

**BEFORE THE BOARD OF APPEALS OF QUEEN ANNE’S COUNTY**

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In the Matter of the Application of \*

**Byler Materials, LLC** \*  
Lessee

and \*

Case No. CU-17070010

**Merrick Farms, LLC** \*  
Land Owner

for a Major Extraction of Sand and Gravel \*

\* \* \* \* \*

**OPINION AND ORDER**

**Proceedings**

The matter before the Board of Appeals of Queen Anne’s County (“Board”) in this case is a conditional-use application filed by Byler Materials, LLC and Merrick Farms, LLC. The application seeks zoning approval for a 50-acre major extraction operation. The property involved in the application is presently the site of an existing 50-acre major extraction operation. Merrick Farms, LLC (“Landowner”), which is a Maryland LLC, owns the involved property. Byler Materials, LLC (“Applicant”), which is a Pennsylvania LLC registered to do business in Maryland, will lease from the Landowner the 50 acres that are the subject of this application.

On July 9, 2018, beginning at 5:00 p.m., the Board conducted a public hearing in the main meeting room in the County’s office building at 110 Vincit Street, Centreville, Maryland, to consider the Applicant’s conditional-use request. At the beginning of the hearing, the Board established all requirements were met governing (1) the filing of the conditional-use application and (2) notice of the July 9, 2018 public hearing. No one attending the public hearing objected to the jurisdiction of the Board to hear the Applicant’s case. Board members hearing the case

were Mr. Kenneth R. Scott, Chairman; Mr. Howard A. Dean, Vice Chairman; and Mr. William D. Moore, Alternate Member.

### **Applicant's Request**

The Applicant requests conditional-use approval under the provisions of § 18:1-14.C.(7) and § 18:1-95.E of the Code of Public Laws of Queen's Anne County ("Code") to commence and operate a major extraction use on a site of approximately 50 acres. The subject 50 acres are part of a tract consisting of 150.3 acres. The proposed extraction operation, which the Applicant calls Phase III, would expand an existing 50-acre surface mining operation (called Phase II) that presently produces and processes aggregate materials, including sand and gravel.

The Applicant will conduct Phase III mining using the same dredge the Applicant presently uses to mine the Phase II area. Phase III operations will use an existing wash plant, processing area, materials stockpile area, small office, truck scale, and various accessory equipment already located on the 50-acre Phase II area. As a part of this conditional-use application, the Applicant will add a new stockpile area (about 1.6 acres) and more employee parking (about 0.2 of an acre) on the 50-acre Phase II area.

Access to the area to be mined as Phase III will be provided via an extension of an existing haul road that connects to Merrick Corner Road near Merrick Corner Road's intersection with Ingleside Road. This intersection is about two miles north (by road) of the community of Ingleside. A combination of berms, landscaping, and existing woodlands will screen the 50-acre Phase III extraction area. When extraction operations are complete, the land mined in Phase III will become part of a pond about 95 acres in size.

As part of the Phase III conditional-use request, the Applicant seeks to increase the hours of operation allowed for both existing mining and proposed mining. Specifically, the Applicant requests that it be allowed to begin mining operations at 6:00 a.m. (instead of 7:00 a.m.) Monday

through Friday. The Applicant also requests that mining operations (except for the loading of trucks) be allowed until 8:00 p.m. (instead of 6:00 p.m. October 1 through March 31 and 7:00 p.m. the rest of the year) Monday through Friday. In addition, the Applicant requests that trucks be allowed on the Property at 6:00 a.m. (instead of 6:45 a.m.), and that trucks be allowed to load and leave the Property starting at 6:00 a.m. (instead of 7:00 a.m.).

### **Conditional Use Standards**

The Board must evaluate the Applicant's conditional use request by applying four groups of standards. First, the Board must apply the general standards set forth in §18:1-94 of the Code, which provide as follows.

An application for a conditional use may not be approved unless the Board of Appeals specifically finds the proposed conditional use appropriate in the location for which it is proposed, based on the following criteria:

A. The proposed use at the proposed location shall be consistent with the general purpose, goals, objectives, and standards of the Comprehensive Plan, this Chapter 18:1, or any other plan, program, map, or ordinance adopted, or under consideration pursuant to official notice, by the County.

B. The proposed use at the proposed location will not result in substantial or undue adverse impacts on adjacent property, the character of the neighborhood, traffic conditions, parking, public improvements, public sites or rights-of-way, or other matters affecting the public health, safety, and general welfare.

C. The proposed use at the proposed location will be adequately served by, and will not impose an undue burden on, any of the required improvements referred to in this Chapter 18:1, Part 7. Where any such improvements, facilities, utilities, or services are not available or adequate to service the proposed use at the proposed location, the applicant shall, as part of the application and as a condition of approval of the conditional use, be responsible for establishing ability, willingness, and binding commitment to provide such improvements, facilities, utilities, and services in sufficient time and in a manner consistent with the Comprehensive Plan, this Chapter 18:1, and other plans, programs, maps, and ordinances adopted by the County.

Second, § 18:1-123.B of the Code requires the Board to make the following findings to grant a conditional use.

- (1) The conditions concerning that conditional use as detailed in this Chapter 18:1 exist;

- (2) The conditional use conforms to the Comprehensive Plan; and
- (3) The conditional use is compatible with the existing neighborhood.

Third, to approve a conditional use, the Board must make certain comprehensive plan consistency findings required by § 1-303 of the Land Use Article of the Annotated Code of Maryland. As may be applicable, the Board's approval of a conditional use must:

“further, and not be contrary to, the following items in the [comprehensive] plan:

- (1) policies;
- (2) timing of the implementation of the plan;
- (3) timing of development;
- (4) timing of rezoning;
- (5) development patterns;
- (6) land uses; and
- (7) densities or intensities.”

Finally, the Board must evaluate whether the application meets the following specific standards for a major-extraction conditional use, as set forth in § 18:1-95.E. of the Code.

(1) Extraction includes sand, clay, shale, gravel, topsoil or similar extractive operations, including borrow pits (excavations for removing material for filling operations), and dredge disposal operations are limited to land disposal or storage of dredge materials from navigable waters, and organic fertilizer storage and transfer operations are limited to use of the fertilizer on the property on which the operation is proposed.

(2) All applications for a zoning permit for all industrial or agricultural support proposals requiring conditional use approval shall, in addition to what is otherwise required for a conditional use permit, be presented to the Planning Commission during a public hearing. The Planning Commission shall forward its report and recommendations to the Board of Appeals within 60 days of the Planning Commission's review. The Board of Appeals shall not render its decision until the Planning Commission recommendations have been received and reviewed.

(a) Any extraction and disposal proposals for the treatment of effluent for a single-family home or community effluent systems that are part of a residential subdivision, are excluded from this requirement.

(b) Any alteration to a proposed end use or reclamation use requires mandatory Board of Appeals approval.

(3) When applying for a zoning permit, the applicant shall provide, in addition to what is otherwise required for a conditional use permit:

(a) A plan of general area within a one-mile radius of the site at a scale of 1,000 feet to the inch or less with a ten-foot contour interval or less that includes the information specified in Subsection E(4) of this section;

(b) A plan of the proposed site at a scale of 100 feet to the inch or less with a two-foot contour interval or less that includes the information specified in Subsection E(5) of this section; and

(c) A plan of operation that includes the information specified in Subsection E.(6) of this section.

(4) The general plan shall show:

(a) Existing data that includes:

[1] The location of the proposed site;

[2] The land use pattern, including building locations and historical sites and buildings within a one-mile radius of the proposed site; and

[3] Roads, indicating major roads and showing width, weight loads, types of surfaces and traffic data.

(b) Site and geological data that includes:

[1] Surface drainage patterns;

[2] Vegetation cover on the site and dominant species; and

[3] Annual precipitation and dominant seasonal wind direction.

(c) The proposed operation of the site that includes:

[1] For extractive operations:

[a] Type of material to be removed;

[b] Annual removal rate;

[c] Methods of extraction, including types of equipment, use of conveyors and use of blasting materials;

[d] Supplementary processes, drying, grading, mixing or manufacturing;

[e] Estimated life of the operation and maximum extent of area disturbed, final depths and side wall slopes; and

[f] Approved sediment erosion control plan.

