**BEFORE THE MONTGOMERY COUNTY**
**BOARD OF APPEALS**

**Office of Zoning and Administrative Hearings**
**Stella B. Werner Council Office Building**
**100 Maryland Avenue**
**Rockville, Maryland 20850**
**(240) 777-6660**

| | | |
|---|---|---|
| IN THE MATTER OF: | * | |
| | * | |
| MELODY BUTLER, *d.b.a.,* | * | |
| BUTLER LANDSCAPE DESIGN, | * | |
| | * | |
| *Petitioner.* | * | Board of Appeals No. S-2711 |
| | * | OZAH Referral No. 08-07 |
| SUSAN W. CARTER, *Esquire,* | * | |
| *Attorney for Petitioner.* | * | |
| | * | |
| LYNN LIPP, | * | |
| CORA WEEKS | * | |
| DOLORES MILMOE, | * | |
| CAROLINE TAYLOR, | * | |
| ANNE STURM, | * | |
| | * | |
| *Respondents*. | * | |
| | * | |
| MARTIN KLAUBER, *Esquire,* | * | |
| *People's Counsel*. | * | |

* * * * * * * * * * * * * * * * * *

BEFORE: LUTZ ALEXANDER PRAGER, *Hearing Examiner*

## HEARING EXAMINER'S REPORT AND RECOMMENDATION

## TABLE OF CONTENTS

## I. INTRODUCTION.

Melody Butler operates a landscape contracting business under the name Butler Landscape Design on 2.68 acres at 21020 Peach Tree Road, between Boyd and Dickerson, close to the intersection with White's Store Road. Her land, as well as all land in the vicinity, is in the Rural Density Transfer ("RDT") zone. Landscape contracting is a permitted special exception use in RDT zones.

In April 2006 Butler encountered a problem in the form of a notice of violation from the Department of Permitting Services for failure to have special exception authorization for the use of her land from this Board. Ex. 48, att. 1. This proceeding arises from Butler's effort to remedy that omission. In the meantime, in April 2007, a district court ordered Butler to cease operations until she obtains special exception approval. Ex. 48, att. 2. After Butler appealed to the circuit court and filed the present petition for a special exception, the district court stayed its order *nunc pro tunc*. Ex. 48, att. 3.

The expert agencies came to conflicting conclusions as to whether Butler's petition should be granted. The County Planning Board unanimously recommends the petition be denied. Ex. 33. The report by the staff of the Planning Department ("staff report") recommends approval, overruling a contrary recommendation from the staff of its community-based planning division. *Compare* ex. 25 at 1-17 *with id*. *1-*10.[1]

In reaching their different conclusions, the agencies also differed in their reasoning. The Board gave two major justifications for its recommendation of denial. The Board doubted that conditions attached to special exception approval could be "effectively enforced, particularly in this case where the applicant has demonstrated a pattern of non-compliance." Ex. 33 at 1. The Board disagreed with the staff report on the merits, concluding that the proposed project was

[1] Page numbers preceded by asterisks refer to circled page numbers in the exhibit.

"incompatible with the uses, scale, and character of the neighboring properties." *Id*. The Board expressed particular concern about the lack of evidence as to the adequacy of the existing septic system and the ability of the local aquifer to support the needs of the nursery stock to be kept at the site. *Id*. The staff report addressed neither Butler's history nor the adequacy of the septic system and aquifer. Rather, it focused on the "small scale" nature of Butler's business, which would not produce unacceptable adverse effects "in kind or degree." Ex. 25 at 10. The report predicated its analysis in large part on Zoning Ordinance § 59-G-2.30.00(6), part of the section governing landscape contractor special exceptions: "the impact of an agricultural special exception on surrounding land uses in the agricultural zones does not need to be controlled as stringently as the impact of a special exception in the residential zones." *See* ex. 25 at 1, 3. Coming to a yet different conclusion, the community-based planning division stressed that the properties surrounding Butler's land formed a "residential enclave" that preexisted the agricultural reserve. Ex. 25 at *1, 3. Butler's commercial project would be incompatible with surrounding existing uses, in scale and character, "akin to inserting a commercial enterprise between residential lots of similar size and dimensions." *Id*. at *3.

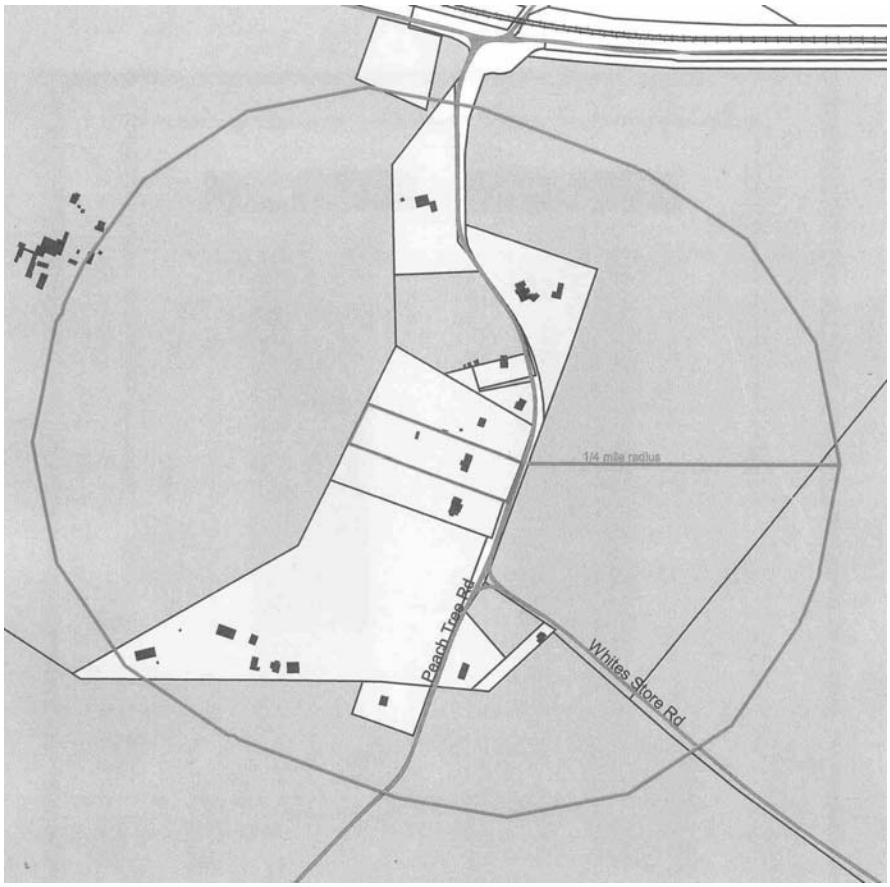
Based on the record produced in this proceeding I recommend denial of the petition on the merits. Some aspects of the use – notably substantial traffic along Butler's driveway and noise generated during loading and unloading of supplies – are non-inherent adverse effects that are detrimental to the peaceful enjoyment of existing adjacent residential properties. Separately, I recommend denial because the evidence supports the Planning Board's conclusion that conditions that might be included in a special exception to mitigate its adverse effects cannot be effectively enforced because Butler is likely to ignore them.

Should the Board disagree with my recommendation to deny the petition, however, I attach an appendix containing conditions that the Board should include in its special exception approval.

## II. FINDINGS OF FACT.

### A. THE NEIGHBORHOOD.

The staff report defined the general neighborhood as land within about a quarter-mile radius of the Butler property. The report's selection of the general neighborhood is reasonable, considering that the concept of neighborhood is "larger and more fluid" in a predominantly rural area. *Montgomery v. Board of Commissioners of Prince George's County*, 263 Md. 1, 7-8, 280 A.2d. 901, 903 (1971). The current land-use configuration is shown in the vicinity map attachment to the report (ex. 25 at *5):



The staff report characterizes the general neighborhood as predominantly rural, interspersed with one-family residences on relatively large lots. Ex. 25 at 6. Of nineteen properties within the general neighborhood, four are farms, three are vacant, and twelve are residential. *Id*. All of the surrounding land is now zoned RDT. *Id.*

The report's characterization, while accurate as far as it goes, is somewhat misleading. Land use is predominantly residential if the neighborhood is slightly more narrowly defined to include only land fronting directly on Peach Tree Road within the same quarter-mile radius. With one exception, lot sizes of residences along Peach Tree Road range in size from half an acre to four acres; most are between one and three acres.[2]

The current RDT zoning is also somewhat misleading. All of the Peach Tree residences, with two exceptions, were constructed before 1975. See n. 2. Before then the area had been classified Rural Residential (R-R), which allowed residential use on half-acre lots. Ex. 25 at 6. The area was rezoned as Rural in 1973 but it was not until 1981 that it was given its current

[2] The following chart included in the community-based planning memorandum (ex. 25 at *3), provides details:

| Address | Acres | Year Built | Gross Floor Area |
|---|---|---|---|
| 21100 Peach Tree Road | 0.685 | 1930 | 1350 |
| 17730 Whites Store Road | 0.480 | 1962 | 753 |
| 17900 Sellman Road | 2.000 | 1999 | 3108 |
| 20830 Peach Tree Road | 1.100 | 1967 | 1552 |
| 20901 Peach Tree Road | 1.260 | 1958 | 1200 |
| 20910 Peach Tree Road | 17.970 | 1966 | 2007 |
| 21010 Peach Tree Road | 2.730 | 1991 | 3300 |
| ***21020 Peach Tree Road (Butler)*** | ***2.680*** | ***1965*** | ***1908*** |
| 21030 Peach Tree Road | 3.390 | 1974 | 1224 |
| 21110 Peach Tree Road | 0.500 | 1957 | 952 |
| 21121 Peach Tree Road | 4.030 | 1949 | 3995 |
| 21210 Peach Tree Road | 3.880 | 1961 | 1832 |

*Source: State Department of Assessment and Taxation*

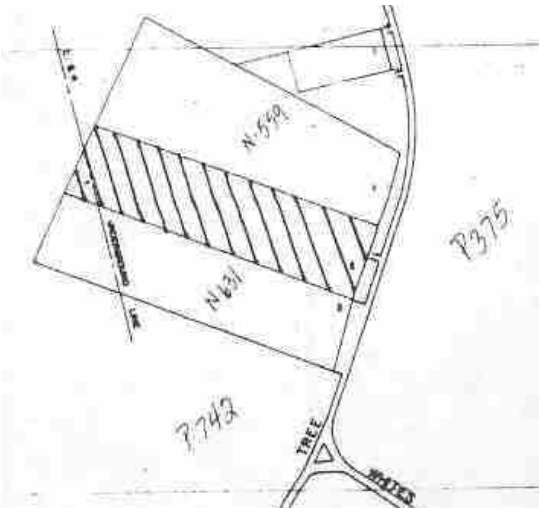
The chart was derived from Maryland Department of Assessment and Taxation records.

RDT classification. *Id*. Butler's lot and that of her two immediate neighbors was subdivided in 1964 into three lots known collectively as Peach Tree Estates. Ex. 25 at *7. The house that Butler occupies was built a year later, in 1965. Ex. 25 at *3. The house belonging to her northern next door neighbor, Emma Cora Weeks, was built in 1974; that of her southern neighbors, the Kingsburys, was constructed in 1991. *Id.* [3]

Peach Tree Road is classified as a rustic road by the Rustic Roads Functional Master Plan (1996), at 128-131. The plan and its implications are discussed below.

