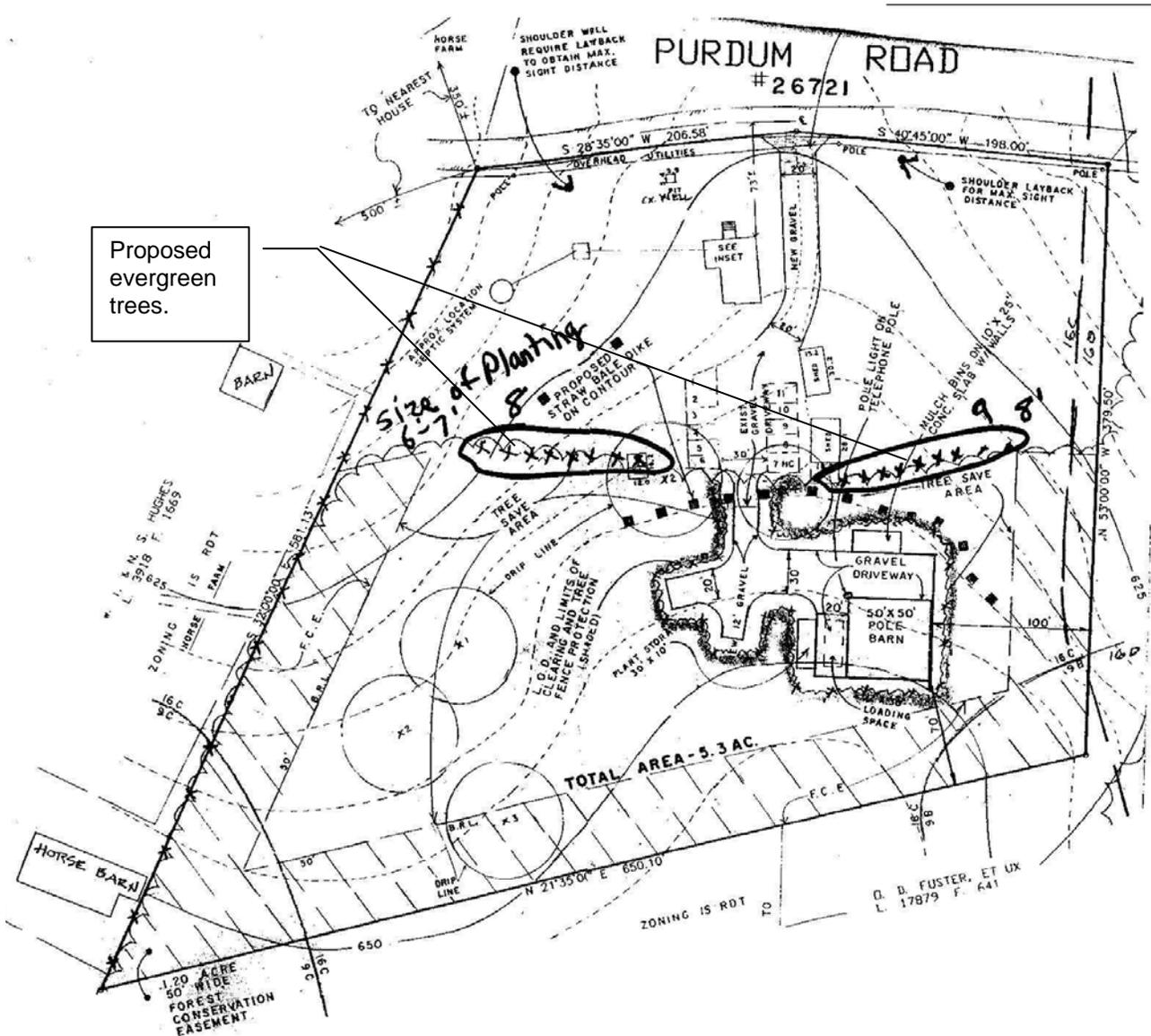
Evidence submitted concerning snow removal services is somewhat inconsistent. The Petitioner's Statement of Operations states in its description of equipment that "snow plows and snow blowers will be stored in the building on the property when they are not in use." Ex. 3(b) at 2. Mr. Brown testified at the hearing, however, in response to questioning from a neighbor, that he does plowing for the County and no snow plows or plowing equipment would be kept on site. Tr. at 69. The recommended conditions of approval hold Mr. Brown to his testimony by specifying that no snow plows or plowing equipment may be kept on site.

The conditions of approval recommended by the Planning Board included a condition stating that no sale of goods or services can occur on-site. The People's Counsel, Martin Klauber, represented that this condition, as written, did not reflect a concern raised during the Planning Board's discussion of this case. In a supplemental staff report, Technical Staff explained that some Planning Board members suggested that equipment used for planting trees and shrubs should be used only off site, given that the proposed special exception does not include a horticultural nursery. See Ex. 21. Accordingly, Technical Staff recommended that the condition in question be revised to clarify that planting equipment may be stored on site but may not be used on site. See *id.* The Petitioner testified before the Hearing Examiner that this condition would be unworkable. Although he does not propose to grow any plants on site, he does propose to store plants there and to use a skid-loader to load plants onto trailers for transport to job sites. The skid loader would also be used to plant trees and bushes at job sites, so it falls within the "planting equipment" category. Neither the Petitioner nor his counsel attended the Planning Board meeting where this matter was discussed, nor did they obtain a copy of the Staff Report prior to the hearing conducted by the Hearing Examiner. As a result, they were not able to explain to the Planning Board and Staff the need to use the skid loader on the subject property.

Mr. Brown proposes to widen and extend the existing gravel driveway to the front of the pole barn, with a small, gravel parking area between the house and the barn. The apron where the driveway meets the street would be paved, and some re-grading would be necessary to ensure adequate sight distances. The parking area, with 11 spaces, would provide parking for the residence

and for employees of the landscape contracting business. Technical Staff suggests that the parking spaces would include four spaces for employee parking, one handicapped-accessible space, two spaces for the residential use and four spaces for business vehicles. The Petitioner testified as to some confusion about these numbers, because he intends to park all of the business vehicles in the pole barn, not in the parking lot. Moreover, several of his employees car-pool to work, so the six employees do not need six parking spaces. Nonetheless, the submitted site plan shows 11 parking spaces and Mr. Brown will be bound by it if the special exception is granted. The Special Exception Plan is reproduced below, minus its General Notes and other technical data.

Special Exception Plan, Exhibit 25



The site plan identifies a loading area and a plant storage area just west of the pole barn. Mr. Brown testified that the loading area would be gravel and the plant storage area would have a dirt surface. Plants stored on site could include any kind of shrubs or trees, which could be in burlap, in plastic containers or in the form of bulbs in a crate. No plants used in the landscaping business would be grown on site. They would be purchased elsewhere and transported to the site by the same trucks used for landscaping installation.

