



COUNTY COUNCIL OF HARFORD COUNTY, MARYLAND

RICHARD C. SLUTZKY
President

MIKE PERRONE, JR.
District A

CHAD R. SHRODES
District D

JOSEPH M. WOODS
District B

PATRICK S. VINCENTI
District E

JAMES V. "CAPT'N JIM" McMAHAN
District C

CURTIS L. BEULAH
District F

NOTIFICATION OF ZONING HEARING EXAMINER'S DECISION

DATE OF DECISION: October 18, 2016
HEARING EXAMINER: Robert F. Kahoe, Jr.
RE: Zoning Appeal Case No. 5838
APPLICANT: Albert J. Bierman
LOCATION: 3440 Dorothy Avenue, Joppa
REQUEST: Special exception to permit mulch processing, storage and sales use in the Agricultural District

Enclosed is an official copy of the Hearing Examiner's decision relative to the above referenced case.

The Hearing Examiner's decision shall become final **NOVEMBER 7, 2016**.

This decision shall be considered a recommended opinion to the Harford County Council, sitting as The Board of Appeals, if a written request for Final Argument before the Harford County Council is filed by the close of business on above date by the Applicant, Applicant's Attorney, Opponents, People's Counsel, or a person aggrieved who was a party to the proceedings before the Hearing Examiner. In addition, any Board Member, upon written notice to the Council Administrator, may request final argument.

COUNTY COUNCIL OF HARFORD COUNTY

Mylia A. Dixon
Council Administrator

Enclosure

cc: Applicant/Attorney; People's Counsel; Department of Planning and Zoning

APPLICANT:
Albert J. Bierman

REQUEST: Special Exception to permit a mulch processing, storage and sales use in the Agricultural District

HEARING DATE: August 17, 2016

BEFORE THE
ZONING HEARING EXAMINER
HARFORD COUNTY
BOARD OF APPEALS

Case No. 5838

ZONING HEARING EXAMINER'S DECISION

APPLICANT: Albert J. Bierman

LOCATION: 3440 Dorothy Avenue, Joppa
Tax Map: 61 / Grid: 3B / Parcels: 85 & 669
First (1st) Election District

ZONING: AG / Agricultural District

REQUEST: Special Exception, pursuant to Section 267-88E(3) the Harford County Code, to permit a mulch processing, storage and sales use in the Agricultural District.

TESTIMONY AND EVIDENCE OF RECORD:

The subject property consists of two adjoining parcels of 24.62 acres and 99.04 acres. Both parcels are zoned Agricultural and are in agricultural use with a significant amount of forest cover. The 24.62 acre parcel is improved by the Applicant's residence. The 99.04 acre parcel supports a shed and is divided by Dorothy Avenue, a County road. On the west side of Dorothy Avenue, and somewhat to the west and north side of the existing farm shed, is the location of the Applicant's proposed mulch storage processing operation.

The parcels are located off Clayton Road in the Joppa area of the County, and are accessed by both Heim Lane and Shirley Avenue, streets servicing the small residential enclave lying between Clayton Road and the subject property.

First testified the Applicant, Albert J. Bierman. Mr. Bierman explained that he has been the owner of the subject parcel since 1998. The property is improved by his home and a barn. Of the total acreage, approximately 40 acres is tillable. The remaining property is wooded. Several ponds are also located on the parcels.

Mr. Bierman has been in the mulch business for about 25 years with his main business location in Essex, Maryland. On the subject property the Applicant plans to construct 8 foot high concrete bins to store the mulch – some which will be processed on-site and some of which will be delivered from Essex for eventual distribution to his customers.

Case No. 5838 – Albert J. Bierman

Mr. Bierman explained that the business is seasonal, beginning in early April and running for about 6 months each year. Mr. Bierman expects to receive up to two large tractor trailer loads of processed material on the subject parcel each week. He will then deliver on smaller vehicles to his landscaping customers. His business will be wholesale only, and he expects to make about 8 to 9 trips out per week. The trucks making deliveries will be one-axle, 20 to 24 feet in length. His business is not a retail operation. The product will be sold on a wholesale basis to landscapers. He expects to have no employees on the site except for his two sons.

He also expects to accept and to bring onto the parcel lawn debris, clippings and the like. He will bring a chipper onto the subject property one day per week to process the lawn debris. The material will be stored and processed in one of the concrete bins.

Mr. Bierman sees no negative impact to his neighborhood. There will be minimal movement of equipment to and from the property. Mr. Bierman will agree to limit truck traffic entering and leaving the subject property to Dorothy Avenue and Heim Lane only, and will agree to not use Shirley Avenue. The Applicant's family owns 5 lots on the south side of Heim Lane (4 houses and one unimproved parcel).

