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March 7, 2022

VIA EMAIL

Mr. Josh Penn, Planner Coordinator
M-NCPPC
2425 Reedie Drive, 13th Floor
Wheaton, MD 20902

Re: CU 22-07, Chapingo (Landscape Contractor)-12120 Prices Distillery Road

Dear Josh,

Per our discussions on this Conditional Use (CU), please find this letter addressing the topic of whether the proposed development satisfies Section 59.7.1.E.f., served by adequate public services and facilities, focusing here on sanitary sewer.

In short, Applicant's position is that since it has no need for sanitary sewer services on site, it by definition has adequate sanitary sewer on to meet its needs. The Applicant is not asking for an office on site (in fact Chapingo's corporate office is nearby just over the Frederick County line), nor is a restroom on site or being requested. In fact, Chapingo staff is only onsite for approximately 45 minutes or less each morning and about 30 minutes at the end of each workday. The property truly will serve primarily as a storage location for Chapingo's equipment for the vast majority of workdays, at night and on Sundays.

To bolster Applicant's view, we offer several supporting positions on why the requested development has adequate public facilities related to sanitary sewer on site.

The first is the language in the Code itself. In the general Conditional Use code Section, 59.7.1.E.f.i., it says. "If a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public facilities, including... sanitary sewer..." Again, the code makes it clear that the need for sanitary sewer must be served adequately. There is no need for sanitary services in CU 22-07 as no bathroom exists at the property and none is being requested. No office is on site nor is one being requested. Further, no residence exists or can be requested as no development rights exist on the property. Thus, since no need exists and no bathroom or office are on site or being requested, the property clearly had adequate services on the topic. The business, Landscape Contractor, which is permitted by Conditional Use, like many traditional and modern businesses involves a mobile work force with staff rarely on site. The staff, like so many other mobile work

forces (salespersons, utility workers, government field inspectors, sanitation workers, etc.) must and does plan their days accordingly to allow for necessary bathroom visits.

Additionally, the CU code section for Landscape Contractors, section 59.3.5.5. lists the definition of it in 3.5.5.A. Later in that section it also notes the requirements for a Conditional Use in the AR zone, like here, in 3.5.5.B.b. Neither section makes any reference to nor states a requirement of an onsite bathroom. If the desire of the Council was to require a bathroom for such Use, it simple would have said so. This indeed would be harsh for many Landscape Contracting operators, including Chapingo, since the Use involves a mobile work force, that is rarely on site and in fact is offsite for the vast majority of the day, all night and on Sundays. The Use requested serves customers at their properties entirely. For the small to mid-size landscape contractors who do not have offices or bathrooms on site, the property realistically serves as a storage location for the equipment that is not being used on a particular workday, each night and on Sundays.

The County Council recently introduced ZTA 21-08 aiming to allow more flexibility for Landscape Contractor operator locations in the County. Landscape Contractor services are greatly desired and thus used by a significant number of residents and businesses in Montgomery County. While the ZTA was withdrawn to allow for additional text review, its introduction clearly shows that a need to assist these businesses in the land use review process exists. We contend that in this case, Chapingo has a nearly ideal location and situation. The site is in a rural area (AR zoned) on a 32 plus acre property. Chapingo will use 3+ acres in the center of the property (P595) (See aeriel Ex. # 1) around the two existing Ag structures, thus allowing the remaining 28+ acres to continue to be used for traditional farming. The Use area is 1,000 ft off Prices Distillery Road via an existing driveway, is not proposing any material changes or new structures (minus fencing) to the property and is relatively modest in scope compared to other operations in the County, especially considering the size of the property. The request is for (25) staff (who carpool to and from work) and (15) trucks current need and for up to 18 for modest future needs, in which typically 50-66 percent of the vehicles are used daily.

The County also has several recent CU cases that provide precedent to support the Applicant's view that adequate public facilities exist here pertaining to sanitary system. Those cases are J.B. Kline, Jr. Landscaping and Lawn Maintenance (S-2807), Robert Pacano D/B/A Woodstone Group, LLC (S-2761) and FM Group, Inc. d/b/a Francisco Landscaping (CU 19-04). We will examine the key parts of each and cite them here.

In J.B. Kline, Jr. Landscaping and Lawn Maintenance ("Kline") the staff report wrote at the bottom of page 11, "Analysis: The proposed use does not require water or sewer services as the site is served by private on-site well and septic systems.... The special exception use does not require approval of a preliminary plan of subdivision. A preliminary plan will be required if a building permit application is submitted in future." Additionally, Kline was in the Environmental Overlay Zone for the Upper Rock Creek SPA. It appears that the septic system capability was not reviewed in the Kline application. That is certainly appropriate and applicable in Chapingo since there is not any septic on site. Additionally, Chapingo is not in an SPA like Kline. The OZAH Report supported and cited staff position on topic, see p. 64, third paragraph

and found that it had adequate public facilities related to septic without any evaluation of bathrooms or septic health status.