Mulch would be stored in a 10' x 25' bin just north of the pole barn, consisting of a concrete slab with two-foot walls constructed of concrete blocks. The concrete slab base would be designed to prevent leaching in the event the mulch starts to decompose. Mr. Brown plans to store about 30 yards of mulch on site, to be delivered by dump truck about one or twice a month from February to November. No chemicals or pesticides would be stored on site, as Mr. Brown subcontracts the pesticide and chemical aspect of garden maintenance to others. His business focuses on landscaping and mowing.

Both the Petitioner and Technical Staff state that no adverse affects should be expected due to noise, because most of the activity associated with the use would take place off-site. Mr. Brown testified that the engine noise from the skid-loader, the only heavy equipment to be operated on-site, is comparable to the engine noise from a typical sedan. The Hearing Examiner notes that other noise impacts during landscape contractor loading and unloading operations typically include vehicle engines, the noise of vehicles moving on gravel surfaces, vehicle back-up alarms and voices. In response to a concern raised by a neighbor, the Petitioner agreed not to operate a chipper on site, except in his capacity as an individual homeowner.

C. Master Plan

The subject property is in the area covered by the *Damascus Master Plan* (the "Master Plan"), approved and adopted in 1982 and amended in 1985 and 1993. Technical Staff states that the Master Plan supports the existing RDT zoning classification on the subject property, which

permits landscape contractor uses by special exception. Accordingly, Staff opines that the proposed use would be consistent with the Master Plan.

D. Lighting, Signage and Landscaping

The only exterior lighting proposed in connection with the special exception is a single 100-watt fixture, to be mounted on the ridge of the pole barn at a height of approximately 20 to 25 feet, depending on the final grade of the building. Mr. Brown indicated that this height is necessary to provide enough illumination to deter intruders. He plans to keep the light on all night for security purposes because without it, that area of the property, near the woods, would be very dark at night. He testified that this light would be no more visible than similar lights on neighboring properties. The Hearing Examiner notes that the light would be approximately 120 feet from the nearest property line and at least 500 feet from the nearest residence.

Technical Staff opined that the proposed lighting would be sufficient to provide a safe and secure environment for the property, and that the fixture proposed is of a type that is very common in rural neighborhoods. See Exs. 22, 31. Staff stated that no light trespass, sky glow or glare is expected from this fixture, regardless of whether it is on a dusk-to-dawn timer or, as discussed during the hearing, a motion sensor. See Ex. 31. Accordingly, Staff suggested that the timer v. motion sensor decision be left to the Petitioner. The Petitioner prefers to use a timer. See Ex. 32 at 1. The proposed light fixture and its specifications are shown below.

Lighting Fixture and Specifications, Excerpted from Ex. 9

To be mounted 20' High

COOPER Lighting LUMARK

Scout™ Dusk-To-Dawn Area Fixtures

Features On-at-dusk, Off-at-dawn photo control.
 Housing: Die-cast aluminum head finished in grey polyester powder coat.
 Reflector: Fluted, formed aluminum reflector fastens to main housing with steel spring release latches for secure fit.
 Refractor: Open bottom refractor is designed for efficient performance at a low initial cost. Type V distribution is standard.
 Dimensions: 17 1/2" H x 12" W.
 Installation: Includes 15" mounting bracket and all hardware.
 Lamp Included: No. 4PK99 has 100W high pressure sodium lamp. No. 4PL01 has 175W mercury vapor lamp.
 Approvals: Meets NEMA specifications for off-street area lighting. UL Listed (E12585) for wet locations and CSA Certified.
 Uses: Ideal for small area lighting, parking lot security lighting, residential and barnyard lighting.

No. 4PK99

HID Type	Lamp Watts	Suggested Replacement Lamp Stock No.	Max. Starting Line Amps	Max. Operating Line Amps	Lumark Model	Stock No.	List Price
HPS	100	2V519	3.2	2.1	SS10	4PK99	\$110.00
Mercury Vapor	175	5V586	4.0	3.3	SV17	4PL01	\$175.00

(←) Denotes energy efficient product.

The forest on the site is made up largely of deciduous trees. As a result, it provides limited visual screening during the winter months. As shown in handwritten markings on the site plan shown on page 11, the Petitioner plans to plant a row of evergreen trees at the edge of the landscape contractor work area, on either side of the gravel drive. These trees, to be planted eight feet apart at a height of six to seven feet at planting, would effectively screen the pole barn and most of the work area from Purdum Road. Mr. Brown plans to remove the three small sheds currently on site and store all of his equipment in the pole barn. As a result, the only features of the special exception readily visible from Purdum Road would be the gravel drive and the parking area.

The Petitioner proposes to erect an unlit sign along Purdum Road, near the entrance to the property. A black and white version of the proposed sign is shown below.

Proposed Sign, Exhibit 7



E. Utilities, Stormwater Management and Environmental

The subject property is served by a private well and septic system. Technical Staff stated in a supplemental report that the septic system and well site have been deemed sufficient by the Department of Permitting Services ("DPS"). See Ex. 22. Mr. Brown testified that the septic

system on his property would not be affected by the proposed special exception, because his employees would not be permitted to use the bathroom facilities in the house except in an emergency. As a general matter, the employees would be expected to use bathroom facilities at gas stations on their way to and from work sites. Mr. Brown stated that his current landscaping business operates in that fashion with no difficulty. Neighbors who participated in the hearing found this explanation implausible, and argued that if the proposed special exception is granted, Mr. Brown should be obligated to install a well and septic system that is adequate to handle the anticipated number of employees. One resident, Mr. Stephen King, testified in his individual capacity but is employed by Montgomery County as a Senior Permitting Specialist for DPS. As a result, he brought to the case considerable knowledge about building requirements and related issues.

Mr. King stated that barns such as the one Mr. Brown proposes on the subject property require a building permit, but they have been interpreted not to require sanitation facilities because they are considered storage uses. See Ex. 34 at 3. He stated that DPS does not impose a sanitation requirement because of a perception that the Board of Appeals does not consider it necessary. See *id.* at 4. Mr. King argued that, as a matter of fairness to neighborhood residents, a pole barn connected to a special exception should be treated like any other business and required to meet normal sanitation requirements.

The Petitioner has not prepared a stormwater management plan. The submitted Special Exception Plan depicts a straw bale dike that apparently is intended to serve a stormwater management function. This has not been reviewed or approved by DPS. The recommended conditions of approval include a requirement that the Petitioner obtain DPS approval for a stormwater management and sediment control plan.

