

**INDIAN RIVER COUNTY, FLORIDA
M E M O R A N D U M**

TO: Jason E. Brown
County Administrator

THROUGH: Phil Matson, AICP
Community Development Director

FROM: Roland M. DeBlois, AICP
Planning Director

DATE: February 20, 2020

SUBJECT: Consideration of Alternative Land Development Regulation (LDR) Amendment Proposals to Define, Regulate and Establish Criteria for Off-site Accessory Landscaping Services in Agricultural Zoning Districts

It is requested that the Board of County Commissioners formally consider the following information at the Board's regular meeting of March 3, 2020.

BACKGROUND

In April 2018, Brian and Kelley Stolze, owners of Caribbean Lawn and Landscaping, Inc. ("Caribbean"), submitted a "Verification of Exemption Affidavit" to the County Building Division to construct a nonresidential agricultural building at 7120 37th Street. The ±10 acre subject property, owned by Caribbean, is zoned A-1, Agriculture District (up to 1 unit per 5 acres). The exemption affidavit is a form that Building staff requests applicants to fill out when claiming an agricultural exemption from needing a building permit.

In the affidavit, the Stolzes described a proposed ±8,000 square foot agricultural building as being for agricultural equipment storage and agricultural office space. As described in an attachment to the affidavit, the overall property was to be used as a nursery operation, with a container nursery; pesticide storage building; pole barn; mechanical shop; shade house; production beds; recycling pond; and office space (see affidavit, Attachment 1). The Stolzes also provided staff with a site plan sketch (Attachment 2). Ultimately, staff accepted the affidavit, under the premise that the building met the agricultural exemption criteria as accessory to a principal tree farm/nursery use being established on the property.

In December 2018, code enforcement staff received a complaint that the Stolzes had completed construction of the ±8,000 square foot agricultural building and were operating a commercial off-site lawn and landscaping business from the property, without there being a principal tree farm/nursery established on the site. Consequently, staff cited the Stolzes/Caribbean for operating an accessory landscaping service without an on-site principal agricultural use (i.e., tree farm/nursery). [Note: the Stolzes eventually planted an on-site tree farm/nursery with an aerial extent greater than the area of the building and associated parking, and the code enforcement case was closed as of August 26, 2019.]

On March 5, 2019, the Board of County Commissioners (BCC) heard a request to speak from Spencer Simmons and Tim Campbell, who expressed concerns about Caribbean's operation. Mr. Simmons and Mr. Campbell, who each live on the segment of 37th Street where the business is located, indicated that they were

following the active code case (at that time) against Caribbean for establishing the accessory landscaping services business ahead of establishing a wholesale nursery on the site. Both expressed concerns about traffic, effects on neighborhood character and property values, and the precedent for future similar situations on other agriculturally zoned properties.

At the March 5, 2019 BCC meeting, Board members acknowledged Right to Farm Act protections and the code enforcement process but also expressed concern that, under current procedures and code interpretation, a landscaping services business could “game the system” by minimally establishing a wholesale nursery in order to have an out-of-scale commercial business in an agricultural area. Ultimately, the Board acknowledged that the code enforcement case would proceed on its own track, and by consensus directed staff to research possible modifications to the land development regulations (LDRs) to balance the needs of agriculture and commercial business in agricultural areas with respect to landscaping services operations (see BCC 3/5/19 minutes, Attachment 3).

Staff (“1st Alternative”) LDR Amendment

On June 18, 2019, staff went back to the BCC with a proposed LDR amendment that would further define accessory off-site landscaping services and allow but limit the use subject to certain criteria (see staff report and draft ordinance, Attachment 4). Under the proposed amendment, an allowed accessory landscaping services use would:

1. Include installation and mowing/trimming maintenance services involving a broad range of landscape material, including grass (lawns), consistent with the code’s existing Chapter 901 definition of “landscaping.”
2. Not include pest control services.
3. Not include (and consequently, would not further regulate) services authorized and conducted in compliance with a home occupation permit.
4. Be associated with a legally established nursery.
5. Be located on an agriculturally zoned site of at least 400,000 sq. ft. (9.183 acres).
6. Be set back (total parking/driveway/building area) at least 50 ft. from property lines.
7. Be limited (total parking/driveway/building area) to no more than 50% of the nursery area located on site (total area under cultivation including outdoor cultivation, green houses, grow houses, shade houses, and similar structures).
8. Be visually screened (parking area) from adjacent properties and streets.
9. Not include or allow for burning, mulching, or dumping off-site debris on the nursery/ landscaping services site.