In Woodstone Group, the Staff report wrote in the last paragraph of p. 19 and on p. 20:

- (i) *Water and Sewer Service The Property is in Water Category W-6 and Sewer Category S-6 indicating that there is no planned community water and sewer service is available or planned. The previous owner of the Property had installed a septic system in 1998 without a proper permit. The system was installed on the neighboring property without an easement. Inspection of the system indicated a malfunction that required a repair of the system based on a Consent Agreement between the owner and the Department of Permitting Services (DPS). In January of 2000, DPS issued a Certification of Sewage Disposal System to allow replacement of the malfunctioning system installed on the adjoining property. The certificate contains the following comments:*

“Due to substandard percolation rates and inadequate septic reserve area, the septic system installed under this permit does not meet all current county and state standards. Although this is the best repair possible, there is a greater than normal risk of premature failure of this system. Use of this system and the dwelling it serves is governed by the terms of conditions of a Consent Agreement recorded in the Montgomery County Land Record at Liber 17523, Folio 195 et seq....”

The Application does not propose any exterior changes to the existing dwelling. The dwelling will be used exclusively as an office for the landscape contractor business. The Applicant has stated that the dwelling will not be rented or used as a residence while it is used as office for the business since the house does not have adequate septic service to serve both a landscape contractor’s office and a residential use. A revised Consent Agreement has been submitted to DPS for approval. The Applicant has indicated that the amended Consent Agreement is intended to ensure that the existing septic field is not overwhelmed by the landscape contractor use. The septic field has been allowed to be 75 feet from the existing well by the Consent Agreement. The well is located in the north side yard approximately 70 feet from the existing dwelling. By e-mail dated May 20, 2014 the Well and Septic Section of DPS has indicated that the amended agreement is acceptable to the DPS, pending any revisions made necessary by the Hearing Examiner’s decision.

Thus, in Woodstone Group they in fact had an inadequate septic and were still found to have sufficient sanitary public facilities for its office. Again, Chapingo does not have an office or bathroom and is not asking for either. It will not need a septic and thus does not have septic on site. Thus, the septic need is certainly adequate as none is needed and none is onsite. In the OZAH Report, the Hearing Examiner supported and cited Staff’s position on p. 31, “As discussed in Parts II.B.4. of this report and in the Technical Staff report (Exhibit 34, pp. 19-21), the evidence supports the conclusion that the subject property would continue to be served, as well, by other adequate public facilities.”

In Francisco’s Landscaping Staff report wrote on p. 25:

The Conditional Use does not require approval of a Preliminary Plan of Subdivision at this stage, but one will be required if a building permit application is submitted in the future. The Application

does not propose construction of any new structures. Existing public facilities—public roads, storm drainage, fire and police protection—are adequate to serve the proposed use.

(a) Water and Sewer Service The property is served by well and a septic disposal system. The well serves the existing dwelling and will continue to do so. The Applicant explained that the contractor business doesn't have an office on the property and that the use of the residential structure remains as a private dwelling. The existing septic system has been determined to be sufficient to serve the residential dwelling.

The situation in Chapingo is similar. The Conditional Use does not require approval of a Preliminary Plan of Subdivision. However, such review would be required if a building permit application is applied to down the road. The project is not requesting construction of any new structures (minus a fence off the driveway in the CU area for screening and buffering).

OZAH concurred with staff's view on the topic of water and sewer services. The report wrote on p. 54,

As to the other public services and facilities, Technical Staff stated, and the Hearing Examiner agrees (Exhibit 40, pp. 25-27):

(a) Water and Sewer Service The property is served by well and a septic disposal system. The well serves the existing dwelling and will continue to do so. The Applicant explained that the contractor business doesn't have an office on the property and that the use of the residential structure remains as a private dwelling. The existing septic system has been determined to be sufficient to serve the residential dwelling

Thus, since no bathroom or office existed or was applied for the business use in Francisco, nor was the septic evaluated for the business, since it was not applicable. The case provides strong precedent for Chapingo. Like Francisco, Chapingo is making no material changes to the property, not adding any material structures and does not have an office or bathroom existing and is not asking to add either. None were needed in Francisco and none are needed in this case. Since none are on site for the Landscape Contactor use and none are requested there is no need to have a review of the need for a bathroom or need to evaluate if the septic would be sufficient for a need that does not exist and is not being requested. Since no sewer service exists or is needed for the use, it clearly has adequate services for the non-existent sanitary need.

Leading up to Francisco case, Staff asked this writer (who was Counsel for the Applicant in the Francisco case) to discuss with the County's Department of Permitting Services (DPS), well and septic division if a bathroom was required in order to have such a Use (Landscape Contractor). Upon meeting and talking with DPS's Jason Flemming, he stated that DPS has no such requirement that a bathroom is required on site. Mr. Flemming did not that DPS would review for sufficiency of the septic if Applicant was requesting to install or use an existing bathroom. As in Francisco, Applicant in Chapingo is not requesting to install or use a bathroom. In fact, none exist on site. Additionally, there is evidence that the prior owner explored the issue of a bathroom on site with DPS well and septic for the now existing, large (7,200 sq. ft) Ag structure built around 2012. See attached Memo (Ex. # 2) and supporting materials in which well and septic advised what would be required to evaluate a potential bathroom (now Chapingo's).