The only environmental issue that was raised in this case concerned the location of the pole barn, which was depicted on early submissions in the southern portion of the subject property. Technical Staff determined that the southern portion of the property contained high quality forest that merited preservation, and recommended that the Petitioner locate the pole barn in the eastern corner of the property, where the forest is of lesser quality, with spot canopies and virtually

no understory. The Petitioner complied with this request, as shown on the Special Exception Plan, Exhibit 25. Technical Staff indicates that the proposed site layout and tree clearing satisfies applicable forest conservation requirements by preserving the required 2.75 acres of forest on site.

F. Traffic

The proposed use would generate far fewer than 50 vehicle trips during the morning and evening peak hours. Accordingly, no traffic study is required to satisfy Local Area Transportation Review requirements. Moreover, the subject property is located in a rural policy area where Policy Area Transportation Review requirements do not apply. See Staff Report, Ex. 20 at 4. The only substantive traffic-related issues raised in this case relate to site access and potential adverse impact on the local road network, particularly Purdum Road.

Mr. King and other neighbors who are opposed to the special exception at issue here testified that Purdum Road is too narrow, winding and hilly to sustain the increase in truck traffic that the proposed use would generate. They maintain that the general neighborhood already has a disproportionate amount of truck traffic because of several landscaping, construction and heavy vehicle maintenance businesses in the vicinity, some of which appear to be operating illegally. The Opposition states that local residents frequently have to drive off the road surface on Purdum Road and nearby Bethesda Church Road to make room for large trucks or pick-up trucks hauling landscape trailers. They maintain that additional truck traffic going to and from the subject property would exacerbate these unsafe conditions. Mr. King suggested that in view of the status of Purdum Road as an Exceptional Rustic Road, the Rustic Roads Advisory Committee should have been asked to comment on the proposed special exception. Comment by this committee on special exceptions is not consistent with established administrative practice, to the knowledge of the undersigned, nor is it required or even suggested in the Zoning Ordinance. See Ex. 34 at 2.

Mr. King argues that the driveway entrance proposed for the subject property, with a 20-foot apron, would be inadequate to accommodate the movement of very large vehicles, such as tractor trailers, into and out of the site. See *id.* He noted that the Technical Staff appears to have

relied on the Petitioner's statement that he found no operational or physical problem when testing 18-wheeler movement into and out of the site, without any supporting data or modeling information provided by the Petitioner. Mr. King concedes that a 20-foot apron may be adequate for a tractor trailer to get in or out, but maintains that there would not be enough room to turn around. This suggests tractor trailers would back out of the subject property onto Purdum Road, creating a safety issue that has not been specifically addressed.

Mr. King also alleges that no evidence was presented as to whether the gravel depth proposed by the Petitioner on the internal portion of his driveway would be adequate to prevent erosion, with the wear and tear of tractor-trailers. The Petitioner stated that he felt it would be in his interest to have adequate gravel on the drive. Technical Staff did not comment on this issue.⁴

Transportation Planning Staff submitted a supplemental post-hearing memorandum, at the Hearing Examiner's request, to respond to issues raised at the hearing. See attachment to Ex. 31. Relevant portions of this report are quoted below.

Based on our review of the existing conditions on Purdum Road and the proposed site entrance as shown on the site plan, it is staff's opinion, the roadway conditions on Purdum Road can accommodate both the vehicles the applicant proposed to house on-site and the limited use of 18-wheel tractor-trailers without adverse impacts on the local road network. There is no operational limitation, such as weight-limited bridges, or a truck-prohibited roadway section on Purdum Road, and trucks including 18-wheel tractor-trailers are currently allowed to use Purdum Road.

During 2003, the Planning Board recommended Purdum Road be classified as an exceptional rustic road in the Rustic Road Functional Master Plan (RRFMP) amendment process. As part of this process, Purdum Road passed all criteria required for rustic road classification, including a review of traffic volumes and accident history, which reflected the operations of existing truck traffic on the narrow road as indicated in the December 8th testimony. Purdum Road was found to have an average daily traffic (ADT) volume of 190 vehicles per day and two recorded accidents, unrelated to drugs or alcohol in the past five years, below the respective review standards of 3,000 ADT and eight accidents. The RRFMP recognizes some operational conflicts exist in designating rustic roads because some heavy vehicles, such as tractor trailers and farm machinery, are needed to support the agricultural uses along these narrow roads with both winding horizontal curves and steep vertical curves. These operational conflicts

⁴ A supplemental memorandum from Transportation Planning Staff to Community-Based Planning Staff closed by stating "We look forward to coordinating with you further, regarding the adequacy of the depth of gravel proposed for the internal site drive." The supplemental staff report submitted with this transportation memorandum did not address gravel depth, nor was any additional information provided at a later date.

are addressed by the RRFMP recommendation that rustic road classifications are suitable only for low-volume roads with an accident history suggesting safe operations.

Regarding the adequacy of the site entrance in the context of the truck traffic, the proposed site entrance is designed consistent with the Montgomery County Standard MC-301.03, paved driveway apron. Based on our review of the turning radius using a vehicle turning template for . . . an 18-wheel tractor trailer, the proposed driveway physically accommodates the truck movement. Also, the applicant indicates that they found no operational or physical problem when they tested 18-wheel tractor-trailer movement into and out of the site. It is staff's opinion that the proposed 20'-wide entrance road from Purdum Road is adequate to provide safe access to the site.

Thus, Transportation Planning Staff concluded that both Purdum Road and the proposed site entrance can accommodate the proposed special exception.

Mr. King sought to undermine the weight given to the opinions provided by Transportation Planning Staff at the MNCPPC, stating that he believes, "after years of dealing with [MNCPPC traffic] studies, that they are statistics that the DPWT [Department of Public Works and Transportation] provides for MNCPPC." Ex. 34 at 2. He states that "MNCPPC has no independent division to assess traffic, all reviews for traffic studies come from independent contractors who provide the information to MNCPPC. . . . " *Id.* Mr. King's charges are unsubstantiated. Moreover, he submitted these accusations in writing on the day the record closed, without copies to Technical Staff. Accordingly, no response has been provided. Under these circumstances and based on the transportation-related reports submitted by MNCPPC in this case, the undersigned believes that Mr. King has unfairly underestimated MNCPPC Transportation Planning Staff and the weight to be accorded to its opinions.