[2] For dredge disposal facilities and organic fertilizer storage and transfer operations:

[a] Approximate number of cubic yards of dredge material to be accepted per day, or thousands of gallons;

[b] A detailed description of the operation;

[c] Methods of protecting material from exposure to wind, rain, or biological influences;

[d] Type and origin of the materials;

[e] The average number of vehicles entering the site and the routes taken to get there;

[f] The ability of roads and bridges to support such loadings;

[g] On-site management techniques used to protect against odor, dust, litter and animal or insect vectors; and

[h] Data on previous developments that have been approved by the County for building permits, zoning reviews, subdivisions or land developments.

(5) A plan of the proposed site shall show:

(a) Basic data that includes:

[1] Soils and geology as related to stormwater management;

[2] Vegetation, with dominant species; and

[3] Wind data (directions and percentage of time).

(b) Proposed usage that includes:

[1] Final grading by contours;

[2] Interior road patterns and the relation to operation yard and points of ingress and egress to state and County roads;

[3] Estimated amount and description of aggregate and overburden to be removed;

[4] Ultimate use and ownership of the site after completion of operation; and

[5] Source of water if the final plan shows use of water.

(6) A plan of operation shall show:

(a) Proposed tree and berm screen locations;

(b) Soil embankments for noise, dust and visual barriers and heights of spoil mounds;

(c) Method of disposition of excess water during operation;

(d) Location and typical schedule of blasting that complies with the criteria in Subsection E.(7) below.

(e) Machines (type and noise levels); and

(f) Safety measures (monitoring of complaints).

(7) End uses.

(a) Concept plan; required information.

[1] A plat shall contain a location map that indicates the location of the proposed end use or reclamation project in relation to municipal boundaries and traffic facilities.

[2] A plat shall show the boundaries of the land that is the subject of the application and specify the location and position of the proposed end use or reclamation project. A copy of the property deed must be indicated.

[3] A plat shall show the status of all land adjacent to the property that is the subject of the application.

[4] A plat shall indicate the characteristics of the land to be reclaimed or developed with an end use proposal and all resources that require protection in accordance with Part 4 of this Chapter 18:1. In addition, a complete set of natural resource calculations in accordance with the requirements of Part 4; Article IX, of this Chapter 18:1 must be submitted.

[5] The plat shall indicate the base site area, which shall meet the density/intensity requirements of the underlying zoning district.

[6] The plat shall indicate all existing and proposed structures, roads, parking areas, and setbacks including dimensions. Parking and buffer yards must be shown on the plat and must include all computations as to how numbers were arrived at.

[7] The plat should include an environmental review with comments by the appropriate state agency. In the case of new extraction operation, critical areas designation and delineation (IDA, LDA, and RCA) and buffers must be indicated on the plat. Dredge disposal uses are not permitted in the critical area buffers.

[8] The concept plan shall include preliminary information as required under the Chapter 18:2, Forest Conservation, of this Chapter 18.

[9] The concept plan shall indicate the following site statistics, if applicable:

[a] Minimum required landscape surface area for site;

[b] Proposed landscape surface area;

[c] Maximum amount of allowable floor area;

[d] Floor area proposed;

[e] Number of required parking spaces;

[f] Zoning of proposed and adjacent sites;

[g] Amount of allowable impervious area;

[h] Amount of proposed impervious area; and

[i] Area of proposed roads for right-of-way.

[10] The concept plan shall outline the following:

[a] Phases of reclamation/end use;

[b] Time frame of each phase of reclamation/end use;

[c] Timetable/construction table outlining the construction of the end use;

[d] Information shall be provided as to post-operation maintenance; and

[e] Reforestation/afforestation planting plan, if applicable.

[11] The concept plan shall include provisions for on-site water testing at the start of the reclamation/end use project and annual testing thereafter for a period of no less than 10 years. The results shall be forwarded to the Department of Environmental Health.



[12] The concept plan shall provide information on stabilization measures including an approved sediment and erosion control plan.

[13] The concept plan will indicate that only clean fill may be used for reclamation.

[14] The concept plan will indicate that an excavation area may not be reclaimed as a sanitary landfill or rubble landfill or used for sludge disposal.

[15] In the case of dredge disposal operations, an easement shall be granted to the County restricting future use of the site to an activity compatible with a reclaimed disposal use such as public recreation or open space.

[16] If the end use is to be an open space use, then documentation shall be provided indicating who shall own and maintain the site and draft restrictive covenants shall be submitted.

[17] A final contour and site plan shall be submitted if the end use is to be an open space use. All piles of disturbed earth or material resulting from the excavation or filling operation shall be graded to a smooth contour to control erosion and to prevent ponding and undrained water pockets.

[18] A declaration shall be submitted binding their heirs and assigns to utilize the land in accordance with said development plan and reclamation or end use until excavation processes cease and the reclamation or end use is completed.

[19] Legal documents shall be created outlining the legal responsibility for any environmental pollution that occurs after the facility is closed.

[20] Evidence shall be submitted outlining the financial ability to clean up any pollution that may occur after the facility is closed.

[21] Detailed engineering studies shall be provided by the applicant setting forth the estimated cost of the accepted plan for rehabilitation. A performance guarantee, which is determined to be suitable by the Board of Appeals, shall be submitted to cover the estimated cost of the accepted plan for end use or reclamation.

[22] Upon abandonment of excavation and dredge disposal operations, all access roads shall be suitably barricaded to prevent the passage of vehicles, whether into or out of the abandoned area, except where such access is needed for vehicles engaged in rehabilitation work.

[23] All machinery and structures not related to the operation of the end use shall be completely removed.

[24] In the case of dredge disposal operations, a vegetated berm must be created to completely screen the site of a width no less than 20 feet and a height of six feet.

(b) Determination by the Planning Director. If the Planning Director determines on the basis of the application that all information sufficient to evaluate the requested determination has been furnished, the Planning Director shall so inform the owner in writing. Alternatively, the Planning Director may require the applicant to submit additional information, which the Planning Director deems necessary for a full and complete consideration of the requested determination. Until such information is furnished, an application is not complete under this section.

(c) Any alteration to the proposed end *use* or reclamation will require mandatory Board of Appeals approval.

(8) Major extraction and major and minor dredge disposal activities.

(a) Extraction and dredge disposal activities shall comply with the performance standards specified in this subsection.

(b) Extractive operations shall meet all development and performance standards set forth in of this Chapter 18:1 and all applicable local, state and federal regulations.

(c) An excavation, quarry wall, or storage area in connection with an extraction operation may not be located within:

[1] Fifty feet of any lot line;

[2] One hundred twenty-five feet from any street right-of-way; and

[3] Two hundred feet of any residential or commercial district boundary line.

(d) Screening. A vegetative buffer of no less than 20 feet wide shall screen the proposed active portion of all extraction and dredge disposal uses. This buffer will consist of mature plant material of significant size and density capable of providing immediate buffering capacity. This buffer will occur regardless of the presence or absence of any required district boundary requirements or street buffer requirements. The buffer shall be expanded to 50 feet in width when adjacent to incompatible uses. The Planning Director shall determine the most suitable location for the buffer that will provide the largest screening benefit. Open storage of equipment and materials shall be allowed only in areas screened from the view of surrounding lots.

(e) Grading and drainage.

[1] All excavations shall be graded in such a way as to provide an area that is harmonious with the surrounding terrain and not dangerous to human or animal life.

[2] Excavations shall be graded and backfilled to the grades indicated by the site plan. Grading and backfilling shall be accomplished continually and as soon as practicable after excavation. Grading and backfilling may be accomplished by use of construction rubble such as concrete, asphalt, etc., or other materials, providing that such materials are composed of nonnoxious, noncombustible solids.

[3] Grading and backfilling shall be accomplished in such a manner that the slope of the fill or its cover shall not exceed normal angle of slippage of such material, or 33 in angle, whichever is less. During grading and backfilling, the setback requirements in Subsection E(8)(c) of this section may be reduced so that the top of the graded slope may not be closer than 25 feet to any lot line, 75 feet to any street line and 100 feet to any nature reserve or residential district boundary line.