B. BUTLER'S LAND AND EXISTING IMPROVEMENTS.

Butler's lot lies between the other two residentially-used parcels included in the Peach Tree Estates. Its formal description is lot 2 (N614); its tax account is no. 11-00920760. Ex. 1(a). A farm borders all three lots to the west. No structures or people are within sight to Butler's west. T. 91. The relationships among the Peach Tree Estate parcels are depicted in the following map and aerial photograph:

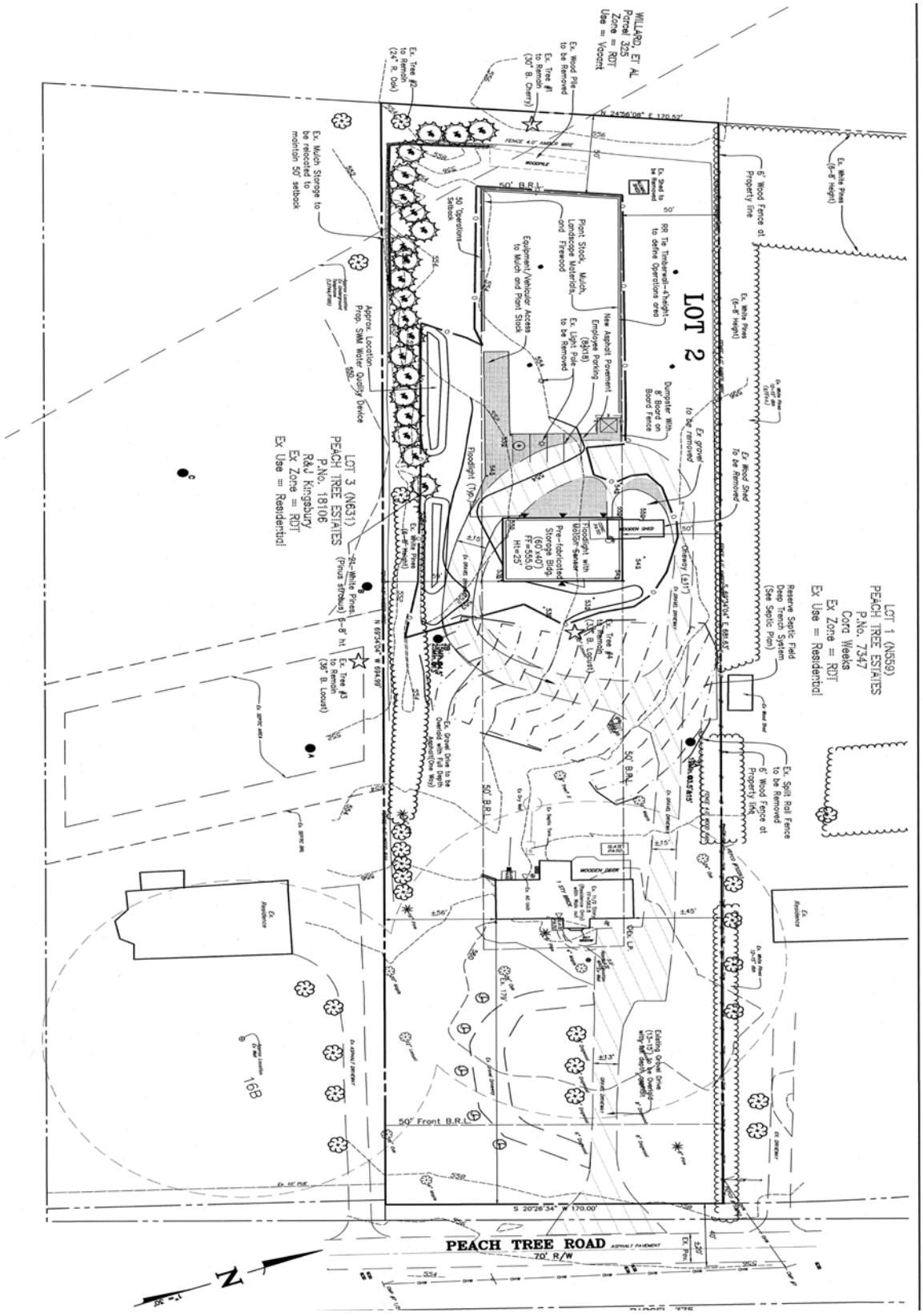



[3] Weeks testified she bought her lot and built her house in 1970. The tax records date the Weeks house to 1974. I use the tax records date but the discrepancy in dates has no bearing on the outcome of this case.


Regal Tree Road

Butler's lot is rectangular and relatively narrow, four times longer than it is wide. Its frontage on Peach Tree Road is 170 feet wide; its rear width is the same. Street frontage includes a 40-foot slope easement. Ex. 25 at *7. The lot's longer sides measure 682 feet along the north, and 695 feet along the south. The measurements come from the revised site plan, ex. 55(k), reproduced in part on the next page:

[This area intentionally left blank]


LOT 2
LOT 1 (N559)
PEACH TREE ESTATES
P.No. 7347
Cora Weeks
Ex Zone = RDT
Ex Use = Residential
LOT 3 (N631)
PEACH TREE ESTATES
P.No. 18106
R&J Kingsbury
Ex Zone = RDT
Ex Use = Residential
WILLARD, ET AL
Parcel 325
Zone = RDT
Use = Vacant
PEACH TREE ROAD
70' R/W
50' Front B.R.L.
50' B.R.L.
Pre-fabricated Storage Bldg. (60'x40') FF=555.0 HI=25'
New Asphalt Pavement Employee Parking (8x18)
Dumpster With 8' Board on Board Fence
Reserve Septic Field Deep Trench System (See Septic Plan)
Ex. Split Rail Fence to be Removed
6' Wood Fence at Property line
Ex. Wood Shed To be Removed
Ex. Wood Pile to be Removed
Ex. Tree #1 to Remain (30" B. Cherry)
Ex. Tree #2 to Remain (24" R. Oak)
Ex. Tree #3 to Remain (36" B. Locust)
Ex. Tree #4 to Remain (36" B. Locust)
Ex. Mulch Storage to be relocated to maintain 50' setback
50' Operations Setback
Plant Stock, Mulch, Landscape Materials and Firewood
Equipment/Vehicular Access to Mulch and Plant Stock
RR Tie Timberwall-Height to define Operations area
Ex. Light Pole to be Removed
Approx. Location Prop. SWM Water Quality Device
Floodlight (Typ.)
Floodlight with Motion Sensor
Ex. grovel to be removed
Driveway (±11')
Ex. Gravel Drive to be Overlaid with Full Depth Asphalt(One Way)
Ex. Shed to be Removed
Ex. White Pines (6-8' Height)
Ex. White Pines (6-8' ht (Group of three)
Ex. Residence
WOODEN DECK
WOODEN SHED
Existing Gravel Drive to be Overlaid with Full Depth Asphalt(One Way)
N 24°56'08" E 170.52'
S 20°26'34" W 170.00'
N 69°34'04" W 894.99'
S 69°34'04" E 894.99'
168
N

The Butler property is improved by a one-family residence, where Butler lives. T. 127. The site also currently contains two sheds in the rear of the property, both of which will be demolished if the special exception is approved. T. 154-155. Access to the property from the County road is by means of a gravel driveway with two loops, one in the front yard and a larger one in the rear. T. 28. Based on the graphic scale shown on the revised site plan (ex. 55(k)), the northern edge of the driveway comes within about 22 feet of Weeks's property line and 42 feet of her residence.

The driveway loops do not appear in pre-April 2006 photographs of the site. *See* above (photograph dated Feb./Mar. 2006); ex. 45(a) (dated 1992). Butler plainly added, or at the least greatly widened, the back loop serving her landscaping business to provide a turning radius for tractor-trailers bringing supplies. She admitted to the widening, having applied weed killer and surfacing it with gravel to give its present configuration and appearance. T. 211.

Butler widened the driveway apron to Peach Tree Road to at least 58 feet wide (see ex. 55(e)), far wider than County regulations permit. The apron violation is discussed in more detail below. Here, it is necessary to note only that its width is more twice than that of the driveway aprons at the immediately adjacent properties. *See id.* (The driveway was 51 feet wide when measured in 1994. Ex. 55(d)).

A row of white pines borders the property line with Weeks but many have lost lower branches, so that their effectiveness as a screen has been compromised. T. 34, 67, 71, 224. The parties agree that age and snow account for limb loss. T. 67 (Donnelly); T. 224 (Weeks). Weeks attributes part of the loss to heavy truck traffic along Butler's driveway over the root zones. T. 224. While her theory is plausible, Weeks presented no scientific evidence to support it.

After she acquired the property, Butler built a berm along the southern (Kingsbury) property line in the back third of the property. T. 147-148; see ex. 36(*l*). There are dispersed 8-foot high pines, as well as shrubs along the line in that area, some planted as part of Butler's berm project. T. 33-34, 66-67; Ex. 36(*l*), 55(k).

Other than the trees along the property lines, Butler's lot is not forested and contains no champion trees according to the approved Natural Resource Inventory/Forest Stand Delineation (NRI/FSD). Ex. 5. The lot contains three specimen trees, two of which are far enough removed from the special exception use as not to be impacted by it. Unspecified measures will be taken to mitigate stress on the third tree, a 33-foot black locust, according to the staff report. Ex. 25 at 7.

The Butler lot contains no significant environmental features. *Id*. The property is not located in a special protection or primary management area. *Id*. Butler's landscape planning expert, Brian Donnelly, testified that it is not in a flood plain and contains no wetlands or other environmental constraints. T. 37; see ex. 5.

The lot is relatively level throughout but slopes perceptibly toward the south. T. 228. The Butler-built berm has a break to allow water drainage. T. 35, 98. Although the soil is described as not highly erodible (ex. 5), runoff through the berm appears to have caused perceptible erosion to the Kingsbury lot. See ex. 25 at *29; ex. 46 at 9. Donnelly contended, however, that although the berm channels the water, the present break in the berm normally allows water to dissipate at non-erosive velocities. T. 35.

Following the hearing, it became evident that the septic system, about which the Planning Board had expressed doubts because of a lack of information, is sufficient to support the use envisaged by Butler's project. The septic system was installed at the time the house was built in 1965. Ex. 40 at 4. The well and septic section of the Department of Permitting

Services (the "Department") has no record that the septic system was inspected or approved at the time. *Id*. As a result of the Planning Board's concern, percolation tests for the existing septic field were conducted for three days in early 2008. Ex. 38. Such tests measure the rate at which waste water infiltrates into the soil. T. 105. The tests results persuaded the Department's well and septic section that Butler's system could adequately serve a six-bedroom house. Ex. 55(c) at 2.

In a post-hearing letter elicited by Butler's counsel, the Department wrote that the septic system was sufficient to support toilet use by up to seven employees. Ex. 59(a). The letter also identified the reserve septic field as a "deep trench septic system." *Id.* Part of the reserve field lies under Butler's driveway. See ex. 55(k). According to the Department letter, such systems are not harmed by truck traffic across them. Ex. 59(a).

C. CURRENT AND PROPOSED USE OF THE PROPERTY**.**

1. *Operations.* Butler provides landscape design for residential and commercial properties, mostly in the County, including mulching, planting, weeding, and mowing. T. 130. She also removes dead trees or trees felled by storms. T. 144-145. She sells hardwood that she harvests from fallen hardwood trees as firewood. T. 144. In the winter, Butler provides snow removal services. T. 130.

Butler's services are all conducted off-site. T. 131. No clients visit the site. *Id*. Office work is conducted in Virginia. Ex. 55(b). She stores no kerosene, gasoline, fertilizer, pesticides, or chemical applications. T. 159-160, 178-179. She sends softwoods – pine or maple – salvaged from downed trees to Virginia and does not store them on site. T. 144. All repairs, including repairs to small equipment, are made off-site. T. 179. No signs identify the business and none will be posted. T. 36.

Butler's work varies seasonally but she labels her business a "year round operation." T. 131, 190. During her busiest seasons, March through May and October into December, she uses seven employees, working six days a week. *Id*. During the summer months, employees work only four to five days a week. *Id*. In the winter, she uses only three to four workers, as needed. T. 137. Unlike her landscaping work, snow and tree removal is unscheduled and can occur at odd times, including nights and weekends. T. 144.

Except for snow and tree emergencies, employees arrive at 7 a.m. in three cars in the busy seasons, and fewer at other times. T. 131; ex. 55(b) (revised statement of operations) at 4. On arrival, they load hand tools and small equipment such as mowers and leaf blowers on Butler's trucks and trailers and drive them to off-site jobs. T. 131-132; ex. 55(b) at 3. They leave the site by 7:30 a.m. *Id*. No employee remains on-site. Ex. 55(b) at 3-4.

Butler remains behind to load mulch and plant stock on her largest truck and drives it to the work site. T. 135-136. She testified she would accept a condition to load no plants, mulch, or heavy equipment before 8 a.m. T. 134-135, 153. She also testified that there was no practical impediment to loading the truck the night before. T. 135. Although she does the loading and conveying to the job site herself, if more material is needed during the day, she may occasionally return with one employee to assist her. T. 132-133; ex. 55(b) at 5.

Butler and her employees are supposed to return between 6:00 and 6:30 p.m. to unload equipment; the employees are supposed to leave for home half an hour later. T. 133; ex. 55(b) at 3. That does not always happen.

To avoid a recurrence of employees relieving themselves outside (see below), Butler has arranged to have her employees use the bathroom in the basement of her residence. T. 146-147. She noted, however, "they're not there long enough to even worry about it, but, if they do need to, definitely, it's available." T. 147.

Butler stores nursery stock, mulch, firewood, flagstones, landscape equipment, trucks, and trailers in the back of her property. Ex. 55(b) at 2. Butler has strewn materials over the rear of her property, including within a 50-foot setback buffer mandated by § 59-G-2.30.00(2). T.189; ex.42. She has pledged to store all her landscape materials away from the buffer in the future. Ex. 55(b) at 5.