G. Subdivision

Technical Staff and the Planning Board recommended as a condition of approval that the Petitioner be obligated to comply with the subdivision regulations of Chapter 50 of the County Code prior to the issuance of any building permit. The Petitioner objects to this condition, arguing that the subject property qualifies for an exception to the building permit and subdivision requirement. The Petitioner states that under Section 50-9(a)(2) of the subdivision regulations, a subdivision plat is

not required for land that “will ‘remain part of a farm,’ but that is used concurrently for a related use that requires issuance of a building permit.” Ex. 32, numbered paragraph 3. He notes that this provision states that it applies to an approved special exception unless the Board of Appeals requires subdivision as a condition of the special exception. *See id.*

The Petitioner turns to the definition of “farm” in Chapter 50 to support his contention that the proposed landscape contractor business would qualify as a farm. He states that Chapter 50 defines a farm as “a tract of land, with or without associated buildings, that is devoted to agriculture . . . the science or art of ‘ . . . managing the soil, growing and harvesting . . . plants, forestry, horticulture . . . and similar activities.” *Id.* The Petitioner then cites the definition of a landscape contractor in Section 59-A-2.1, which includes designing, installing, planting or maintaining lawns, gardens or other landscaping. He states, without additional support, that lawns, gardens and landscaping “clearly fall within the purview of an agricultural use.” *Id.*

Staff of the MNCPPC Development Review Division stated in a supplemental staff memorandum that the subject property, measuring 5.3 acres in size, does not qualify as a farm because it is less than 25 acres in size, and that a commercial landscape contractor use is not considered agricultural. *See* attachment to Ex. 31.

The Hearing Examiner finds the Petitioner’s argument unpersuasive. The position articulated by the MNCPPC Development Review Division carries considerable weight, in light of that Division’s responsibility for implementing the subdivision regulations. Moreover, a mere perusal of the partial definitions the Petitioner provided of “agriculture” and “landscape contractor” leads to the conclusion that they are not the same thing – the former involves growing plants *on a farm* while the latter involves planting and maintaining lawns and plants *off-site*. To suggest that a landscape contractor is engaged in agriculture merely because the product that he delivers and installs for customers is something that he purchased from a farm requires a logical leap that the undersigned is unwilling to make. The Petitioner did not cite what is facially a more persuasive argument, that the specific conditions for a landscape contractor arguably imply that landscape contractor is an “agricultural special exception.” *See* Code § 59-C-2.30.00(6). That provision should be viewed in

the context of the common combination of horticultural nursery, which involves growing plants, and landscape contractor, which does not. That provision, alone, is not reason enough to reject MNCPPC's practice and consider this proposal to be exempt from subdivision. Accordingly, the Hearing Examiner recommends that the BOA defer to MNCPPC's determination that subdivision is required, and include an obligation to obtain subdivision approval as a condition of approval if the special exception is granted.

H. Development Standards

The Special Exception Plan, Ex. 25, states that the proposed use would comply with setback and frontage requirements applicable under the RDT Zone, but it cites those requirements incorrectly.⁵ The Staff Report states that the proposed use would comply with the minimum lot size under the RDT Zone and the operational setback of 50 feet required under the specific conditions for a landscape contractor use. It does not, however, address the setbacks required under the RDT Zone. The following table sets forth development standards applicable in the RDT Zone under Code § 59-C-9.4, together with relevant data from the Special Exception Plan submitted in this case.

	Required	Proposed (Pole Barn)
Minimum net lot area	40,000 sq. ft.	5.3 acres
Minimum lot width		
Measured along front building line	125 feet	No specific lot widths provided; lot appears to measure roughly 400 feet narrowest point.
Measured along front street line	25 feet	
Yard requirements for an accessory building		
From front lot line or proposed street line	50 feet ⁶	Not provided; appears to be roughly 300 feet 100 feet 70 feet
From the side lot line of an interior lot	15 feet	
From a rear lot line	10 feet	

As shown in the table above, the proposed use satisfies the applicable development standards for the RDT Zone.

⁵ The setback requirements noted on the Special Exception Plan are those for a main building, while the only construction proposed in this case is an accessory building.

⁶ This setback must consist of any scenic setback indicated on an approved and adopted master plan or 50 feet, whichever is greater. The record contains no indication of any applicable scenic setback.

I. Community Participation

Two neighbors participated in the hearing, Mr. King (referred to in previous sections) and Chuck Harris. Mr. King spoke on behalf of himself and of Mr. and Mrs. Larry Hanniker, who also live on Purdum Road. The opposition's principal concern was potential adverse impact on Purdum Road traffic conditions, as discussed in Part F above. Concerns about visual impact were largely met by the Petitioner's commitment to plant a row of evergreen trees that would block most of the special exception operations from view. Mr. Harris raised a concern that approving this special exception could lead to an application for a bigger operation on the property, for example if someone else buys the property from Mr. Brown. This concern cannot be considered relevant to the legal determinations the BOA is required to make. Any future application for an expanded business operation on the subject property would be the subject of another public hearing and would be considered at that time, on its own merits.

Mr. King stated that the general neighborhood of the subject property already has a large number of landscaping and construction businesses that have adverse effects on the character of the neighborhood. He submitted into the record a map showing the locations of six such businesses within a few miles of the subject property, four of which are located on or very near Purdum Road. Mr. King argued that the neighborhood should not have to absorb another use of this type. The Petitioner did not contest the veracity of Mr. King's testimony, although he was quick to state that his business would not be unsightly like some of the others that have vehicles and heavy equipment strewn about.

Mr. Harris suggested that although the Petitioner described his business as having limited activity during the day, with most of the activity centered on morning loading and evening unloading of trucks, nothing would prevent him from having more intense use of the property during the day. The recommended conditions of approval include a condition that is designed to address this concern by specifically limiting the approved special exception to the operations described in the Petitioner's testimony and statement of operations.

The record contains two letters in support of the proposed special exception, both of which were submitted after the hearing. See Exs. 29 and 30. These letters are from Walter and Nancy Hughes, who for 34 years have lived on a 12-acre property adjoining the subject property to the southwest, and Michael and Barbara Cannizzo, who have lived directly across the street from the subject property for 20 years. The two letters are substantially similar. Both state that the lighting proposed in this case would not be problematic for the neighborhood. The Hughes state that they and most of the residents of Purdum Road have dusk-to-dawn security lights, while the Cannizzos state that they have two security lights on their farm. Both letters contest the contention by opposition witnesses that area residents often have to pull off the road surface to allow large trucks to pass, stating that the writers have never had to do so, nor have they witnessed anyone else doing so. The Hughes state that the largest vehicles that routinely travel Purdum Road are school buses, service and utility trucks and trash trucks, and that an occasional pick-up truck passes by pulling a landscaping trailer. Both letters voice confidence that Mr. Brown would deal with the driveway entrance and gravel depth issues appropriately.

