

IN THE ST. MARY'S COUNTY BOARD OF APPEALS

CUAP NUMBER 19-131-00030

DARCEY PROPERTY/BEETHOVEN GRAVEL MINE

FIFTH ELECTION DISTRICT

DATE HEARD: SEPTEMBER 24, 2020

ORDERED BY:

**Mr. Hayden, Mr. Brown, Mr. Ichniowski
Mr. Miedzinski, and Mr. Richardson**

ENVIRONMENTAL PLANNER: STACY CLEMENTS

DATE SIGNED: October 08, 2020

Pleadings

Ronald E. & Mildred H. Darcey (the “Applicants”) seek conditional use approval, CUAP Number 19-131-030, to allow a gravel mine in excess of 5 acres as an Extractive Industry, Use Type # 82, within the Rural Preservation District (“RPD”).

Public Notification

The hearing notice was advertised in *The Enterprise*, a newspaper of general circulation in St. Mary’s County (“County”), on September 4, 2020 and September 11, 2020. The hearing notice was also posted on the Property. The file contains the certification of mailing to all adjoining landowners, including those located across a street. Each person designated in the application as owning land that is located within two hundred feet of the subject property was notified by mail, sent to the address furnished by the St. Mary’s County Department of Land Use and Growth Management (“LUGM”). The agenda was also posted on the County’s website on September 16, 2020. Therefore, the St. Mary’s County Board of Appeals (“Board”) finds and concludes that the Applicants have complied with the notice requirements.

Public Hearing

A public hearing was conducted at 6:30 p.m. on September 24, 2020 at the St. Mary’s County Governmental Center, 41770 Baldrige Street, Leonardtown, Maryland. All persons desiring to be heard were heard after being duly sworn, the proceedings were recorded electronically, and the following was presented about the proposed conditional use requested by the Applicants.

The Property and the Site

The Applicants own a property of approximately 89.9 acres (the “Subject Property”) at 37170 New Market Road, Charlotte Hall, Maryland. The Subject Property is located in the RPD

and is identified on Tax Map 4, Grid 8, Parcel 52. On the Subject Property, the Applicants propose constructing the Beethoven Gravel Mine (the “Site”), a 55.03-acre surface gravel mine, part of which currently is operating across the Charles County line.

The Conditional Use Requested

The Applicants seek a conditional use pursuant to St. Mary’s Comprehensive Zoning Ordinance (“CZO”), Chapter 25, Schedule 50.4 Use # 82, Section 51.3.82 to allow a gravel mine in excess of 5 acres within the RPD.

The St. Mary’s County Comprehensive Zoning Ordinance

Pursuant to Schedule 50.4 of the CZO, Use Type 82, “Extractive Industry” is defined as:

Removal of natural materials from the surface or subsurface of the earth for sale or further processing. This classification includes sand and gravel mining and mineral extraction.

The Evidence Submitted at the Hearing by LUGM

Harry Knight, Deputy Director of the St. Mary’s County Department of Land Use and Growth Management (“LUGM”), presented the following evidence:

- The Subject Property is an agricultural property consisting of 89.9 acres according to the Maryland State Department of Assessments and Taxation. The Subject Property contains a single-family dwelling and several agricultural outbuildings according to the site plan submitted in support of this conditional use request.
- The Applicants are requesting Conditional Use approval for a 55.03-acre surface gravel mine, Use Type # 82, Extractive Industry. The mine has a proposed longevity of five years of operational status.
- The Applicants will be required by the Maryland Department of Environment (“MDE”), pursuant to Title 26, Subtitle 21, Chapter 01 of the Code of Maryland

Regulations (“COMAR”), to have an approved Mining and Reclamation Plan, permit, and license to operate a surface mine. Such a plan is known as the “10-10-10” Rule, requiring 10 acres of clearing, 10 acres of mining, and 10 acres of reclamation. The land will be reclaimed with 4 inches of topsoil, seed, and mulch.

- COMAR Title 26, Subtitle 21, Chapter 01 also regulates setback and haul road requirements.
- The surface mine site will be accessed by an existing gravel road and Maryland State Highway Administration (“MSHA”) approved entrance, which extends to Maryland Route 6 in Charles County. The Applicant anticipates the following for Maryland Route 6:
 - 200 average daily truck trips;
 - 85 trips during morning peak hours;
 - 45 trips during PM peak hours;
 - The following table describes the level of service before and after the operation of the surface mine:

| | | Intersections | | | | |
|------------------|----------|--------------------------------|----------------------------|----------------------------|--------------------------------|--------------------------------|
| | | MD 6/Beethoven Place *LOS B | MD 6/Whalen Road *LOS C | MD 6/Culver Lane *LOS C | MD 6/MD 5 Southbound *LOS D | MD 6/MD 5 Northbound *LOS D |
| Level of Service | Existing | A | A ¹ | A ¹ | C ¹ | C/B ¹ |
| | Future | A | A ¹ | A ¹ | C ¹ | C/B ¹ |

- Setbacks are in accordance with COMAR 26.21.01.17 addressing surface mining. The standard setback of 25 feet is measured from the horizontal plan of a property line, easement, or right of way. A 100-foot setback applies to sites with scenic and

wild rivers or a parcel of land that has been designated as an area of Critical state concern.

- LUGM reviewed the proposed project during the November 2019 Technical Evaluation Committee cycle. Ex. 2, Att. 3. The St. Mary's County Department of Public Works & Transportation ("DPW&T"), St. Mary's County Metropolitan Commission ("MetCom"), St. Mary's County Health Department, and the St. Mary's Soil Conservation District ("SCD") have approved the site plan. Approvals are still pending for LUGM—conditional Use approval required—and MSHA. SCD will approve a Sediment and Erosion Control plan prior to the issuing of the mandatory Mining Permit and License, which are issued by MDE for surface mine operations in the State of Maryland.
- Pursuant to Section 25.9 of the CZO, "Limitations on Conditional Use Approval," "Subject to an extension of time granted by the Board of Appeals for cause, no conditional use permit shall be valid for a period longer than one year unless a site plan is approved, a building permit is issued, construction is actually begun within that period and is thereafter diligently pursued to completion, or a certificate of occupancy is issued and use commenced within that period."
- The following Attachments to the Staff Report were introduced:
 - #1: Letter of Intent;
 - #2: Traffic Impact Study
 - #3: November 2019 TEC Comments
 - #4: Land Use Map;
 - #5: Location Map; and

#6: Zoning Plan.

#7: Minor Site Plan

#8: MSHA-returned September 16, 2020 Comments.

Applicants' Testimony and Exhibits

The Applicants appeared over WebEx before the Board. The following evidence was presented:

- The Site is surrounded by primarily agricultural buildings and fields and woodlands.
- In Charles County, the Applicants received a special exception—that jurisdiction's name for a conditional use—for the Beethoven Gravel Mine operation that is located there.
- Ingress and egress to the Site will be on a gravel access road that connects to Maryland Route 6 in Charles County. The Site will not utilize the adjacent farm road for ingress and egress related to mining operations. The home is owned by the Applicants, but is renter occupied.
- Once the trucks leave the Site to enter Maryland Route 6, they will haul their loads and from Charlotte Hall and the Chaney facility in Mechanicsville. The haul route will be on two state roads.
- There are some concerns from homeowners of adjoining properties, primarily related to noise, though none have filed written objections.
- The Applicants prepared a noise analysis, which uses the three onsite pieces of equipment, places all three in the same location, and assumes for analysis that they all are running at the same time and at full throttle. The purpose of this analysis is

to analyze the worst-case noise scenario. Though it is unlikely that this condition will arise, noise analysis requires such conditions. Notwithstanding, under this analysis, there is a point on the property where the mining operation is unnoticeable.

- The Applicants intend to work on the interior of the mine outward, which will decrease noise and allow the Applicants to construct a berm. The actions will lower the elevation of the mine and decrease the noise. While it was not their testimony that the noise would be fully mitigated, the Applicants will continue to evaluate the noise as the mining operation progresses. Moreover, the Applicants will address any noise issues that are presented in the future.
- The Site is excavating 90 feet from property owned by the Darceys, and the property line of another adjacent residential property is 85 feet from the Site.
- The traffic study highlighted that the peak hours for the intersection in question were from 6:00 a.m. to 9:00 a.m. and from 4:00 p.m. to 7:00 p.m. The “peak of the peak”—or the highest volume of traffic within one hour—was from 7:00 a.m. to 8:00 a.m. and from 4:30 p.m. to 5:30 p.m.
- Based on the traffic study, the Applicants intend to operate six days per week from 6:00 a.m. to 4:00 p.m. and 7:00 a.m. to 3:00 p.m. on Saturdays. The weekday hours were to beat rush hour.
- Along the Darcey property on Route 6, half of the frontage will not be disturbed, and the other half is in Phase 1, which will have a 25-foot buffer from the Maryland State 25-foot right-of-way.
- There will be curbing on Route 6, no visual screening has been proposed, and no mining operations will occur within the 25-foot buffer.

- While mining operation truck traffic generates dust, MDE will require the Applicants to control the dust by water trucks and ensure that there is always a clean entrance.
- There will be no burning on site.
- All clearing will be used to create new habitats, and topsoil is first stripped to make the berms then replaced for reclamation.
- No environmental features will be disturbed.
- The Applicants were required to do an environmental features site assessment, including wetlands delineation, and any mining operations will require a 25-foot setback from the wetlands.
- While the Applicants aver that *East Star, LLC v. County Commissioners of Queen Anne's County*, 203 Md. App. 477 (2012), preempts local jurisdictions from adopting regulations concerning mining operations, including preemption from amending the 25-foot setback under COMAR 26.21.01.17, the Applicants also proposed adhering to any of the buffer types in the CZO—which includes the Type “C” Buffer—as a means to mitigate the noise to adjoining property owners.

Decision

County Requirements for Granting Conditional Uses

The St. Mary's County Comprehensive Zoning Ordinance § 25.6 sets forth eight separate standards that must be met for a conditional use to be granted:

1. The conditional use complies with the standards of the district in which it is to be located and standards applicable to that use;
2. The establishment, maintenance, and operation of the conditional use will not be

- detrimental to or endanger the public health, safety, convenience, morals, order, or general welfare;
3. The conditional use will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already permitted, and will not substantially diminish or impair property values within the neighborhood;
 4. The proposed use at the proposed location will not have adverse effects above and beyond those inherently associated with the proposed use irrespective of its location within the zoning district;
 5. Adequate utilities, access roads, drainage, and/or necessary facilities have been or are being provided;
 6. Adequate measures have been or will be taken to provide ingress and egress following a design that minimizes traffic congestion in the public streets;
 7. The proposed conditional use is not contrary to the goals, objectives, and policies of the St. Mary's County, Maryland Comprehensive Plan ("Comprehensive Plan"); and
 8. The conditional use, in all other respects, conforms to the applicable regulations of the district in which it is located or to the special requirements established for the specific conditional use in the Ordinance.

Conclusions

Upon review of the facts and circumstances, the Board concludes that the Applicants have met the general standards for granting a conditional use under CZO § 25.6. Several factors support this decision.

First, the Site is in the RPD, the proposed conditional use, Use Type # 82, "Extractive Industry," complies with the standards of the RPD because the proposed conditional use is

permitted as a limited use in this zoning district pursuant to CZO Schedule 50.4 Use # 1. Moreover, pursuant to CZO §31.1, “The regulations of Rural Preservation Districts are intended to foster agricultural, forestry, *mineral resource extraction*, and aquacultural uses and protect the land base necessary to support these activities.” (Emphasis added). Additionally, the proposed Site, as an Extractive Industry with a total affected area of more than 5 acres, may only be approved as a conditional use by the Board of Appeals.

Second, the gravel mine will be subject to numerous county, state, and federal regulations intended to assure the public’s health, safety, and welfare. The Applicants will be required by the MDE, pursuant to COMAR Title 26, Subtitle 21, Chapter 01 to have an approved Mining and Reclamation Plan, permit, and license to operate a surface mine. Moreover, the Site may only operate for five years, during and after which the Applicants are required to reclaim the mined areas. Chapter 01 also regulates setback and haul road requirements, and the conditions of the Board—including those proposed by the Applicants—intend to further abate issues relating to the public’s health, safety, and welfare. Next, the Site will be accessed by an MSHA approved entrance. Further, MDE will require the Applicants to control the dust by water trucks and ensure that there is always a clean entrance. Finally, SCD must approve a Sediment and Erosion Control plan prior to the issuing of the mandatory MDE Mining Permit and license for surface mine operations in the state.

Third, the current uses on adjoining properties are residential and agricultural. The proposed gravel mine will be buffered by existing forest and land in agricultural use on neighboring properties. Although, it is proposed to be approximately 85 feet to the nearest adjacent residential home, the Board is confident that its conditions will limit noise pollution to this adjoining property owner.

Fourth, given the rural character of the surrounding agricultural and residential properties, the proposed gravel mine is less likely to have an adverse effect at this location as it would in other locations. Specifically, the Site is surrounded by primarily agricultural buildings and fields and woodlands, and it is expected to operate and become an integral part of the rural landscape, as so many others have that are located within RPD. As stated above, the Applicants intend to—and this Board will mandate the Applicant—implement measures to ensure safety and quiet for neighbors, including additional setbacks, limitations on the hours and conduct of operations, and a prohibition on burning on site. Moreover, the traffic study highlighted that the level of service will not change for the intersections affected by the Site. Finally, although there are two adjoining residential properties, the Board is convinced that its conditions, as well as the operational intents of the Applicants, will ensure limited disturbance to these properties, one of which is owned by the Applicants.

Fifth, the commercial site plan review process, administered by LUGM, will ensure that adequate utilities, road access and erosion controls will be provided. In addition, MDE administers the surface mining program within the state, through its licensing and permitting process, subjecting the Site to MDE inspections.

Sixth, the existing point of ingress and egress is the existing gravel road onto Maryland Route 6, a secondary class road that is owned and maintained by the State of Maryland. Moreover, this means of egress was approved by the Charles County Board of Appeals. Furthermore, although ingress and egress from the site will generate dust, MDE will require the Applicants to control the dust by water trucks and ensure that a clean entrance is maintained.

Seventh, the proposed Site comports with the Comprehensive Plan, Section 4.4 of which seeks to “[a]llow supplemental income productive activities at a scale or intensity that will not

unduly change the character of the area[,] establish performance standards that will prevent negative impacts on surrounding properties,” and “[p]romote use of best management practices in resource-based activities to minimize contamination of surface and groundwater and adverse effects on plants, fish and wildlife resources, and other environmentally sensitive areas.” Here, the conditions imposed by this Board will ensure that negative impacts on surrounding properties are eliminated. As for best management practices, the Applicants were required to complete an environmental features site assessment, which included a wetlands delineation, any mining operations will require a 25-foot setback from the wetlands all clearing will be used to create new habitats, topsoil is first stripped to make the berms then replaced for reclamation, the Applicants must adhere to the “10-10-10” Rule, and no environmental features will be disturbed.

Finally, Chapter 51 standards for an Extractive Industry have been streamlined, by policy, to require a commercial site plan and, for mines with more than 5 acres of affected area proposed, require conditional use approval by the Board of Appeals. MDE mining regulations allow limits of disturbance within 25 feet of property boundaries, though, based on the Applicants’ proposal to adhere to the buffer types in the CZO, the buffer along one property line will be expanded by an additional five feet.

ORDER

PURSUANT to the application of Ronald E. & Mildred H. Darcey, requesting conditional use approval pursuant to Chapter 25 of the St. Mary’s County Comprehensive Zoning Ordinance for Use Type 82, Extractive Industry, (CUAP 19-131-030) to allow a gravel mine in excess of 5 acres, within the Rural Preservation District; and

PURSUANT to the notice, posting of the property, and public hearing and in accordance with the provisions of law, it is

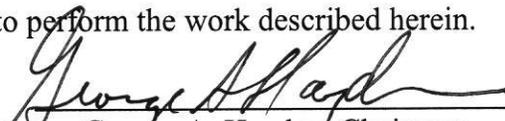
ORDERED, by the St. Mary’s County Board of Appeals, that the Applicants are granted a conditional use to allow a gravel mine in excess of 5 acres, within the Rural Preservation District, with the following three conditions:

- There shall be no burning on site;
- The daily hours of operation shall be as follows:
 - Mondays through Fridays 6:00 a.m. - 4:00 p.m.;
 - Saturdays 7:00 a.m. - 12:00 p.m. for site maintenance only;
 - And no Sunday operations; and
- Along Maryland Route 6, there shall be a 30-Foot Type “C” Buffer, as shown in CZO Schedule 63.3.a, without a fence or berm, and there shall be a 25-foot buffer along the rest of the Subject Property.

Additionally, the foregoing conditional use is also subject to the following condition that the Applicants shall comply with any instructions and necessary approvals from the Department of Land Use and Growth Management.

This Order does not constitute a building permit. In order for the Applicants to construct the structures permitted in this decision, they must apply for and obtain the necessary building permits, along with any other approvals required to perform the work described herein.

Date: October 08, 2020



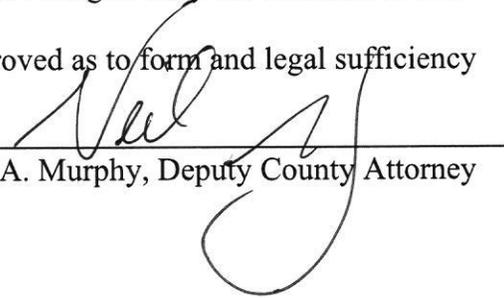
 George A. Hayden, Chairman

Those voting to grant the conditional use:

Mr. Hayden, Mr. Brown, Mr. Ichniowski,
Mr. Miedzinski, and Mr. Richardson

Those voting to deny the conditional use:

Approved as to form and legal sufficiency



 Neil A. Murphy, Deputy County Attorney

NOTICE TO APPLICANTS

Within thirty days from the date of this Decision, any person, firm, corporation, or governmental agency having an interest therein and aggrieved thereby may file a Notice of Appeal with the County Board of Appeals. St. Mary's County may not issue a permit for the requested activity until the 30-day appeal period has elapsed.

Further, St. Mary's County Comprehensive Zoning Ordinance § 25.9 provides, "Subject to an extension of time granted by the Board of Appeals for cause, no conditional use permit shall be valid for a period longer than one year unless a site plan is approved, a building permit is issued, construction is actually begun within that period and is thereafter diligently pursued to completion, or a certificate of occupancy is issued and use commenced within that period."

If this case is not appealed, exhibits must be claimed within 60 days of the date of this Order; otherwise, they will be discarded.