Lastly, and perhaps most compelling, please see attached OSHA section 1910.141(d)(2)(i) (Ex. # 3), which states that the sanitation requirements do not apply to mobile crews or to normally unattended work locations if employees have transportation readily available to nearby facilities. See also (Ex. # 4) the attached OSHA Overview document that defines prompt access as 10 minutes with readily available transportation. Also, on this topic see the attached (Ex. # 5) titled, Standard Interpretation /Mobile crews must have prompt access to nearby toilet facilities- Standard Number 1926.51(c)(4); 1926.51(c); 1926.51. It is an Interpretation reply by OSHA to Mr. Mertz of Minnesota's inquiry of the construction sanitation standard, pertaining to mobile crews. The reply is dated June 7, 2002 and is currently on OSHA website. The OSHA response is from Russell B. Swanson, Director, Directorate of Construction. The OSHA interpretation reply pertained to the question what does "nearby" mean in where, "The requirements of Section 1926.51(c) for sanitation facilities states that they do not apply to mobile crews "having transportation readily available to nearby toilet facilities." Mobile work crews, per OSHA, are ones that who continually or frequently move from jobsite to jobsite on a daily or hourly basis. Conversely, non-mobile workers, for sanitation standards, are ones who report to a conventional construction project, where they work for more extended periods of time (days, weeks or longer). Chapingo, like we suspect all private landscape contractors in Montgomery County (and beyond) is a mobile work force. The OSHA reply went on to define "prompt access" and "nearby" to toilets to mean "it would take less than 10 minutes to get to them." Applicant contends that prompt access to nearby toilet facilities exists throughout Montgomery County. For Chapingo just a few specific examples of locations to use toilet facilities within ten minutes of its location on Prices Distillery Road in Damascus include the following, Dunkin and Carroll Fuel in Hyattstown, McDonalds, Safeway and Starbucks in Damascus and 7-11 and Harris Teeter in Clarksburg.

For all the above noted reasons, we respectfully request that Staff concur that the Applicant does not need any septic services on site since it does not have a bathroom, is not requesting a bathroom and rarely has staff on site. When staff are on site it is very limited in time. The visits are less than 45 minutes in the morning and 30 minutes at the end of the workday. Consequently, since no sanitary services are needed and none are on site, it clearly does have adequate sanitary services on site to serve the need for none. For Chapingo, like most of the thousands of other mobile work forces and employees in the County, prompt access to nearby facilities exists everywhere in Montgomery County, including from the Applicant's property via shopping centers, stores and restaurants in Damascus, Clarksburg and even Hyattstown. One would be hard pressed to find a location in the County in which toilet facilities are not within a ten-minute walk, bike or drive.

If you have any questions or concerns with our view, please contact me. We would welcome the opportunity to further discuss the topic in person. Thank you.

Sincerely,

MILLER, MILLER & CANBY

Sean P Hughes

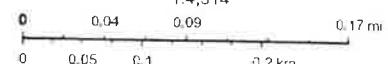
Exhibit 1

FINDER Online Map



3/16/2021, 5:24:49 PM

1:4,514



MD iMAP, MDP, SDAT, MD iMAP, MDP, Esri, HERE, Gamma, (c) OpenStreetMap contributors, and the GIS user community, Frederick County, Montgomery County, MD, MNGRPC, VITA, Esri, HERE, Gamma, INCREMENT P, NGA, USGS, MD iMAP, DOIT

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DEPARTMENT OF PERMITTING SERVICES

Isiah Leggett
County Executive

July 30, 2012

Carla Reid
Director

Memorandum

To: Mark Yates
2501 Green Valley Road
Clarksburg, Maryland 20871-8512

From: Kim Beall, R.S.
Well and Septic Program

Re: Inquiry for 'water table' data
12120 Prices Distillery Road
Tax Map EX62 Parcel 595

As discussed at our office last week, you expressed interest in constructing a farm office building on the subject property. All information contained in this memo is based on the assumption that the farm office building will include plumbing and heating/cooling.

Prior to consideration for Well and Septic approval to construct the farm office building, you will need to establish a sewage disposal area to serve this proposed structure by conducting sufficient 'water table' and percolation testing, starting in Spring, 2013. Further you will need to install an adequate septic system to serve the proposed structure. An approved water well will also required to serve the building.

I have enclosed the 'water table' data for the surrounding property as requested. I have also included a copy of a portion of the approved Pre-Application plan for the subdivision. As you had indicated, this subdivision has not been recorded. It appears that the subject parcel was created by deed in October, 2010.

Based on elevation and topography, it appears that the 'water table' testing conducted on the surrounding property may not be usable for the purpose of presenting a sewage disposal area for percolation testing on your property. However, you will need to submit a complete proposal to the Well and Septic plan reviewer for your property for final decision. The Well and Septic plan reviewer for your property is Gene von Gunten. You can reach Gene at 240-777-6319 or via email at gene.vongunten@montgomerycountymd.gov.