Butler uses seven vehicles in her business. Five are on-road trucks: a one-ton pick-up; a stake-bed truck, a three-quarter-ton pick-up, and two smaller pick-ups. T. 136; ex 55(b) at 4. She also has two off-road utility vehicles manufactured by the Bobcat Company, one a front-end loader. *Id*. The loader is used on site to load mulch and plants. T. 136. The other Bobcat is used off site. *Id*. In addition to the self-propelled vehicles, Butler uses four trailers that are hitched to her trucks. T. 137. At least one of the trailers is two wheeled; all were described as small. S*ee* 36(j); T.137.

In the past, Butler has received her supply of mulch by tractor-trailer. T. 139; ex. 46 at 4 (depicting one such trailer). Each carried about 90 cubic yards of mulch. T. 139. Butler acknowledged she sometimes received more than a single trailer load at a time. *Id*. That is an understatement. Weeks testified that Butler's mulch deliveries had been far more frequent than Butler acknowledged as many as five tractor-trailer trucks at a time. T. 222. There had been Sunday evening deliveries. *Id.* Butler insisted, however, that she stopped accepting tractor-trailer deliveries in the spring of 2007. T. 189.

Instead of tractor-trailer deliveries of mulch, Butler is currently receiving deliveries by smaller trucks. Her present hauler is her older brother, with whom she has an oral agreement about the number of deliveries and the weight of each delivery. T. 184-185. His deliveries are by "roll-off" trucks, capable of carrying no more than 30 cubic yards of mulch. T. 157.[4] Butler

[4] Butler was unable to estimate the weight of 30 cubic feet of mulch or of the loaded truck. T. 186-187.

described a roll-off truck as one that hauls a container that rolls off when the truck bed is raised. T. 157. Butler plans to continue 30-cubic-yard deliveries if a special exception is approved. *Id.*; ex. 55(b) at 6. Mulch delivery trucks travel north on Peach Tree Road from Route 28. T. 186. Butler currently receives mulch deliveries three times a week from March through June. T. 157. Deliveries are twice a week at most the rest of the year. T. 157-158; *see* ex. 55(b).

Tractor-trailer trucks also previously brought plant stock three times a year – spring, summer, and autumn – except that summer deliveries were skipped when the weather was unusually dry. T. 158-159. Her supplier has agreed to use smaller trucks – "like U-Haul trucks" – to bring in plants. T. 158. Because of the smaller truck loads, Butler proposes to double the number of deliveries to six, two each in spring, fall, and (if appropriate) summer. Ex. 55(b) at 6; see T. 159.

Aside from truck traffic on the premises generated by suppliers and by Butler's own trucks, Butler receives trash removal services twice a week during her high season and once a week otherwise. T. 198-200. She has protested to the trash hauling company about early morning refuse removal but has found she has limited control over the hauler's schedule. *Id.* The hydraulic lift is noisy. T. 230. Butler acknowledged that Weeks had complained to her once about a 6 a.m. refuse collection and that Butler herself was also "so upset and so furious" about it. T. 199-200.

Following the hearing, the Department of Permitting Services issued a letter stating that the driveway's intrusion into the 50-foot buffer is not a violation of § 59-G-2.30.00(2). Ex. 55(a) at 2. The Department does not consider travel over the driveway to qualify as "parking and loading"; neither does it regard use of the driveway solely to come and go to constitute "other on site operations." *Id.* In other words, according to the Department, "[a] driveway that is used only to provide access from the public road to the landscape operation is not * * * required to

meet the fifty * * * foot setback." *Id.* The Department's interpretation is discussed later in this report.

Butler waters her plant stock using a system that delivers water to each of four zones in turn: "When I get one zone working and before I leave, I will cut that zone off." T. 141. On Butler's return at 7:00 in the evening or so, she waters other zones until 10 or 11 p.m. T. 142. She denied watering all four zones simultaneously because her system does not allow it. *Id.* She also denied watering around the clock: "you cannot water when it's 100 degrees out and the sun is beating down on your plant materials and burns it up." T. 143. She denied that she keeps the system on even during rain, but admitted that the system might have remained on when she was not there to turn it off. *Id.* Even so, "[i]t's not like it went on for four or five hours." *Id.*

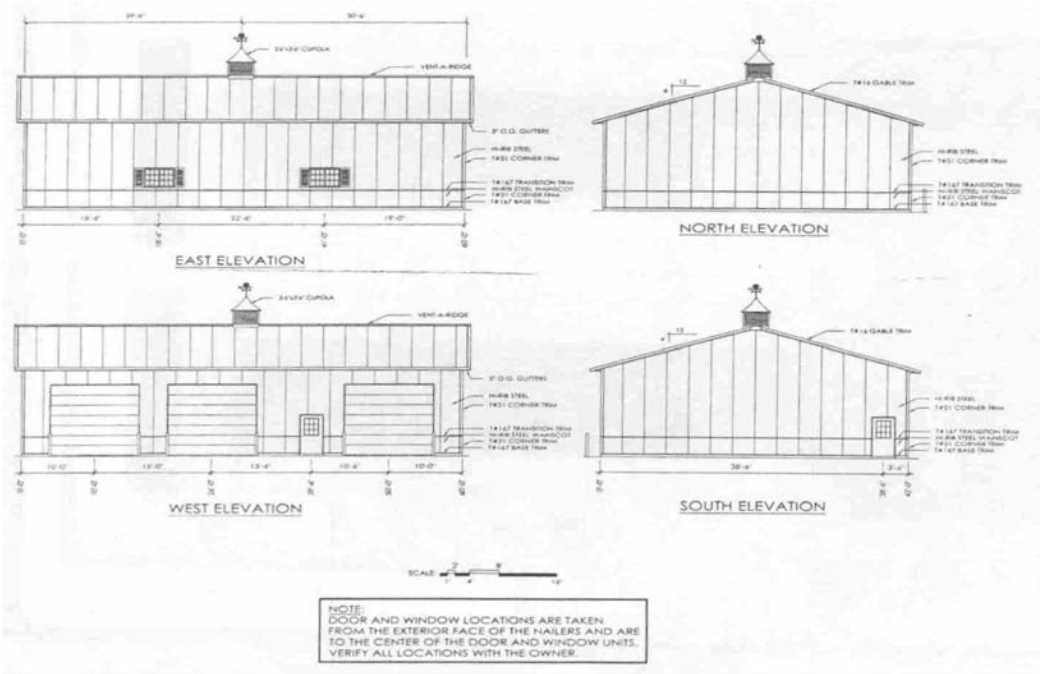
After the Planning Board expressed concern about the adequacy of well water needed for Butler's plant stock (ex. 33 at 1), Butler installed a water meter on her irrigation system. T. 143. A "flow test" revealed that her system consumed 110 gallons per hour or 2640 hours in 24 hours. Ex. 39; T. 44-45. Since the flow test was conducted in January, an atypical month for landscaping work, it is not clear how representative the test is, especially in light of Donnelly's testimony that water usage fluctuates significantly. T.73. A typical household consumes 300 gallons per day. T. 74.

No test has been done to determine the impact on wells in the area from Butler's use of her irrigation system. T. 73-74. For reasons explained below, none appear to be necessary. Butler agrees to maintain the water meter and to report water usage. T. 143. She has no rain sensor system, but is prepared to install one if any exist. T. 195-196.[5]

[5] They exist. See, *e.g.,* http://en.wikipedia.org/wiki/Rain_sensor#Irrigation_sensors.

2. *Proposed changes to the property.* Butler's site plan and statement of operations contemplate a number of changes to the property.

*a.* Butler proposes to erect a prefabricated shed behind her residence, 60 feet long, 42 feet wide, and 22 feet high, measured from grade. T. 28, ex. 4(b) (engineering drawing); ex. 55(b) at 4; ex. 55(k). The shed will be four feet taller than Butler's residence but slightly narrower. T. 60. Viewed from Peach Tree in front of Butler's house, the shed should not be visible except above Butler's roof. See ex. 55(k). It will be partly visible at other angles. The shed's western side (facing away from Peach Tree Road and the Butler residence) will have a doorway and three garage doors. Ex. 4 (b). The eastern side will have two windows. *Id*. Both the shorter northern and southern walls will be featureless, except for a doorway close to the eastern corner of the southern wall. *Id*. The shed's black steel ribbed roof will be surmounted with a 6½-foot high cupola. Ex. 55(b); 4(b). The shed itself will be ivory T. 28; ex. 55(b) at 4. The architectural design (ex. 4(b) is reproduced here:



The shed will not intrude on the 50-foot buffer but its northern wall will be exactly 50 feet from the Weeks lot line. *See* ex. 55(k). By my calculations (using the scale on the site plan (ex. 55(k)), the closest point on the new structure will be 210 feet from the Weeks residence, about 225 feet from the Kingsbury residence, and 175 feet from Butler's.

The shed and Butler's house will occupy 3.7% of the Butler lot (4360 sq. ft.) T. 29-30, 59. The Zoning Ordinance permits up to 10% coverage, here 11,700 sq. ft. T. 59; § 59-G-9.46. They will be the only structures on the property after Butler demolishes two small existing sheds in conformity with the revised site plan. See ex. 55(k). Butler originally intended to preserve one of those (T. 89, 104) but changed her mind in her revised plan. T. 154-155.

The new shed will serve as a garage for all of Butler's commercial vehicles, including her Bobcats and trailers, and her landscaping tools and equipment. Ex. 55(b) at 4. In her revised statement of operations she for the first time stated that one of her pickup trucks serves both commercial and personal uses, and proposed that it be allowed to be parked elsewhere than in the new shed. Ex. 55(b) at 4. For reasons stated below, I recommend that, if the special exception is approved, all vehicles used in the landscaping business be parked in the shed even if they are partially used for personal reasons. [6]

b. Butler will have a four-foot high timber wall comprised of wooden railroad ties erected to demarcate the northern, western, and southern perimeters of the outdoor storage area in which material can be stored without infringing on the buffer. Ex. 55(b) at 5, 7; *see* 55(k) (site plan). The storage area will be open toward the east, where the buffer is not an issue. *Id*.

*c.* Butler will provide additional screening along her northern and southern property lines. On the north, Butler intends to erect a 6-foot wood-on-wood fence along the entire line.

[6] The shed was originally to contain toilet facilities. When it became evident that a modern septic system would be necessary (ex. 40 at 4-5) that idea was abandoned in favor of allowing employees access to Butler's basement bathroom.

T. 34; ex. 55(b) at 7. Weeks opposes that plan. T. 227; ex. 53. at 2. If a fence is to be built, Weeks wants it to be along the 50-foot setback line. T. 227.[7]

Butler intends to plant shrubbery and 21 white pines near her property line with the Kingsburys. Ex. 55(b) at 7. Her site and landscape plan was revised to include four pines near the separation in the berm in order to provide additional screening. Ex. 55(b); *see* ex. 55(k).

Butler also proposes to dig a "bio-retention" area near the berm to contain storm water run-off. T. 38. Donnelly described a bio-retention area as an excavated pit, about eight inches lower than the surrounding area, back-filled with filter fabric, sand, and gravel and surmounted with mulch and water-tolerant plants. T. 38, 87. From an adjoining property, he said, it would appear as a cluster of dense cover plants. T. 87. The bio-retention is designed to stanch runoff but will not do so completely, especially during heavy rainstorms. T. 100.

Donnelly estimated that Butler's bio-retention area would "probably" be 8 feet wide, 65-70 feet long, and eight inches deep but conceded that its storage capacity had not been established. T. 112. At the time of the hearing, storm-water management engineering studies had not been submitted to the County. T. 112-113, 119.

*d*. Butler proposes to pave the existing gravel driveway for its entire length with "full depth asphalt" and to widen the driveway loop in front of the new shed. T. 28, 96; ex. 55(k). The loop will be wide enough to provide four parking spaces for employee parking. T. 29, 30; ex. 55(k). The trash dumpster will be located in a recess north of the employee parking spaces. T.

[7] A fence along the entire set-back line would make the landscape operations entirely inaccessible since the driveway is partly within the set-back area. To that extent, Weeks's demand is unreasonable. As noted in the previous paragraph of the text, Butler *will* be required to fence in the outdoor storage area. As a screening device, a fence along the perimeter is appropriate and I include a condition to that effect in the appendix. If, however, the Board is inclined to grant the special exception and Weeks and Butler can agree in writing to a different screening mechanism, the Board should give favorable consideration to that change if it would be compatible with the neighborhood.

29; ex. 55(k). The dumpster, which Butler estimated to be five feet high, eight feet long, and four feet wide (T. 198), is to be stored behind a eight-foot high board-on-board fence. T. 29.

A 130-foot-long paved loading apron at the southwest arc of the loop will extend westward to the outdoor storage area. Ex. 55(k). All vehicles entering the property from Peach Tree Road will travel counter-clockwise. T. 28-29. To load and unload mulch and plant stock, vehicles will make a 180° turn in the loop and back up 130 feet. T. 96-97. Neighbors have complained about the beeping noise of vehicles backing up. T. 230; ex. 54 at (unn.) 2. Those noises will continue, and likely increase, with the use of the loading apron.