At the June 18, 2019 BCC meeting, after discussion and input from staff and from members of the public, the BCC voted to direct the County’s Agriculture Advisory Committee (AAC) to review staff’s proposed draft ordinance, including all agricultural land conflicts and uses, and to offer its recommendations on the issue (see BCC 6/18/19 minutes, Attachment 5). The AAC has since considered the matter and has made recommendations (as later explained in this memorandum).

In addition to reviewing staff's recommended ordinance amendment, the AAC also reviewed two related LDR amendment applications to change regulation of accessory off-site landscaping services (the "Hendrix proposed LDR amendment" and the "Simmons/Campbell proposed LDR amendment"), as hereinafter described.

Hendrix Proposed LDR Amendment

Notwithstanding staff's proposed LDR amendment, in June 2019, Ken and Pamela Hendrix of 6220 1st Street SW submitted an LDR amendment application to change the County's accessory off-site landscaping services regulations for such uses in agricultural zoning districts (see Attachment 6). Mr. and Mrs. Hendrix reside (in the A-1 agricultural zoning district) next to Tropical Property Management, an off-site accessory landscaping services business at 6300 1st Street SW, and have expressed concerns to county staff as to the compatibility of the use nearby to rural residences. Under the Hendrix proposed LDR amendment, off-site landscaping services would become a "special exception" use. Per County Code Section 971.05(2), special exception uses "*are those types of uses that would not generally be appropriate throughout a particular zoning district. However, when special exception uses are carefully controlled as to number, area, location, and/or relationship to the vicinity, such uses would not adversely impact the public health, safety, comfort, good order, appearance, convenience, morals and general welfare and as such would be compatible with permitted uses within the particular zoning district.*" As such, special exception uses are not "a given," and are subject to a public hearing process before the PZC and BCC, with public notice of the hearings mailed to all property owners within 300 feet of the proposed use. Uses classified as special exceptions are subject to specific land use criteria contained in LDR Chapter 971.

Under the Hendrix proposed LDR amendment, three criteria are proposed for off-site landscaping services:

1. Indoor facilities shall maintain a 50 foot setback from adjacent properties and 500 feet from the nearest residence, with outdoor improvements (parking, storage, roads, paths, and travel-ways a minimum of 50 feet from adjacent properties; conditions may be imposed to mitigate or attenuate noise impacts.
2. No on-site or off-site landscaping service facilities shall be located on an agriculturally zoned site that abuts a property on which a residence is located, other than a residence on the subject property, on an agriculturally designated property having a parcel size less than 400,000 square feet.
3. Off-site and on-site landscaping employees and personnel shall be supervised by management staff when on site and while entering and leaving the premises.

In January 2020, Mr. Hendrix submitted an email and legal opinion letter from his attorney, Brian Stephens of Dean Mead, concerning the neighboring business (Tropical Property Management) and the County's ability and prerogative to regulate the business (see Attachment 6). In the legal opinion letter, Mr. Hendrix's attorney contends that the neighboring landscaping services business is not a bona fide farming operation and is not exempt from County regulation under the Florida Right to Farm Act (FRFA).

Simmons/Campbell Proposed LDR Amendment

In addition to staff's proposed LDR amendment and the Hendrix proposed amendment, in August 2019, Mr. Simmons and Mr. Campbell submitted an LDR amendment application relating to accessory off-site landscaping service businesses in agricultural zoning districts. Under the Simmons/Campbell proposed LDR amendment, the allowance of off-site accessory landscaping services under County Code Section 911.06(4)(d) would be eliminated, for reasons explained in the application (see Attachment 7).

AAC Review and Recommendations

The AAC, at public meetings held on October 30, 2019 and December 11, 2019 (see meeting minutes, Attachment 8), reviewed staff's proposed draft LDR amendment presented to the BCC on June 18, 2019, as well as the Hendrix and Simmons/Campbell proposed LDR amendments, and recommended that the County adopted a "staff proposed alternative (2nd Alternative)" LDR amendment," summarized as follows.