Mr. Harris submitted a letter into the record in response to the Hughes and Cannizzo letters. See Ex. 33. He suggested that the Cannizzos support for the proposed special exception should carry little weight because they have put their property up for sale. He stated that in a neighborhood with about 20 houses and a thousand acres of land, the only security lights are on the Hughes property, the Cannizzo property and the subject property. He noted that the power company offers residents the option of a dusk-to-dawn yard light and only two households have accepted that offer. He suggests that the rest prefer darkness.

Mr. Harris indicates that it is undoubtedly true that cars have not been run off the road by trucks in front of the Hughes and Cannizzo properties, which are on a relatively straight, wide section of the road with few trees. However, he maintains that he was run off the road one evening last Fall by the Petitioner's pick-up truck, which was pulling a landscape trailer around a bend in the road. Finally, he describes his view of the impact the proposed use would have on his small, very quiet, rural community:

A commercial business with its daily use of heavy earth moving equipment, its frequent deliveries by dump trucks that roar and belch out soot and exhaust, and its daily caravans of pickup trucks towing trailers full of mowing equipment, challenging us at our every encounter, cannot help but adversely affect our way of life, our privacy, our safety, our peace and quiet, our darkness.

III. SUMMARY OF TESTIMONY

A. Applicant's Case

The Applicant, Scott D. Brown, served as his only witness. Mr. Brown testified that he is the owner of the subject property and resides in the single-family home located on it. He explained that he intends to provide landscape and lawn maintenance services to clients, housing the trucks and trailers for the business on the subject property. Hours of operation would be from 7:30 a.m. to 6:00 p.m. Monday through Friday, depending on weather conditions. They would also work on Saturdays at times. Employees would arrive in the morning and park their cars on site, although most of them car-pool. They would load up a trailer and leave the site between 8:00 and 8:30, not returning until evening. At that point the equipment would be locked up and doors shut and the security light would come on. There would be no sale of products of any kind from the subject property, nor would any customers come to the property.

Mr. Brown stated that trucks and trailers for the proposed use would be limited to the number specified on Exhibit 15(e). At the suggestion of the People's Counsel, he explained what type of vehicle is represented by each of the models listed on that exhibit, so that a corresponding condition can be crafted based on vehicle types rather than specific models that may not be able to be replaced in the future. Tr. at 58-62. All vehicles would be housed in the pole barn that is proposed for construction as part of this petition.

Based on the advice of Technical Staff and a professional arborist, the location of the pole barn is planned for the east side of the site, in the area with the lowest forest quality, where a significant number of trees have already been cut down or died. Mr. Brown pointed out on an aerial photograph (Ex. 24) that the lesser quality of forest in that area, compared with the western and

southern portions of the site, is visually apparent. Tr. at 10. He also pointed out on the aerial photo the current uses of adjoining properties, and the distances from his property to the nearest homes.

Mr. Brown stated that he proposes to extend the existing gravel driveway into the subject property past the house and to the front of the pole barn, with a small, gravel parking area between the house and the barn. The parking area would have 11 parking spaces. Technical Staff described these as four spaces for employees, one handicapped-accessible space, two residential spaces and four spaces for business vehicles. Mr. Brown testified that this description is mistaken, because in fact all of his business vehicles would be parked in the pole barn, except for a truck that he drives, which would be parked in the gravel lot. He first testified that the parking spaces would not be marked, but later amended his testimony to specify that the handicapped-accessible spaces would be designated with a painted mark and a sign. Tr. at 57.

If one of his vehicles breaks down and needs a minor repair, Mr. Brown would like to have the flexibility to leave that vehicle outside the pole barn for one or two days while he secures necessary parts and makes the repair. He does not plan to do oil changes or anything else involving fluids on the site. He requested a condition allowing him to store one vehicle at a time outside the pole barn, for minor repairs, for no more than two days at a time. Tr. at 40.

Mr. Brown currently has porch lights on the front and side of his home, as well as a security light that turns on when he pulls around to the back of the house. He proposes to install an additional security light, to be pole-mounted at the corner of the pole barn at a height of 20 to 25 feet, depending on the final grade of the building. Mr. Brown indicated that this height is necessary to provide enough illumination to deter intruders. He plans to keep the light on all night because it would be the only light out there in the woods. He said that it would be no more visible than other pole lights that he can see on his neighbors' properties. In response to a statement by the People's Counsel that the Planning Board had discussed, when it considered this petition, the possibility of putting that light on a motion sensor, Mr. Brown stated that either a motion sensor or having the light on from dusk to dawn would be acceptable to him. Tr. 54-55.

Mr. Brown noted that there are currently three small storage sheds on the property, which he intends to tear down once the pole barn is available. He described the other features shown on the site plan, including the mulch bin, loading area and plant storage area. He stated specifically that no chemicals or pesticides would be stored on site because he subcontracts the pesticide and chemical aspect of garden maintenance to others.

Mr. Brown testified that the septic system on his property would not be affected by the proposed special exception because his employees would not be permitted to use the bathroom facilities in the house except in any emergency. As a general matter, the employees would be expected to use bathroom facilities at gas stations on their way to and from work sites. Mr. Brown stated that his current landscaping business operates in that fashion without any problems.

Mr. Brown is 23 years old and has lived in the area of the subject property since the age of seven. He stated that is familiar with the population density and types of buildings in the area, and he believes that the pole barn he proposes would be in harmony with the neighborhood. The only noise generated by the business would be vehicles engines and a skid-loader, a piece of heavy equipment with different attachments to serve several functions, such as digging holes and moving plants. Mr. Brown testified that the engine noise from the skid-loader is no louder than a typical car. He plans to have hoses available to control dust from the gravel. He stated that all of the existing and proposed buildings are at least 50 feet from the property lines, and he considers the screening and buffering adequate to protect neighbors from noise, dust, odor or other objectionable impacts.

Mr. Brown proposes an unlit sign on Purdum Road, near the entrance to the property. In response to concerns voiced by a community member about the visual impact of the proposed business use as seen from Purdum Road, Mr. Brown testified that he intends to plan a row of evergreens between the parking area and the pole barn, which would screen the view of the business operations from the street. At the Hearing Examiner's request, Mr. Brown manually amended his site plan to show the locations and tree sizes proposed at planting. See Ex. 25.

In response to questioning by a community member, Mr. Brown stated that his business includes snow plowing, but they do that work for Montgomery County and therefore would

not keep any snow plows on site. Mr. Brown acknowledged that the only sediment control measure shown on the site plan is a straw bale dike, and that he would be required to obtain a sediment and erosion control permit prior to construction.

Also in response to a community member, Mr. Brown stated that he has no current plans for deliveries arriving by tractor trailer, and that he is willing to limit any such deliveries to no more than two per month, within normal business hours. Tr. at 77-78.