[4] When excavations that provide for a body of water are part of the final use of the tract, the banks of the excavation shall be sloped to a minimum ratio of seven feet horizontal to one foot vertical, beginning at least 50 feet from the edge of the water and maintained into the water to a depth of five feet.

[5] Drainage shall be provided, either natural or artificial, so that disturbed areas shall not collect or permit stagnant water to remain.<sup>1</sup>

### **Property and Neighborhood Description**

The property involved in the conditional-use application is a 150.3-acre tract and a small portion of a 167.5-acre tract located in the First Election District of Queen Anne's County, between the unincorporated Ingleside community and the Town of Barclay ("Property"). The 150.3-acre tract is designated as parcel 44 on Sectional Zoning Map 31. Parcel 44 has an address of 2251 Goldsboro Road, Barclay. The 167.5-acre tract is designated as parcel 73, Lot 1, on Sectional Zoning Map No. 31. Parcel 44 contains the proposed and existing mining areas, as well as the stockpiling, processing, and other operational uses. The Applicant proposes to use

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<sup>1</sup>Effective in April 2017, the County Commissioners added a new subsection (9) to § 18:1-95.E. of the Code. Subsection (9) reads as follows: "On-site exemption. Nothing contained in this Chapter 18:1 shall be construed to require a permit or conditional use approval with respect to the extraction of materials by a property owner solely for use on-site." In this case, the Applicant proposes to mine materials for use offsite. Thus, the Board need not consider the provisions of subsection (9).

only a small area along the eastern edge of Parcel 73, Lot 1, to buffer Parcel 73 from mining operations on Parcel 44. The Property is zoned AG-Agricultural. The Property is not located in the Chesapeake Bay Critical Area.

The Landowner began extracting sand and gravel from the Property about ten years ago, after the County approved two minor-extraction operations in May 2008. One operation was located on Parcel 44 and the other operation was located on what was then part of Parcel 73. (Certain minor-extraction operations were, and are, a permitted use in the AG zoning district.) In 2011, the Board granted the Landowner conditional-use approval for a 20-acre major-extraction operation on Parcel 44.

The Landowner then sought to expand major extraction operations. Unfortunately, the Landowner's mining operations were plagued by numerous problems, including excavations that exceeded the area approved for mining and other violations of State and County code requirements. As the County was reviewing the Landowner's expansion plans, the Applicant stepped in to take over mining operations. The Applicant applied for a conditional use to consolidate the previously mined areas and to expand them into a 50-acre extraction operation. During consideration of the Applicant's conditional use request, the County Health Department required the Applicant to drill a well and provide a septic reserve area. Because of this requirement and other reasons, the Applicant and Landowner obtained approval of an administrative subdivision to combine all mining operations onto one parcel (Parcel 44).<sup>2</sup>

Thereafter, on September 15, 2014 in Case No. CU-010003, the Board approved the Applicant's conditional-use request for Phase II of the mining. As part of the 2014 approval, the Board required the Applicant to submit to the County yearly "as-builts" to show the progress of mining operations. Planning and Zoning reports the Applicant has regularly done so.

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<sup>2</sup>At some point during the review and approval of the Phase II request, the Applicant purchased 100% of the ownership interests in the Landowner.

Furthermore, Planning and Zoning reports the Applicant has maintained all required landscaping in good condition, including replacing dead growth when necessary.

Most of the Property now proposed for Phase III mining operations is presently unimproved land being used agriculturally. An additional portion of the Property, beyond the proposed Phase III, is forested. The forested area includes an arm of woodlands stretching along the west side of Ingleside Road. Parcel 73 is primarily in agricultural use at present, including most of Lot 1. Associated with the agricultural use are an historic farmhouse, several agricultural buildings, and a farm road. In addition to Lot 1, Parcel 73 has been platted with 22 lots for single-family residential use. A paved roadway called Greystone Way has been built to serve 20 of the lots. But only two of the residential lots appear to be improved, one lot with the historic farmhouse and one lot situated along Merrick Corner Road. The subdivision of Parcel 73 also includes areas of deed-restricted open space, forest conservation, and stream buffers.

During the platting of Parcel 73, an easement was required to protect an old family burial ground near Merrick Corner Road. Access to the burial ground is obtained through Parcel 44. In addition, there are reports of a burial ground on Parcel 44, which may have been used by slave families. Further study is needed to confirm these reports.

The neighborhood in which the Property is located is dominated by agricultural uses and forested land. In addition to agriculture and forestry, the neighborhood includes a scattering of single-family homes, rural businesses, and institutional uses. The Board defines this rural-residential neighborhood as bounded by Maryland Route 302 along the north, Maryland Route 301 along the west, and Maryland Route 19 and Ed Morris Road along the south. Along the east, the neighborhood extends to Mason Branch and Dixon Tavern Road. The Town of Barclay and the Ingleside community fall at the edges of the neighborhood.

The closest single-family homes to the Property include the two homes on Parcel 73, a home across Merrick Corner Road from the farm-road entrance into Parcel 73, and two homes along the east side of Ingleside Road. Dale and Lora Walls own one of the homes on Ingleside Road. The Walls' home is situated 477 feet from the edge of the proposed mining. Mr. Walls appeared before the Board in 2014 to oppose the Applicant's Phase II expansion.

### **Agency Recommendations**

Ms. Holly Tompkins, the Development Review Principal Planner with the County's Department of Planning and Zoning ("P&Z"), presented and summarized a written staff report, which the Board accepted into evidence as P&Z Exhibit 1. In presenting the staff report, Ms. Tompkins used a power-point presentation projected onto a large screen in the hearing room. The Board admitted into evidence the power-point digital file as P&Z Exhibit 2.

In addition, the Board received a copy of recommendations made by the Queen Anne's County Planning Commission resulting from the Commission's hearings on the application. The Board admitted the Planning Commission's recommendations into evidence as Applicant's Exhibit 5. The Planning Commission recommends conditional approval of the Applicant's request. The Planning Commission's proposed conditions include: (1) the Applicant should add native evergreen plantings on or near the existing berm, and (2) within 30 days the Applicant should arrange for a response from the Maryland Department of the Environment ("MDE") addressing an "oily slick" that appeared on the existing pond. Concerning the Applicant's request to increase hours of operations, the Planning Commission recommended as follows:

- Monday through Friday, 7:00 AM to 5:00 PM, with additional mining and processing (but no trucks) until 8:00 PM.
- Saturday from 8:00 AM to 12:00 Noon, with additional mining and processing (but no trucks) until 3:00 PM.
- No Sunday operations.
- Trucks may be allowed on site as early as 6:00 AM.
- Trucks may leave the site immediately.

As Applicant's Exhibits 12 through 15, the Board admitted into evidence comments and recommendations from (1) a reviewer with the County's Department of Environmental Health ("DEH"), (2) the Regional Engineer of the State Highway Administration's District 2, (3) the Queen Anne's County Soil Conservation Service, and (4) the County's Fire Marshal's Office. Review-agency comments mostly addressed technical issues. No agency recommended denial of the conditional use. The DEH reviewer recommended the Applicant conduct tests for copper levels in the Property's existing sediment ponds and nearby soils. In addition, the reviewer noted the Applicant may need to obtain an updated groundwater appropriation permit from MDE. The reviewer also reminded the Applicant that existing bathroom facilities on the Property must be properly maintained and must be accessible to all employees and truck drivers. The Fire Marshal's Office noted it would perform a field inspection prior to that Office's final approval.