Staff Proposed "2nd Alternative" LDR Amendment

Different from the staff proposed "1st Alternative" LDR amendment presented to the Board of County Commissioners on June 18, 2019, the "2nd Alternative" staff proposed amendment (Attachment 10) makes off-site accessory landscaping services in agricultural zoning districts an Administrative Permit use, whereby such a use would now be subject to site plan approval. As recommended by the AAC, site plan approval would be subject to PZC approval (i.e., not staff-level approval). Under the alternative staff amendment, the following criteria would apply:

1. The off-site landscaping services must be accessory to a legally established wholesale nursery on agriculturally zoned property at least 400,000 square feet (9.18 acres) in size;
2. The total parking/driveway/building area associated with the landscaping services must be set back at least fifty (50) feet from all property lines and limited to less than fifty (50) percent of the nursery site area under cultivation;
3. The total parking/driveway/building area associated with the landscaping services use must be visually screened from adjacent properties and streets by means of a 6 foot opaque feature (such as a fence, wall, berm, preserved or planted vegetation, or combination thereof); and
4. No burning of material brought in from off-site, stockpiling of organic material, or dumping of debris brought in from off-site is allowed on the wholesale nursery/landscaping services site.

Planning and Zoning Commission Recommendation

At a public hearing on January 23, 2020, the Planning and Zoning Commission voted 5 to 0 to recommend that the Board of County Commissioners adopt staff's proposed alternative ("2nd Alternative") LDR amendment, requiring that off-site accessory landscaping services in agricultural zoning districts be subject to certain criteria specified in the amendment and be subject to PZC approval as an Administrative Permit use, as recommended by the AAC (see PZC minutes, Attachment 9).

The Board of County Commissioners is now to consider the alternative Land Development Regulation (LDR) amendment proposals described herein and adopt, or adopt with modifications, one of the proposed alternative amendments (or deny all of the alternative amendments).

ANALYSIS

Staff's report (and attachments) considered by the BCC on June 18 (see Attachment 4) provides a detailed analysis and summary of:

- Land use conflicts in agricultural areas, with county LDRs accommodating a wide and eclectic range of large and small scale agricultural uses, conditional uses, and low density "residential estate" uses historically and currently existing in agriculturally designated areas;

- State pre-emptions and protections of agricultural uses;
- Current County regulation of landscaping services;
- Regulation of landscaping services in agricultural districts in other counties; and
- Existing landscaping services in Indian River County agricultural areas.

For reasons explained in that staff report, staff drafted its proposed (1st Alternative”) LDR amendment (presented to the BCC on June 18, 2019) to continue the allowance of accessory landscaping businesses in agricultural zoning districts, but with conditions and clarifications tied to a carefully defined term of “off-site accessory landscaping services.” Under staff’s “1st Alternative” approach, such a use would not be subject to the special exception public hearings process (the Hendrix amendment proposal) or eliminated completely in agricultural areas (the Simmons/Campbell amendment proposal), but would be allowed albeit with limitations to address off-site compatibility issues. **The AAC supported staff alternative (2nd Alternative”) LDR amendment contains criteria similar to the June 18 staff “1st Alternative” amendment, but would make the use subject to site plan review and PCZ approval as an Administrative Permit use.**

In drafting the proposed staff “2nd Alternative” LDR amendment (supported by the AAC), staff considered issues that the AAC directed staff to review. Following is a summary of staff’s analysis of those issues.

50 Foot Setback for Driveways

At the October 30, 2019 AAC meeting, it was pointed out that certain agriculturally zoned parcels with a “flag lot” configuration could not meet a 50-foot setback requirement for a driveway. That is because on flag lots, the “flag pole” portion of the lot is standardly 60 feet wide for driveway access, which does not allow for a 50 foot driveway setback from a side property line.

In reviewing this matter, staff found that flag lot configurations are most commonly associated with 5-acre parcels in the A-1 (1 unit per 5 acres) agricultural district. Since staff’s proposed amendment would only allow off-site accessory landscaping services on 400,000 square foot (9.18 acre) or larger parcels, the potential for conflict of a 50-foot driveway setback requirement on a flag lot (common to 5-acre parcels) is minimal. Given that flag lots over 5 acres are not common, and the daily coming and going of landscaping services vehicles on a driveways closer than 50 feet to a property line is a potential nuisance to an adjacent property, a 50-foot setback is justified and should be a requirement, and as such is included in staff’s alternative amendment proposal.