The witness explained that the vehicle bringing the mulch to the property will be a 48 foot tractor trailer which holds 50 to 60 yards of material. He will store on the property from 100 to 150 yards of processed mulch. This material will then be delivered to landscapers in smaller trucks which hold up to 10 yards each. A typical order is from 6 to 12 yards, with an occasional larger order. Heim Lane, in Mr. Bierman's opinion, is suitable for use by such vehicles. He believes Heim Lane is 25 feet wide.

The applicant agreed to a condition which would limit his use to a wholesale operation only, with no retail customers to be serviced from the property. He will have no signage on the property indicating the mulch operation.

Mr. Bierman also agreed that the hours of operation would be from 9:00 am to 3:00 pm. There will be no weekend mulch processing, delivery or sales.

Mr. Bierman also added that, while he may have up to 150 yards of processed mulch on-site at any one time, he will also have to up to an additional 150 yards of material being processed on site.

Next testified Torrence Pierce, President of Frederick Ward Associates. Mr. Pierce was offered and accepted as an expert in planning, engineering and land development. Mr. Pierce described the property as being 125 acres divided into two separately deeded parcels. The parcels are zoned Agricultural.

Mr. Pierce confirmed that Mr. Bierman has agreed not to use Shirley Avenue. Both Shirley Avenue and Heim Lane are fronted by residential properties.

Case No. 5838 – Albert J. Bierman

The bins to be used for the mulch processing will be located behind the existing barns and are shown on the Applicant's site plan. A revised site plan was submitted as there is no need for the buffer as shown on the east side of Dorothy Avenue. The use will be located to the west of Dorothy Avenue and, accordingly, a buffer is required around that parcel only.

Mr. Pierce described the general land uses in the area, which consist of agricultural and residential uses. An old clay surface mining pit is located to the north of the property.

According to Mr. Pierce, the closest residential dwelling is about 1,000 feet from the proposed mulch processing operation, and is located at the corner of Dorothy and Shirley Avenues. He does not believe that the mulch storage area will be visible to any residents of Shirley Avenue, Dorothy Avenue or Heim Lane.

The proposed use, in Mr. Pierce's opinion, can easily meet all conditions of Code Section 267-88E(3). Mr. Pierce believes that the 8 foot high concrete bins will satisfy the special exception requirement that storage areas be fully buffered from public roads and neighboring residences.

Mr. Pierce believes that the traffic generated by the mulch processing operation will not impact the community as there will be relatively few trips each week with minimum impact.

Mr. Pierce also reviewed the considerations of Section 267-9I and found no adverse impact. He believes a condition that Mr. Bierman not use Shirley Avenue will significantly reduce impact to the adjoining residential neighborhood. The proposed use is consistent with agricultural uses. The use is seasonal, from April to approximately September.

Mr. Pierce stated that the surrounding roads are about 20 feet in width, are of tar and chip construction, and are adequate for the proposed use. The roads are designed to accommodate truck traffic. The trucks proposed by Mr. Bierman to be part of the mulch operation are similar to farm vehicles which also use these roads. Mr. Pierce also recommends not using Shirley Avenue.

Mr. Pierce explained that a similar special exception was granted to the Bearsch property located just north of the parcel on Clayton Road. The Bearsch property is also agriculturally zoned and its use is not inconsistent with the Harford County Master Plan.

On cross-examination, Mr. Pierce stated that Clayton Road appears to be wider than Heim Lane.

Next for the Applicant testified Mark Keeley of Traffic Concepts. Mr. Keeley was offered and accepted as an expert traffic engineer. Mr. Keeley had prepared a traffic report, dated August 17, 2016, which was accepted as Applicant's Exhibit No. 8. Mr. Keeley had conducted traffic counts for Dorothy Avenue and Heim Lane. Dorothy Avenue averaged 24 vehicles per day over a 3 day count; Heim Lane averaged 145 vehicles per day over a 3 day count (page 2 of Report).

Case No. 5838 – Albert J. Bierman

Mr. Keeley also determined the schedule for school bus pick up and drop off and found no conflict with the proposed hours of operation by Mr. Bierman, which are from 9:00 am to 3:00 pm. However, Mr. Keeley admitted that he had not determined bus pick up or drop off times for Pre-K students.

Mr. Keeley's conclusion is that:

“The proposed mulch business and its impact at this location is no greater than if this use was proposed on a similarly zoned agricultural property located elsewhere in Harford County.