The Board also admitted into evidence, as Applicant's Exhibit 7, an MDE Surface Mining Inspection Report dated March 26, 2018. The Applicant submitted the MDE report in response to the Planning Commission's recommended condition concerning the "oily slick." In the report, MDE Mine Inspector Ryan Streett notes the Queen Anne's Conservation Association had supplied MDE with aerial photographs of the Property that depicted a "sheen" on the pond near the dredge. Inspector Streett observed no sheen or slick during his inspection, and no sign of pollutants emanating from the dredge. Inspector Streett opined the sheen in the aerial photographs most likely was caused by the accidental spillage of a petroleum product when the dredge was being refueled. Inspector Streett's report includes 25 photographs of the Property and mining equipment. In the report, Inspector Streett notes a build-up of sand material along the shoulder of Merrick Corner Road, but otherwise concludes the Applicant is mining in substantial compliance with MDE requirements. The report recommends the Applicant clean

and stabilize the road shoulder, and submit for MDE's review proposed site-entrance improvements to reduce the possibility of sediment being tracked offsite.

During her presentation and in her written report, Ms. Tompkins provided the following information:

Existing and Proposed Site Operations:

- Phase III proposes a 48.20-acre mining area, a 0.177-acre area for additional parking, and 1.616 acres for an expanded stockpile area.
- For the most detailed and useful reference for every requirement within the conditional use code, please refer to the End Use Plan, Sheet L-103.
- The following setbacks are required during extraction: 50 feet from any lot line and 125 feet from any street. During grading and backfilling, the setbacks may be reduced to 25 feet and 75 feet. The required one-mile radius map is provided on Sheet V-101, which also labels the distances from the site to the nearest residences.
- The mining operation will not use blasting. The primary method of extracting materials will be using a diesel hydraulic dredge.
- The Phase III operation is estimated to be 10 years with approximately 100 trucks per day working 300 days a year. Phase II still has approximately three years of material left to remove.
- The majority of the products being extracted are sand and gravel. Supplementary processes involved with this project are washing, screening, dewatering, and storage.
- The existing height of the processing equipment and storage piles is 35 feet; 45 feet is permitted.
- Other structures onsite include an office, scale, and wash plant.
- The applicant states that noise generated by the use will not exceed 65 decibels (dBA) at the property lines in accordance with COMAR. Machinery onsite includes the dredge equipment, broom tractor, water truck, excavator, bulldozer, wash plant, and truck traffic. Refer to the Vibra-Tech noise study dated March 7, 2018. Staff notes that the applicant studied truck-loading noise between 6:00 AM and 7:00 AM and whether sound levels would meet nighttime standards. The applicant was not recommended to operate until 7:00 AM; however, trucks would be permitted to queue onsite starting at 6:00 AM.
- No odor or emissions from the operation are anticipated. As required by Environmental Health, stockpiles of material must be designed to prevent wind-drifted dust and other materials from leaving the property.



- The Stormwater Management Plan continues to be reviewed by DPW.
- Any and all declarations, bonds, performance guarantees, public works agreements, etc., not already executed must be done so and provided to the County before final permitting is granted.
- The end-use plan shows the site reclaimed with a large pond, with land not covered by the pond used as a farm.

Traffic/Circulation/Parking:

- The existing entrance on Merrick Corner Road will remain as the primary operations access point. Parking is onsite and requires 10 spaces, shown on Sheet V-103.
- The applicant has provided a Haul Road Note, Sheet G-102. Existing signage regarding the haul route and truck stacking is shown on Sheet V-102.
- Per DPW: “Public Works staff met onsite with applicant and engineer on November 21st to review site conditions and discuss approach to addressing the matter of road maintenance. Applicant expressed commitment to providing appropriate contribution to road repair/restoration and understands that Conditional Use approval will include the requirement of entering into a Public Works Agreement (PWA) and posting surety of a to-be-determined value prior to issuance of permits.”
- A traffic study dated December 2017 prepared by Traffic Concepts indicates that intersection capacity will continue at “A” level of service for MD Route 313 and MD Route 19. An amended document was submitted to correct the hours of operation in the site history.

Landscape Design/Buffering/Lighting:

- There are existing landscaping berms on either side of the entrance on Merrick Corner Road, as well as the berm that was required for CU-010003 (which was built at the southeastern corner near Ingleside Road).
- The applicant intends to relocate an existing buffer area to incorporate the expanded stockpile area. See the end-use plan for more details on where those 73 plantings are to be relocated.
- The existing buffer screening will be continued all along the western property line to meet up with the existing forest to the south of the proposed mine expansion area. All of the proposed plantings will consist of a mix of evergreens.
- Site lighting will consist of security and safety lights primarily surrounding the office trailer, scale house and processing plant, especially during dusk and dawn timeframes for fall and winter. The Applicant states that lighting will not cause glare or spill over onto adjoining properties.

- The Planning Commission recommended additional plantings be added to the berm. The applicant has provided 80 more evergreen trees, as shown on Sheet L-101.

Environmental Overview:

- The site is not impacted by the Critical Area, threatened or endangered species, steep slopes, erosive soils, or the 100-year floodplain.
- The site drains from the north to the south into an agricultural tax ditch.
- The applicant states that the water from the extraction and processing operations is recycled back to the mining pit and that the water in the pit is constantly moving from both the recycled water and groundwater to prevent pit-water from becoming stagnant.
- The remaining land area of the site will continue in agricultural production as noted by the end-use plan. The forest onsite includes a variety of hardwood species.
- Mineral Extraction activities are exempt from the Forest Conservation Act, §18:2-4B(10) of the Code. Approximately 4.8 acres of forest are proposed to be cleared at the southernmost portion of the expanded mining operation.
- According to a response dated November 2, 2017 from the Department of Natural Resources, Wildlife Heritage Service, no State or Federal records for rare, threatened, or endangered species are found within the boundaries of the project site.

Conformity With the 2010 Comprehensive Plan:

- 2.0, Sensitive Areas – Goal 1 states, “Undeveloped lands where Mineral Resources are found [should] remain available for recovery activities accompanied with appropriate reclamation plans.”
- Map ESA-7 maps the site as “Upland Deposits.”
- Section 2.0, Vision for Water Resources: “Queen Anne’s County will remain a rural, agricultural, and maritime County because it restores, enhances, protects and conserves its valuable land, air and water resources through such measures as conservation and protection of agricultural lands, open spaces, woodlands, wetlands, mineral resources, wildlife and their habitats.”

Concluding her presentation, Ms. Tompkins told the Board P&Z has no objection to approval of the requested conditional use, subject to the following conditions:

1. From the Department of Environmental Health:
  - a. Dust and wind-drift suppression is implemented as required.

- b. Any groundwater appropriation permitting is continued, updated, and obtained from the Maryland Department of the Environment.
  - c. The existing bathroom facilities must be maintained and accessible to all employees and truck drivers.
  - d. The applicant will test the sediment pond and nearby soils for copper levels.
2. From the Department of Public Works:
- a. The Queen Anne's County Department of Public Works must approve all Stormwater Management plans.
  - b. Environmental protections must be implemented in accordance with authorities having jurisdiction over dewatering practices and associated documentation be submitted upon request by the County.
  - c. All site access shall be maintained at the specified Merrick Corner Road entrance.
  - d. Facilities as appropriate are adequately maintained to free dirt and debris from the wheels and undercarriage of trucks prior to entering Merrick Corner Road.
  - e. Haul trucks shall adhere to the approved haul route: right entrance and left exit via Merrick Corner Road from and to Maryland 313. Excepting immediately local deliveries, no trucks may proceed on County roads beyond Maryland 313.
  - f. The Applicant shall enter into a Public Works Agreement, satisfactory to the Queen Anne's County Department of Public Works (DPW) and County Attorney, which directs the repair, upgrade and/or improvement to Merrick Corner Road in accordance with the scope and terms mutually established between the Applicant and DPW.
3. All Soil Conservation District approvals are obtained and edits to the site plan are made as noted in the comments dated May 3, 2018.
4. All financial sureties for reclamation, landscaping, and any road improvements are in place before final permits are granted.
5. All landscaping required shall be maintained to assure plantings remain alive and healthy during the operation period.
6. All State permits are in place prior to final permitting by Queen Anne's County and a copy of those permits are provided to the Department of Planning and Zoning.
7. Site lighting is limited to security and safety lights primarily surrounding the office trailer, scale house, and processing plant. Lighting shall not cause glare or spill over onto adjacent properties.