As specified on the copy enclosed, Benning & Associates prepared the plans for the surrounding property (proposed subdivision). You may want to contact this company regarding plans and requirements relative to your proposal. I have enclosed a phone list of engineers and septic contractors for your use. I have also included our guidelines and application. (Please be advised that we do not endorse any specific companies.)

I hope this information is helpful.

MONTGOMERY COUNTY
 DEPARTMENT OF PERMITTING SERVICES
 WELL AND SEPTIC SECTION

2004 Wet Season - Water Table Evaluation - Four Foot Buffer Required With These Results

Subdivision/Street Address: LEISURE FARM Appl. #: T-041040

Inspector: Marvin Schubert Date: 3/31/04 Excavator: MENS

| Date | Lot # | Hole # | Water table information | Total depth of hole | Comments |
|------|-------|--------|-------------------------|---------------------|------------------------------------|
| 9 | | B | DRY @ 16 | | |
| 10 | | B | DRY @ 14 1/2 | | |
| 11 | | B | DRY @ 14 1/2 | | |
| 12 | | B | DRY @ 15 | | |
| 8 | | A | DRY @ 13 1/2 | | "A" is shown on plans at bottom of |
| 7 | | B | GW @ 4 1/2 | 12 | Rock @ 4 |
| 7 | | C | Dry @ 10 1/2 | | Rock @ 5 |
| 6 | | B | Dry @ 5 | | Rock @ 3 1/2 |
| 6 | | C | DRY @ 14 | | |
| 2 | | B | DRY @ 12 1/2 | | |
| 5 | | B | DRY @ 14 1/2 | | |
| 4 | | C | DRY @ 14 1/2 | | |
| 4 | | B | DRY @ 8 1/2 | | |
| 3 | | D | DRY @ 14 | | Rock @ 7+ |
| 3 | | C | DRY @ 11 | | Rock @ 5+ |
| 3 | | B | DRY @ 8 | | Rock @ 5+ |
| 1 | | C | DRY @ 10 1/2 | | Rock @ 2 |
| 1 | | D | GW @ 12 1/2 | 120 | Rock @ 9 |
| 1 | | B | DRY @ 4 | 120 | Rock @ 1 |

MONTGOMERY COUNTY
DEPARTMENT OF PERMITTING SERVICES
WELL AND SEPTIC SECTION

3/2

2004 Wet Season - Water Table Evaluation - Four Foot Buffer Required With These Results

Subdivision/Street Address: LEISURE FARM Appl #: 7-0464

Inspector: Marie Schubert Date: 3/31/04 Excavator: MENSO

LEI SHEAR FARM

| BLOCK | A | B | NEEDS |
|-------|------------------------|--|---|
| 8 | NTC 2.5' LA 20c 12' | NTC 2.5' LB 20c 12' | 12/ |
| | NTC 3.5' LA | NTC 3.5' LB | 12/a |
| | NTC 4.5' LA | NTC 4' LB | 1/5 |
| | NTC 4.5' LA | NTC 4.5' LB | 5/6 |
| | NTC 5' LA | NTC 5' LB | 5/7 |
| | NTC 5.5' LA | NTC 5.5' LB | 5/8 |
| | | NTC 2' LC NTC 1.5' LC NTC 1.5' LC NTC 6.5' (Rock) | NTC 2' LD NTC 1.5' LD NTC 3.5' LD NTC 6' (Rock) LD |
| 9 | NTC 2.5' A 20c 12' | 20c 2.5' B 17c 13' | 12/ |
| | NTC 3.5' LA | | 12/a |
| | NTC 4' LA | | 1/5 |
| | 30c 4.5' LA | | 5/6 |

By Standard Number / 1910.141 - Sanitation.

- **Part Number:** 1910
- **Part Number Title:** Occupational Safety and Health Standards
- **Subpart:** 1910 Subpart J
- **Subpart Title:** General Environmental Controls
- **Standard Number:** 1910.141
- **Title:** Sanitation.
- **GPO Source:** e-CFR

1910.141(a)

General –

1910.141(a)(1)

Scope. This section applies to permanent places of employment.

1910.141(a)(2)

Definitions applicable to this section.

Nonwater carriage toilet facility, means a toilet facility not connected to a sewer.

Number of employees means, unless otherwise specified, the maximum number of employees present at any one time on a regular shift.

Personal service room, means a room used for activities not directly connected with the production or service function performed by the establishment. Such activities include, but are not limited to, first-aid, medical services, dressing, showering, toilet use, washing, and eating.

Potable water means water that meets the standards for drinking purposes of the State or local authority having jurisdiction, or water that meets the quality standards prescribed by the U.S. Environmental Protection Agency's National Primary Drinking Water Regulations (40 CFR 141).

Toilet facility, means a fixture maintained within a toilet room for the purpose of defecation or urination, or both.

Toilet room, means a room maintained within or on the premises of any place of employment, containing toilet facilities for use by employees.

Toxic material means a material in concentration or amount which exceeds the applicable limit established by a standard, such as 1910.1000 and 1910.1001 or, in the absence of an applicable standard, which is of such toxicity so as to constitute a recognized hazard that is causing or is likely to cause death or serious physical harm.

