

**IN RE: PETITIONS FOR SPECIAL  
EXCEPTION AND VARIANCE  
(14538 Old York Road)  
10<sup>th</sup> Election District  
3<sup>rd</sup> Council District  
Creech Company, LLC  
*Legal Owner*  
Lerch Brothers, LLC  
*Lessee*  
**Petitioners****

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BEFORE THE  
OFFICE OF  
ADMINISTRATIVE HEARINGS  
FOR BALTIMORE COUNTY  
**Case No. 2018-0331-XA**

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**OPINION AND ORDER**

This matter comes before the Office of Administrative Hearings (OAH) as Petitions for Special Exception and Variance filed for property located at 14538 Old York Road. The Petitions were filed on behalf of Creech Company, LLC, legal owner and Lerch Brothers, LLC, lessee (“Petitioners”). The Special Exception petition seeks approval to use the subject property for a landscape service company in the RC zone. The Petition for Variance seeks approval: (1) for an existing internal roadway located 1 ft. from a property line in lieu of the required 25 ft.; and (2) for an existing accessory structure (barn) located 25 ft. from a property line in lieu of the required 50 ft. A site plan was marked as Petitioners’ Exhibit 1.

Appearing at the hearing in support of the petitions were John Lerch, Tom Lerch, landscape architect David Martin and environmental specialist Henry Leskinen. Lawrence E. Schmidt, Esq. represented Petitioners. Several neighbors, represented by J. Carroll Holzer, Esq., opposed the requests. The Petition was advertised and posted as required by the Baltimore County Zoning Regulations (BCZR). Substantive Zoning Advisory Committee (ZAC) comments were received from the Department of Planning (DOP) and the Department of Environmental Protection and Sustainability (DEPS). Neither agency opposed the request.

The subject property is approximately 49.34 acres in size and is zoned RC-2. The property is improved with a single-family dwelling, pool, barn and other accessory buildings. The large site has several paddocks with sheds for horses and a portion of the property is in agricultural production.

The Lessee has for approximately five years operated its landscaping business at the site without obtaining a special exception. A complaint was filed recently with Code Enforcement, and Petitioners were informed a special exception was required for a “landscape service operation” in an RC-2 zone. BCZR §1A01.2.C.15. Several neighbors vehemently oppose the special exception request, contending that the Lessee’s storage of materials on the property is unsightly and that the business operations are noisy and disturb the tranquility of this rural area. The protestants also argue that the Lessee is in fact a general contractor (not a landscape company), a use not permitted in the RC-2 zone.

#### SPECIAL EXCEPTION

Under Maryland law, a special exception use enjoys a presumption that it is in the interest of the general welfare, and therefore, valid. *Schultz v. Pritts*, 291 Md. 1 (1981). The *Schultz* standard was revisited in *Attar v. DMS Tollgate, LLC*, 451 Md. 272 (2017), where the court of appeals discussed the nature of the evidentiary presumption in special exception cases. The court again emphasized a special exception is properly denied only when there are facts and circumstances showing that the adverse impacts of the use at the particular location in question would be above and beyond those inherently associated with the special exception use.

Landscape architect David Martin, who was accepted as an expert, described the site plan which he prepared and also reviewed numerous photographs of the site and surrounding areas. He noted the site is large and is fairly well-screened by forest and topographical features. He opined

Petitioners satisfied all requirements in BCZR Section 502.1 (as well as Section 404.3 concerning landscape service operations) and the Maryland case law interpreting that provision.

Henry Leskinen, an ecologist accepted as an expert, testified the Lessee was cited by Baltimore County for placing fill material and pallets in the forest buffer on site. Mr. Leskinen testified he is working with DEPS and has developed a plan that will eliminate the violation. He said the proposal is to remove all debris from the buffer area, install a silt fence, and have a surveyor determine how much fill needs to be removed from the buffer area to restore the *status quo*. He opined that if the plan is implemented Petitioners will be in compliance with all regulations concerning environmental features on the subject property.

Other than their testimony as briefly described above, Protestants did not offer any evidence which would tend to establish that the detrimental impacts of the use at this location would be above and beyond those inherently associated with a landscaping company, regardless of its location in the zone. As such I believe the petition for special exception should be granted.

In other words, the negative impacts identified by Protestants are ones that are inherent in the operation of a landscape service operation. As Mr. Lerch testified, such businesses have trucks, utility trailers, mowers and other power equipment. They also store landscaping materials on-site, including mulch, pavers, timbers and other hardscaping materials. This type of commercial equipment can be loud and the storage of landscaping materials can be fairly described as unsightly. But the Baltimore County Council is presumed to have been aware of these impacts when it permitted such a use by special exception. As recognized by Maryland's highest court, most if not all special exception uses have such adverse impacts. *Montgomery County v. Butler*, 417 Md. 271, 297 (2010) ("Most [uses for which a special exception is required] are regarded as potentially troublesome because of noise, traffic, congestion, or other associated problems").

Part of the difficulty in a special exception case concerns the nomenclature. While Baltimore County uses the term “special exception,” throughout the country the more familiar term is “conditional use.” The latter term correctly identifies that the use can be conducted subject to certain conditions imposed by the zoning board to protect surrounding properties. The “special exception” terminology leads members of the community to believe (mistakenly) that the petitioner is seeking an exception to existing regulations. That is not the case. The County Council in Section 1A01.2.C of the BCZR has identified more than 30 uses (many of which, including the landscape service operation, are commercial in nature) which are presumptively and conditionally appropriate in the RC-2 zone.

Protestants also contend Petitioners are operating a general contracting or masonry business at the site. They described hearing very loud noises emanating from the site which they believe are associated with masonry and/or contracting work. Protestants presented internet postings by Lerch Brothers advertising that they build outdoor kitchens, pools, pool houses, etc. Prot. Ex. 1-I. They also submitted a printout for a business known as “Masonry Repair Services,” which lists the business address at the subject property. Prot. Ex. 1-B.

Mr. Lerch testified that in his opinion landscaping involves everything that is built outside of the home. He also testified he formerly ran a masonry business online using subcontractors, but is no longer affiliated with “Masonry Repair Services” even though the Old York Road address is still used on the website.

The BCZR defines a “landscape service operation” as one “primarily engaged in the designing, installing, planting or maintaining of lawns, gardens or other plantings at off-site commercial or residential uses.” BCZR §101.1. That definition was adopted in 1992, and while it does use the word “primarily,” it fails to specifically enumerate the many other tasks routinely

undertaken by landscape companies. Mr. Lerch testified landscaping companies frequently install patios, walkways and other features using stone or other durable material, which is often referred to as “hardscaping.” Tom Dembeck, who has been a landscape contractor for many years and has clients in the vicinity of the subject property, testified he “never cuts grass.” In response to a question from Petitioner’s counsel he acknowledged he has constructed for clients water features, patios, pavers and walls, all of which he considers to be within the domain of a landscape service operation.

The reality is that the dividing line between a landscape business and general contractor is unclear, and the BCZR is of little assistance in resolving the inquiry. In fact, the zoning regulations define a “contractor’s shop” as a business involved in the “construction, improvement or maintenance of buildings or landscaping of grounds.” BCZR §101.1 (emphasis added). A “contractor’s equipment storage yard” is defined as the space used for “storage or keeping of contractor’s equipment or machinery, including landscaping equipment and associated materials.” Id. (emphasis added). Based just on the above definitions, one could argue that a business which stores “landscaping equipment” is operating a contractor’s equipment storage yard, which is not permitted in the RC 2 zone.

Leaving aside those inconsistencies, it is clear a general contracting or masonry business cannot be operated lawfully at the subject property, and Petitioners have not made such a request. The Protestants could have, but did not, file a petition for special hearing seeking a determination of whether the operation at the site was a general contracting business or landscape operation. Whether or not the Lessee is operating unlawfully at the site must be determined in a code enforcement/zoning violation proceeding, not in a special exception case. Having said that, a restriction will be included in the order below to prevent the Lessee from breaking, recycling, or

sorting stone or concrete at the site, which I do not believe are activities associated with a landscape service operation.

### VARIANCES

A variance request involves a two-step process, summarized as follows:

1. It must be shown the property is unique in a manner which makes it unlike surrounding properties, and that uniqueness or peculiarity must necessitate variance relief; and
2. If variance relief is denied, Petitioner will experience a practical difficulty or hardship.

*Cromwell v. Ward*, 102 Md. App. 691 (1995).

The large property has irregular dimensions and topographical changes across the site. As such the property is unique. If the B.C.Z.R. were strictly interpreted Petitioners would suffer a practical difficulty since they would be required to raze or relocate the internal driveway and barn, both of which have been in existence for many years. Finally, I find that the variance can be granted in harmony with the spirit and intent of the BCZR, and in such manner as to grant relief without injury to the public health, safety, and general welfare. Conditions will be included in the order below to help ensure that the potential impacts upon the community are minimized.

THEREFORE, IT IS ORDERED by the Administrative Law Judge for Baltimore County, this 17<sup>th</sup> day of **October, 2018**, that the Petition for Special Exception for approval to use the subject property for a landscape service operation in the RC zone, be and is hereby GRANTED; and

IT IS FURTHER ORDERED that the Petition for Variance: (1) for an existing internal roadway located 1 ft. from a property line in lieu of the required 25 ft.; and (2) for an existing accessory structure (barn) located 25 ft. from a property line in lieu of the required 50 ft., be and is hereby GRANTED.

The relief granted herein shall be subject to and conditioned upon the following:

1. Petitioners may apply for necessary permits and/or licenses upon receipt of this Order. However, Petitioners are hereby made aware that proceeding at this time is at their own risk until 30 days from the date hereof, during which time an appeal can be filed by any party. If for whatever reason this Order is reversed, Petitioners would be required to return the subject property to its original condition.
2. No signage pertaining to the landscape service operation may be installed at the subject property.
3. No showroom and/or retail sales shall be permitted at the subject property.
4. Petitioners are not permitted to break, sort, recycle or otherwise process concrete or stone materials at the subject property.
5. Petitioners must comply with the ZAC comments submitted by the DOP and DEPS, copies of which are attached hereto.

Any appeal of this decision must be made within thirty (30) days of the date of this Order.

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Signed \_\_\_\_\_  
JOHN E. BEVERUNGEN  
Administrative Law Judge  
for Baltimore County

JEB/sln