*e*. Butler proposes to add lighting at the site. At present, the only outdoor lights are porch lights at the front entrance of her residence and on a rear deck. Ex. 55(b) at 7.

The original statement of operations contemplated a single motion-activated outside security light at the rear (east side) of the new shed, on the side facing Butler's residence. Ex. 5. The original plans contained no light or photometric plans.

During the hearing Butler testified that in addition to the motion-activated light at the rear of the shed, she expected to have three lights mounted on the western wall of the shed, one above each of the three 8-foot-high garage doors. T. 150-151. Although she also testified that at least one of those lights would be triggered by motion sensors, a post-hearing letter from Butler's counsel stated that all three lights would be exclusively manually operated by switches inside the shed. Ex. 55 at 2.

Asked whether she needed to turn the outside lights on in order to have access to her equipment in the event of a snow or tree emergency, Butler explained that she did not because "the equipment has light on it." T. 178. She also testified that only one light was necessary to illuminate access to the shed. T. 202.

The motion-activated light contemplated at rear of the shed (facing the residence) is to be mounted at the eave line. T. 151. Butler and her neighbors disagreed whether motion detectors would frequently be triggered by roaming animals, such as deer or raccoons. Butler's witness, Donnelly, acknowledged that animals could trip motion sensors (T. 124) but Butler asserted that she had "never had a deer in my backyard" in the two years she's lived on Peach Tree Road. T. 152-153. Lipp, however, testified that deer came around "a lot." T. 214. Given the rural surroundings, Lipp's testimony is by far the more plausible.

Butler filed a lighting and photometric plan as part of her post-hearing submissions. Ex. 55(*l*). It shows that each lighting fixture will radiate 0.5 foot-candles 30 feet and 0.1 foot-candles about 55 feet out, without spillover into neighboring properties. *Id*.

D. BUTLER' S NON-COMPLIANCE WITH LAW, REGULATIONS, AND PROMISES.

It became evident during the hearing that Butler tends to do what she wants without regard to legal and other obligations, including those of which she is well aware.

Butler has been in the landscape contractor business for 26 years. T. 176-177. She had previously been cited in 2005 for operating her landscaping business on River Road in Potomac, on rental property, without special exception authorization. T. 168-169. She attributed this initial lapse to being unaware of the need for approval. *Id.* Her lack of awareness at the time may not have been uncommon. One of the opposing parties, Caroline Taylor, a former landscape contractor, testified that many in the trade in the County shared Butler's mistaken assumption about not needing County approval to carry out a landscaping business. T. 251.

After Butler was closed down at River Road, she made no inquiry before starting up again on Peach Tree Road, with the excuse that "honestly, I didn't think that I needed to have

that here because I'm in the country." T. 170. In fact, however, she was fully aware she was operating unlawfully. In April, 2006 she told her neighbor Weeks that she *had* been issued special exception authorization for the Peach Tree Road site. T. 222. I credit Weeks's testimony about the conversation: Weeks was generally credible; Butler did not deny the conversation, only that she could not remember it (T. 160); and Weeks reported the conversation contemporaneously to a friend. *See* T. 236-237 (Milmoe). Of course, when Weeks investigated, she discovered that no authorization existed. T. 222.

After Butler filed her petition for a special exception Butler nonetheless ignored restrictions that she knew about. She knew from her petition and its attachments that all on-site landscape-related activities must occur more than 50 feet from any property line. See § 59-G-2.30.00(2)).[8] Yet she continued to dump mulch, firewood, pallets, and flagstones within the 50-foot setback. T. 189. Her only explanation was that she believed needn't comply while she was "waiting to see if I was going to be able to operate my business." T. 190.

Butler also knew she had committed to time restrictions for operations at Peach Tree Road. During the hearing she agreed to be bound to a condition to the effect that her employees will return from their off-site work no later than 6:30 p.m. and leave about 20-30 minutes later. T. 145. In a joint post-hearing letter, Weeks and Ms. Kingsbury wrote: "this has not been the observed departing time. It is usually much later. In fact today, March 12th, the employees did not leave until 8 p.m." Ex. 60 at (unn.) 2. Butler filed no response to the letter although given the opportunity to do so. *See* ex. 64 at 1. I credit the Weeks-Kingsbury representation.

[8] It is clear from the record that Butler knew about the 50-foot buffer. In a post-hearing letter, Ms. Kingsbury wrote that Butler had unsuccessfully tried to lease a 50-foot strip of land from her in order to comply with the requirement. Ex. 54. Butler does not deny either approaching Kingsbury for that purpose or, more importantly, being aware of the setback requirement. Ex. 59 at (unn.) 3.

Although Maryland residents must register their Maryland-based vehicles with the State, Butler registered only two of the five vehicles she uses in her business in Maryland. T. 191. As a result, she was operating her commercial trucks for at least the two years on Peach Tree Road, and perhaps as many as 26 years, in violation of Md. Code Transportation Art. § 13-402. She must have known of the requirement because she did register two of the trucks. She gave no reason for her failure to register the others.

Butler widened driveway apron at the entrance from Peach Tree Road without authorization. See T. 171-172**.** M.C. Code § 49-35(a)(1) provides: "A person must not construct any * * * driveway * * * or begin any such construction * * * without a permit from the Director of Permitting Services." Under M.C. Code § Sec. 49-36(a), "the actual construction must conform to law and to the requirements for a road of its class." The width of Butler's driveway far exceeds the width permitted by County regulations. For commercial driveways, the County Department of Transportation limits the width of the driveway apron to the width of the driveway plus tapered wings no more than six feet on each side. *See* Dept. of Trans. standard no. MC-302.01(Apr.2006), available at:

http://www.montgomerycountymd.gov/content/dpwt/capital/dcd//htm/mc30201.htm.

Under that standard, Butler's driveway should not have exceeded about 27 feet (6'+15'+6'). Butler's is almost 59 feet wide. A post-hearing letter from Butler's counsel states that Butler would not object to a condition by this Board to make modifications to the driveway apron "as may be required in order to comply with County law." (Ex. 55 at 4). The revised site plan retains the existing apron size. Ex. 55(k).

Butler did not have a Maryland plant broker license required by Md. Agriculture Art. § 5-301 *et seq*.; ex. 55(h), 55(j). T. 176, 196. The Maryland law's application to landscape contractors is apparently not widely known. The People's Counsel stated that he had

participated in many landscaper special exception hearings and the plant broker license had never been mentioned. Following the hearing, Butler applied for and received the license. Ex. 59(b).

Butler failed to rectify the consequences of offensive conduct by employees after she was made aware of it. At least one employee defecated near Weeks's property line. T. 225. Butler claims she was unaware of the incident until Weeks told her of it. T. 145. Although Butler apologized to Weeks and said she threatened to fire any employee who engaged in such behavior in the future (T. 145, 161, 188), she took no action to clean the mess up or cover it with lime. T. 161. Although she claimed that "I did not even know where it was" (*id.*), Butler plainly had no interest in finding out.[9]

A post-hearing letter from Weeks accused Butler of leaving engines running on vehicles when not in immediate use, exposing neighbors to diesel exhaust and unnecessary noise. Ex. 53 at 1. In particular, Butler allegedly has let her Bobcat loader idle for long periods of time. *Id.* Once, Butler let it run while she left for an errand in Point of Rocks, about 14 miles and 25 minutes away. See http://maps.google.com. When Weeks confronted her, Butler explained she let it idle because it was difficult to start. Ex. 53 at 1. I credit Weeks's account.

## III. MASTER PLANS.

The property is located in the western sector of the Functional Master Plan for the Preservation of Agriculture and Rural Open Space. The plan encourages preservation of farmland, but recognizes a need for commercial and residential uses to serve the rural community. Ex. 25 at 7. The plan does not make a specific recommendation for Butler's parcel. *Id.*

[9] Weeks testified that there had been more than one such incident but provided no further information about them. T. 225. I make no findings as to those.

As a rustic road, Peach Tree Road is subject to the Rustic Roads Functional Master Plan. Rustic roads, including Peach Tree, do not have strong foundations capable of withstanding heavy truck traffic. Plan at 27. At the same time, the plan recognizes that heavy trucks, including tractor-trailers, serve the agricultural community. *Id.* at 27. The plan also recognizes that landscape contractor deliveries may require the use of rustic roads. *Id.;* T. 41.

## IV. EXPERT AGENCY ANALYSIS.

### A. PLANNING BOARD.

The Planning Board unanimously recommended denial. It deemed the proposed project "incompatible with the uses, scale, and character of the neighboring properties." Ex. 33 at 1. The Board deplored a lack of information as to the adequacy of well water to support the proposed use and the capacity of the septic system to meet additional demands. *Id.*

The Board also wrote it did not believe "it advisable to impose conditions on the applicant that could not be effectively enforced, particularly in this case where the applicant has demonstrated a pattern of non-compliance." *Id.*

### B. PLANNING STAFF.

The planning staff had earlier recommended approval of the special exception because it regarded Butler's business as "small scale" without the characteristics of a larger operation, in kind or degree, that might produce unacceptable adverse effects. *Id.* at 10. The report placed special emphasis on § 59-G-2.30.00(6), directing this Board to "consider that the impact of an agricultural special exception on surrounding land uses in the agricultural zones does not need to be controlled as stringently as the impact of a special exception in the residential zones." *See* ex. 25 at 1, 3. The staff report expressed confidence that all significant adverse effects could be essentially mitigated by a list of 11 conditions, specifying hours of operation, number of

employees and vehicles, construction of a fence along the northern property line, and the like. *Id.* at 2-3.

In order to meet the special concern of the staff's community-based planning division concerning heavy-truck traffic on Peach Tree Road (*id.* at *1-*4), the staff report included a condition prohibiting mulch deliveries by tractor-trailers and restricting mulch deliveries to no more than three 30-cubic-yard loads three times a week. *Id*. at 2. As so circumscribed, the report stated that Butler's use will not be inconsistent with the Rustic Roads Functional Master Plan. It pointed out that Peach Tree Road has no posted weight restrictions. Ex. 25 at 8; *see id.* at *14 (identical conclusion by transportation section). The staff report labeled the "rustic road issue * * * somewhat problematic since the Council, in establishing a landscape contractor as a special exception in the RDT zone, is presumed to know Rustic Roads exist in the agricultural preserve." Ex. 25 at 8.

A "policy area mobility review" ("PAMR") led to the staff's conclusion that no other traffic mitigation measures were warranted. Ex. 25 at *13-*14. Presuming that the use would generate seven peak hour trips in the morning and again in the evening, the staff concluded that no local area transportation review is necessary. *Id.*

C. COMMUNITY-BASED PLANNING DIVISION.

The staff report's conclusion and recommendations overrode the recommendation of the staff's community-based planning division that the petition be denied. The division memorandum noted that the immediate area, which had been subdivided and platted for residential use before creation of the County's agricultural reserve, is effectively "a residential enclave" in the reserve. Ex. 25 at *3. In the division's view, a landscape contractor's business at the site would insert a commercial enterprise between residential lots of similar size and dimensions. *Id*. The division regarded the storage shed that Butler hoped to erect as

incompatible with the residential area because it would be larger than Butler's home and all but two of the Peach Tree Road residences. *Id*. at *4. The division expressed a fear that traffic associated with Butler's business would damage Peach Tree's roadbed. Ex. 25 at *2.

## V. PROCEDURAL HISTORY.

Butler filed her petition on July 30, 2007. Ex.1(a). On November 7, 2007, Butler's counsel submitted letters that the Office of Zoning and Administrative Hearings ("OZAH") construed as motions to amend the petition. Ex. 12-17. The amendments were considered granted when no opposition to them was filed. See Ex. 13, 15, 17.

Butler did not sign the original petition or the accompanying statement of operations. *See* ex. 1(a). In order to ensure that the petitioner certified her understanding of documents purporting to represent her intentions, I gave Butler the option of either filing a signed amended application or of adopting the statements in the application and statement during her sworn testimony. T. 11-12. Butler's counsel chose the second course. During the hearing, Butler testified that the contents of the petition and accompanying documents were true and correct. T. 128. Later, she signed a revised statement of operations. Ex. 55(b) at 8.

The planning staff issued its report recommending approval with conditions on December 10, 2007. Ex. 25. The Planning Commission issued its unanimous recommendation to deny on December 20, 2007. Ex. 33.

Eight pre-hearing letters opposed approval. Ex. 11, 19(a), 21(a), 23(a), 24(a), 26, 27, 28.[10] One was a letter from the Sugarloaf Citizens' Association, stating that although landscape contracting businesses are appropriate in many locations in the agricultural reserve, "this is definitely not one." Ex. 27. Two objectors filed post-hearing letters. Ex. 52, 54. One resident

[10] OZAH rejected unsigned e-mailed objections. Ex. 18, 20, 23.

submitted a post-hearing letter in support of the petition; none had been filed pre-hearing. Ex. 62.