In summation, the proposed use on the agricultural land would not significantly alter the existing traffic volume or the type of vehicles currently using Dorothy Avenue or Heim Lane. The traffic count data reveals several heavy trucks, including a tractor trailer truck operating on Dorothy Avenue and Heim Lane. Although there are no shoulders along Dorothy Avenue and Heim Lane, the minimal traffic volume reduces the likelihood of vehicles passing in opposite direction.”

Mr. Keeley's report concluded

“...the use will not pose any unusual danger to the public or overburden the roadway network and is acceptable for a traffic impact for an agricultural operation. The existing site access will serve the site and will have no greater impact to the surrounding roadways than already exists. It is our assessment that the proposed mulch business should be granted from a traffic impact statement.”

(see page 4 of Report)

Mr. Keeley observed that Dorothy Avenue has a paved width of between 19 – 20 feet; Heim Lane has a paved width of about 20 – 22 feet; and Clayton Road has a paved width of about 22 - 23 feet.

Next for the Department of Planning and Zoning testified Anthony McClune, Chief of Current Planning. Mr. McClune and the Department believe that the proposal will meet all specific special exception conditions. However, the surrounding community is an older residential neighborhood consisting of generally smaller residential lots than would be allowed under current Subdivision Regulations. Most homes along Heim Lane are closer to the roadway than would be allowed today. The Department believes the proposed use would have a greater impact, as a result, on the surrounding community than it would if located elsewhere. Mulch trucks will be driving through an existing residential community. Heim Lane and Dorothy Avenue are not as wide as streets constructed under modern subdivision regulations.

Case No. 5838 – Albert J. Bierman

The Staff Report stated,

“The delivery and sale of processed mulch through the established subdivisions will result in increased noise and traffic. The homes are located on small, residential lots, with the houses situated relatively close to the road(s). Therefore, the Department of Planning and Zoning believes that the proposed use will have an adverse impact on the area and surrounding residential uses.”

Accordingly, the Department recommends denial.

On examination by the Applicant’s attorney, Mr. McClune stated that he considers the overall community to be roughly that area from Singer Road south to Interstate 95. He believes the homes in the area, for the most part, sit very close to respective subdivision streets.¹

Mr. McClune distinguished the Bearsch special exception from the Bierman request for mulch processing. The Bearsch property has direct access to Clayton Road. Moreover, the topography of the Bearsch property actually separates it somewhat from adjacent neighbors. Most importantly, traffic on the Bearsch property does not go through residential areas. The Bearsch use has less of an impact than would the use on the subject property.

In opposition first testified Linda Fancher, of 1706 Shirley Avenue. Her property is located at the corner of Dorothy and Shirley Avenues, and was previously identified by Mr. Pierce as the closest residence to the proposed mulch processing operation.

Ms. Fancher has lived at her property for about 37 years. She can see the Bierman house. In the winter time, she can see the barn to the west and north of the proposed location of concrete bins. She believes that at certain times of the year she would be able to see the mulch processing facility.

Ms. Fancher believes that any condition which prohibits traffic on Shirley Avenue will not be enforced, and, in fact, cannot be enforced. She believes Mr. Bierman will violate that condition without repercussions. At present, there are 3 – 4 trucks a week accessing the Bierman property from Shirley Avenue. Ms. Fancher does not know the purposes of those trucks. However, they are quite noisy and cut across her lawn at the corner of Shirley and Dorothy Avenues.

¹ Little noted at the hearing or in post hearing briefs (except for a passing mention in Department of Planning and Zoning staff report), is a decision Board of Appeals, dated December 7, 2000 which denied a special exception request by the Applicant for the same property which was remarkably similar to that now before the Board. In 2000 Mr. Bierman was proposing to construct a sawmill on the property but to limit hours of operation to Monday through Friday 8 a.m. to 4 p.m. with occasional Saturday or holidays; to limit truck deliveries of timber to a maximum of three per week, twelve per month; and to not use Shirley Avenue for access to the site. While the potential noise from the sawmill was an issue, the Hearing Examiner in denying the request found "the fact remains that the proposed site, located immediately adjacent to an older, residential neighborhood, presents problems with adverse impacts that are greater at that location than they would be at other locations within the agricultural district. The presence of that neighborhood, with its narrow, residential country roads and homes built close to the street, amplifies the impact of noise from the sawmill operation and the truck traffic associated with it." See Board of Appeals Case No. 4997, Albert J. Bierman, Jr.