Urinal means a toilet facility maintained within a toilet room for the sole purpose of urination.

Water closet means a toilet facility maintained within a toilet room for the purpose of both defecation and urination and which is flushed with water.

Wet process means any process or operation in a workroom which normally results in surfaces upon which employees may walk or stand becoming wet.

1910.141(a)(3)

Housekeeping.

1910.141(a)(3)(i)

All places of employment shall be kept clean to the extent that the nature of the work allows.

1910.141(a)(3)(ii)

The floor of every workroom shall be maintained, so far as practicable, in a dry condition. Where wet processes are used, drainage shall be maintained and false floors, platforms, mats, or other dry standing places shall be provided, where practicable, or appropriate waterproof footgear shall be provided.

1910.141(a)(3)(iii)

To facilitate cleaning, every floor, working place, and passageway shall be kept free from protruding nails, splinters, loose boards, and unnecessary holes and openings.

1910.141(a)(4)

Waste disposal.

1910.141(a)(4)(i)

Any receptacle used for putrescible solid or liquid waste or refuse shall be so constructed that it does not leak and may be thoroughly cleaned and maintained in a sanitary condition. Such a receptacle shall be equipped with a solid tight-fitting cover, unless it can be maintained in a sanitary condition without a cover. This requirement does not prohibit the use of receptacles which are designed to permit the maintenance of a sanitary condition without regard to the aforementioned requirements.

1910.141(a)(4)(ii)

All sweepings, solid or liquid wastes, refuse, and garbage shall be removed in such a manner as to avoid creating a menace to health and as often as necessary or appropriate to maintain the place of employment in a sanitary condition.

1910.141(a)(5)

Vermin control. Every enclosed workplace shall be so constructed, equipped, and maintained, so far as reasonably practicable, as to prevent the entrance or harborage of rodents, insects, and other vermin. A continuing and effective extermination program shall be instituted where their presence is detected.

1910.141(b)

Water supply.

1910.141(b)(1)

Potable water.

1910.141(b)(1)(i)

Potable water shall be provided in all places of employment, for drinking, washing of the person, cooking, washing of foods, washing of cooking or eating utensils, washing of food preparation or processing premises, and personal service rooms.

1910.141(b)(1)(ii)

[Reserved]

1910.141(b)(1)(iii)

Portable drinking water dispensers shall be designed, constructed, and serviced so that sanitary conditions are maintained, shall be capable of being closed, and shall be equipped with a tap.

1910.141(b)(1)(iv)

[Reserved]

1910.141(b)(1)(v)

Open containers such as barrels, pails, or tanks for drinking water from which the water must be dipped or poured, whether or not they are fitted with a cover, are prohibited.

1910.141(b)(1)(vi)

A common drinking cup and other common utensils are prohibited.

1910.141(b)(2)

Nonpotable water.

¹Where toilet facilities will not be used by women, urinals may be provided instead of water closets, except that the number of water closets in such cases shall not be reduced to less than 2/3 of the minimum specified.

²1 additional fixture for each additional 40 employees.

1910.141(c)(1)(ii)

The requirements of paragraph (c)(1)(i) of this section do not apply to mobile crews or to normally unattended work locations so long as employees working at these locations have transportation immediately available to nearby toilet facilities which meet the other requirements of this subparagraph.

1910.141(c)(1)(iii)

The sewage disposal method shall not endanger the health of employees.

1910.141(c)(2)

Construction of toilet rooms.

1910.141(c)(2)(i)

Each water closet shall occupy a separate compartment with a door and walls or partitions between fixtures sufficiently high to assure privacy.

1910.141(d)

Washing facilities.

1910.141(d)(1)

General. Washing facilities shall be maintained in a sanitary condition.

1910.141(d)(2)

Lavatories.

1910.141(d)(2)(i)

Lavatories shall be made available in all places of employment. The requirements of this subdivision do not apply to mobile crews or to normally unattended work locations if employees working at these locations have transportation readily available to nearby washing facilities which meet the other requirements of this paragraph.

1910.141(d)(2)(ii)

Each lavatory shall be provided with hot and cold running water, or tepid running water.

1910.141(d)(2)(iii)

1910.141(g)(1)

Application. This paragraph shall apply only where employees are permitted to consume food or beverages, or both, on the premises.

1910.141(g)(2)

Eating and drinking areas. No employee shall be allowed to consume food or beverages in a toilet room nor in any area exposed to a toxic material.

1910.141(g)(3)

Waste disposal containers. Receptacles constructed of smooth, corrosion resistant, easily cleanable, or disposable materials, shall be provided and used for the disposal of waste food. The number, size, and location of such receptacles shall encourage their use and not result in overfilling. They shall be emptied not less frequently than once each working day, unless unused, and shall be maintained in a clean and sanitary condition.

Receptacles shall be provided with a solid tight-fitting cover unless sanitary conditions can be maintained without use of a cover.

1910.141(g)(4)

Sanitary storage. No food or beverages shall be stored in toilet rooms or in an area exposed to a toxic material.