On December 21, 2007, OZAH granted Butler's counsel's request, filed the day before, to postpone the hearing until February 8, 2008. Ex. 29. 30. OZAH refused to reconsider the postponement over objection by Weeks. Ex. 31, 32.

The hearing convened as rescheduled on February 8 and lasted into the early evening. See T. 273. At the beginning of the hearing I announced that I had briefly visited the area the previous weekend. I reported that I gained only a very general impression of the area but would place no reliance on my hasty viewing. T. 2-3. Butler called two witnesses, Donnelly and herself. Donnelly qualified as an expert in landscape planning. T. 20-21. He was not qualified to testify as an expert on septic systems or hydrology. *Id.* As part of her case-in-chief Butler filed an affidavit of posting. Ex. 34. Each of the respondents listed in the caption testified except Sturm, who left early; all participated in cross-examining Donnelly and (except for Sturm) Butler. Sturm's unsworn statement was admitted without objection. T. 270-271.

The People's Counsel, Martin Klauber, had given timely notice (ex. 10) and participated actively by cross-examining witnesses. At the end of the hearing, the People's Counsel announced he neither opposed nor supported the petition. T. 265-266.

The record was kept open until March 14 to receive additional exhibits, including legal memoranda and responses. T. 270. Because counsel for Butler submitted several exhibits that could be construed as amendments to the petition, I reopened the record until April 10 to receive opponents' responses and Butler's reply, if any. Ex. 64. On May 9, I extended the time for filing this report until June 11. Ex. 66. On June 23 I extended the time an additional twelve days, nunc pro tunc.

## VI. SUMMARY OF TESTIMONY.

A. PETITIONER'S CASE.

1. *Brian Donnelly*.

Donnelly is a civil engineer, surveyor, and planner with Macris, Hendricks & Glascock. T. 14. He has 25 years experience as a site planner (T. 15) and previously qualified as an expert in site planning in other special exception hearings. T. 17. In the present case, he was accepted as an expert in landscape architecture and planning, but not in septic systems or hydrology after he acknowledged he had no expertise in those fields. T. 20-21.

Donnelly described the present site as currently configured. T. 22-28, 33-35, 37. He then recapitulated the changes envisaged by the site plan. T. 29-30, 34, 36, 38. He described percolation tests and water usage results. T. 31-32, 44-46. His testimony in all these respects is summarized above.

Donnelly expressed several opinions during Butler's case-in-chief. He thought the landscaping operation would not be visible from Peach Tree Road because Butler's residence would obstruct the view and would also screen the new storage shed. T. 36. He believed that the scale of the business was small in comparison with other landscape firms he had assisted. T. 49. He deemed Butler's operations to have no non-inherent adverse characteristics because they would be screened from neighbors and because most would be off-site. T. 51. He recited each of the standards in § 59-G-2.30.00 and each applicable development standard, concluding that Butler's proposed uses and changes satisfied them all. T. 53, 59.

On cross-examination, Donnelly addressed a number of new issues. Emergency vehicles will travel the same route as delivery trucks and Butler's vehicles. T. 61. A fire truck might overhang the grass, but could use the driveway without difficulty. *Id.* He had considered adding shrubbery along the property line with Weeks's lot, but had decided that a board-on-

board fence would provide better screening. T. 67. In his opinion, damage to the pines along the perimeter was the result of age, not traffic, but he acknowledged he could not differentiate between decline caused by age and decline resulting from other causes. T. 71.

Donnelly testified about water usage regulation about Butler's water consumption. His testimony on regulation is discussed later in this report. Donnelly acknowledged that Butler's water usage could vary day to day, so that the February 7, 2008, report from Bob's Well Service (Ex. 39) might not be representative of uses on other days. T. 73, 106. The purpose of the water meter that Butler will keep, if the special exception is approved, is to make certain that her usage stays below 5,000 gallons per day. T. 74. A typical garden hose uses about 300 gallons per hour. T. 107. At that rate, it takes 17 continuous hours to reach 5,000 gallons. *Id.* He acknowledged that no test had been done to determine whether maximum usage would affect other wells in the area. T. 73-74. He noted, however, that the natural resources inventory regulations do not require an aquifer to be identified. T. 87-88.

Donnelly spent considerable time discussing septic systems and septic fields (an area in which he has no expertise). T. 77-79, 83-84, 95, 104, 113. His testimony was effectively superseded by subsequent correspondence from the well and septic section of the Department of Permitting Services. See ex. 59(a).

On the matter of rustic roads, he conceded he had taken no core samples of Peach Tree Road, but believed that the light traffic generated by Butler's use would not be damaging. T. 81.

Donnelly discussed four matters that were later altered in the final site plan and revised statement of operations. Responding to my concern about gaps in the plant screening along the southern property line, Donnelly said that existing gaps did not actually provide visibility onto the site, but could be filled by an additional tree and additional shrubs. T. 103-104. The final plans incorporate these additional plants. Donnelly said that the shed near the western

boundary of the property, within the 50-foot buffer area, was not used in the landscaping business. T. 104. The final plans call for its removal. Donnelly had not proposed fencing the storage area because he wanted to avoid giving it an institutional or commercial appearance. T. 109. The final plans call for a four-foot-high timber wall on three sides of the storage area. Donnelly also discussed lighting plans. T. 123-124. The lighting and photometric plan submitted after the hearing supersedes his testimony in large measure.

Donnelly testified the stormwater management question had not been fully resolved. It was his understanding that there would be no impermeable ground cover under the stored mulch or plant stock. T. 110. The Department of Permitting Services had not yet decided whether mulch piles are impervious. T. 111. That question and the issue of what size the bio-retention area would need to be would be resolved once a storm water management concept is approved. T. 112-113, 118-119. After that, engineering construction drawings would need approval by the Department. T. 112-113. No grading or building permits can be issued without those approvals. *Id*. He estimated that it normally takes four weeks to approve the concept and an additional twelve weeks to approve technical drawings. T. 119.

On redirect examination, Donnelly said he considered the new storage shed to be compatible with the area because there were a number of large “storage barns and facilities up and down” Peach Tree Road. T. 113. He later explained he was not comparing the new storage shed to particular barns, just that buildings of that size and type are characteristic of the RDT zone. T. 122.

Donnelly explained that correspondence in the record stating that a new septic system would be necessary to support Butler’s operations (ex. 40) was no longer relevant. The correspondence had been triggered by plans to include toilet facilities in the new shed. T. 114. Butler had abandoned those plans in favor of having employees use her basement toilet. *Id.*

2. *Melody Butler*.

Butler explained the nature of her landscaping business. She serves both residential and commercial clients. T. 130. Her work includes planting shrubs, mulching, weeding, mowing, snow removal, and supplying a "very minimum" of firewood. *Id.* She described her daily operations. T. 131-141, 144-145, 150-153, 184-187, 190, 191-193, 198-200. Those activities have been recited above.

Butler recounted that she had created the berm near the Kingsbury lot for privacy. T. 148. A County inspector had told her the berm complied with County regulations but needed a channel to allow water runoff to prevent "ponding". T. 148-149.

Butler agreed to accept several conditions on future operations. She agreed that no mulch, plants, or heavy equipment would be loaded before 8 a.m. T. 134. She agreed to garage all landscape-related vehicles in the storage shed. T. 138. She accepted a recommendation in the staff report that mulch deliveries be made by trucks carrying no more than 30 cubic yards of mulch. T. 139-140. She agreed to let her employees use her basement bathroom. T. 146-147. She agreed to remove both existing sheds. T. 154-155. She agreed to have no Sunday deliveries. T. 192. She agreed to retain the water meter on her irrigation system and to install a rain sensor system, if available. T. 143, 195-196. And she agreed to fence in the outdoor storage area at the 50-foot buffer line so long as an opening remained to allow for the delivery of materials. T. 205-206. Although the outdoor storage area would be considerably smaller than the space she had been using, she said, "Yes, that's fine." T. 167.

During cross-examination, Butler conceded that she had stored landscaping material within the 50-foot buffer. T. 163-165. She considered that acceptable because the material was 25 to 30 feet from the property line: "It's not sitting right on her property line." T. 165. Some of the materials she stored, such as flagstones, are for use in building patios and stone

walls. *Id.* Pallets seen in one photograph, accumulated as a result of the installation of sod for a client, were awaiting return to a supplier for a $10 credit each. T. 166.

Butler had been in the landscaping business for 26 years at four sites, one of them in Virginia. T. 176-177. Her business had grown and she expected it to grow in the future. T. 177. She thought her site could accommodate the anticipated growth. *Id*.

Butler explained how she had previously run afoul of zoning requirements on River Road. T. 168-170. When her lessor had a feud with a neighbor, the County investigated and she was cited for operating without special exception approval. T. 168-170. She hired a lawyer, but chose not to follow up when one condition would have been to plant 400 trees. T. 169. She chose not to make the investment because it became evident that her lessor was trying to sell the property. *Id.*

Butler was not aware that she needed permission to widen the driveway apron. T. 171-172. She had widened the driveway herself. T. 171.

Butler expressed a readiness to accept a condition establishing a "community liaison council" composed of interested neighbors and citizens associations to meet with her to discuss the conduct of her business at the Peach Tree Road site. T. 205. She was not willing, however, to accede to public review hearings by OZAH for the next three to five years. Id. 204. (Because I conclude that the use Butler proposes is inappropriate for the site, Butler's willingness or not becomes irrelevant).

B. RESPONDENTS' TESTIMONY.

1. *Lynn Lipp.*

Lipp has lived at 21121 Peach Tree Road for 35 years. T. 212. She chose to live there because of its beauty and tranquility. *Id.* She described it as an area of "quaint farms,"

"stretches of woodland," "peaceful country homes," but also a place with tractors. *Id.* She considered the proposed storage shed to be completely out of character with the area. T. 213.

Lipp testified she was disturbed by noise from Butler's property at all times of the day, including the sounds of chain saws and backup beepers. T. 215. She lives about 600 feet from Butler's residence. T. 217. There are "at least" two intervening properties between the two properties. *Id.* Lipp said she was nonetheless able to place the sound by its direction. T. 216. Because of the distance and obstructions, I find Lipp's impressions of the sound source to be unreliable.

2. *Cora Emma Weeks.*

Weeks is Butler's northern neighbor, at 21030 Peach Tree Road. Peach Tree Estates, she testified, was subdivided in the 1950s. T. 219. Her own house was built in 1970, about five years after the house that Butler now owns. *Id.*; but see n. 3, above.

She estimated that the adverse effect on the enjoyment of her property was seven to eight on a 10-point scale, where 10 represent the most adverse. T. 231. She had built the house 180 feet from the road in order to eliminate road noise. T. 222. Now, she had traffic noises coming from within 50 feet of her house, along Butler's driveway. *Id*. Weeks testified she was annoyed by the beeping of vehicles backing up on Butler's property and by noise from the hydraulic lift mechanism of the trash truck. T. 230. The times when she becomes aware of noises varies, depending on when Butler moves mulch and other supplies. *Id.* Butler had previously had as many as five tractor-trailer trucks at a time and Sunday evening deliveries. T. 222.

Weeks introduced a series of photographs showing substantial changes in Butler's property since Butler's arrival in April 2006. T. 219-221 (discussing ex. 45(A)-(D)). Butler had removed many trees from the site, "so it's pretty bare." T. 221.

Weeks disagreed that the pine trees along the property line with Butler provided an adequate screen. T. 224. Many of the trees have lost their lower limbs because of age and snowstorms. Heavy vehicular traffic over their root zones will further their decline. *Id.* Nevertheless, on cross-examination, Weeks objected to a six-foot fence along the property line because it would "affect [her] visual path." T. 227. She would prefer that a fence be put on the 50-foot buffer line. *Id.*

According to Weeks, Butler stores her mulch on plastic sheets, adding to the impervious surfaces on the property. T. 222-223. Butler had cut a channel in the berm after “very large ponding”; when the channel was open, the rush of water perceptibly damaged portions of the Kingsbury property to the south. T. 223 (discussing exhibit 45(B), misidentified as “45-E” in the transcript).

3. *Delores Milmoe*.

Milmoe lives about six miles from the site. T. 233, 245-246. She identified herself as the conservation advocate for the Audubon Naturalist Society. T. 232-233. Because the organization had not provided the ten-day notice of intention to testify, § 59-A-4.49, Milmoe was permitted to testify only in her individual capacity. T. 235. Her personal interest in the case arose from having a landscape contractor operating illegally near her home. T. 243. She feared this case could be a precedent to allow others to locate in the preserve. T. 244.

Milmoe called Butler’s business a “very intense and industrial commercial establishment” that is incompatible with a residential enclave in the agricultural reserve. T. 236; see 239.

Milmoe had become involved in these proceedings when Weeks had called her after being told by Butler that she (Butler) had special exception approval for her landscaping business. T. 236-237. It was clear that she had no such approval. *Id.* Milmoe did not, however, have conversations directly with Butler. T. 247.

Milmoe claimed to have been told by a well and septic section official that no traffic would be permitted over Butler's septic system if it were a shallow-trench system. T. 237. She had also been told that no changes to the use of the property should be allowed without additional information about the system. T. 238.

Milmoe expressed skepticism that Butler would be able to fit mulch, plants, and supplies within a 70-foot narrow rectangular corridor in the back of her lot. T. 238. She objected to allowing commercial driveway use within the 50-foot setbacks. T. 239. She also objected to the increased traffic that Butler's work would bring to the area. T. 240. Although she understood that the Zoning Ordinance permitted landscape contractors to locate in lots as small as two acres, "this is the wrong 2.68 acres." T. 241. She was not opposed to landscape contractors as such, but they should be allowed only where they are more compatible with their surroundings. T. 245.

4. *Caroline Taylor*.

Taylor lives in Poolesville, 12 to 14 minutes from Butler by car. T. 248. She bicycles with her children and fiancé along Peach Tree Road almost biweekly and has befriended Weeks. T. 249.

Her special concern was for the aquifer. T. 249-250. She had been instrumental in having the aquifer serving Butler recognized by the U.S. Environmental Protection Agency as a "sole source aquifer" in 1997. *Id.* That aquifer includes large parts of Frederick County, the upper and lower Piedmont, and perhaps parts of Loudoun County, Virginia. T. 256-257. The EPA designation does not directly affect private water use, only use by properties that receive federal funding. T. 257-258. According to Taylor, orchards in the Peach Tree Road area do not use water for irrigation, except for new plantings. T. 258-259.

Taylor said she was aware from her eight years of experience in the business that landscape contractors use quite a bit of water. T. 250. She had not installed a water meter and so could not quantify the amount of water she had used in her business. T. 255. Although Butler's use alone would not degrade the aquifer, the cumulative effect of such uses would "absolutely" do so. T. 254.

Taylor no longer works as a landscape contractor. Her operation had been small – just herself and her fiancé – and did not have special exception approval at the time because (she said) no approval was necessary. T. 255-256. Her experience as a landscaper made her aware that many in the County had the mistaken assumption no approval is necessary to engage in that line of business in rural areas. T. 251.

She was skeptical that Butler would abide by conditions imposed by this Board. T. 252-253.

5. *Ann Sturm*.

Sturm, who lives at 21730 Peach Tree Road, was present for part of the hearing but left before its conclusion. Her unsworn statement was marked as evidence and was later admitted without objection. T. 243; 270-271.

Sturm's statement asserts that the County's enforcement of conditions included in special exceptions is lax. Ex. 47 at 1. It predicts that granting Butler's petition would serve as a precedent to the proliferation of landscape contractors on "every two-acre plus property in the Agriculture Reserve." *Id.* It states that landscape contracting causes noise, dust, odors, drainage problems, water pollution, and traffic, none of which can be mitigated. And it asks that such businesses be limited to industrial areas exclusively.

## VII. DISCUSSION AND CONCLUSIONS.

I recommend that the petition be denied on the merits. The use contemplated will have serious adverse consequences on Weeks's property because of the commercial traffic engendered along Butler's driveway 42 feet from Weeks's residence and a mere 22 feet from her property line. The noise generated by trucks and Bobcats backing up to load and unload on Butler's property will also seriously disturb both adjacent neighbors. Because of the narrowness of Butler's lot, the configuration of the commercial use that Butler has included in her site plan, and the closeness of the commercial use to neighboring properties, I do not believe that conditions can be devised that will attenuate these adverse effects adequately.

I also recommend that the petition be denied for the separate and independent reason that the record creates substantial doubt that conditions included in special exception approval can, even if otherwise protective of neighboring properties, be effectively enforced in light of Butler's pattern of conduct.

Although I recommend denial of the petition, I do not find two reasons suggested by the Planning Board to justify denial.

A. REASONS FOR DENYING THE PETITION.

1. *The Merits.* By its terms, the Zoning Ordinance creates a strong presumption that landscape contractors can locate in agricultural zones. It expressly provides that those who chose to operate in agricultural zones need not be as stringently controlled as they would be in other zones. Sec. 59-G-2.30.06.

The presumption is not conclusive, however. Even a strong presumption can be rebutted by sufficient evidence to the contrary. When it is clear that the special exception use will have unbearable adverse effects on neighboring property that cannot be alleviated through the use of restrictive conditions, the presumption must give way.

The presumption may itself not be fully suitable in unusual circumstances, such as where the immediate neighborhood is in fact more residential than agricultural despite its zoning. The community planning memorandum aptly called the Peach Tree Estates area a residential enclave. It's also an enclave that mostly pre-existed creation of the agricultural reserve and RDT zoning. Most of the houses in Butler's neighborhood, including Weeks's and Butler's, were constructed when the Zoning Ordinance recognized rural one-family residences as among the preferred uses in the rural parts of the County. Thus, while landscape contractor special exceptions need not be controlled as stringently as in residential zones, the pre-existing residential uses deserve protection. Landscape contractor use is not a matter of right use. It remains subject to general and specific special exception standards. If a new project turns out to be incompatible with pre-existing uses, § 59-G-2.30.00(6) is not an insurmountable impediment to denying a petition and surely was not intended to be.

A landscape contractor special exception cannot be denied, of course, simply because it is adjacent to residences. The Ordinance plainly allows landscape contractors to locate in residential areas, including those with single family houses. Among the zones in which they may locate are those classified as RE-1 and RE-2, where lots may be as small as one or two acres respectively. *See* 59-C-1.31(c). Locating in a residential enclave is therefore not a *sufficient* reason to deny a landscape contractor special exception petition.

When, however, a landscape contractor special exception creates special hardships for residential neighbors who long preceded the proposed commercial use, the general presumption of the ordinance, favoring landscape contractors in agricultural zones, must give way to the particular circumstances of the case. *See* § 59-G-1.21(5).

Here, denial of the petition is warranted because the narrowness of Butler's lot, the configuration of the commercial enterprise on that lot, and closeness of commercial activities to

adjacent properties have particularly detrimental effects on the peaceful enjoyment and, potentially, on the economic value of the neighboring properties.

Butler's business, while relatively modest, generates a substantial traffic flow immediately next to Weeks's house. In Butler's high season there will be as many as *24* individual trips (once coming, once going) within about 22 feet of Weeks's property line and 35 feet of her house. That traffic will include heavy trucks: two trips by roll-off trucks three times a week; two trips by a commercial trash-hauling truck two days a week; Butler's two or four daily trips with her one ton truck. There will be eight trips by Butler's smaller trucks, together with their trailers. Finally, there will be as many eight trips by employee cars. Although Butler's employees now car-pool, commuting habits may change. It is certainly reasonable to assume that the four parking spaces that Butler plans to supply for employee parking will be filled, perhaps often. This recitation does not include the plant delivery trucks because their schedule is too infrequent to have any appreciable additional adverse effect.

As noted above, the Department of Permitting Services wrote that driveways need not be set back 50 feet because it did not deem their use for entry and exit exclusively to constitute "other on site operations" within the meaning of § 59-G-2.30.00(2). An agency interpretation of a statute that it enforces should be given deference unless the interpretation is wrong. *Cf. Wakins v. Secretary, Dept. of Public Safety*, 377 34, 46, 831 A.2d 1079, 1086 (2003). The term, "other on site operations," is undefined and there is reason to question the Department's blanket exclusion of driveways from the setback requirement. It is doubtful that the Council intended to permit intensive traffic along a driveway, with attendant noise and fumes, while prohibiting relatively static activities such as parking within the 50-foot buffer. In the present case, however, the Board need not resolve the legal issue of whether driveways can always (or may never) be located in the buffer.

Even if the 50-foot buffer zone does not *prohibit* use of a driveway closer than fifty feet to neighboring property, the legislative judgment that activities closer than 50 feet pose special problems reinforces my view in this case that the amount of heavy truck traffic considerably *less* than 50 feet from Weeks's home and *less* than half that distance from her property line is fatally detrimental. By its terms, § 59-G-2.30.00(2) requires "adequate * * * buffering to protect adjoining uses from * * * objectionable effects of operations * * *." When the evidence establishes that buffering cannot realistically be adequately protective, the subsection cannot be enforced. Thus, irrespective of whether the mere location and use of a driveway within the buffer zone is lawful, subsection (2) still is designed to protect neighboring properties when the intensity of the driveway's use is unavoidably injurious.

To be sure, Butler agreed to ban all delivery by tractor-trailer. That is an undoubted improvement, but not a sufficient one. Instead of a massive truck bringing 90 cubic yards of mulch once a week, there are now indeterminately less massive trucks passing close to the Weeks home three times a week during high season. Butler did not know the size of the "roll-off" trucks (T. 186-187) but it is fair to infer that they are large. Butler has agreed to build a six-foot high fence along the property line with Weeks. That fence will make traffic less visible but has no certain effect on noise and truck exhaust.

The proposed use will also generate substantial noise at various time of the day during loading and unloading of supplies. As envisaged by the site plan, all loading and unloading will occur in the middle of Butler's lot, about 90 yards from the Kingsbury house and slightly farther from the Weeks house. While noise is to some extent an inherent effect of any landscape contracting business, here it is uniquely exacerbated by the need to back up 130 feet from the driveway loop to the open storage area to unload. Butler's Bobcat loader will also need to travel back and forth to load and unload. Each reverse trip by a vehicle will cause its back-up beeper

to sound. Kingsbury (ex. 54 at (unn) 2) and Weeks have already been disturbed by frequent and prolonged beeping. The site plan, with its 130-foot loading apron, ensures the noise will continue. The shed may act as a baffle but there is no testimony about its effect in the record. In the absence of evidence, the assumption must be that the noise of loading and unloading will continue to disturb the peaceful enjoyment of both adjoining properties.

2. *Ineffectiveness of Conditions.*

Based on the record evidence, I agree with the Planning Board that conditions included in special exception approval are likely to be ineffective.

As part of its responsibilities in special exception proceedings, the Board is expected to "supplement the specific requirements of this Article with any other requirements that may be necessary to protect nearby properties and the general neighborhood." Sec. 59-G-1.22. Conditions are vital elements of every special exception approval because they focus on the idiosyncratic problems associated with the project, a task for which the generalized standards in the Zoning Ordinance are less aptly suited. Their inclusion in a special exception approval presupposes not only that they are necessary to provide protection to the nearby community but that they will be implemented in good faith. Without implementation, the conditions are empty words and the protection they provide illusory. When a petitioner has a history of recurrently disregarding legal restrictions the Board may reasonably take that history into account to determine whether conditions it considers essential will, in fact, be effective.

Here, Butler has displayed a pattern of ignoring governing restrictions: starting the Peach Tree Road business without inquiring whether a special exception was necessary despite having just been cited in another location for operating without a permit; trying to mislead Weeks about having Board approval for the Peach Tree site; using the 50-foot buffer for her operations after she filed her petition, despite having been made aware the buffer cannot be

used; ignoring her sworn pledge that employees will leave the premises by 7 p.m.; failing to register three of her commercial vehicles in Maryland. These are neither inadvertent nor minor lapses. The list does not include excessively widening the driveway apron without a permit or failing to have a plant broker permit. In both of those instances Butler can be given the benefit of the doubt that she was unaware that she was in non-compliance and reasonably so. The same cannot be said of her other lapses.

It is within the Board's power to take this pattern of behavior into account. Just as the Board may refuse to approve a special exception that cannot be prevented form harming the neighborhood and nearby properties by the inclusion of conditions, so can the Board refuse to approve a special exception when it is reasonably certain that the conditions it wishes to include will be less than scrupulously observed. This is such a case.

This does not mean that the Board's judgment as to the credibility of a petitioner's stated willingness to comply with conditions will always justify denial of a special exception. In many cases, the petitioner's possible failure to satisfy conditions can be rectified after the fact by enforcement by the Department of Permitting Services. That will be true when violations of conditions will have an attenuated impact on neighbors or the community. When, however, the impact on those neighboring properties of a violation of conditions is highly likely to be acute, and the petitioner's history raises very serious credibility concerns, denial of the special exception is justified.

B. INSUFFICIENT REASONS TO DENY THE PETITION.

1. The Planning Board gave two reasons why the petition should be denied: the absence of information about the sufficiency of Butler's septic system and the effect of Butler's water use on nearby wells. Neither of the Board's reasons turns out to justify denial.