Incidental Pesticide Use vs. Stand-Alone Pesticide Business

To address the issue of distinguishing pesticide use incidental to a bona fide nursery operation from a stand-alone off-site pesticide business, staff modified the proposed definition of “off-site accessory landscaping services” to indicate that such services *do not* include stand-alone pest control services (see Attachment 9). Similarly, staff also revised the off-site landscaping services definition to specify that stand-alone lawn mowing services are not included as well.

Appropriateness of 50% Areal Coverage Threshold (Accessory Use vs. Principal Use)

At the October 30 AAC meeting, concern was expressed that an up to 50% areal coverage for an accessory use (i.e., for an off-site accessory landscaping service) is questionable as an appropriate scale for such a use. In reviewing this issue, staff notes that the current definition of accessory use in the County Code is as follows:

“*Accessory use* a use which:

- (a) Is clearly incidental to, customarily found in association with, and serves a principal use;

- (b) Is subordinate in purpose, area, and extent to the principal use served; and
- (c) Is located on the same lot as the principal use, or on an adjoining lot in the same ownership as that of the principal use.”

Under this definition, an accessory use is “subordinate in purpose, area and extent to the principal use...” Staff interprets this as requiring an accessory use to have an areal coverage “subordinate” to the principal use, which by definition must be less coverage (i.e., less than 50/50) in comparison to the principal use coverage. To address concerns that that ratio (up to/less than 50/50) is not an appropriate scale for an accessory landscaping service, staff drafted its alternative amendment to require that total parking/driveway/building area associated with the accessory landscaping services use be limited to less than 50% of the nursery site under cultivation. (Example: if 6 acres of a 10-acre nursery site is under cultivation, the accessory landscaping services component could not exceed/must be less than 3 acres in areal coverage).

Administrative Permit Use vs. Permitted Use

As previously explained in this report, staff’s proposed alternative (“2nd Alternative”) amendment would make off-site accessory landscaping services in agricultural zoning districts an Administrative Permit use, subject to site plan approval with conditions as set forth in the proposed amendment. Per the AAC’s recommendation, the Administrative Permit use would be subject to PZC approval (not just staff-level approval).

Grandfathering of Existing Legally Conforming Landscaping Services Uses

In considering the proposed LDR amendment alternatives relating to off-site accessory landscaping services in agricultural zoning districts, it is important to note that any LDR amendment would affect landscaping businesses “going forward” and would not eliminate existing off-site landscaping business in compliance with county regulations at the time of establishment. Such businesses (or certain aspects of the businesses) would become “legal nonconformities” as regulated under County LDR Chapter 904 (Nonconformities) and would be allowed to continue as “grandfathered” uses (but with certain limitations on expansion or increase in the nonconformity, with potential loss of grandfather status if discontinued for more than one year, as set forth in LDR Chapter 904). Also, by eliminating uses currently allowed or by changing the use classification, the County must take into consideration the protection of private property rights and potential loss of real property value without compensation, as protected under state law (i.e., under the Bert J. Harris, Jr., Private Property Rights Protection Act, F.S. 70.001).

RECOMMENDATION

Staff recommends that the Board of County Commissioners adopt staff’s proposed alternative (2nd Alternative”) LDR amendment, requiring that off-site accessory landscaping services in agricultural zoning districts be subject to certain criteria specified in the amendment and be subject to PZC approval as an Administrative Permit use, as recommended by the AAC and the PZC.

ATTACHMENTS

1. Stolze/Caribbean Lawn and Landscaping Exemption Affidavit
2. Stolze/Caribbean site plan sketch
3. BCC 3/5/19 meeting minutes
4. Staff report for BCC 6/18/19 meeting (including attachments)
5. BCC 6/18/19 meeting minutes
6. Hendrix proposed LDR amendment (including attorney opinion letter)

7. Simmons/Campbell proposed LDR amendment
8. AAC meeting minutes (10/30/19 and 12/11/19 meetings)
9. PZC 1/23/2020 meeting minutes
10. Staff proposed alternative (“2nd Alternative”) LDR amendment