1910.141(h)

Food handling. All employee food service facilities and operations shall be carried out in accordance with sound hygienic principles. In all places of employment where all or part of the food service is provided, the food dispensed shall be wholesome, free from spoilage, and shall be processed, prepared, handled, and stored in such a manner as to be protected against contamination.

[39 FR 23502, June 27, 1974, as amended at 40 FR 18446, April 28, 1975; 40 FR 23073, May 28, 1975; 43 FR 49748, Oct. 24, 1978; 63 FR 33450, June 18, 1998; 76 FR 33607, June 8, 2011]

**UNITED STATES
DEPARTMENT OF LABOR**

Occupational Safety & Health Administration

200 Constitution Ave NW

Washington, DC 20210

• 800-321-6742 (OSHA)

TTY

www.OSHA.gov

Restrooms and Sanitation Requirements

Restrooms and Sanitation Requirements Menu

Workers' Rights

Overview

OSHA requires employers to provide all workers with sanitary and immediately-available toilet facilities (restrooms). The sanitation standards (29 CFR 1910.141, 29 CFR 1926.51 and 29 CFR 1928.110) are intended to ensure that workers do not suffer adverse health effects that can result if toilets are not sanitary and/or are not available when needed.

How do employers ensure restrooms are accessible?

Employers must provide at least the minimum number of toilet facilities, in toilet rooms separate for each sex (see the table in 29 CFR 1910.141(c)(1)(i)), and prompt access to the facilities when needed. Restroom access frequency needs may vary significantly from worker to worker, and may be affected by medications, fluid intake, air temperature and other factors.

In response to questions about reasonable access to toilet facilities, OSHA published letters of interpretation that, together, describe how employers must ensure prompt access to toilet facilities (see references for letters of interpretation under Additional Resources below).

Employers must:

- Allow workers to leave their work locations to use a restroom when needed.
- Provide an adequate number of restrooms for the size of the workforce to prevent long lines.
- Avoid imposing unreasonable restrictions on restroom use.
- Ensure restrictions, such as locking doors or requiring workers to sign out a key, do not cause extended delays

Employers may need to be flexible in developing procedures to ensure that workers have access to toilet facilities as needed. Employers with mobile workers must provide readily available transportation that provides prompt access (i.e., less than 10 mins) to restrooms if they are not available at the work location. Toilets for farmworkers must be located no more than a quarter mile from the location where workers are working on similar findings. Also, when work stations require constant coverage (e.g., production lines and bus drivers), employers may implement a system for workers to request relief as long as there are sufficient relief-workers to assure the wait is not unreasonably long.

Additional Resources

<https://www.osha.gov/restrooms-sanitation>

- Portable Toilet and Sanitation Best Practices for Women in Construction. OSHA and the National Association of Women in Construction Alliance, (2015). For more information about the NAWIC alliance, please visit the alliance page.
- Guidance to Employers: Best Practices - A Guide to Restroom Access for Transgender Workers. OSHA Publication 3795, (2015).
- Requirements for Washing Facilities in Construction Industry under 29 CFR 1926.51(f)(1) and in Agriculture Industry under 29 CFR 1928.110. OSHA Memorandum, (July 20, 2005).
- 1926.51(c)(4): Sanitation and Mobile Crews. OSHA Memorandum, (June 7, 2002).
- 29 CFR 1910.141(c)(1)(i), Toilet Facilities. OSHA Letter of Interpretation, (April 6, 1998). Clarification about this memorandum was provided in OSHA's letter dated April 23, 2003. Additional clarification on restricting worker's access to restrooms is provided in OSHA's letter dated February 2, 2006.
- Other related OSHA Letters of Interpretations.

UNITED STATES DEPARTMENT OF LABOR

Occupational Safety & Health Administration
200 Constitution Ave NW
Washington, DC 20210
• 800-321-6742 (OSHA)
TTY
www.OSHA.gov

FEDERAL GOVERNMENT

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[A - Z Index](#)

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Exhibit 5

2/5/22, 10:22 PM

Mobile crews must have prompt access to nearby toilet facilities. | Occupational Safety and Health Administration

Standard Interpretations / Mobile crews must have prompt access to nearby toilet facilities.

- Standard Number: 1926.51(c)(4) ; 1926.51(c) ; 1926.51

OSHA requirements are set by statute, standards and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations. This letter constitutes OSHA's interpretation of the requirements discussed. Note that our enforcement guidance may be affected by changes to OSHA rules. Also, from time to time we update our guidance in response to new information. To keep apprised of such developments, you can consult OSHA's website at <https://www.osha.gov>.

June 7, 2002

Mr. Nicholas Mertz
9054 Hyland Creek Road
Bloomington, MN 55437

Re: §1926.51(c)(4); sanitation, mobile crews

Dear Mr. Mertz:

This is in response to your letter of October 1, 2001, to the Occupational Safety and Health Administration (OSHA) in which you ask for an interpretation of the construction sanitation standard, specifically the provision pertaining to mobile crews. We apologize for the long delay in providing this response.

Question: The requirements of §1926.51(c) for sanitation facilities states that they do not apply to mobile crews "having transportation readily available to nearby toilet facilities." What does "nearby" mean?