B. Opposition

1. Stephen King

Mr. King lives on Purdum Road about 1,000 feet northeast of the subject property, near Bethesda Church Road. He spoke on behalf of himself and two other Purdum Road residents, Mr. and Mrs. Larry Hanniker. Mr. King is employed by the Montgomery County Department of Permitting Services as a Senior Permit Processing Specialist and reviews special exceptions and other land use matters in his professional capacity. He participated in this matter, however, in his personal capacity.

Mr. King stated that Purdum Road is a small, hilly residential road that twists and turns as it goes up and down. He submitted a series of photographs of the road in the vicinity of the subject property. Mr. King questioned whether the proposed driveway apron could safely accommodate an 18-wheel tractor trailer, which has a wide turning radius. He suggested that an 18-wheeler would have to do a lot of maneuvering to go on and off the site, and that neighbors would be very much opposed to such large vehicles on Purdum Road.

Mr. King is concerned that despite Mr. Brown's representations that his employees would not use bathroom facilities on the site, a special exception should not be approved without an approved septic plan showing that well and septic facilities on the property are adequate for the number of people expected to use those facilities. He noted that when a house is built, the septic requirement is based on the number of bathrooms, because those bathrooms represent bedrooms and people, and that a similar standard should be applied here.

Mr. King also argued that his neighborhood currently suffers from the adverse impacts of a number of landscaping businesses, some of which may be operating illegally, and they should not have to bear the burden of an additional one. He submitted photographs showing a lot in the general vicinity that is used for tractor trailer repairs and dump truck operations, and another that is used for trucks and other elements of a construction business. He stated that it is not uncommon for residents to come around the corner and find a tractor trailer parked in the middle of the road, preventing other vehicles from passing. He maintained that the neighborhood already has a high density of landscaping and other business operations and should not have another one added.

Mr. King objected to the condition requested by Mr. Brown that would allow him to keep one vehicle at a time outside the pole barn, for minor repairs, for up to two days at a time. His concern was somewhat resolved by Mr. Brown's testimony that he intends to plant a row of evergreen trees that would screen the view of the pole barn and surrounding area from the street.

Based on his experience in seeing the divergence, at times, between what the Board of Appeals intends and what happens during implementation, Mr. King recommended a condition of approval, if the special exception is approved, that would require the Petitioner to obtain any necessary building permits or other approvals from the Department of Permitting Services.

2. Chuck Harris

Mr. Harris resides at 26700 Purdum Road, diagonally across the street from the subject property. His property shares about 30 feet of property line with Mr. Brown, whom he has known since Mr. Brown was about ten years old.⁷ Mr. Harris did not make a statement, observing that Mr. King had adequately voiced his concerns, but he did ask a number of questions, the substance of which is summarized below.

⁷ Mr. Harris stated that his shared property line is at the southern corner of Mr. Brown's property. The subject property and Purdum Road sit at odd angles relative to the four compass directions, but it appears from the site plan that Mr. Harris's home is located across Purdum Road from the western corner of the subject property. If area residents think of Purdum Road as running north/south, what appears on the site plan to be the western corner of the property would be considered the southern corner. The submitted Special Exception Plan does not show any common boundary between the subject property and Mr. Harris's property. The Hearing Examiner has not attempted to resolve this discrepancy, as it is not directly relevant to the issues to be decided.

Mr. Harris is concerned that while the use Mr. Brown described during the hearing might not be too bad, it could become a stepping stone for someone else who buys the property later to build more ambitious projects. Mr. Harris also fears that the long hours of operation Mr. Brown proposes would expose him and other neighbors nearby, who are at home basically 24 hours a day, to noise and lots of activity all day long. He noted that the subject property is the highest point in what he estimated would be a circumference of three miles. It is a very visible piece of property and the forest is deciduous, so anything going on towards the back of the property could be very visible. Finally, he echoed Mr. King's concern about additional truck traffic on narrow, winding, hilly Purdum Road. He testified that on several occasions he has been forced to leave the road surface to make room for a passing landscaping truck.

IV. CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards, both specific and general, are met. The special exception is also evaluated in a site-specific context because there may be locations where it is not appropriate. Based on the testimony and evidence of record, I conclude that the proposed landscape contractor special exception would satisfy all of the specific and general requirements for the use.

A. Inherent and Non-inherent Adverse Effects

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 landscape contractor. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed use that are not consistent with the characteristics thus identified, as well as 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 landscape contractor use: structures or outdoor areas for the storage of plants grown off-site; 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 and suppliers; trips to and from the site by employees engaged in off-site landscaping activities; parking for employees; dust and noise associated with the movement of nursery and landscaping products and the loading and unloading of landscaping equipment; noise associated with the occasional testing of lawn mowers and other landscaping equipment; and early hours of operation.

Technical Staff did not make a specific finding as to whether any non-inherent adverse effects are present in this case. Staff concluded, however, that none of the physical or operational characteristics of the use proposed here would have adverse effects on the neighborhood.

The Hearing Examiner finds, based on the totality of the evidence presented in this case, that most of the characteristics of the proposed use should be considered inherent characteristics. The physical characteristics are all inherent in the use; the pole barn, parking area and outdoor storage areas are all typical of landscape contractors. The basic operations of the business, including the arrivals and departures of employees and loading and unloading activities,

are typical of landscaping contractors and should be considered inherent. Trips from the subject property to job sites and back are generally an inherent operational characteristic of landscape contractors, as are deliveries from suppliers. However, the nature of a particular operational characteristic can turn an inherent adverse effect into a non-inherent one. Moreover, adverse effects created by unusual characteristics of the site are, pursuant to the specific language of Code § 59-G-1.2.1, non-inherent. In the case at hand, the undersigned finds that both trips to and from job sites and deliveries must be considered non-inherent adverse effects because of the character of Purdum Road. In addition, deliveries by tractor-trailer are not necessarily associated with a landscape contractor, as demonstrated by Mr. Brown's own testimony that he does not currently foresee such deliveries. Accordingly, they should be considered a non-inherent adverse effect in this case.

Opposition Evidence: General Truck Traffic. Undisputed evidence established that Purdum Road is a narrow, winding, hilly road that is classified as an Exceptional Rustic Road. Testimony by two neighbors about cars being forced to pull off the pavement to allow tractor-trailers and trucks with landscaping trailers to pass was contested in letters submitted by two other neighbors. The Hearing Examiner found the neighbors who participated in the hearing to be credible in their description of current conditions. Mr. King's testimony, in particular, deserves extra weight because of his expertise as a permit specialist for DPS. Lacking the opportunity to observe the demeanor of the neighbors whose participation was limited to letters, and bearing in mind that the need to pull off the pavement in a given situation may be perceived differently by different drivers, the Hearing Examiner concludes that at least some Purdum Road residents have felt the need to pull off the pavement to allow larger vehicles to pass safely. The opposition also objected to the general impact of increased truck activity and associated noise as interfering with the peace and quiet of a rural environment and adding to the disruptions caused by several existing landscaping and construction businesses in the area.

