

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. S-2711

**PETITION OF MELODY BUTLER
d/b/a BUTLER LANDSCAPE DESIGN**

OPINION OF THE BOARD

(Opinion Adopted September 10, 2008)
(Effective Date of Opinion: November 7, 2008)

Case No. S-2711 is an application for a special exception to permit a landscape contractor pursuant to Section 59-G-2.30.00 of the Zoning Ordinance. The Hearing Examiner for Montgomery County held a public hearing on the application on February 8, 2008, closed the record on June 23, 2008 and on that same date issued a Report and Recommendation for denial of the special exception.

The subject property is Lot 2, Peach Tree Estates Subdivision, located at 21020 Peach Tree Road, Dickerson, Maryland, 20842, in the RDT Zone.

Decision of the Board: Special Exception **Denied.**

The Board of Appeals considered the Hearing Examiner's Report and Recommendation, together with requests for Oral Argument from Susan Carter, Esquire, on behalf of Melody Butler, and from Caroline Taylor, at its Worksession on July 23, 2008. On a motion by David K. Perdue, seconded by Catherine G. Titus, with Allison Ishihara Fultz, Chair in agreement, and Wendell M. Holloway necessarily absent, the Board denied the requests for oral argument. The Board based this denial on a finding that the issues raised in the requests for oral argument could reasonably have been raised during the public hearing on the application. The Board could not rule on the special exception itself on July 23, 2008 because there were not four members present for the vote, as required by Section 59-A-4.62(b) of the Zoning Ordinance.

The Board again considered the Report and Recommendation at its Worksession on September 10, 2008. Section 59-G-1.2 of the Zoning Ordinance provides:

A special exception must not be granted absent 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.

The Hearing Examiner found that because the driveway for the special exception is located 22 feet from a neighboring residential property line, and 42 feet from the residence on that neighboring property, the commercial traffic along the driveway will have serious adverse consequences on that property. He further found that the noise generated by trucks and Bobcats backing up to load and unload on Butler's property will also seriously disturb both adjacent neighbors. [Report and Recommendation, page 39]. He further found that because of the narrowness of the lot, the configuration of the proposed special exception use, and the proximity of the pre-existing residential uses, the operation will produce traffic and noise on the property that have peculiarly immediate adverse effects on adjoining lots," which are "sufficiently detrimental to warrant denial of the petition" [Report and Recommendation, p. 48]. Boardmembers Holloway, Titus and Fultz concur with the Hearing Examiner's finding that the special exception as proposed and in this particular location presents non-inherent adverse effects sufficient to warrant denial of this special exception.

On a motion by Boardmember Wendell M. Holloway, seconded by Catherine G. Titus, Vice-Chair, with Allison Ishihara Fultz, Chair, in agreement, and Boardmember David K. Perdue not in agreement, the Board voted to deny the special exception, and adopted the following Resolution:

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

Allison Ishihara Fultz
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 7th day of November, 2008.

Katherine Freeman
Executive Director

NOTE:

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

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.