Case No. 5838 – Albert J. Bierman

Ms. Fancher stressed that there were no sidewalks in the area and a car and school bus cannot pass each other without one pulling over. Ms. Fancher stated that one school bus carrying Pre-K students use Shirley Avenue in the late morning to transport children. None of the roads have shoulders. All are of tar and chip construction. Ms. Fancher is familiar with the Bearsch operation but has seen no impact from it. The difference is that the Bierman operation will use neighborhood roads. Shirley Avenue will be used, she states, unless someone is there constantly watching for violations and enforcing the conditions. She is not certain of the width but believes Clayton Road is wider than Shirley Avenue, Dorothy Avenue or Heim Lane. Ms. Fancher wants peace and quiet. She does not want the impact of the mulch operation in her neighborhood.

Next in opposition testified Laura Thacker, of 1702 Heim Lane. Ms. Thacker states that even two cars cannot pass on Heim Lane and because of its narrow width; a truck and a car cannot pass each other without one pulling over.

Ms. Thacker is worried that the proposed mulch operation will actually be more than it is represented to be. Her neighborhood is different than that in which the Bearsch property is located. Her biggest worry is that the Bierman use will be more intense than it is represented to be.

APPLICABLE LAW:

This special exception request is governed by Section 267-88E(3) of the Harford County Code:

“Natural resource uses.

- (3) *Mulch processing, storage and sales. These uses may be granted in the AG District, provided that:*
 - (a) *A minimum parcel area of 10 acres is required.*
 - (b) *Storage areas are fully buffered from view of public roads and neighboring residences by means of a solid fence or wall at least 8 feet high.*
 - (c) *A Type "E" buffer yard [see § 267-30 (buffer yards)] shall be provided along any adjacent road right-of-way or adjacent property.*
 - (d) *No wood products shall be piled more than 6 feet high or above the level of the buffering, whichever is greater.*

Furthermore, Section 267-9I of the Harford County Code, Limitations, Guides, and Standards, is also applicable to this request.

Case No. 5838 – Albert J. Bierman

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Applicant owns two fairly large parcels divided by a short, older county Road known as Dorothy Avenue. Dorothy Avenue is about 2,000 feet long and is parallel to Clayton Road and separated from it by about 1,300 feet. It is connected to Clayton Road at each of its two ends by Shirley Avenue to the south and Heim Lane to the north. Much of the general area is relatively heavily wooded, with the Applicant's property having some tillable acreage in its interior and surrounding the proposed site of the mulch operation. Both Shirley Avenue and Heim Lane, but not Dorothy Avenue, are fronted by older residential dwellings on lots which testimony describe as being smaller than what would be allowed under current subdivision regulation. The homes are also somewhat closer to the road than would otherwise be allowed under current code. Shirley Avenue and Heim Lane are, as determined by Applicant's traffic expert, between 19 and 22 feet wide. There are no established shoulders and no sidewalks along either Shirley Avenue or Heim Lane.

The Applicant's parcels are agriculturally zoned, have been used in the past for agricultural uses and no doubt will in the future continue to entertain agricultural uses. Clearly, both Heim Lane and Shirley Avenue are utilized by farm vehicles accessing the Applicant's property, and perhaps other adjoining properties as well.

The Applicant proposes to establish a mulch processing and storage business on his parcel, to the west side of Dorothy Avenue. The business will operate six months per year and will be serviced by the delivery of perhaps two tractor trailer loads of processed material to the site and eight to nine weekly trips from the site by smaller vehicles. The Applicant's operation will also include the processing of lawn and landscape debris. It is unclear how many trips per week this will entail but the Applicant did testify that he would have no more than 150 yards of such material being processed on site at any one time. A tractor trailer can hold 50 to 60 yards of material.

Mulch processing is a special exception in the Agricultural District under the Harford County Code. "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..." See Creswell v. Baltimore Aviation Services, Inc., 257 Md. 712 (1970).

There is, therefore, a presumption that the Special Exception use is to be permitted. Potentially mitigating against such a presumption, however, and being a requirement of review, is the need to decide if the:

"... adverse effects in a particular location would be greater than the adverse effects ordinarily associated with a particular use that is considered by the agency." See Eastern Advertising Co. v. Mayor & City Council of Baltimore, 128 Md. App. 494 (1999).

Case No. 5838 – Albert J. Bierman

Since the use has been determined legislatively to be generally compatible with the uses otherwise allowable in the agricultural district, it is not necessary to redetermine compatibility. Accordingly, the Applicant's attempt to show compatibility of the mulch operation traffic with agricultural traffic is not necessary and is in fact irrelevant to this discussion. Compatibility has been determined.

What has not been legislatively determined, however, is 'whether the adverse effects in a particular location would be greater or more severe than the adverse effects ordinarily associated with the particular use.'