A percolation test and further analysis by the Department of Permitting Services show that the current septic system is sufficient for its use by Butler and up to seven employees. The revised statement of operations does not exceed that number of potential users. The Department also concluded the septic system is a deep trench system. A deep-trench system is not degraded by compression from truck traffic above it. Accordingly, the existing septic system is not an impediment to approving the petition.

The record does not warrant denying the petition because of Butler's use of water to irrigate her plant stock. The County has not made water consumption a specific environmental or zoning concern. As Donnelly testified, the natural resources inventory does not specifically require an aquifer to be identified. See COMCOR § 22A.00.01.06.A(01) (listing the natural resources to be included in the NRI but not mentioning subsurface features). The staff report did not raise it as a concern. The special exception section regulating landscape contractors does not refer to water use even though the section anticipates that landscapers will locate in agricultural zones where wells are the primary source of water. More broadly, as Donnelly also testified, water use is regulated by the State, not the County. T. 70, 73, 107. Only when water consumption exceeds 5000 gallons per day are State laws and regulations triggered. See Md. Environ. Code § 5-502(a)-(b) (reproduced in ex. 55(g)); COMAR §§ 17.06.01-.03 at 1393-1396.

It is hardly unusual for a landscape contractor to use water to irrigate plant stock. Although there is no comparative data in the record, Butler's use appears not to be atypical. The record shows that she is likely to consume less than 5000 gallons per day even during her high seasons. The State *does* require commercial water users to certify that they use less than 5000 gallons. Md. Environ. Code § 5-502(b)(3)(ii). Butler filed a notice of exemption with the state on February 29, 2008. Ex. 55(f). The notice seems to be effective without State action. See *id.* Butler has also agreed to retain her water meter to monitor future consumption.

The only evidence in the record regarding water usage comes from Donnelly's testimony and from Taylor's concerns that the *cumulative* effect of water use by landscape developers in the agricultural reserve *may* dangerously sap the aquifer. Absent specific guidance in the Zoning Ordinance and environmental regulations, and in light of evidence that Butler's water consumption falls below the State threshold, her routine water use as a landscape contractor does not provide a sufficient basis to deny the petition.[11]

C. SECTION-BY-SECTION ANALYSIS.

***1. Inherent and Non-inherent Adverse Effects.***

*§ 59-G-1.2. Conditions for Granting a Special Exception.*

> *A special exception must not be granted without the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner, or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. 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. Non-inherent adverse effects, alone or in conjunction with inherent adverse effects, are a sufficient basis to deny a special exception.*

Analysis of inherent and non-inherent adverse effects begins with determining what physical and operational characteristics are necessarily associated with landscape contracting. Characteristics that are universal for all landscape contractors are *inherent* adverse effects. Physical and operational characteristics that are idiosyncratic, including adverse effects created

[11] The sub-aquifer serving Peach Tree Road homes appears to be part of an interrelated series of sub-aquifers comprising a Maryland Piedmont aquifer that serves much of northwestern Montgomery County and parts of adjacent jurisdictions. See U.S. Environmental Protection Agency, "Sole Source Aquifer Designation of Poolesville Area Aquifer System." 63 F.R. 6176, 6177 (1998). Protecting the quantity of water available to an area is a legitimate County concern but, without more legislative guidance or specific evidence of likely harm to the water supply, it is insufficient ground to warrant a closer inquiry in a routine special exception case.

by unusual site conditions, are *non-inherent* adverse effects. Inherent and non-inherent effects must be analyzed in the context of the particular property at issue and of the general neighborhood, to determine whether those effects are acceptable or would create adverse impacts sufficient to result in denial.

Almost by definition, under § 59-A-2.1, the physical and operational characteristics associated with landscape contractors are essentially those listed in the staff report. Ex. 25 at 10. Contractors will have structures and outdoor areas for storing plants, mulch, equipment, and other landscape materials. They will have on-site parking of their commercial vehicles, including trucks, trailers, and loading equipment. They will provide parking space for staff. They will generate traffic by employees, suppliers, and trips to and from work sites. Their work will produce traffic noise including during loading and unloading of equipment and supplies. They are likely to have long hours of operation. Some supplies, such as mulch, may produce odors or dust.

Seven characteristics are generally used to distinguish between and non-inherent effects of a use of property at the location chosen by a petitioner: size, scale, scope, light, noise, traffic, and environment.

I agree with the staff report's conclusions that Butler's proposed operations are modest in size and scale. Butler's is a comparatively small operation, with just seven employees plus Butler. Her business does not engage in unusual on-site activities or activities disproportionate to its size. The planned hours of operation are typical of the landscape contractor business. Lighting, which will be reduced if the condition I propose in the appendix is accepted, will produce no objectionable glare. No unusual odors are likely. While Ms Kingsbury claims in a letter that Butler's mulch is so pungent she is forced to close her windows (ex. 54 at 1), there is nothing in the record to show that it is peculiarly so. Indeed, the evidence is that Butler's mulch

is relatively fresh since her need for frequent mulch deliveries must mean that she quickly carts it off to off-site clients.[12]

As already noted, because of the narrowness of the lot, the configuration of the proposed use, and the proximity of pre-existing residential uses, the operation will produce traffic and noise on the property that have peculiarly immediate adverse effects on adjoining lots. These effects are non-inherent and are sufficiently detrimental to warrant denial of the petition.

The slope of the land, coupled with the increase in impermeable surfaces, may also have significant adverse effects on the Kingsbury property. If the Board of Appeals is inclined to grant the special exception, I recommend that the Board first ask the Department of Permitting Services to review the storm water management concept and engineering drawings to determine how severe those effects are and whether they can be ameliorated. If they cannot be, that would be an additional reason to deny the petition.

**2. *§ 59-G-1.21. General conditions***

> *(a) A special exception may be granted when the Board or the Hearing Examiner finds from a preponderance of the evidence of record that the proposed use:*
>
> *(1) Is a permissible special exception in the zone.*

Landscape contracting is a permitted use in RDT zones. *See* 59-C-9.3. The business that Butler conducts meets the Ordinance's definition of landscape contractor in § 59-A-2.1:

> *The business of designing, installing, planning 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 parked, serviced or loaded at the business location.*

---

[12] Although I make no finding on the matter because it is not part of the record, the prevailing opinion seems to be that fresh mulch has relatively little odor unless anaerobic decomposition is allowed to start by failing to rotate the material. *See* http://en.Wikipedia.org/wiki/mulch.

Butler engages in all of the listed activities (except servicing vehicles and equipment) and no others.

> *(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.*

Butler's use complies with all specific standards listed in § 59-G-2.30.00. Those standards are discussed 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 a special exception must be consistent with any recommendation in a 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.*\

The proposed use is consistent with the Preservation of Agriculture and Rural Open Space Master Plan (1980), which recommended the general area for RDT zoning. The plan makes no specific recommendations for the site. Landscape contractors are a permitted use in the RDT zone. Sec. 59-C-9.3.

Peach Tree Road is classified as a rustic road and therefore is subject to the Rustic Road Functional Master Plan (1996). *See id*. at 128-130. The plan acknowledges that heavy trucks use rustic roads to supply farms and to move their products; large trucks also service landscapers. *Id*. at 27. Contrary to Donnelly's testimony (T. 41), the plan language is a lament, not approval of intensive use of rustic roads, much less an invitation to create uses that will bring additional heavy traffic. As the plan notes, heavy use can harm the road surfaces of such roads. Plan, at 27.

Moreover, contrary to the staff report (ex. 25 at 8), the decision by the Council allowing landscape contractors to locate in RDT zones is insufficient to establish that the Council approved such uses on a rustic road. There are roads in the agricultural reserve that are not rustic, where truck weight and traffic volume are not significant issues.

Nevertheless, I agree with the staff report that the proposed use, as revised, is not inconsistent with the rustic road plan. The plan does not contemplate eliminating all commercial use on rustic roads. If the special exception is approved, no tractor-trailer deliveries of any sort will be permitted. Mulch deliveries will be by roll-off truck no more than three times a week during Butler's peak season and no more than twice a week at other times. Such trucks, although large, are smaller and lighter than tractor-trailers and therefore less damaging to the road bed. Plant stock deliveries, limited to two in any three-month period three times a year, will also henceforth be brought by relatively small trucks. Peach Tree Road has no posted weight limits. Butler's five commercial vehicles weigh a ton or less. The total of daily round trips produced by Butler's business, although unacceptable on Butler's driveway, will add little to the traffic on Peach Tree Road.

> *(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. The Board or Hearing Examiner must consider whether the public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

The special exception will not be in harmony with the immediately adjacent properties because of on-site traffic and noise. It will not add to population density or to parking needs. It is consistent with the Growth Policy standards in effect in July 2007, as further discussed below under § 59-G-1.21(a)(9).

Although one could reasonably argue, as Community-Based Planning Staff did, that the proposed storage shed is incompatible with the neighborhood because of its size, I conclude that on balance, it is in sufficient harmony with the general character of the rural/residential neighborhood. In length (60'), the shed is shorter than any of the three houses in the Peach Tree Estates grouping. In width (42'), it is no bulkier than the Kingsbury residence. Its peaked roof is taller than the neighboring houses but the height to the eave line, is not.[13] From the architectural drawings, the peaked roof, copula, and ribbed walls (as well as the color scheme) make the shed look vaguely barn-like, an appearance reasonably compatible with nearby residences and the rural character of the general area. As an aesthetic matter, locating the shed farther in the rear of the property would have been preferable. Even so, its proposed location is at least 210 feet from the neighboring houses and 330 feet from Peach Tree Road, just far enough not to have a detrimental effect on the neighborhood. Moreover, the view of the shed from the street would be largely obscured by Butler's residence. Accordingly, I consider the proposed storage shed to be sufficiently in harmony with the neighborhood to meet the standards of this subsection.

> *(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.*

For reasons stated previously, the special exception will be detrimental to the peaceful enjoyment and potentially the economic value of the adjacent properties because of on-site traffic and noise.

---

[13] The revised statement of operations states that the overall height is 22 feet from grade and only 14 feet to the lowest point of the eaves. Ex. 55(b) at 4. That is lower than Donnelly's testimony and seems to be inaccurate. The schematic drawing (ex. 4(b)) does not give heights. Using the drawing's scale (1"=8'), the height seems to be 16 feet to eave and 24 feet to roof peak.

*(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.*

The use will create objectionable noise. It will not cause objectionable vibrations or fumes: no manufacturing is done on site; no fume-emitting materials are stored on site. The photometric study shows there will be no light spillage on other properties. Even so, for reasons stated below, some of the proposed lighting is unnecessary and should be eliminated. Some odors will necessarily be associated with mulch storage for reasons discussed above. They are inherent in landscaping businesses. There is no reason to believe that odors produced by Butler's mulch storage will be more intense than normal.

*(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.*

This is not zoned as a one-family residential area but is residential in fact. There are no special exceptions in the general neighborhood. See ex. 8. A pet cemetery (S-805) exists just outside the area. *Id.*; T. 58. A monopole antenna has been approved (S-2515) but is awaiting judicial review.

Although there are residences nearby that will be adversely affected, the proposed use will not adversely affect or alter the predominantly residential nature of the area as a whole.

*(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.*

The use will have no adverse effect on health, safety, security, or morals of workers or nearby residents. No visitors are permitted at the site.

The general welfare of adjacent residents will be disturbed by noise emanating from trucks backing up to load and unload in the driveway loop west of the storage shed and significant levels of traffic and activity on 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.*
>
> (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
>
> (B) *If the special exception does not require approval of a preliminary plan of subdivision, the Board of Appeals must determine the adequacy of public facilities when it considers the special exception application. The Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

The site is already subdivided. The proposed use does not require public schools, water, sanitary sewer, storm drainage, or other unspecified public facilities. None of Butler's operating needs are affected by the Growth Policy standards in effect at the time the petition was filed (July 2007). See *2003-5 Annual Growth Policy*, Council Res. 15-375 (Oct. 23, 2003). As previously discussed, Peach Tree Road is adequate for the anticipated use. The use needs no special fire or police protection. Fire and police protection is presumed to be adequate. *2003-5 Annual Growth Policy* at 14.

I credit the staff report's conclusion that the traffic volume will not reduce vehicular or pedestrian safety. Ex. 25 at 14; *id.* at *13-14.

> *(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 facts regarding public facilities does not bind any other agency or department which approves or licenses the project.*

I recommend denial of the petition. Were the special exception to be granted, however, petitioner would be required to obtain all permits required by applicable law. Because Butler has displayed a pattern of ignoring permit requirements, I recommend language in the appendix that specifies the permits that Butler must obtain before final approval of the special exception. Storm water management plans, in particular, require prior approval to protect the Kingsbury property.

> *(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. The burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.*

Butler has not demonstrated she is entitled to a special exception for reasons stated elsewhere in this report. She has met her burden with respect to other applicable and specific standards as discussed throughout this report.

**3. *Additional requirements, § 59-G-1.22.***

> *(a) The Board, the Hearing Examiner, or the District Council, as the case may be, may supplement the specific requirements of this Article with any other requirements necessary to protect nearby properties and the general neighborhood.*

Although I recommend that the petition be denied, I have included a list of conditions in the appendix that would be appropriate if the Board rejects my recommendation to deny.

> *(b) Using guidance by the Planning Board, the Board, the Hearing Examiner, or the District Council, as the case may be, may require a special exception to comply with Division 59-D-3 if:*
>
> *(1) The property is in a zone requiring site plan approval, or*
>
> *(2) The property is not in a zone requiring site plan approval, but the Planning Board has indicated that site plan review is necessary to regulate the impact of the special exception on surrounding uses because of disparity in bulk or scale, the nature of the use, or other significant factors.*

No site plan approval is necessary by law or in order to regulate the impact of the proposed use.

**4. *General development standards, § 59-G-1.23.***

*(a) Development Standards. Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in § G-1.23 or in § G-2.*

The project meets all applicable development standards, as specified in the first column below:

| DEVELOPMENT STANDARD | REQUIREMENT/ ALLOWED | PROPOSED |
|---|---|---|
| Minimum lot area (§ 59-G-2.30.00(1)) | 2 acres (minimum) | 2.68 acres |
| Building height (§ 59-C-9.47) | 50 feet (maximum) | 25 feet (storage building) |
| Building coverage (all buildings) (§ 59-C-9.46) | 10% (maximum) 11,700 sq. ft. | 3.7% 4360 sq. ft. |
| Building setbacks (§ 59-G-2.30.00(2)) | | |
| front | 50 feet (minimum) | 179 feet (east) |
| side | 50 feet (minimum) | 50 feet (north) |
| side | 50 feet (minimum) | 61 feet (south) |
| rear | 50 feet (minimum) | 250 feet (west) |
| Minimum lot width (§ 59-C-9.43) | 125 feet | 170 feet |

*(b) Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.*

Article 59-E does not establish parking requirements for landscape contractors in RDT zones. The parking requirements in § 59-G-2.30.00(3) for landscape contractors is discussed below. The proposed use satisfies those parking requirements.

Employee parking is not directly addressed in § 59-G-2.30.00(3) and is only incidentally mentioned in the staff report, but Butler's meets foreseeable needs. The driveway loop will

have four parking spaces for Butler's seven employees. I credit her testimony that her employees, all of whom have been employed by her for over five years, currently car-pool.

In the unlikely event that as many as three additional parking spaces for Butler's employees become necessary, I propose a condition that additional employee parking must be provided in the new storage shed. That space would be available because Butler's own vehicles will be off-site during the work day. Under no circumstances may employee cars be parked elsewhere on site than in the four specified spaces and in the storage shed.

> *(c) Minimum frontage. In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*

Not applicable. In any event, Butler's lot conforms to § 59-C-9.43 for the RDT zone. See chart above.

> *(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.*

No preliminary forest conservation plan is in the record but one was apparently approved on November 5, 2007. The environmental staff memorandum attached to the staff report states that the property is subject to Chapter 22. Ex. 25 at *12. According to the memorandum, there is a 0.40 forestation requirement that will be met in part by a payment-in-lieu and partly by protecting existing trees and by new plants. *Id*.

The staff report requires that all conditions of approval for the preliminary forest conservation plan dated November 5, 2007, must be satisfied before issuance of sediment and erosion control permits by the Department of Permitting Services. Ex. 25 at 1. In the appendix, I recommend that any approval of the special exception include such a condition as well.

> *(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.*

The environmental staff memorandum attached to the staff report states that the property is located in the Lower Dry Seneca sub-watershed of the Dry Seneca watershed. Ex. 25 at *12. The area is described as having good overall water conditions by the *Countywide Stream Protection Strategy.* The sub-watershed is classified as an "agricultural Watershed Management Area in which the voluntary implementation of best management practices is recommended." *Id*. at *12-*12A.

> *(f) Signs. The display of a sign must comply with Article 59-F.*
>
> No signs will be erected or displayed.
>
> *(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. * * **

This subsection is not applicable because the property is located in an agricultural zone. The compatibility of the new shed is discussed above.

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

This subsection is not directly applicable because the property is located in an agricultural zone, but the effect of lighting on nearby residences is nevertheless a legitimate consideration. In an area where light pollution is less extreme than in more urban settings each additional light will be prominent even when spillage is slight.

Butler bears the burden of establishing the need for lighting for her proposed use. She has not provided it. On the contrary, she acknowledged that her vehicles and indoor lighting would provide sufficient light to accomplish most tasks. Having three lights on the front of the new shed therefore serves no necessary purpose. Giving Butler the benefit of the doubt that some lighting on the front may occasionally be useful, I recommend that the lighting and photometric plan (ex. 55(*l*)) be modified to permit a single fixture of the type specified in the plan (*i.e.*, 100 watt, wall-mounted floodlight) mounted at the height stated in the plan.

The security light at the side facing the Butler residence will not cause undue adverse affects on neighboring properties and the neighborhood if properly adjusted. I find the testimony that deer and other animals are often present in the area to be credible. I accept Donnelly's testimony that those animals can trigger motion detectors to turn on the security light. To avoid having false alarms alter the rural ambience by unnecessary light, the security light system must be calibrated to ensure that the light will be extinguished within *five* minutes of the time it is illuminated. That is enough time to alert Butler of a possible problem and yet ensure that the light will not long be visible in the neighborhood. A proposed condition to that effect is included in the appendix.

**5. *Specific Standards.***

*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.*

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

The 2.68-acre lot satisfies the allowable 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 provided for such areas.*

Parking, loading, and "other on site operations" will occur more than 50 feet from all property lines. The use of the driveway to enter and leave the property may not violate this subsection. See above. Nevertheless, for reasons stated above, the heavy traffic generated by the Butler's enterprise only 22 feet from Weeks's property line and 35 feet from her house will cause irremediable adverse effects to the neighboring property.

*(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.*

The parking that Butler intends to provide for her business vehicles is fully adequate for the use. The new shed will be used to park all of Butler's vehicles, including off-road Bobcats and four trailers. As a condition of approval, no commercial vehicle may be parked elsewhere on the property. A commercial vehicle is every vehicle Butler uses in the business, including any that has dual – commercial and personal – use.

For reasons discussed above, adequate provision has been made for employee parking. A condition is included in the appendix for employee parking needs should current car-pooling patterns change materially.

> *(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.*

No plants, supplies, or equipment will be sold at the site.

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

A proposed condition limiting hours of operation is suggested in the appendix. Although Butler agreed to abide by such hours, there is credible testimony that she has ignored those limits since her agreement to them during the hearing.

> *(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 need to be controlled as stringently as the impact of a special exception in the residential zones.*

This provision has been discussed at length earlier. Although the Peach Tree Road area is in an RDT zone, it was previously zoned Rural Residential. Lots along Peach Tree Road within one-quarter mile are predominantly in residential use.

## VII. RECOMMENDATIONS AND CONDITIONS

Based on the foregoing findings and conclusions and a review of the entire record, I recommend that the petition in no. S-2711 requesting a special exception to conduct business as a landscape contractor in an RDT zone at 21020 Peach Tree Road be DENIED.

Should the Board disagree and vote to grant the petition, I append a list of conditions that should be included with the Board's approval.

Respectfully submitted.

_____
LUTZ ALEXANDER PRAGER
*Hearing Examiner*

Dated: June 24, 2008

**APPENDIX: PROPOSED LIST OF CONDITIONS**

1. Petitioner shall be bound by all her testimony and exhibits of record, and by the testimony of her witness and representations of counsel identified in this report.

2. Petitioner must obtain all licenses, permits, and approvals necessary to implement the special exception as granted, including but not limited to building permits and use and occupancy permits. In particular:

*a.* all conditions of approval for the preliminary forest conservation plan dated November 5, 2007, must be satisfied before issuance of sediment and erosion control permits by the Department of Permitting Services;

*b.* petitioner must obtain final approval from the Department of Permitting Services for storm water management;

*c.* petitioner must obtain any necessary permit from the Department of Permitting Services for paving the existing driveway as depicted on the site-plan (ex. 55(k)), subject to the changes contained in condition 7, below.

3. Petitioner shall at all times ensure that the special exception use and facility comply with all applicable codes, regulations, directives, and other governmental requirements. In particular, Petitioner shall keep no road vehicle in her ownership or under her control anywhere on the property that does not display a current Maryland license plate. Petitioner shall at all times be licensed as a Plant Dealer/Broker by the Maryland Department of Agriculture.

4. Petitioner shall file all subsequent government agency permits, licenses, or other approvals with this Board for inclusion in the record of this case.

5. No supplies, including mulch, plant stock, and other landscape supplies shall be delivered to the site by tractor-trailer truck. Mulch deliveries shall be limited to a single delivery of no more than 30 cubic yards of mulch per day on no more than three days per week from

March though June, and on no more than two days a week during other months. Deliveries of plant stock and other materials are limited to two in any three-month period between March and November. The trash dumpster shall not be emptied more than twice per week. Sunday deliveries and pick-ups are not permitted.

6. No mulch, plant stock, landscape supplies, or equipment is permitted to be loaded, unloaded, or moved before 8 a.m. or after 6:30 p.m. This condition shall not be construed to prevent employees from loading hand tools and small landscape equipment between 7:00 and 7:30 a.m. The trash dumpster shall not be emptied before 8 a.m.

7. The entrance of the driveway at its intersection with Peach Tree Road, including any portion on the public right-of-way shall be reduced to and maintained at a width of no more than 27 feet. At the property line, the driveway shall be no wider than fifteen feet. The site plan is to be amended accordingly. Petitioner shall comply with all applicable permitting requirements in M.C. Code §§ 49-35 and -36 and with all related regulations.

8. Hours of operation are limited to 7:00 a.m. to 6:30 p.m., no more six days a week from March through June and from September through December, and five days a week (Mondays-through Fridays) during all other time of the year. No Sunday work is permitted. This condition shall not be construed to restrict off-site snow removal or emergency tree removal.

9. The number of employees is limited to petitioner and seven non-resident employees. Employees will have access to toilet facilities in the existing residence when on the site.

10. No more than seven employee vehicles may be parked on-site. The first four such vehicles will be parked in the parking spaces depicted on the site-plan. Additional employee vehicles shall be parked in the storage shed. No employee vehicles may be parked off site in the vicinity of the subject property.

11. Vehicles used in connection with the special exception are limited to those listed in petitioner's revised statement of operations (ex. 55(b)), namely: one single-ton stake body or dump truck; four pick-up trucks weighing no more than three-quarter tons each; and two off-road utility vehicles (Bobcats or similar). Each road vehicle must have current Maryland registration and license plates (see Condition 2). In addition, petitioner will be limited to four trailers no larger than reasonably necessary to transport landscaping tools and equipment and plant stock to a job site.

12. All vehicles (including any with both commercial and personal use) shall be parked in the storage shed at all times except when in actual use. No such vehicles shall ever be parked in front of the residence.

13. No vehicle, road or off-road, may be left idling for more than fifteen minutes.

14. All mulch, plant material, and other supplies of whatever nature (including, but not limited to hardwood firewood, flagstones, and pallets) shall be stored within the plant storage area depicted on the site-plan. As shown on the site-plan (ex. 55(k), the storage area shall be bounded on the north, west, and south by a timber wall no less than four-feet high constructed not less than fifty feet from any property line.

15. No chemicals, pesticides, manure, gasoline, diesel fuel, other inflammable liquids may be stored on site.

16. No operations of any kind shall occur less than fifty feet from any property line. This condition shall not be construed to prevent the use of the driveway solely to enter and leave the property.

17. No outdoor lighting is permitted except one switch-operated fixture at the front (western side) of the storage shed and one motion-sensor triggered security light at the back of the storage shed at the eave line. Both lights shall conform to all specifications stated or

depicted in the lighting and photometric plan (ex. 55(*l*)). The security light shall be calibrated to be extinguished automatically in no more than five minutes from the time it is illuminated.

18. Petitioner shall erect a six foot high board on board fence along the northern property line, as shown on the site-plan (ex. 55(k)), or submit a proposal for an alternative screening mechanism agreed upon in writing with the abutting property owner, subject to Board approval.

19. Petitioner shall retain a meter to measure water usage by her plant sprinkler system and keep a monthly log of water usage. The log shall be made available for inspection by the Department of Permitting Services.

20. Petitioner shall install a rain sensor system for her sprinkler system to avoid having the system turn on automatically when it is raining.

21. No signs shall be displayed.