Opposition Evidence: Tractor Trailers. Mr. King submitted evidence, both written and oral, suggesting that the entrance planned for the subject property would not be able to safely accommodate tractor-trailers. He noted that even if the 20-foot-wide driveway apron could physically

accommodate a tractor-trailer, there is no room for such a vehicle to turn around on site. This raises the prospect of tractor-trailers backing out of the subject property onto Purdum Road, creating a safety issue that has not been addressed in this record. Mr. Brown is willing to limit trips to the site by tractor-trailers to two per month, but he objects to prohibiting them altogether and failed to respond to the Hearing Examiner's specific request that he consider whether some number of trips fewer than two per month would be acceptable.

Staff Evidence: General Truck Traffic. The Petitioner presented no expert testimony of his own, choosing to rely entirely on the reports submitted by Technical Staff. The substantive portions of Transportation Planning Staff's memorandum, an attachment to Exhibit 31, are set forth in full on pages 18-19 above. Transportation Planning Staff concluded that both Purdum Road and the site entrance could accommodate the trips to be generated by the proposed use. Staff explained that Purdum Road was classified as an Exceptional Rustic Road during 2003. That classification process included a review of traffic volumes and accident history, which Staff indicates reflected the existing truck traffic that Mr. King and Mr. Harris described during the public hearing in this case. The average daily traffic ("ADT") on Purdum Road was estimated at 190 vehicles per day, and records indicate that only two recorded accidents, unrelated to drugs or alcohol, had taken place during the previous five years. These figures are substantially below the limits for an Exceptional Rustic Road of 3,000 ADT and eight accidents. Staff notes that rustic road designations take into account the impact of heavy vehicles such as tractor trailers and farm machinery by giving such designations only to "low-volume roads with an accident history suggesting safe operations." Transportation Planning memo attached to Ex. 31 at 2. Thus, Staff provided substantial, probative evidence that Purdum Road can accommodate the level of traffic anticipated from the proposed use.

Staff Evidence: Tractor Trailers. Technical Staff evaluated the issue of tractor-trailers by reviewing the submitted Special Exception Plan and basic design criteria for driveway aprons. Staff concluded that the driveway could physically accommodate in and out movements by tractor-trailers. Staff did not, however, discuss whether those movements would include turning around on site or backing out onto Purdum Road, and whether the possibility of such trucks backing onto

Purdum Road presents a safety issue. The only evidence in the record on this point is Mr. King's allegation.

Analysis: Technical Staff did not address the existence of other landscaping and construction businesses in the neighborhood, so we do not have the benefit of their expertise in assessing whether the impact of the proposed special exception, when considered in the context of existing conditions, would be sufficiently adverse to warrant denial of the petition. The undersigned believes that the opposition has raised legitimate concerns about the effect of multiple businesses that use large trucks on the character of their neighborhood, and finds it to be a close question whether the truck traffic associated with the proposed use – both deliveries and trips to and from job sites – would have an adverse effect on the neighborhood sufficient to warrant denial. A special exception may not be denied merely because it would have adverse effects; particular uses are permitted in various zoning districts only by special exception *because* some degree of adverse impact is inherent in the use, i.e., adverse effects are expected due to the nature of the use. The responsibility of the Hearing Examiner and the BOA is to determine whether the *non-inherent* adverse effects of a proposed special exception, in combination with its inherent adverse effects, rise to such a level as to warrant denial of the petition.

Having carefully weighed the evidence and considered the standard of review set forth in the Zoning Ordinance, the Hearing Examiner concludes that with appropriate conditions, the non-inherent adverse effects of the proposed use can be reduced to a level that does not warrant denial of the petition. To this end, the undersigned has proposed two conditions of approval at the conclusion of this report to which the Petitioner has not agreed: (1) prohibiting any trips by tractor-trailers to or from the subject property in connection with the special exception; and (2) limiting deliveries of any kind to Monday through Friday, 9:00 a.m. to 6:00 p.m. The Petitioner objects to the first condition, but the undersigned considers this limitation to be a reasonable means of reducing the impact on the neighborhood of permitting an additional truck-intensive use. This condition is particularly appropriate in light of the absence of any substantive discussion in the record of the safety of tractor-trailers backing out onto Purdum Road. Moreover, this condition eliminates one of

the non-inherent adverse effects of the uses. The second condition was not discussed at the hearing. The undersigned considers it to be a minor limitation on the Petitioner's business that can be of significant benefit to the neighbors by limiting the amount of noise and intensity of activity on the site during early morning hours.

The recommended conditions of approval also include a condition designed to limit the intensity of activity on the site during the middle of the day, between the early morning loading period and the late afternoon unloading. With the proposed conditions, the Hearing Examiner concludes, based on the preponderance of the evidence, that the inherent and non-inherent adverse effects of the proposed use are not sufficient to warrant denial.

B. Specific Standards

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 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 evidence supports the conclusion that the adverse effects of the proposed use would not rise to the level of a nuisance.

- (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 5.3 acres.

- (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 to be located more than 50 feet from all property lines. The storage and loading of vehicles, equipment and materials would take place in a portion of the site that is buffered by mature deciduous forest on three sides, and by a row of evergreen trees on the side facing the road. The Special Exception Plan, Ex. 25, specifically includes a 50-foot-wide forest conservation easement around the perimeter of the portion of the site that would house the principal business activities. Moreover, the nearest house is approximately 350 feet from the property line and at least 500 feet from the area designated for landscape contractor activities. The evidence supports the conclusion that distance and landscaping would be 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 recommended conditions limit the number of vehicles and trailers permitted on site. The pole barn would provide adequate parking space for the business vehicles and equipment proposed. With eleven parking spaces, the gravel parking area would provide more than adequate space for employees and the residential use: one handicapped space and two spaces allocated to the residential use leaves eight spaces for a total of six employees, some of whom travel to work in car pools.

- (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: No sales of any kind are proposed.

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

Conclusion: The recommended conditions restrict hours of operation and delivery times.

- (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: The Hearing Examiner has taken this admonition into account in weighing the evidence and making a recommendation of approval although, as discussed in Part II.G. above, she agrees with Technical Staff that a landscape contractor is a business, not an agricultural activity.