This is perhaps, at least at first glance, a somewhat elusive standard. The seminal case of Shultz v. Pritts, 291 Md. 1 (1981), however, explained in fairly basic terms how the standard is to be applied. Judge Rita Davidson, writing for the Court, explained that a conditional² use results from a legislative determination that a particular use is "compatible with the permitted uses in a use district, but that the beneficial purposes [that conditional] uses serve do not outweigh their possible adverse effect." The adverse effect referred to is "at the particular location proposed" and is "above and beyond that ordinarily associated with" the particular conditional use. Thus, the Court held 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."

See also Days Cove Reclamation Co. v. Queen Ann's County, 146 Md. App. 469 (2002).

Reviewing the Applicant's proposed use, it would appear that even if the applicant complies with the conditions to which he has agreed the use will, clearly, have a greater impact at the proposed location than it would if located elsewhere else. Access to the Applicant's property would be through a small, older residential area which consists of homes built along both sides of Heim Lane, on small lots and closer to the road than allowed under the current subdivision regulations, on a road without sidewalks or shoulders. Testimony is that it is difficult, if not impossible, for two vehicles to pass each other on Heim Lane without one pulling over to allow the other to get by. It takes no great imagination to envision the impact on these homes and their occupants of mulch hauling tractors and trailers and 20 to 24 foot single delivery vehicles. Such an impact would be greater here than it would in an area where the homes, lots and streets are not so constrained.

² A "conditional use" is considered to be the same as a "special exception".

Case No. 5838 – Albert J. Bierman

Are there any other locations in the district where such an impact would not occur? Unusually for these sorts of cases, there is a good example of a location where a similar use does not have such an impact, which is the Bearsch property to the north of the subject parcel, located directly on Clayton Road. The Bearsch's Special Exception was granted some years ago for a mulch processing business, the same use requested by the Applicant. Even given the limitations proposed by Mr. Bierman, the Bearsch activity would have a lesser impact on the surrounding properties as trucks do not go through the type of residential area which is located on Heim Lane. The Bearsch property directly accesses Clayton Road and vehicles join the varied traffic flow on the wider and more heavily used Clayton Road. There is simply not the same impact on the homes in the Bearsch neighborhood that the Bierman use will have on the residential enclave along Heim Lane.

Schultz v. Pritts held that a special exception, "...should be denied [if] there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effect above and beyond those inherently associated with such a special exception use irrespective of its location within the zone."

The review of Applicant's special exception is accordingly a site specific undertaking. One must look at the particular area in which the proposed special exception is to be located to determine if there are any features that would contribute to or cause a special exception to have an impact not present if located elsewhere.

Characteristics of the neighborhood within which the vehicles servicing this Special Exception will operate supports a finding that the adverse impact of the mulch processing operation will be greater at the location proposed than at somewhere else within the zone. A review of the aerial photographs submitted by the Applicant and marked as Applicant's Exhibit 4, shows that by rough count, a minimum of fifteen homes front on Heim Lane between Dorothy Avenue and Clayton Road. Because of the shallowness of the front yards, the smaller lot size, a lack of sidewalks and the narrowness of the paved portion with Heim Lane, the Special Exception will cause a greater and more adverse impact than if it were located at a location without these particular characteristics.

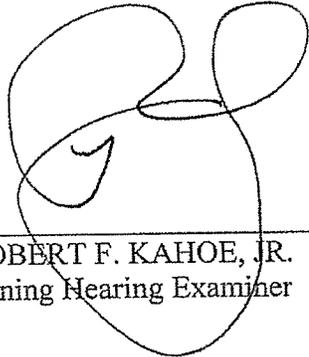
The promise of the Applicant to limit his mulch business to certain hours and certain times of the year, and with a relatively modest volume, is understood. However, the Applicant's promise to moderate his operation does not eliminate impact. While the passage of two heavy vehicles a week along Heim Lane may be better than having, for instance, ten such vehicles a week, the impact will be more pronounced, by any reasoning, than would be the impact in a neighborhood without the particular characteristics of Heim Lane. Accordingly, it is found that the requested Special Exception will have adverse effects at the location proposed greater than would be the case if it were located elsewhere within its zone.

Case No. 5838 – Albert J. Bierman

CONCLUSION:

Accordingly, it is recommended that the requested Special Exception for mulch processing be denied.

Date: October 18, 2016



ROBERT F. KAHOE, JR.
Zoning Hearing Examiner

Any appeal of this decision must be received by 5:00 p.m. on NOVEMBER 7, 2016.