8. Any substantive change to the overall concept plan must return to the Queen Anne's County Planning Commission and then be approved by the Board of Appeals.
9. The Applicant must continue to submit yearly as-built updates to the Board of Appeals for inspection by Planning and Zoning per the conditions of CU-010003, which state as-built drawings shall be updated as of December 31 of each year and delivered by February 28 of the following year.
10. There shall be no truck parking on Merrick Corner Road. There shall be no stacking or parking outside of the gate and no Jake brakes. The Applicant shall maintain a sign with the notice regarding these restrictions.
11. Any legal documents are reviewed and approved by the Planning Commission attorney.
12. An additional 80 evergreens for the berm are planted, bonded, and inspected.

Later in the hearing, the Board heard from Mr. Lee Edgar, an engineer with the County's Department of Public Works ("DPW"). Mr. Edgar testified the County has previously undertaken repairs to and certain upgrades of Merrick Corner Road. Except for a few spots where trucks turn and brake heavily, the road has held up relatively well under truck traffic generated by the existing mining. Mr. Edgar testified the County will continue to make repairs to Merrick Corner Road as needed. In addition, when the Applicant has completed Phase III mining, the County will likely reconstruct the portion of the road that haul trucks use.

Mr. Edgar confirmed the Applicant and DPW are negotiating a Public Works Agreement whereby the Applicant will pay a "fair share" of road repairs and upgrades needed because of truck traffic. DPW hopes to develop a formula that would define the Applicant's contribution. DPW is also exploring with the Applicant an agreement under which the Applicant will provide the County with aggregate materials that DPW can use to maintain County roads.

### **Applicant's Presentation**

Mr. Stephen Z. Meehan, Esq. represented the Applicant. After an opening statement, Mr. Meehan introduced several consultants and others who have worked on the Phase III project and who would be appearing as witnesses for the Applicant.

First to testify was Mr. Joseph “Sean” Callahan. Mr. Callahan is a planner with Lane Engineering. His 26 years of experience includes 24 years with Lane Engineering and two years as Talbot County’s zoning administrator. He has worked on about 30 surface mining projects in four Eastern Shore counties. Mr. Callahan has testified as an expert witness in surface mining matters before several administrative decision-makers. Based on Mr. Callahan’s experience and education, the Board’s Chairman recognized Mr. Callahan as an expert in the planning and design of major extraction uses.

Mr. Callahan began his testimony by narrating video footage of the Property taken from a drone. He testified the dredge was in operation at the time, noting vibrations in the water from the dredge’s diesel engine and the supply line extending from the dredge to fastland. Mr. Callahan also noted the existing operation’s scale house, conveyors, and stockpiles of washed materials, as well as materials being loaded onto a truck. Mr. Callahan testified mining and loading is a “wet process” that creates little dust. If necessary, dust is controlled with a water truck. Mr. Callahan testified that when needed the Applicant will clean Merrick Corner Road near the site entrance to keep the road free of dust and mud.

Mr. Callahan testified the site is self-contained for handling stormwater. All stormwater runs into the pond created by the mining. The only water leaving the site comes from pumping excess water from the pond to an approved discharge point. Such pumping is rare. When it rains, silts and other fine materials on the Property run back into the pond and collect near the pond’s edge. Mr. Callahan described the pond, noting the side walls generally maintain a 7:1 slope.

Showing the Board several photographs, Mr. Callahan testified a sign is in place alerting truck drivers to the previously approved haul route. He told the Board he is not aware of any documented complaint about drivers using a non-approved route. Responding to photographs

shown earlier by Ms. Tompkins, Mr. Callahan opined the photographs did not depict pollution from the mining. He thought that what appears to be discoloration in the ditch carrying water from pumping was caused by ice just below the water's surface. The Board's Vice Chairman, however, noted he has seen trash floating on the water in the ditch.

Addressing the Vice Chairman's comment, Mr. Jonathan Byler testified pumping usually occurs in the winter, when the area's water table is higher. Mr. Byler, who is President of Byler Materials, said pumping is not continuous. Sometimes no pumping occurs for six months. When pumping occurs, typically 300,000 to 400,000 gallons per day are discharged, even though, as Mr. Callahan testified, the Applicant's MDE permit allows a discharge of up to 1,000,000 gallons of pumped water per day.

The Applicant's next witness was Mr. Jonathan A. Ferdinand, a sound and vibration specialist with Vibra-Tech Engineers, Inc. Based on his experience and education, the Board accepted Mr. Ferdinand as an expert in sound and vibration. Mr. Ferdinand discussed two studies he undertook for the Applicant. Both studies were combined into Applicant's Exhibit 9. The purpose of the studies was to determine whether noise associated with proposed mining operations will meet COMAR regulations, which allow daytime sound levels up to 65 dBA and nighttime sound levels up to 55 dBA in areas with residential uses.

The first study examined noise associated with the mining dredge. Mr. Ferdinand testified he took noise readings of the dredge while the dredge was in operation. He then modeled sound levels at eight locations offsite, based on three possible dredge locations onsite within the pond. The eight offsite locations extended 419 feet to 3,433 feet from the assumed dredge locations. The model indicates sound levels at the eight offsite locations would range from 44 dBA to 61 dBA. Because the greatest sound level was lower than 65 dBA, Mr. Ferdinand opined dredge operations will comply with COMAR regulations.

In response to a comment from the Board's Vice Chairman that he found the dredge noise "deafening" on one of the two visits he made to the Property, Mr. Allen Scott addressed the Board. Mr. Scott oversees onsite operations at the existing surface mine. Mr. Scott testified the dredge uses a 12-inch pump and the dredge engine produces 850 horsepower. When in full operation, the dredge engine runs at 2,100 RPMs. Mr. Scott testified the engine can run at higher RPMs; however, because running above 2,100 RPMs is not optimal, the operator avoids doing so as much as possible. Mr. Byler added that the existing wash plant uses an electric motor, which is quieter than the dredge.

Mr. Ferdinand continued his testimony by explaining the second study he undertook for the Applicant. The second study measured sound levels produced by truck-loading activities. Mr. Ferdinand testified ten trucks were staged for loading. Mr. Ferdinand explained he took sound-level readings at two locations along the Property's boundaries, one 825 feet from the loading area and the other 2,500 feet from the loading area. According to the sound-level readings, the highest decibel level at 825 feet was 55 dBA. At 2,500 feet, the highest decibel level was 43 dBA. Mr. Ferdinand testified backup alarms on the trucks were sounding when he took measurements. Because the greatest sound level did not exceed the 55-dBA nighttime limit, Mr. Ferdinand opined truck-loading operations will comply with COMAR regulations.

As Mr. Ferdinand concluded his testimony, discussions ensued among Board members, Mr. Ferdinand, and Mr. Byler. Board members expressed concerns about quality-of-life impacts even if decibel levels meet COMAR standards. The Board Chairman noted HUD standards call for an *average* level of no more than 55 dBA in residential areas. The Chairman also noted noise inside of homes will vary depending on construction methods and materials. Board member Moore raised the matter of being a good neighbor. He observed that sometimes doing what is allowed is still not being a good neighbor, such as backup beepers starting at 6:00 a.m. In

response, Mr. Ferdinand opined starting truck operations at 6:00 a.m., as opposed to 7:00 a.m., does not create a unique impact from the perspective of decibel levels. In response to another comment, Mr. Byler added the Applicant has not considered it necessary to explore using an electric dredge, because decibel levels of the existing diesel are not that high.

Next to testify for the Applicant was Mr. W. Fitzhugh "Fitz" Turner. Mr. Turner is a real estate appraiser whom the Board has accepted as an expert in real-estate values many times. Mr. Turner testified his study of homes in the area versus comparable homes elsewhere indicated the existing surface mine has had no impact on property values. This conclusion is the same as several other studies he has done near other surface mines. Mr. Turner observed that the owners of a nearby rancher have not planted vegetation nor erected a fence between the home and the mine, and thus he assumes they do not experience noise issues associated with mining operations.

Next, Mr. Jonathan Byler returned to testify. Mr. Byler first addressed the Applicant's request to begin operations at 6:00 a.m. Mr. Byler testified starting operations at 6:00 a.m. instead of 7:00 a.m. would put the first truck on the road by about 6:05 a.m. Because school buses pass the Property around 7:00 a.m., the first group of trucks will have left the mine before the buses arrive. When talking to school-bus drivers, he discovered they liked the idea.

Mr. Byler testified trucks tend to travel in groups, arriving and leaving more-or-less together. Haul runs usually take three-to-six hours. Most drivers make two runs a day, so there is an overall circular traffic pattern. Mr. Byler testified it takes about 2½ scoops, at eight tons per scoop, to load a truck. Loading takes two-to-three minutes. Typically, between 20 and 30 trucks are loaded during the first hour of operations and then there is some slack time.

Concerning the Planning Commission's recommendation that the Applicant plant 80 additional trees along the southeastern portion of the berm on the Property, Mr. Byler testified



the Planning Commission intended the trees to provide protection for the Walls property. The Applicant believes additional trees are no longer needed because the Applicant will be buying the Walls property, contingent on the Board's approval of the conditional use application for Phase III mining operations.<sup>3</sup>

Mr. Allen Scott returned to address comments by a Board member who was concerned about truck traffic conflicting with school-bus traffic, especially in the winter when buses are on the road before sunrise. Mr. Scott testified truck drivers do not leave the Property if they see a school bus on Merrick Corner Road. Although a school bus does go by the Property earlier, the local bus does not arrive in the area until 7:05 a.m. Presently, that is about the same time the first trucks leave the Property. Mr. Scott testified, however, he is not aware of any traffic conflict between trucks and local school buses. Mr. Scott also acknowledged there is other early-morning traffic on Merrick Corner Road, including local farmers and traffic to a mill in Delaware. But Mr. Scott said the early-morning traffic is not significant.

Mr. Scott testified, at present, a maximum of about 100 trucks a day will enter and leave the Property. He told the Board trucks do not stack along Merrick Corner Road. Instead, they enter the site and wait along the haul road to be loaded. Mr. Scott testified the dredge is relatively new; the Applicant began using the dredge in July 2016. He also testified the wash plant is powered by an electric motor, not a diesel engine.

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<sup>3</sup>Earlier during the hearing, Mr. Meehan had informed the Board about the Applicant's contract to purchase the Walls property. Mr. Meehan told the Board that, because of the contract, the Queen Anne's Conservation Association decided not to oppose the conditional use request for Phase III. When asked what the Applicant will do with the Walls property, Mr. Meehan responded the Applicant does not have any firm plans at this time. It is possible the Applicant will sell the property. But if the Applicant sells the property, Mr. Meehan said the Applicant would make sure the buyers are aware of mining operations, including noise that is associated with surface mining. During discussions following Mr. Byler's testimony, Ms. Tompkins indicated the Applicant should be required to plant additional trees along the berm if the property is sold as a residence.

Further discussion ensued about noise generated by the dredge. The Chairman noted he had visited the Property and was surprised by how loud the dredge sounded. He wondered if the additional trees the Planning Commission recommended would help reduce noise for properties other than the Walls property. Board member Moore told the Applicant he was familiar with “hospital grade” mufflers for diesel engines and wondered if the Applicant had considered adding a muffler to the dredge. He thought the mufflers were not that expensive, around \$2,500. In response, Mr. Byler said he would be willing to investigate adding such a muffler to the dredge.

### **Participation by Others**

Mr. James Apple appeared to ask questions about the Applicant’s proposal. He told the Board he was neither in favor of nor against the conditional use. Mr. Apple testified he lives a mile to a mile-and-a-half from the Property by road. He said the Applicant’s site plan includes a drawing of a one-mile radius around the Property, and his home falls within the radius. In addition, Mr. Apple testified he owns land next to the proposed Phase III excavation.

Mr. Apple expressed concern about what time the trucks would be on Merrick Corner Road if operations began at 6:00 a.m. He also expressed concern about the water table. He asked how deep the dredging will go. Mr. Apple testified his well is relatively shallow at 70 feet deep. He was especially concerned about a drop in the water table during dry years and how additional mining might affect the water table.

In response to Mr. Apple’s concerns, Mr. Byler testified the average depth of the dredged area is about 55 feet and the maximum depth is about 65 feet (although dredging is allowed as deep as 70 feet). Mr. Callahan then added that drinking wells in the area reach below a natural clay layer. The Applicant is not permitted to dredge below this clay layer. Thus, to the extent there is any effect on the water table, dredging would affect only the surface aquifer, which is not

usable for drinking water. In addition, Mr. Callahan testified the Applicant previously had to record a declaration in the land records promising to replace any nearby well adversely affected by the mine.

Mr. Apple then testified he cannot hear dredge operations from his home, although he occasionally hears the back-up beepers from the trucks. He testified his granddaughter boards a school bus between 6:10 a.m. and 6:15 a.m., and thus he is concerned about mining operations starting at 6:00 a.m. If, however, the Applicant takes reasonable precautions, he is not necessarily opposed to a 6:00 a.m. start time.

Mr. Byler returned to tell the Board demand for sand and gravel is high at present. The extended hours of operation will allow the Applicant to better meet that demand. Mr. Byler testified the Applicant supplies materials all over the Baltimore-Washington region, locally, and to users in Pennsylvania. In response to a question from the Board, Mr. Byler said he did not know if back-up alarms could be replaced with strobe lights before sunrise and after sunset. In response to a question about plantings along the berm, Mr. Byler told the Board he believed the existing berm and trees are adequate for screening and noise reduction.

During the hearing, there were discussions about an abandoned cemetery, possibly a slave cemetery, on the Property. The Board's Vice Chairman related a conversation he had with a farmer who at one time tilled the Property. The farmer said he knows the approximate location of the cemetery on the Property. The Vice Chairman provided an aerial photograph marked with the position on the Property where the farmer believes the cemetery is located. Without objection, the Board admitted the marked aerial photograph into evidence as Board Exhibit 2.

### **Findings and Conclusions**

In general, the Board finds persuasive the testimony and exhibits provided by the Applicant's witnesses, several of whom the Board accepted as experts. The Board also finds

persuasive the testimony and written staff report provided by Ms. Holly Tompkins of the Department of Planning and Zoning, as well as the testimony of Mr. Lee Edgar of the Department of Public Works. The Board, therefore, concludes the conditional use should be approved. Nevertheless, based on Ms. Tompkins and Mr. Edgar's testimony, Planning and Zoning's staff report, the Planning Commission's recommendations, and other evidence, the Board will impose conditions on the use.

Regarding the specific standards set forth in §18:1-95.E of the Code, the Board finds the Applicant has met (or, for those standards imposing an on-going or future responsibility, the Applicant will be able to meet) these standards. The testimony and exhibits show the Applicant has completed the mandated review process for a major-extraction use, including public hearings before the Planning Commission. The Applicant's site plan is thorough and mostly complete. As indicated by agency comments, the Applicant need make only minor revisions to the site plan.<sup>4</sup> With the conditions the Board will impose, the site plan, Planning and Zoning's staff report, the testimony of Ms. Tompkins, and the testimony of the Mr. Callahan cumulatively demonstrate the Applicant has appropriately addressed the specific Code standards in §18:1-95.E, including setbacks, screening, grading, and drainage.

The Board also finds the evidence supports a conclusion the proposed conditional use meets the general conditional-use standards found in §18:1-94 and § 18:1-123.B of the Code, as well as the comprehensive-plan consistency requirements set forth in the Land Use Article of the Annotated Code of Maryland. Concerning the County's 2010 comprehensive plan, evidence

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<sup>4</sup>Among the site-plan changes the Applicant needs to make, the Board would call the Applicant and Department of Planning and Zoning's attention to the note labeled "Hours of Operation" on Sheet G-102 of the site plan. In the note, the plan states the facility may open its gates for trucks to enter the Property as early as 6:00 a.m. This is *not* correct. The Board's decision in Case No. CU-01003 does not allow trucks to enter the Property until 6:45 a.m. The Board's decision in this case does not change the 6:45 a.m. limitation. Accordingly, the Applicant must revise the hours-of-operation note on Sheet G-102.

provided by Ms. Tompkins establishes the proposed major-extraction use conforms to and is consistent with the comprehensive plan. The comprehensive plan calls for undeveloped lands with potential mineral resources to remain available for extraction of those resources. To that end, the plan recognizes the Property is in an area of the County known for deposits of sand, gravel, and similar resources. The same evidence supports a conclusion the proposed conditional use will further and not be contrary to the policies, timing, goals, development patterns, land uses, and intensity of land uses included in the 2010 comprehensive plan.

For these reasons, and because the evidence also supports a conclusion the proposed conditional use is consistent with the general purpose, goals, objectives, and standards of other applicable plans, programs, maps, and ordinances adopted by the County, the Board concludes the conditional use is appropriate for the location proposed. Regarding the proposed location, the Board finds the location will not significantly increase or exacerbate the potential impacts inherent in a major-extraction use, which of necessity must be in rural areas of the County. This finding is supported by the fact a 50-acre extraction operation already exists on part of the Property. The evidence before the Board did not identify any major problems with the existing operation, other than probable noise impacts.

The Board's conclusion the conditional use is appropriate for the proposed location includes a finding that potential impacts to County roads are no greater than inherently expected, because the Applicant has agreed to use a defined haul route to reach State roads and has agreed to enter into a Public Works Agreement to address maintenance of and repairs to Merrick Corner Road. Although truck traffic can increase the need for road maintenance, such impacts are inherent in an extraction operation anywhere in the County. The Board was not presented with evidence that truck traffic generated by the Applicant's proposal will be worse than truck traffic

generated by a typical extraction operation, given the Applicant's willingness to help with maintenance of and repairs to Merrick Corner Road.

Furthermore, based on the testimony of the Applicant's witnesses, Ms. Tompkins, and Mr. Edgar, the Board finds that, with the conditions the Board will impose, the proposed major-extraction use at the proposed location will not result in substantial or undue adverse impacts on adjacent property, the character of the neighborhood (the boundaries of which the Board previously delineated), traffic conditions, parking, public improvements, public sites or rights-of-way, or other matters affecting the public health, safety, and general welfare. Height of mining equipment will be lower than the height allowed for other land uses in the AG zoning district. Site lighting will be limited. The Applicant has satisfactorily maintained the existing berm and landscaping. The Phase III area does not support wetlands, floodplains, steep slopes, woodlands, rare or endangered species, or other sensitive environmental resources. Stormwater drainage will remain interior to the Property. Runoff will be directed into the mining pond. Pumping water from the pond is a concern, but the Board believes residents in the neighborhood can rely on MDE to police the discharge of pond water. The Board notes MDE was responsive to the Planning Commission's recommendation for an inspection of the Property. MDE's inspection found no evidence of pollutants in the pond or the discharge ditch. The Board, however, would remind the Applicant to remove trash and debris that collects in the ditch so that the ditch does not become clogged (see page 1 of 1 of the March 16, 2018 Field Report in Applicant's Exhibit 10).

Concerning noise from mining operations, including the dredge and truck loading, sound levels generally will meet minimum State requirements, as set forth in Applicant's Exhibit 9 and as testified to by Mr. Ferdinand. But there are locations where Vibra-Tech's model indicates decibel readings for dredge operations will be over 55 dBA. The Board notes decibel levels of

55 dBA exceed the COMAR nighttime limit. Moreover, noise impacts encompass more than decibel levels. Factors such as the shrillness, repetitiveness, and duration of noise can negatively affect quality of life. The Board must consider these effects when evaluating whether a conditional use will have adverse impacts on adjacent properties and the character of this rural neighborhood. Here, the Board is not persuaded noise from mining operations is innocuous enough to allow operations to begin at 6:00 a.m. COMAR defines 6:00 a.m. to 7:00 a.m. as a nighttime hour.

Concerning traffic, the Board finds the conclusions in the Applicant's traffic study (Applicant's Exhibit 8) are acceptable with respect to trip generation. In addition, limiting truck traffic to a specified haul route will minimize impacts on County roads and the public who use these local roads to access their homes and farms. Moreover, the Board finds that by entering into a Public Works Agreement with the County, the Applicant will contribute a fair share of the costs of keeping Merrick Corner Road in good condition despite the heavily loaded trucks that will use the road. As Mr. Edgar testified, heavy breaking can damage a road over time.

Regarding other considerations, the Applicant's expert appraiser, based on his experience and several studies undertaken for mining projects elsewhere, testified the proposed extraction use will not appreciably affect residential land values in the vicinity. The Board accepts the appraiser's conclusion if mining operations continue as they have. But mining operations continuing as they have includes hours of operation. (The appraiser did not specifically address hours of operation.) This is another reason the Board is not persuaded it should allow operations to begin at 6:00 a.m. Other mining operations approved by the Board do not begin this early. The Board, however, appreciates the Applicant's desire to meet the current high demand for aggregate materials. Thus, the Board will extend weekday mining operations (but not truck

loading) to 8:00 p.m. in the evening. COMAR defines the hour from 7:00 p.m. to 8:00 p.m. as a daytime hour.

Concerning public improvements, facilities, utilities and services, the Board finds the proposed conditional use at the location proposed will use minimal facilities and services, and the proposed use will be adequately served by those limited facilities and services that will be used in a manner consistent with the Comprehensive Plan, Chapter 18:1, and other relevant plans, programs, maps, and ordinances adopted by the County. The major-extraction use does not require public water, public sewer, or public storm drains. Although the County's Department of Emergency Services has certain technical issues regarding emergency access to the Property, the Department does not object to the proposed use. The Board has already addressed the use of County roads, but will reiterate here its conclusion that with a restricted haul route and a Public Works Agreement to address maintenance of and repairs to Merrick Corner Road, roads will be used in a manner consistent with County regulations and policies. Daily traffic to the Property will not lower the levels-of-service at intersections along the haul route, which presently meet County adequacy-of-public-facility requirements.

As required by § 18:1-123.B.(3) of the Code, the Board finds that, considering the conditions the Board will impose, mining operations will be compatible with the existing neighborhood. The neighborhood is composed of rural-residential land uses, with larger properties supporting agricultural operations and smaller properties supporting single-family homes at an overall low density. Merrick Corner Road and nearby residential properties will continue to be buffered by a berm, landscaping previously planted on the berm, and existing woodlands along Merrick Corner Road.<sup>5</sup> In addition to screening the mining use, the berm and

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<sup>5</sup>Considering the testimony about the Applicant purchasing the Walls property, the Board will not require the Applicant to plant additional trees along the existing berm, as the Planning Commission recommends. If the Applicant later sells the Wall property for residential use, the



woodlands will somewhat attenuate noise levels; however, as Mr. Apple testified, sounds associated with truck loading can be heard up to a mile away. The Board finds that because of the nature of these sounds, mining operations should not begin as early as 6:00 a.m. Existing and future residential uses in the neighborhood need protection from noise continually generated for up to 13 hours a day, even where the noise does not exceed State-mandated maximum decibel levels. Regarding future residential uses, the Board notes the life of mining operations will be about ten years if 100 truck-loads of materials are removed daily. There are 22 platted residential lots just to the east of the Property. Over the next ten years, it is likely (“probable of fruition”) homes will be built on at least some of these lots.

Regarding school buses, the evidence does not support a conclusion that allowing trucks to leave the Property at 6:00 a.m. will reduce conflicts with school-bus traffic. Mr. Apple testified a school bus picks up his granddaughter between 6:10 a.m. and 6:15 a.m. In addition, Mr. Scott testified he is not aware of any truck-bus conflicts resulting from current Phase II operations. He also testified truck drivers are careful and will not turn onto Merrick Corner Road from the Property if they see a school bus on the road. The Board commends the drivers for being careful, but the hour between 6:00 a.m. and 7:00 p.m. is dark during portions of the year. The Board believes truck drivers will find it harder to distinguish a school bus from other vehicles in the dark.

Concerning noise produced by the dredge, based on the testimony of Mr. Ferdinand, and the testimony the dredge does not usually operate at full power, the Board will not require the Applicant to install a muffler on the dredge. But the Board will require the Applicant to

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Board believes it would be a good idea for the Applicant to add additional landscaping on the berm. But the Board will not require the Applicant to do so. Future sale of the Property is too speculative at this time, and the Board presumes the physical presence of mining operations will alert potential buyers to possible noise impacts.

investigate the feasibility of adding a muffler—something Mr. Byler indicated he is willing to do.

The Board also will require the Applicant to study the Property to determine whether an abandoned cemetery exists on the Property. The cemetery could have important historical and cultural significance. Therefore, the public welfare requires further investigation. If a study finds identifiable evidence of the cemetery, the Applicant must either (1) preserve the cemetery or (2) move the cemetery in conformity with State law after appropriate archeological and historical assessments.

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For the foregoing reasons, by a vote of three in favor and none opposed, the Board grants conditional approval of the conditional-use application for a major extraction use on the Property. Mining of the Property and related operations and uses are to be conducted in substantial accord with Applicant’s Exhibit 16 (including technical revisions required by County agencies), and are subject to the following conditions:

1. The Applicant must implement dust-suppression and anti-wind-drift measures to the satisfaction of the County’s Department of Environmental Health (“DEH”).
2. The Applicant must obtain, keep in place, and update groundwater appropriation permits required by the Maryland Department of the Environment.
3. The Applicant must properly maintain and make accessible to all employees and truck drivers bathroom facilities on the Property.
4. As often as may be requested by DEH, the Applicant must test the sediment pond and nearby soils for copper levels and must submit test results to DEH.
5. The Applicant must obtain approval from the Queen Anne’s County Department of Public Works (“DPW”) for all stormwater management plans.

6. The Applicant must implement environmental-protection measures in accordance with authorities having jurisdiction over dewatering practices, and, if requested by the County, must submit documentation of the Applicant's implementation to DPW.

7. Access to the Property must remain limited to the existing access connecting with Merrick Corner Road, as shown on Applicant's Exhibit 16. The Applicant must maintain this access in good condition, including preventing the tracking of sand, mud, dust, gravel, and other materials onto Merrick Corner Road. If any such materials are tracked onto or otherwise accumulate on Merrick Corner Road, the Applicant must clean the road in a manner approved by DPW.

8. The Applicant must employ and adequately maintain appropriate facilities and equipment to remove sand, gravel, dirt, dust, mud, and debris from the wheels and undercarriage of trucks leaving the Property, before trucks enter onto Merrick Corner Road.

9. The Applicant is responsible for assuring that:

- a. Trucks adhere to the following haul route: (to the Property) Maryland Route 313 to Merrick Corner Road to a right turn into the Property; and (leaving the Property) a left turn from the Property onto Merrick Corner Road to Maryland 313; and
- b. Except for immediately local deliveries, no trucks may use County roads beyond Maryland Route 313.
- c. In addition, the Applicant must maintain in a prominent location on the Property, and in good condition, a sign giving truck drivers notice of the foregoing haul-route restrictions.

10. The Applicant must enter into a Public Works Agreement satisfactory to DPW and the County Attorney for repairs to, upgrades of, and improvements to Merrick Corner Road.

Other provisions may be added to the Public Works Agreement at the discretion of the Applicant and DPW.

11. The Applicant must revise the site plan (Applicant's Exhibit 16) as noted in comments by the Soil Conservation District ("SCD") dated May 3, 2018 (Applicant's Exhibit 14), and thereafter must obtain SCD approval of its plans. The Applicant also must revise the site plan as indicated in footnote 4 of this decision.

12. Before the County approves final permitting for mining operations, the Applicant must put in place all financial sureties for reclamation of the Property, landscaping maintenance, and road improvements.

13. The Applicant must properly maintain all landscaping, including assuring that plantings remain alive and healthy until reclamation of the Property necessitates removal of the berm.

14. Before the County approves final permitting, the Applicant must put in place all required State permits and must provide a copy of the permits to the Department of Planning and Zoning.

15. Site lighting must be limited to security and safety lights only. Lighting must be primarily located around the office trailer, scale house, and processing plant.

16. Site lighting must not cause glare and must not spill over onto adjacent properties and roadways.

17. Truck parking on Merrick Corner Road is prohibited.

18. Use of "jake breaks" is prohibited on the Property and on County roads.

19. Stacking or parking of trucks and vehicles of any kind outside of the entrance gate into the Property is prohibited.

20. The Applicant must maintain in good condition a sign that is legible to truck drivers giving notice of the restrictions in conditions 17, 18, and 19.

21. The Applicant must continue to submit yearly “as-built” updates to the Board for inspection by the Department of Planning and Zoning, as required by the Board’s approval of conditional use Case No. CU-010003, including submitting as-built plans showing the status of mining on the Property as of December 31 of each year and delivery of such as-built plans to the Department of Planning and Zoning by February 28 of the following year.

22. The Applicant must obtain approval of the Planning Commission’s attorney for all documents creating a legal obligation on the part of the Applicant in connection with this conditional-use approval, subsequent permit and related County approvals, or both.

23. Substantive changes to the site plan (Applicant’s Exhibit 16) must be reviewed by the Queen Anne’s County Planning Commission and approved by the Board. The Department of Planning and Zoning may determine whether proposed plan changes are substantive or may submit the proposed changes to the Board for the Board to determine whether the proposed plan changes are substantive.

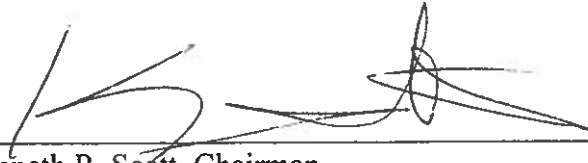
24. The Applicant must investigate equipping the dredge used on the Property with an appropriate “hospital grade” muffler.

25. All hours of operations will remain the same as set forth in the Board’s September 15, 2014 decision approving conditional use Case No. CU-010003, except that weekday mining operations (not including loading of trucks) may continue until 8:00 p.m.

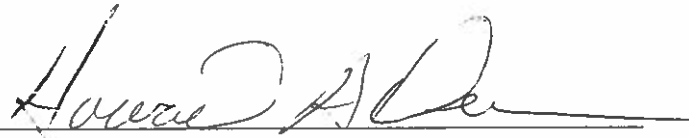
26. The applicant must study the Property in a manner approved by the Department of Planning and Zoning to determine whether there are graves or funerary objects, or both, in the portion of the Property to be mined; and if graves or funerary objects or both are identified, the Applicant must either (A) preserve and protect the burial area or (B) relocate the graves and

funerary objects in conformance with Maryland law after appropriate archeological and historic assessments.

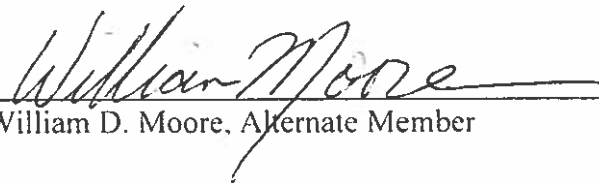
27. To the extent not already addressed by the Applicant or not superseded by the foregoing conditions, all conditions set forth in the Board's September 15, 2014 decision approving conditional use Case No. CU-010003 remain in effect.

A handwritten signature in black ink, appearing to read 'K. Scott', written over a horizontal line.

Kenneth R. Scott, Chairman

A handwritten signature in black ink, appearing to read 'Howard A. Dean', written over a horizontal line.

Howard A. Dean, Vice-Chairman

A handwritten signature in black ink, appearing to read 'William D. Moore', written over a horizontal line.

William D. Moore, Alternate Member

State of Maryland, County of Queen Anne's:

I HEREBY CERTIFY that the foregoing is a true and correct copy of the Opinion and Order of the Board of Appeals of Queen Anne's County in Case Number CU-17070010, for Byler Materials, LLC, Lessee, on land owned by Merrick Farm, LLC, which Opinion and Order resulted from a public hearing conducted by the Board of Appeals on July 9, 2018 and that the minutes and a recording of the July 9, 2018 meeting are filed in the office of Board of Appeals.

Certified this 7th day of September, 2018 by:



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Cathy Maxwell  
Clerk to the Board of Appeals