Answer:

Construction sanitation standard; mobile crews

OSHA's construction sanitation standard is codified at 29 CFR 1926.51. Paragraph (c) of §1926.51, "*Toilets at construction jobsites*," states:

Toilets shall be provided for employees according to the following table:

Table D-1

| <i>Number of employees</i> | <i>Minimum number of facilities</i> |
|----------------------------|--|
| 20 or less | 1. |
| 20 or more | 1 toilet seat and 1 urinal per 40 workers. |
| 200 or more | 1 toilet seat and 1 urinal per 50 workers. |

However, as you are aware, §1926.51(c)(4) makes the provisions of paragraph (c) inapplicable to "mobile crews having transportation readily available to nearby toilet facilities."

When determining whether paragraph (c)(4) applies to a work crew, employers must evaluate the nature of the site and job functions of the crew. Workers who continually or frequently move from jobsite to jobsite on a daily or hourly basis would be considered a "mobile crew." Workers who report to a conventional construction project, where they work for more extended periods of time (days, weeks, or longer), would not be considered a "mobile crew" for purposes of the sanitation standard.

Definition of "nearby"

As noted above, the requirements of (c)(4) are inapplicable when a mobile crew has transportation readily available to "nearby" toilet facilities. As explained below, for purposes of this standard, "nearby" means prompt access — sufficiently close so that employees can use them when they need to do so.

The purpose of this standard is to ensure that employees will not suffer the adverse health effects that can result if toilets are not available when

employees need them. Individuals vary significantly in the frequency with which they need to urinate and defecate, with pregnant women, women with stress incontinence, and men with prostatic hypertrophy needing to urinate more frequently. Increased frequency of voiding may also be caused by various medications, by environmental factors such as cold, and by high fluid intake, which may be necessary for individuals working in a hot environment. Diet, medication use, and medical condition are among the factors that can affect the frequency of defecation.

Medical studies show the importance of regular urination, with women generally needing to void more frequently than men. Adverse health effects that may result from voluntary urinary retention include increased frequency of urinary tract infections (UTIs), which can lead to more serious infections and, in rare situations, renal damage (see, e.g., Nielsen, A. Waite, W., "Epidemiology of Infrequent Voiding and Associated Symptoms," **Scand J Urol Nephrol Supplement 157**). UTIs during pregnancy have been associated with low birthweight babies, who are at risk for additional health problems compared to normal weight infants (see, Naeye, R.L., "Causes of the Excess Rates of Perinatal Mortality and the Prematurity in Pregnancies Complicated by Maternity Urinary Tract Infections," **New England Journal of Medicine 1979; 300(15): 819-823**). Medical evidence also shows that health problems, including constipation, abdominal pain, diverticuli, and hemorrhoids, can result if individuals delay defecation (see **National Institutes of Health (NIH) Publication No. 95-2754**, July 1995).

The language and structure of the construction industry sanitation standard reflect the Agency's intent that employees be able to use toilet facilities promptly. The standard in (c)(4) requires that toilet facilities be "provided." The most basic meaning of "provide" is "make available." See **Webster's II New College Dictionary**("Webster"), 1995, defining "provide" as "to furnish; to make ready; to make available." Toilets that take too long to get to are not "available." Similarly, one purpose of the requirement in Table D-1 that adequate numbers of toilets be provided for the size of the workforce is timely access -- to assure that employees will not have to wait in long lines to use those facilities. The most basic meaning of "readily" as defined by Webster is "promptly; willingly; easily;" and it furthermore defines "ready" as "prepared or available for service or action."

Mobile crew employees relying on "nearby" facilities must be afforded access equivalent to that provided by the general provision for employees at fixed worksites. Read together, the two provisions make clear that mobile crews must have prompt access to nearby toilet facilities. For example, in general, toilets would be considered "nearby" if it would take less than 10 minutes to get to them.

If you need additional information, please do not hesitate to contact us by fax at: U.S. Department of Labor, OSHA, [Directorate of Construction, Office of Construction Standards and Guidance], fax # 202-693-1689. You can also contact us by mail at the above office, Room N3468, 200 Constitution Avenue, N.W., Washington, D.C. 20210, although there will be a delay in our receiving correspondence by mail.

Sincerely,

Russell B. Swanson, Director
Directorate of Construction

DEPARTMENT OF LABOR
UNITED STATES

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[A - Z Index](#)

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Subchapter 4. Construction Safety Orders

Article 3. General

[Return to index](#)
[New query](#)

§1526. Toilets at Construction Jobsites.

(a) A minimum of one separate toilet facility shall be provided for each 20 employees or fraction thereof of each sex. Such facilities may include both toilets and urinals provided that the number of toilets shall not be less than one half of the minimum required number of facilities.

EXCEPTIONS:

(1) Where there are less than five (5) employees, one (1) single-user toilet facility designated for all-gender use is sufficient.

(2) Each single-user toilet facility designated for all-gender use counts as one of the required separate toilet facilities if all of the following conditions are met: 1) the total number of toilet facilities provided is in accordance with subsection (a); 2) all single-user toilet facilities are designated for all-gender use, and; 3) all multi-user separate toilet facilities are provided in equal number to each sex.

