

**BOARD OF APPEALS CASE NO. 5102**

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**BEFORE THE**

**APPLICANTS: Todd Linkous & Fred Linkous**

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**ZONING HEARING EXAMINER**

**REQUEST: Special Exception to allow a private  
airfield in the Agricultural District;  
4702 Fawn Grove Road, Pylesville**

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**OF HARFORD COUNTY**

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**Hearing Advertised**

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**Aegis: 11/29/00 & 12/6/00**

**Record: 12/1/00 & 12/8/00**

**HEARING DATE: January 17, 2001**

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**ZONING HEARING EXAMINER'S DECISION**

The Applicant, Todd Linkous is requesting a Special Exception pursuant to Harford County Code Section 267-53I(1) to allow a private airfield in an AG/Agricultural District.

The subject parcel is located at 4702 Fawn Grove Road, Pylesville, Maryland 21132 and is more particularly identified on Tax Map 9, Grid 4D, Parcel 11. The parcel consists of 144.633 acres, is zoned AG/Agricultural and is entirely within the Fourth Election District.

Mr. Todd Linkous appeared and indicated that his father is the current owner of the property. The witness indicated that he owns and operates a two seat Cessna aircraft which he characterized as a trainer model. He intends to construct a grass airstrip and operate in accordance with State and Federal regulations related to private airfields. His aircraft is currently kept 40 minutes from his home and has no inside storage. It would be more convenient for the Applicant if he could keep the aircraft on his own property sheltered from the elements. The Applicant indicated that there would be no interference with any adjoining property and that he had spoken to most of his neighbors who indicated that they had no objections to the use proposed by the Applicant.

Mr. Bruce F. Mundie appeared as a representative of the Maryland Aviation Administration. Mr. Mundie was very familiar with the proposed use as well as the various state, local and federal requirements for operation of a private use airport. The witness indicated that the Applicant could meet or exceed all of the regulatory requirements that apply to operations of private use airports.

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These regulations include but are not limited to the statutory requirements of the Maryland Transportation Article, the Code of Maryland Regulations and regulations and advisory opinions issued by the Federal Aviation Administration (FAA). Mr. Mundie believed the design of the proposed airport would be safe and would be compatible with the surrounding rural area of Harford County. The witness indicated that the Harford County Code, Section 267-53l(1) is out of date and includes information and requirements that do not apply and, in some cases is just unreasonable. Specifically, the witness identified the following parts of the statute that, in his opinion, should not apply:

Currently Section 267-53l, Par (1)(a) reads as follows:

- (a) The airfield is designed in accordance with design criteria recommended in Advisory Circular For Utility Airports, AC 150/53004B, or Heliport Design Guide, AC 150/5390-1B, both by the Federal Aviation Administration.

The witness pointed out that the Advisory Circular described above was completely replaced in 1989 and no applicant could comply with those standards and still operate within the regulatory framework of the FAA.

Currently Section 267-53l Par (1)(e) provides:

- (e) The takeoff and landing flight path will be a minimum distance of one thousand (1000) feet in any direction from any residence or building.

The witness indicated that he has no idea what may have prompted what he considers an unreasonable restriction of 1000 feet. The witness pointed out that 150 feet is considered a safe distance and would meet the requirements of the Maryland Aviation Administration and the FAA. Mr. Mundie pointed out that even commercial airports that handle large jet traffic only require 150 foot distances from flight path to other structures. With the exceptions noted above, the witness stated that the Applicant would meet or exceed each of the other technical requirements of the Harford County Code allowing approval of the personal use airport at this location.

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Mr. Anthony McClune testified on behalf of the Department of Planning and Zoning and stated that the Department had thoroughly investigated and evaluated the request and recommended approval. Mr. McClune did agree, however that the 1000 foot requirement of the Code was problematic because the proposed runway, from center, will only be 500 feet from an existing structure. He also agreed that the Applicant could not reasonably be expected to comply with regulations that were replaced in 1989. Other than that, Mr. McClune agreed that the Applicant could meet all of the other Code requirements allowing approval of the requested Special Exception.

There were no persons appearing in opposition to the request.

### **CONCLUSION:**

The Applicant is seeking a Special Exception pursuant to Section 267-53I(1) of the Harford County Code to construct and operate a private airfield in an AG/Agricultural Zone.

Section 267-53I(1) provides as follows:

“Transportation, communications and utilities (TCU).

- (1) Aircraft landing and storage, private. This use may be granted in the AG, CI, LI and GI Districts, provided that:
  - (a) The airfield is designed in accordance with design criteria recommended in Advisory Circular For Utility Airports, AC 150/53004B, or Heliport Design Guide, AC 150/5390-1B, both by the Federal Aviation Administration.
  - (b) The approach and landing paths are in accordance with the current Federal Aviation Administration Regulation, Part 77, Objects Affecting Navigable Airspace.
  - (c) The length of the runway and the height of obstacles at each end of the runway are compatible with takeoff and landing performance, as defined in the flight manual for the aircraft to be operating from the airfield.
  - (d) The length of the runway is sufficient for the aircraft to stop safely without thrust reversal after aborting takeoff at takeoff speed.

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- (e) The takeoff and landing flight path will be a minimum distance of one thousand (1,000) feet in any direction from any residence or public building.
  - (f) The takeoff and landing flight path of the aircraft has a minimum of two hundred fifty (250) feet vertical clearance over surrounding property, unless a navigation easement agreement is reached with affected property owners for a lesser clearance.
  - (g) No business, such as the sale or leasing of aircraft, maintenance or flight instructions, shall be allowed.
  - (h) The applicant shall maintain a flight operation log that shall be open for inspection by representatives of the Department of Planning and Zoning.
- (2) Airports, general aviation. These uses may be granted in the CI, LI and GI Districts, provided that:
- (a) Landing, takeoff and utility areas used by aircraft shall be provided with a hard surface.
  - (b) No structures or areas used for servicing aircraft shall be located less than two hundred (200) feet from any property line or less than one hundred (100) feet from any public or private institution.
  - (c) Airport approach and departure paths shall not be located over residential, institutional or other densely populated areas.
  - (d) The decibel reading shall not exceed a measure of seventy (70) decibels at the property line and shall not be objectionable due to intermittence, beat frequency or shrillness.
  - (e) No areas used by self-powered aircraft shall be located less than one thousand (1,000) feet from any residential lot on the approach and departure ends of the runway.
  - (f) Parking of vehicles shall not be permitted within one hundred (100) feet of any property line.
  - (g) The airport shall be surrounded by a sturdy and well-constructed fence, not less than six (6) feet in height, with suitable gates effectively controlling access to such area.

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- (h) Appropriate airport accessory uses, such as restaurants, snack bars, automobile rental agencies, airline business offices and service facilities, but not other business or industrial uses, may be permitted.
- (i) The Zoning Administrator shall refer the application to the Federal Aviation Agency and/or the appropriate regional planning bodies to determine:
  - [1] If such airport is an integral part of or will interfere with the general plan of airports for the Maryland-Washington Regional District.
  - [2] If the takeoff and landing pattern of a new, reoriented or lengthened runway will interfere with the flight pattern of any nearby airport.
- (j) The takeoff and landing flight path will be a minimum distance of two hundred fifty (250) feet vertical clearance over surrounding property, unless a navigation easement agreement is reached with affected property owners for a lesser clearance.”

The standard to be applied in reviewing a request for special exception use was set forth by the Maryland Court of Appeals in Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319 (1981) wherein the Court said:

“...The special exception use is a part of the comprehensive zoning plan sharing the presumption that, as such, it is in the interest of the general welfare, and therefore, valid. The special exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible *absent any facts or circumstances negating the presumption*. The duties given the Board are to judge whether the *neighboring properties in the general neighborhood would be adversely affected* and whether the use in the particular case is in harmony with the general purpose and intent of the plan.

Whereas, the Applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements, he does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community. If he shows to the satisfaction of the Board that that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material. If the evidence makes the question of

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**harm or disturbance or the question of disruption of the harmony of the comprehensive plan of zoning fairly debatable, the matter is one for the Board to decide. But if there is no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the operation of the comprehensive plan, a denial of an application for a special exception use is arbitrary, capricious, and illegal. (Citations omitted). These standards dictate that if a requested special exception use is properly determined to have an adverse effect upon neighboring properties in the general area, it must be denied.” (Emphasis in original).**

**The Court went on to establish the following guidelines with respect to the nature and degree of adverse effect which would justify denial of the special exception:**

**“Thus, these cases establish that the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.” 291 Md. At 15, 432 A.2d at 1327.**

**Based on all of the testimony and a review of the “Limitations, Guides and Standards” set forth in Section 267-9I of the Code, the Hearing Examiner concludes that this special exception use at this particular location will not have any adverse impacts above and beyond those inherent with such a use, regardless of its location within the AG zone. Generally, the analysis set forth in Schultz would end the inquiry. However, the Harford County Code provides that the requested use in this zone must have a minimum distance of 1000 feet between the flight path and any existing structures such as residences or other buildings.**

**While expert testimony by the Maryland Aviation Administration was compelling regarding the unreasonableness of the distance, it is nonetheless one of the requirements specifically required in order to create a presumption of compatibility with other uses in the zone. The inquiry is whether the Hearing Examiner has the ability to ignore or modify the specific conditions set forth in the Code for this use. Presumably, the County Council had very specific criteria in mind when the various specific requirements for each type of Special Exception was set forth in the Code.**

**In the opinion of the Hearing Examiner, ignoring these technical requirements would be tantamount to rewriting existing legislation which is well without the jurisdiction of the**

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Hearing Examiner. It is not appropriate for the Hearing Examiner to inquire why the County Council included such provisions within the Code, it is enough that they are there and must be met by all Applicants seeking approval under the statute. Similarly, seeking to determine why the County Council has required an Applicant to meet standards that were rewritten in 1989 is well outside the purview of the Hearing Examiner. In other words, the provisions of Section 267-53I(1) are the minimum requirements that must be met as a prerequisite to a finding that this particular use is a permitted one, under the statute.

“It is generally accepted that a special exception is, “... a grant by an administrative body pursuant to the existing provisions of the zoning law and subject to certain guides and standards, of a special use permitted under the provisions of the existing zoning law. Rezoning or reclassification is, of course, *a change in the existing law itself*, so far as the subject property is concerned.” Cadem v. Nanna, 243 Md. 536, 543, 221 A.2d 703, 707 (1966). “ A special exception is a use which has been legislatively predetermined to be *conditionally compatible* with the uses permitted as of right in a particular zone, the condition being that a zoning body must, in each case, decide under specified statutory standards whether the presumptive compatibility in fact exists. Creswell v. Baltimore Aviation Serv., Inc., 257 Md. &12, 719, 264 A.2d 838, 842 (1970).

In the instant case the County Council acting in its legislative capacity has set forth certain conditions which, if met, presume that the enumerated use is a permitted use within a particular zone. In the instant case, both the regulatory requirement of 267-53I(1)(a) and the 1000 foot requirement set forth in 267-53I(1)(e) have not been met. The Applicant has argued through expert testimony that neither of these conditions is reasonable and should be ignored by the Hearing Examiner. The Hearing Examiner must determine then, if this is a legitimate Administrative function or an impermissible legislative act. There is substantial precedent for finding the latter.

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In Kassab v. Burkhardt, 34 Md. App. 699, 368 A.2d 1064 (1977), the Maryland Court of Appeals stated, “An applicant for a special exception must meet all conditions precedent to the grant of such use. In the instant case, planned unit development provisions requiring that evidence be submitted to demonstrate that the subject development will be served by public water and sewage disposal systems which exist at the time of the plan is submitted for approval must be literally interpreted. The courts may not attempt, under the guise of construction, to supply omissions or remedy possible defects in the statute or insert exceptions not made by the legislature. Here the requirement was stated in unambiguous manner and was not susceptible to statutory construction.” “A special exception or conditional use involves a use which is permitted, once certain statutory criteria have been satisfied.” Mossburg v. Montgomery County, 107 Md. App. 1, 666 A.2d 1253 (1995). Perhaps the concept was most succinctly stated by the Maryland Court of Special Appeals in County Comm’rs of Queen Anne’s County v. Soaring Vistas Properties, Inc., 121 Md. App. 140, 708 A.2d 1066 (1998) wherein the Court stated. “ The terms “conditional use” and “special exception use” are frequently interchanged. Conditional uses are permitted uses, *so long as the conditions set out in the zoning ordinance are satisfied.*” Emphasis added.

In Chester Haven Beach Partnership v. Board of Appeals for Queen Anne’s County, 103 Md. App. 324, 653 A.2d 532 (1995), the Maryland Court of Special Appeals addressed a special exception use wherein the Applicant also requested a variance from the specific provisions of the statute allowing such a special exception use. The case is so similar to the request before the Hearing Examiner, the opinion is set forth at some length.

“In the subject case, in order to qualify for a conditional use approval, an applicant must seek a variance from the density and cluster provisions in order to satisfy conditions of the ordinance to be entitled to a conditional use. *An applicant may not eliminate the conditions required to achieve a conditional use by obtaining a variance therefrom.* [emphasis added]

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The attempt to follow this procedure creates fundamental and conceptual problems with the generally accepted proposition that, if the expressed conditions necessary to obtain a conditional use are met, it is a permitted use because the legislative body has made that policy decision...the application for a conditional use becomes dependent upon the granting of the variance. Under those circumstances, the presumption that a conditional use is permitted may well fall by the wayside. The policy that establishes certain uses as permitted is predicated upon the satisfaction, not avoidance, of conditions.”

While the Hearing Examiner agrees with the Applicant that certain provisions of the statute are out of date or may be unreasonable in light of the proposed use and current state regulatory requirements, nonetheless, the legislative body of Harford County has predetermined that this use is permitted as a special exception only when certain specific and unambiguous conditions are present. The assumption must be that when those enumerated conditions are not met, the special exception use is not presumptively permitted. Consequently, the Hearing Examiner finds that the Applicant, as a condition precedent to approval, must meet the specific conditions set forth in Section 267-53(l)(1) of the Code. Having failed to meet those conditions, the Hearing Examiner is unable to provide administrative relief and recommends, therefore, that the Special Exception be denied.

Date     **JANUARY 26, 2001**

**William F. Casey**  
**Zoning Hearing Examiner**