C. General Standards

The general standards for a special exception are found in Section 59-G-1.21(a). Based on the preponderance of the evidence, the Hearing Examiner concludes that the proposed use would be consistent with these standards, 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 landscape contractor is a permitted use 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 use would comply with each of the standards and requirements set forth for the use in Code §59-G-2.30.00, as detailed in Part IV.B. above.

- (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: The Hearing Examiner accepts Technical Staff's conclusion that the proposed special exception would be consistent with the *Damascus 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 Hearing Examiner is in agreement with Technical Staff's conclusion that the proposed special exception would be in harmony with the general character of the neighborhood. The only construction proposed is a pole barn, which is a typical structure in a rural, agricultural neighborhood. The intensity of activity on the site would be limited, given that most of the activity would occur during brief periods in the morning and late afternoon. With the proposed conditions, deliveries would take place during standard working hours, and would not take place on weekends. On-site parking would be more than adequate. The amount of traffic generated by employee arrivals and departures would be very small and would have no discernible impact. The amount of truck traffic generated by trips to and from job sites would be limited by the small number of employees, which limits the number of trucks that can be used at one time, and by the proposed condition prohibiting tractor trailer traffic. As discussed in Part IV.A. above, an objective consideration of the traffic impacts leads to the conclusion that, with the proposed conditions, the adverse effects of anticipated traffic are not sufficient to warrant denial of the special exception.

- (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 due to the limited periods of intense activity and substantial buffering by distance and vegetation, the proposed special exception 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: The evidence supports the conclusion that the proposed special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site. The proposed security lighting is not unusual for rural areas and would be a substantial distance from the nearest residences, with no anticipated off-site impacts. The noise and odors that may be expected are consistent with the inherent characteristics of a landscape contractor use and therefore should not be considered objectionable in this context.

- (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: Not applicable; the general neighborhood of the subject property is rural/agricultural in character, rather than single-family 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 special exception would not adversely affect the general welfare of residents, visitors and workers in the area of 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.

Conclusion: The evidence supports the conclusion that the subject property, currently used for residential purposes, would continue to be served by adequate public facilities with the exception of sanitary sewer, which is not provided. The opposition argues that the Petitioner should be obligated to demonstrate that his septic system is adequate to accommodate his employees as well as the existing residential use. The Petitioner maintains that his employees would not use bathroom facilities on the site, except in an emergency. As a general matter, they would be expected

to use restrooms at gas stations while en route to or from job sites. The undersigned is aware, as reported by the opposition, that past administrative practice has been to permit landscape contractors to operate without on-site bathroom facilities for employees. In light of this practice and the Petitioner's stated intention to operate consistently with it, the Hearing Examiner does not find sufficient basis in the record to warrant requiring a septic system upgrade.

- (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 granting 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 and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.

Conclusion: Subdivision approval would be required before building permit approval.

- (ii) With regard to findings relating to public roads, the Board . . . must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.

Conclusion: As discussed in Part IV.A. of this report, the preponderance of the evidence supports a finding that the proposed use, with the recommended conditions of approval, would not have sufficient detrimental effect on the safety of vehicular traffic to warrant denial of the special exception. There is no evidence to suggest any detrimental effect on pedestrian traffic, particularly because there are no sidewalks on Purdum Road and therefore no specific provisions for pedestrian traffic.

- (b) Nothing in this Article relieves an applicant from complying with all requirements to obtain a building permit or any other approval required by law. The Board's finding of any facts regarding public facilities does not bind any other agency or department which approves or licenses the project.
- (c) The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. This burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.

Conclusion: As discussed above, the Petitioner has met his burdens of proof and persuasion in this case.

V. RECOMMENDATIONS

Accordingly, based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petition No. S-2590, which requests a special exception under the RDT Zone to operate a landscape contractor business on property located at 26721 Purdum Road in Damascus, Maryland, be **granted** with the following conditions:

1. The Petitioner shall be bound by all of his testimony and exhibits of record, and by the testimony and representations of counsel identified in this report, including the final special exception (site) plan to be submitted pursuant to this condition. To avoid future confusion, the submitted Special Exception Plan (Exhibit 25) must be revised, before the special exception takes effect, to delete the incorrect reference to RDT setback requirements under "General Notes".
2. The hours of operation for the landscape contractor business shall be from 7:30 a.m. to 6:30 p.m. Monday through Friday and 9:00 a.m. to 3:30 p.m. on Saturdays.
3. No sale of goods of any kind may take place on the subject property in connection with the landscape contractor business.
4. The landscape contractor business is limited to six employees in addition to the holder of the special exception.
5. Deliveries to the subject property in connection with the special exception shall take place only between the hours of 9:00 a.m. and 6:00 p.m., Monday through Friday. No deliveries shall take place on Saturdays or Sundays.
6. Vehicles, trailers and heavy equipment stored on the subject property in connection with the landscape contractor business shall be limited to six trucks, five landscaping trailers and one skid loader, as follows:
 - One 24,000 pound flat-bed truck

- Two standard pick-up trucks
 - One pick-up truck with crew cab
 - One medium-duty pick-up truck
 - One heavy-duty pick-up truck
 - Five 16-foot landscaping trailers
 - One skid-loader (heavy equipment, transported on the back of a trailer)
7. All business vehicles shall be stored inside the pole barn when not in use, with the exception of the vehicle used by the Petitioner for his personal transportation, which may be parked in the gravel parking lot. The Petitioner shall be permitted to store one vehicle at a time outside the pole barn, for no more than two days, for purposes of carrying out minor repairs to the vehicle. Any such outside vehicle storage must take place in a portion of the site that is screened from view from Purdum Road.
 8. Signage must be limited to a single sign along Purdum Road, near the driveway, measuring approximately 18 inches by 30 inches.
 9. No chemicals or pesticides may be stored on site in connection with the landscape contractor business.
 10. No snow plows or snow removal equipment may be stored on site.
 11. Activities taking place on site must be limited to those described in the Petitioner's testimony and written evidence, consisting primarily of employees loading equipment and materials on trucks in the morning and unloading them in the late afternoon. Activities taking place between those times must be limited to accepting deliveries and other minor, incidental activities related to the landscape contractor business. A chipper may not be used on site as part of the landscape contractor business.
 12. No trips shall be made to or from the subject property by tractor-trailer.

13. The Petitioner must submit an application for subdivision review in connection with construction of the pole barn, in compliance with the requirements of Chapter 50 of the County Code.
14. The Petitioner must comply with the stormwater and sediment control regulations of the Montgomery County Department of Permitting Services.

Dated: March 29, 2004

Respectfully submitted,

Françoise M. Carrier
Hearing Examiner