(b) Under temporary field conditions, not less than one toilet shall be available.

(c) Where the provision of water closets is not feasible due to the absence of a sanitary sewer or the lack of an adequate water supply, nonwater carriage disposal facilities shall be provided. Unless prohibited by applicable local regulations, these facilities may include privies (where their use will not contaminate either surface or underground waters), chemical toilets, recirculating toilets, or combustion toilets.

(d) Toilet facilities shall be kept clean, maintained in good working order, designed and maintained in a manner which will assure privacy and provided with an adequate supply of toilet paper.

(e) The requirements of this section shall not apply to mobile crews having readily available transportation to nearby toilet facilities.

Note: Authority cited: Section 142.3, Labor Code. Reference: Section 142.3, Labor Code.

HISTORY

1. New section filed 7-12-74; effective thirtieth day thereafter (Register 74, No. 28).
2. Repealer and new section filed 1-7-75; effective thirtieth day thereafter (Register 75, No. 2).
3. Repealer and new section filed 9-27-85; effective thirtieth day thereafter (Register 85, No. 40).
4. Amendment of subsection (d) filed 1-26-94; operative 2-25-94 (Register 94, No. 4).
5. Repealer and new Exceptions to subsection (a) filed 3-3-2020; operative 7-1-2020 (Register 2020, No. 10).

 [Go Back to Article 3 Table of Contents](#)

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Subchapter 18. Ship Building, Ship Repairing and Ship Breaking Safety Orders

Article 8. Miscellaneous Safe Practices

[Return to index](#)
[New query](#)

§ 8397.4. Health and Sanitation.

(a) General requirements.

(1) The employer shall provide adequate and readily accessible sanitation facilities.

(2) The employer shall establish and implement a schedule for servicing, cleaning, and supplying each facility to ensure it is maintained in a clean, sanitary, and serviceable condition.

(b) Potable water shall be provided in accordance with General Industry Safety Orders, Section 3363. In addition, the employer shall dispense drinking water from a fountain, a covered container with single-use drinking cups stored in a sanitary receptacle, or single-use bottles. The employer shall prohibit the use of shared drinking cups, dippers, and water bottles.

(c) Non-potable water.

(1) The employer may use non-potable water for other purposes such as firefighting and cleaning outdoor premises so long as it does not contain chemicals, fecal matter, coliform, or other substances at levels that may create a hazard for employees.

(2) The employer shall clearly mark non-potable water supplies and outlets as "not safe for health or personal use."

(d) Toilets.

(1) General requirements. The employer shall ensure that sewered and portable toilets:

(A) Provide privacy at all times. When a toilet facility contains more than one toilet, each toilet shall occupy a separate compartment with a door and walls or partitions that are sufficiently high to ensure privacy; and

(B) Are separate for each sex, except as provided in (d)(1)(B)2 of this section;

1. The number of toilets provided for each sex shall be based on the maximum number of employees of that sex present at the worksite at any one time during a work shift. A single occupancy toilet room shall be counted as one toilet regardless of the number of toilets it contains; and

2. The employer does not have to provide separate toilet facilities for each sex when they will not be occupied by more than one employee at a time, can be locked from the inside, and contain at least one toilet.

(C) The employer shall establish and implement a schedule to ensure that each sewered and portable toilet is maintained in a clean, sanitary, and serviceable condition.

(2) Minimum number of toilets.

(A) The employer shall provide at least the following number of toilets for each sex. Portable toilets that meet the requirements of subsection (d)(3) may be included in the minimum number of toilets.

TABLE F-2

| <i>Number of employees of each sex</i> | <i>Minimum number of toilets per sex</i> |
|--|--|
|--|--|

| | |
|------------|--|
| 1 to 15 | 1 |
| 16 to 35 | 2 |
| 36 to 55 | 3 |
| 56 to 80 | 4 |
| 81 to 110 | 5 |
| 111 to 150 | 6 |
| Over 150 | 1 additional toilet for each additional 40 employees. |

NOTE TO TABLE F-2: When toilets will only be used by men, urinals may be provided instead of toilets, except that the number of toilets in such cases shall not be reduced to less than two-thirds of the minimum specified.

(3) Portable toilets.

(A) The employer shall provide portable toilets, pursuant to subsection (d)(2)(A) and Table F-2, only when the employer demonstrates that it is not feasible to provide seweried toilets, or when there is a temporary increase in the number of employees for a short duration of time.

(B) The employer shall ensure that each portable toilet is vented and equipped, as necessary, with lighting.

(4) Exception for normally unattended worksites and mobile work crews. The requirement to provide toilets does not apply to normally unattended worksites and mobile work crews, provided that the employer ensures that employees have immediately available transportation to readily accessible sanitation facilities that are maintained in a clean, sanitary, and serviceable condition and meet the other requirements of this section.

(e) Hand washing facilities.

(1) The employer shall provide hand washing facilities at or adjacent to each toilet facility.

(2) The employer shall ensure that each hand washing facility: