4/15-92

#86-195-X THE SOUTHERN FOUR, INC.
3/11/92 - Dismissed by C. of S.A.
(Appellant in default of Md. Rule 8-502 -
Brief not filed)

3/16 ltr
TO 6-3

The Southern Four, Inc.	*	In the
Appellant	*	Court of Special Appeals
v.	*	No. 1684
Bird River Community Association	*	September Term, 1991
Appellee	*	

ORDER

It appearing that the appellant is in default of Maryland Rule 8-502, the brief due on February 19, 1992 not having been filed, it is this 11th day of March, 1992, by the Court of Special Appeals, upon its own motion, pursuant to Maryland Rule 8-602 (a)(7),

ORDERED that the captioned appeal be, and it is hereby, dismissed.

Alan M. Wilner
Chief Judge

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County Board of Appeals of Baltimore County
COUNTY OFFICE BUILDING, ROOM 315
111 W. CHESAPEAKE AVENUE
TOWSON, MARYLAND 21204
(301) 887-3180

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June 19, 1989

Michael P. Tanczyn, Esquire
Suite 106, 606 Baltimore Avenue
Towson, MD 21204

RE: Case No. 86-195-X
The Southern Four, Inc.

Dear Mr. Tanczyn:

Enclosed is a copy of the final Opinion and Order issued this date by the County Board of Appeals regarding the subject matter.

Sincerely,

Kathleen C. Weidenhammer
Administrative Secretary

Encl.

cc: Mr. William A. Barkuloo
Michael E. Marr, Esquire
Thomas C. Swiss, Esquire
The Southern Four, Inc.
Ms. Patricia Ecke
Mr. William Cosden
Ms. Janine Mauersberg
Mr. Jerry R. Bloyer
Mr. Jack Gease
Mr. Mark Kahler
Ms. Charlotte Rheinhardt
Mr. David C. Brown
Ms. Diane Fielding
Mrs. Carol Wehner
Mr. Charles J. Hajek
Phyllis Cole Friedman, Esquire
P. David Fields
Pat Keller
J. Robert Haines
Ann M. Nastarowicz
James E. Dyer
Docket Clerk -Zoning
Arnold Jablon, County Attorney
Sarah J. Taylor, PhD
Ren Serey, Planner -Chesapeake Bay CAC
Hon. E. Farrell Maddox
Marilee Camron

IN THE MATTER OF THE APPLICATION OF THE SOUTHERN FOUR, INC. FOR A SPECIAL EXCEPTION ON PROPERTY BEGINNING AT THE CENTERLINE OF EBENEZER ROAD, 1248.75' EAST OF THE CENTERLINE OF BIRD RIVER BEACH RD 15th ELECTION DISTRICT 5th COUNCILMANIC DISTRICT	:	BEFORE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY CASE NO. 86-195-X

OPINION

This case comes before the Board as an appeal from the Zoning Commissioner's Amended Order, which clarified and adopted his prior Order of November 20, 1986, granting a Special Exception, with restrictions, to The Southern Four, Inc., to conduct a controlled excavation and removal of sand and related materials operation.

The subject property is zoned R.C. 2 and R.C. 20 and is located at the northeast corner of Ebenezer Road and Bird River Beach Road, in the 15th Election District of eastern Baltimore County.

The Appellant /Protestant in this matter, the Bird River Civic Association, opposes the granting of the special exception, arguing that the proposed excavation operation is violative of the standards governing special exceptions contained within Section 502.1 of the Baltimore County Zoning Regulations (B.C.Z.R.), and as such, would be detrimental to the health, safety and general welfare of the residents of the locality involved, and would also create congestion in roads.

This hearing before the Board of Appeals commenced on November 3, 1987, and was concluded after five hearing dates on January 4, 1989, at which time counsel were given 45 days to submit closing remarks by memorandum.

A CASE REVIEW OF THE SUBJECT PARCEL

Requests for permission to mine this 129-acre site as a sand and gravel excavation date to 1972. At that time, the first Petition for Special Exception was denied in that it failed to conform with the provisions of Section 502.1 of the B.C.Z.R. A second Petition for Special Exception was filed in 1974. During the course of the litigation encompassing this second Petition, the property was acquired by Stancill Contracting Company, an entity comprised of some of the principals of The Southern Four, Inc. This second Petition was denied by Order of the Zoning Commissioner in November of 1974 and again by the County Board of Appeals in March of 1976. Ultimately, this Petition was appealed to the Court of Special Appeals of Maryland which affirmed the Board's denial.

In early 1986, The Southern Four, Inc., filed its Petition for Special Exception. After a third hearing considering mining on the site, the Petition was granted by Order of the Zoning Commissioner dated November 20, 1986. The matter has been appealed to this Board. The litigation surrounding the history of the site is significant in that it shapes the respective positions of the parties.

The Protestants argue that the subject Petition should be denied because the previous petitions to excavate minerals had been denied, and that the facts and features of the operation underlying those earlier decisions remain at the present time. Contrary to this view, the property owner argues that the Protestants must show that any adverse impact by the excavation activity would be "worse at the subject location" than if the excavation were situated "elsewhere in the R.C. 2 zone." Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319 (1981)

An additional determination for the Board in this petition, which was not considered in prior cases, is that 60 percent of the subject property has been designated as within the Chesapeake Bay Critical Area. Since the Order by the Zoning Commissioner in November 1986 granting the special exception, Baltimore County has passed legislation pertaining to developments in non-tidal wetlands, an investigative process that applies to the subject petition.

TESTIMONY

In view of the five days of this hearing, extended over a period of 18 months, the Board will not repeat the testimony presented, rather will endeavor to summarize the testimony of particular witnesses who most significantly contributed to the considerations before this Board.

Mr. Terry Stancill, President of The Southern Four, Inc., the Petitioner, testified at length about the plans for the site and the requirements for authorization to conduct a mining operation under state and local governments. Mr. Stancill discussed the projected procedures for the excavation of minerals, the processing, the transportation of the product from the site, and the controlling requirements in the operation --all matters of inquiry by the participants in this hearing. Mr. Stancill estimated that 50 truckloads a day by independent truckers departing the site would not cause a traffic problem, nor violate Section 502.1 of the B.C.Z.R.

Mr. Stancill responded to questions from Counsel for the Protestants regarding the use and care of the 129-acre parcel since his family acquired ownership in 1974. Contrary to the inference by Counsel, Mr. Stancill testified that the selective cutting of large trees for timber and the spreading of sludge in the created open spaces were carried out with the proper permit.

Mr. Michael Clar, an expert in water resources and environmental engineering retained by the Petitioner, responded to local residents' concerns by stating that the 26-acre, 60-foot deep lake created would help wells in the area by elevating the water pressure in the area. He further testified about the ground water table, and that neighborhood wells would not be adversely impacted by the proposed development. Mr. Clar addressed the Protestants' inquiries concerning any negative impact the sludge residue had on water quality, stating that it was non-toxic sludge, all evidence of which would be removed by the Southern Four operation.

Testifying for the Petitioner, Mr. Timothy Ryan, expert traffic engineer, offered his analysis of the traffic impact of the mining operation. Mr. Ryan's study of Ebenezer Road in the Fall of 1987 indicated that the exit from the site provided a good sight view, that the location was acceptable to speed greater than the posted 35 mph, and that the average traffic flow was less than the manual rating for such a road.

In reply to questions posed by Counsel for the Protestants, Mr. Ryan acknowledged that Ebenezer Road would be a sub-standard road if built today, and would have to be 12 feet wider, with 8-foot shoulders. He concurred that this main artery of travel is a rolling type road, presently 19½ feet wide with no shoulders for most of its length.

Mr. Bernard Page appeared as an expert real estate appraiser on behalf of the Petitioner. Noting his observations and analysis of properties in the surrounding rural areas, he testified that the excavation operation would have no impact, one way or another, on property values or marketing prospects. Mr. Ryan further responded to questions that truck traffic will not affect values or sales, and that the operation was compatible with the agricultural atmosphere of the area.

The Protestants in this case expressed opposition on a variety of bases. They feared an adverse effect which trucks from the site of this once-forrested land would bring to bear on traffic along Ebenezer Road. Other residents voiced their concern for well water quality and quantity, and the detrimental changes in their environment.

Mr. Elmer Yingling, longtime resident and President of the Bird River Community Association, spoke of the increasing traffic difficulties and future problems along Ebenezer Road, the region's only east-west artery of travel. Mr. Yingling described the cautions and defense tactics drivers must employ at the culvert over Windlass Run where the roadway narrows to less than 18 feet. When approaching vehicles arrive simultaneously, school buses usually stop, and for ten-wheeler trucks, "it's a tight squeeze." Evidence was presented indicating that vehicles often cross the yellow dividing line at this passing point.

Mr. Earl Bolling, trustee of the historic Ebenezer United Methodist Church, testified to the effect that nearby existing sand and gravel excavations have had on the church's supply of water. A licensed plumber, he recounted the detrimental results of a neighboring mining operation as it approached church property, 1,000 feet from the building, and the incursion of sand into two consecutive wells.

Testimony as to declining real estate values, which contradicted that opinion offered by Mr. Page, was presented by Patricia Ecke. Mrs. Ecke, a local realtor, stated that she has lost prospects for waterfront properties due to the proposed mining activity. She asserted that property values will be reduced regardless of the standards of the Southern Four operation. As stated earlier, the above is but a synopsis of the lengthy record compiled in this

case. There was additional and often cumulative evidence offered, which speaks for itself within the case record.

CHESAPEAKE BAY CRITICAL AREA CONSIDERATIONS

Post-dating the decision of the Zoning Commissioner, and continuing as a main determinent in this case, has been the ongoing evolvement of state and local legislation establishing procedures for protecting the lands and waters of the Chesapeake Bay Critical Area. An Environmental Impact Report was entered as Exhibit No. 11 for the Petitioner with comprehensive information bearing on the "plans" for the operation, but including minimal attention as to the "Critical Area" location and impact of the parcel of land. With the advent of legislation by the Baltimore County Council (Bill No. 32-88, July 1988), an Addendum to the Impact Report was submitted redelineating the boundaries of non-tidal wetlands.

To comply with these requirements, Petitioner made extensive revisions in its plan for utilizing the site in accordance with the review process of the Baltimore County Department of Environmental Protection and Resource Management (DEPRM). The mining area will be approximately 29 acres of the total parcel, with a single lake on the site at the conclusion of the operation rather than a series of lakes. The new plan relocated the processing facility outside the Critical Area, and of the 60 acres delineated as within the protective zone, only 19 acres are proposed to be impacted by the operation. The Critical Areas Findings Plan and its Addendum addressed every item of the DEPRM review process.

Appearing as a witness for the Protestants, Jeffrey B. Jollie, expert in hydrology with DEPRM, expressed acceptance of the hydrological features of the plan. His favorable review of the projected procedures was qualified as dependent on strict compliance by the mining operations.

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#86-195-X The Southern Four, Inc.
8/13/91 - Circuit Court AFFIRMED Board of Appeals. (J. Wm. Hinkel, Hon.)

CIRCUIT COURT FOR BALTIMORE COUNTY, MARYLAND
FILED
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THE SOUTHERN FOUR, INC.		IN THE
Appellant		CIRCUIT COURT
VS.		FOR
BIRD RIVER COMMUNITY ASSOCIATION	)	BALTIMORE COUNTY
Appellee	)	CASE NO. 89CG2509

MEMORANDUM OPINION AND ORDER

The matter before the Court on this appeal from the County Board of Appeals of Baltimore County ("Board") involves the denial of a special exception to the petitioner, The Southern Four, Inc. (Southern Four), to conduct a controlled excavation and removal of sand and related materials. The subject property is a 129 acre site located in the 15th Election District in eastern Baltimore County at the northeast corner of Ebenezer Road and Bird River Beach Road. The property, originally zoned R.C. 2, includes areas zoned R.C. 50 after the 1988 designation of the Chesapeake Bay Critical Areas.

In one form or another, this matter has been before the courts for nearly twenty years. In 1972, the first Petition for Special Exception was denied for its failure to conform with Section 502.1 of the Baltimore County Zoning Regulations (B.C.Z.R.). A second Petition was filed in 1974 and denied by Order of the Zoning Commissioner in November 1974. It was during this time that the subject property was purchased by the Stancill Contracting Company. Subsequently, the Board also denied the Petition in March 1976. Eventually, the Court of Special Appeals of Maryland affirmed the Board's denial in an

IN THE MATTER OF THE APPLICATION OF THE SOUTHERN FOUR, INC. FOR A SPECIAL EXCEPTION PROPERTY BEGINNING AT THE CENTERLINE OF EBENEZER ROAD, 1248.75' EAST OF THE CENTERLINE OF BIRD RIVER BEACH ROAD 15TH ELECTION DISTRICT 5TH COUNCILMANIC DISTRICT	*	IN THE CIRCUIT COURT FOR BALTIMORE COUNTY CIVIL ACTION NO.: 89-CG-250G Zoning Case No.: 86-195-X

* * * * * * * * * * * * *

REPLY MEMORANDUM OF APPELLANT SOUTHERN FOUR, INC.

Southern Four, Inc., Petitioner/Appellant, by its undersigned attorneys, respectfully submits the following Memorandum in reply to the Memoranda submitted by the Protestants/Appellees, Bird River Civic Association, et al. and Peoples Counsel.

If ever there was a classic case to demonstrate why an Appellant is afforded an opportunity to file a reply brief, the instant case serves that purpose. The Protestants/Appellees have so distorted and sidetracked the issues on appeal that those issues are barely recognizable. The Petitioner/Appellant originally proffered three relatively narrow issues for this Court's consideration.

> 1. Whether the Board erred as a matter of law in applying the principles and standards of Maryland law governing applications presenting exceptions?
>
> 2. Whether the Board erred as a matter of law in giving weight to the facts established in Barkuloo, et al. v. Stancill Contracting Co.?
>
> 3. Whether the Board erred as a matter of law in denying Southern Four's motion for disqualification and sitting in judgment at the hearing?

By rearranging the priority of those issues and by seizing on periferal and emotional considerations, the Protestants/Appellees have obscured the focus of the matters before this Court. While the integrity of the zoning process was a matter of concern to the Petitioner/Appellant at the outset of the case, it was not and is not the key issue on appeal. Of course, the Petitioner/Appellant was and remains concerned about the integrity of the zoning process. Of course, the Petitioner/Appellant is concerned that the Board, despite persistant reminding, failed to follow applicable case law. Certainly, it was important to the Petitioner/Appellant that the Board recognize and follow the standards governing its application for a zoning exception, particularly in light of the very delicate political situation that existed concerning the Petitioner/Appellant's property. The Petitioner/Appellant's belief that the Board's failure to do so emphasizes the Petitioner/Appellant's point that the process must be protected in a way that it is above reproach. But the Board's integrity is not the primary issue on appeal.

The primary question before this Court is whether the Board applied standards governing consideration of zoning exceptions, not how those standards were historically derived. Of course, Schultz v. Pritts is deeply rooted in prior case law. Contrary to the Protestants/Appellees' arguments, the Petitioner/Appellant never suggested otherwise. Furthermore, the Petitioner/Appellant does not dispute that the standard of judicial review of a decision by the Zoning Board is, as most

recently restated in Board of County Commissioners v. Holbrook, 314 Md. 210, 218 (1988), the "fairly debatable" standard. This Court must answer the question "whether a reasoning mind reasonably could have reached factual conclusions the agency reached". Id. at 218, citing Supervisor of Assess. v. Ely, 272 Md. 77, 84 (1974). The Petitioner/Appellant agrees that this Court cannot substitute its judgment of the facts and evidence of record for that of the Board. The standard for judicial review is reasonableness, not rightness. Snowden v. Mayor & City Council of Baltimore, 224 Md. 443, 448 (1961).

But the Petitioner/Appellant is not asking this Court to second-guess the Board's judgment. Rather, it is asking this Court to review the entire record to determine whether the Protestants/Appellees offered any evidence at all that would support the Board's conclusion that the grant of the proposed special exception would adversely effect adjoining and surrounding properties in some unique or particular way different than would result if the proposed use were located anywhere else in the zone. This is the Schultz test. In Schultz, the Court of Appeals enunciated the seminal evidentiary test that a zoning authority must find satisfied before it can deny an application for special exception. The focus of the test is the extent or degree of impact the proposed use will have on neighboring and surrounding properties in comparison to its inherent impacts on similar properties elsewhere. Absent evidence of a particularized and more intense impact, the denial of a request for special exception is, as a matter of law,

unreasonable. Anderson v. Sawyer, 23 Md. App. 612 (1974).

This very fine but critical distinction is at the heart of this appeal. While this Court cannot substitute its judgment of the evidence for that of the Board, it can and should ascertain the presence or absence of evidence to satisfy the controlling test. This right is fundamental if there is to be any judicial review of zoning decisions.

Throughout the hearing, the Petitioner/Appellant was very careful to develop in the record evidence which comported with the standards established in Schultz. The Petitioner/Appellant did so out of an abundance of caution since before any witness testified or any evidence was offered, its proposed use enjoyed a presumption of validity.

> "The special exception use is part of the comprehensive zoning plan sharing the presumption that, as such, it is in the interest of the general welfare, and therefore valid. The special exception use is a valid zoning mechanism that delegates to the administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any facts or circumstances negating the presumption."

Schultz v. Pritts, 291 Md. at 11, quoted with approval in Board of County Commissioners v. Holbrook, 34 Md. 210 at 216. This presumption of validity demands more than just lip service. In Anderson v. Sawyer, supra, the Court of Appeals carefully considered the derivation of this presumption and the nature of the evidence necessary for it to be overcome. The proposed special exception use in that case was a funeral home in a residential zone. In affirming the order of the Circuit Court

requiring that the special exception be granted, the Court of Special Appeals stated:

> "... [t]he legislature of Baltimore County has determined that as part of its comprehensive plan funeral homes are to be allowed in residential zones notwithstanding their inherent deleterious effects. By defining a funeral home as an appropriate use by way of special exception, the legislature of Baltimore County has, in essence, declared that such uses, if they satisfy the other specific requirements of the ordinance, do promote the health, safety and general welfare of the community. As part of the comprehensive zoning plan this legislative declaration shares in a presumption of validity in correctness which courts will honor.
>
> The presumption that the general welfare is promoted by allowing funeral homes in a residential use district, notwithstanding their inherent depressing effects, cannot be overcome unless there are strong and substantial existing facts or circumstances showing that the particularized proposed use has detrimental effects above and beyond the inherent ones ordinarily associated with such uses. Consequently the bold allegation that a funeral home is inherently psychologically depressing and adversely influences adjoining property values, as well as other evidence that confirms that generally accepted conclusion, is insufficient to overcome the presumption that such a use promotes the general welfare of the locality. Because there were neither facts nor valid reasons to support the conclusion that the granting of the requested special exception would adversely effect adjoining and surrounding properties in any way other than would result from the location of any funeral home in any residential zone, the evidence presented by the Protestants was, in effect, no evidence at all." Anderson, 23 Md. App. at 624-25 (emphasis added), (citations omitted).

The evidence in the instant case must be considered in light of the tenets of Anderson. This Court must carefully examine the record to determine whether the Protestants/Appellees offered any facts which the Board could have reasonably concluded that the Petitioner/Appellant's

proposed controlled excavation would adversely affect adjoining and surrounding properties in any way other than would result from its location in a residential zone. Anderson, 23 Md. App. at 625.

The Board certainly understood and appreciated that the proposed use was a sand and gravel mining operation. The Petitioner/Appellant's witnesses included Terry Stancill and Michael Clar, both of whom described the operation at length. The Board also learned and should have understood that such use has certain inherent, potentially adverse, impacts, including visual instrusion, noise, dust, water table effects, pollution and truck traffic. Indeed, the Petitioner/Appellant offered substantial evidence to describe specifically the actual inherent adverse impacts of its proposed use. The Board's findings as to two of the areas of adverse impacts, (1) traffic congestion and safety and (2) domestic well water supply and quality, are the subject of this appeal.

The Petitioner/Appellant described at length in its initial memorandum the testimony and evidence presented at the hearing on both of these subjects and will not reiterate that evidence in this Memorandum. Suffice it to say that the Protestants/Appellees did not aggressively challenge the Petitioner/Appellant's description of the proposed use. Rather, the Protestants/Appellees concentrated their evidence on the alleged adverse impacts.

Furthermore, the Board certainly had before it substantial evidence to understand and appreciate the physical nature of the

proposed site and the neighboring and adjoining properties. Again, there was no real dispute between the Petitioner/Appellant and Protestants/Appellees in that regard other than perhaps the legal definition, extent and scope of the term "neighboring and adjoining properties" as used in prior case law. The Petitioner/Appellant believed and therefore asserted before the Board that this was a term of art to be literally contrued and not extended to remote locations. The Protestants/Appellees apparently thought otherwise, since they concentrated on impacts at remote locations.

In essensce, then, the critical factor in the case at bar regarding the application of the Schultz test, and the factor which is the focus of this appeal, is whether there were facts and circumstances presented to the Board from which it could have concluded that the adverse impacts from the proposed use at the proposed site were unique or greater on neighboring and surrounding properties than those impacts inherent to the proposed use regardless of where that use may otherwise be located in the zone.

As noted, two areas of potential impact were addressed. One was the potential for adverse impacts on domestic well-water supplies, and water quality. The Petitioner/Appellant offered expert opinion that the proposed use would have no effect on the supply or quality of domestic well-water in the area. The Protestants/Appellees themselves offered an expert, Jeffrey Jollie (employed by the County) who confirmed that the proposed use would have no effect on domestic wells in the area. Indeed,

the record clearly reflects that the only evidence of particularized adverse impacts offered by the Protestants/Appellees were the speculative concerns of neighbors which concerns were of no probative value. Deen v. Baltimore Gas & Electric Co., 240 Md. 317 (1965); Anderson v. Sawyer, supra.

The second area of potential adverse impact involved truck traffic in the area. The Petitioner/Appellant's evidence that its proposed use would not put any additional truck traffic on the road went uncontroverted. Accrodingly, as a matter of law, there was no proof of any impact. The Protestants/Appellees did offer evidence of impacts at remote locations of potential additional truck traffic. However, as the Petitioner/Appellant pointed out in its original Memorandum, there was no evidence offered by the Protestants/Appellees to show that the Petitioner/Appellant's proposed use would have any impact on existing traffic conditions on neighborhoods and adjoining properties. The Protestants/Appellees relied heavily on factual conclusions in a previous case. However, the findings of the earlier Barkuloo, et al v. Stancill Contracting Co. case were not site specific as required by the Schultz test. The issue before the Board was not whether Ebeneezer Road was the same as in 1974-8 but whether the proposed use would have more extreme adverse impact at the site than if the use were located any where else in the zone. The Protestants/Appellees evidence, at best, showed that the impact would be the same anywhere in that zone. The Protestants/Appellees offered no evidence whatsoever

of particularized adverse traffic impact at the site or in the immediate vicinity of the site. Absent such evidence, the Petitioner/Appellant presumption of validity must become a binding factual conclusion.

In summation, there was no evidence put forth that the Petitioner/Appellant's proposed use would have greater or more severe adverse impact on neighboring and surrounding properties that would normally occur if such a use were located anywhere else in the zone. Speculative allegations of harm or bold allegations of potential adverse effects inherent to the proposed use, are, as noted in Anderson, no evidence at all.

CONCLUSION

For all the above reasons, the Petitioner/Appellant submits that the decision of the Board should be reversed and the findings of hte Zoning Commissioner reinstated.

Respectfully submitted,

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SWISS & WOODS
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 5 day of March, 1990, a

copy of the aforegoing Reply Memorandum of Appellant Southern Four, Inc. was mailed by first class mail, postage prepaid to the Board of Appeals of Baltimore County, Room 315, County Office Building, 111 W. Chesapeake Avenue, Towson, Maryland 21204; Michael B. Tanczyn, Esquire, Suite 106, 606 Baltimore Avenue, Towson, Maryland 21204; and to Peter Max Zimmerman, Esquire, County Office Building, Suite 304, 111 W. Chesapeake Avenue, Towson, Maryland 21204.

Thomas C. Swiss

TCS/4P.6

1-22-90

IN THE MATTER OF THE APPLICATION OF THE SOUTHERN FOUR, INC. FOR A SPECIAL EXCEPTION PROPERTY BEGINNING AT THE CENTERLINE OF EBENEZER ROAD 1248.75' EAST OF THE CENTERLINE OF BIRD RIVER BEACH ROAD 15th ELECTION DISTRICT 5th COUNCILMANIC DISTRICT * IN THE CIRCUIT COURT * FOR BALTIMORE COUNTY * * Case No. 89-CG-2509

* * * * * * * * * * * * * *

MEMORANDUM OF APPELLEES/PROTESTANTS, BIRD RIVER CIVIC ASSOCIATION, WILLIAM BARKULOO, ELMER YINGLING AND PATRICIA ECKE

The Appellees, Protestants below, Bird River Civic Association, William Barkuloo, Elmer Yingling and Patricia Ecke, submit the following Memorandum pursuant to Maryland Rule B-12 to assist the Court in considering the Appeal of The Southern Four, Inc. from the Decision of the Baltimore County Board of Appeals, dated June 19, 1989 denying the Petition of The Southern Four, Inc. for a Special Exception for controlled excavation and removal of sand and related materials in an RC2 and RC50 zone.

The Protestants/Appellees concur with the statement of hearing dates contained in the Appellant's Memorandum, the date of the issuance of the Board of Appeal's Decision on June 19, 1989 denying The Southern Four, Inc.'s Petition to supplement that Statement of Facts.

The property at issue in this Petition is the same property considered for similar requests of Stancill Contracting

and The Southern Four, Inc., which was twice previously denied in 1972 and in 1978, finally by Decision of the Court of Special Appeals in the case of Barkuloo vs Stancill Contracting Company, copy of same attached to People's Counsel Circuit Court Memorandum.

ISSUE ONE

Whether the Board of Appeals erred as a matter of law law or acted in an arbitrary or capricious manner in deciding not to recuse itself and in hearing the case.

This case was heard de novo before the Board of Appeals and was scheduled in the Summer of 1987 to begin on November 4, 1987. The day before the hearing was to begin Petitioner, The Southern Four, Inc., filed a Motion requesting the Board of Appeals disqualify itself and asked the Baltimore County County Council to appoint a substitute Board to hear its Petition on Appeal. Their request was the first matter considered by the Board when the case began.

In its argument in support of its motion, the Petitioner's counsel noted that Mr. Hackett, the Chairman of the Board of Appeals, had properly recused himself (T5) and next expressed the fear that, no matter what happened, hence someone must win and someone must lose, at the end of the case the people would say "something funny happened here". (T6) The Petitioner also noted (T20) that Mr. Thomas Bollinger (now Honorable Thomas Bollinger, District Court Judge) had recused himself for more

subtle but equally important reasons recognized by attorneys.

Following presentation of argument by Petitioner and responses by People's Counsel and Protestants' counsel, the Chairman recessed the Board for consideration (T25) and once the Board reconvened (T27) noted that the Motion on receipt had been immediately forwarded by the Board of Appeals to the Office of Law, its appointed lawyers, for legal advice and that the Board of Appeals had received an opinion the evening before the hearing at 6:30 p.m. The Board announced its decision that the Board would sit (T28) noting that the Baltimore County Code provides no mechanism to allow the County Council to do as the Petitioner suggested (T29), noted that the case is heard de novo, and the Board then took the extraordinary step of having each Board member state under oath that they had had no prior involvement with the earlier cases involving The Southern Four, Inc. or Stancills Contracting Company; that none of them had a pecuniary or personal interest in the case in the time period each had served to the start of the hearing date on the Board of Appeals; and each Board member stated under oath that they would hear the case fairly and impartially. (T31, Vol.1) It is interesting that Petitioner's counsel in his opening statement (T37) expressed that he was satisfied to go forward under the present circumstances and thanked the Board for its consideration of the Motion for disqualification.

The Baltimore County Board of Appeals is authorized by

Article 11(a) of the Maryland State Constitution and expressly codified under Article 25(a), Section 5(u) of the Annotated Code of Maryland, the Baltimore County Charter created and established the County Board of Appeals in Section 601, et seq. The present Board is composed of seven members, two of whom recused themselves from serving as Board members to hear the Petitioner's case. Further the Baltimore County Code, Section 22-32 provides that appeals taken from any decision of the Zoning Commissioner shall be taken to the Baltimore County Board of Appeals. That Code provision states "Such appeals shall be heard and disposed of by the County Board of Appeals as may be provided in the Charter and the Board's own Rules of Procedure. Those rights of appeal were found to be the exclusive rights of appeal in Hope vs Baltimore County, 288 Md 656, 421 A 2d 576 (1980).

The Board of Appeals correctly decided to hear the case in this matter and took extraordinary steps to assure the Petitioner prior to the onset of the hearing that its members who were empaneled to hear this case could and would fairly and impartially hear this case. Perplexingly, Petitioner's counsel expressed satisfaction with the Board's decision at the outset of the case (T37, Vol.1) and now, having received an unfavorable decision, apparently harkens back to Petitioner's argument (T6) where it expressed the fear that somebody who lost would say "something funny happened there" (T6).

This case was heard over a span of one and one-half

OPINION

The Board is again called upon to answer a question oft asked in zoning litigation; to wit, whether petitioned for development can be permitted based upon its compatability with the existing neighborhood. It is without question that the need for the natural resources and minerals which can be provided by this facility is greater than ever. So too is it clear that the minerals which can be extracted here are available only from but a limited number of locations. Balanced against this need and available site, however, is the consideration of the impact on this locale. Simply stated, this Board must determine, are the benefits to be reaped from this operation worth the cost.

Deliberations over an acceptable and approved utilization of the parcel of 129 acres have been extensively and carefully considered in governmental agencies and courts for more than a decade. The arguments over the general location, the specific site, the domestic water supply from wells, and the adequacies of the road system for both commercial and residential users have been very debatable.

Expert witnesses have completed studies and analyzed aspects of the Petitioner's proposal. In the testimony highlighted above, lay citizens have refuted some of their studies as based on their experience as long-term and recent residents of the Bird River community. The Board acknowledges that the "site plan" for the excavation process has been as expertly designed as possible to satisfy the requirements of such an operation. Although there is much merit in the proposal, the Board does not concur with the Zoning Commissioner in the granting of a special exception to mine at this location in the R.C. 2 zone for the following reasons.

The Schultz v. Pritts Standard

As is clearly set forth within the B.C.Z.R., the granting of special exceptions is within the purview and discretion of the Zoning Commissioner and, on appeal as a de novo hearing, the Board of Appeals. The appropriate zoning authority is to consider the propriety of the petitioned special exception against the standards of B.C.Z.R. Section 502.1. Those standards require the Board to consider potential impacts of the proposed special exception use as to traffic, interference with adequate light and air, over-utilization of public services such as sewerage and transportation, etc. In fact, B.C.Z.R. 502.1(a) provides a helpful synopsis of the intent of that entire section wherein it provides for consideration that the use will not be "detrimental to the health, safety or general welfare of the area."

In addition to the agreement between counsel for the parties that the standard contained within Section 502.1 is controlling, there was also agreement that Schultz enumerates the requirements of that standard. Regrettably, however, that is where agreement ends. Although all agree that Schultz is the leading case, the litigants dispute its meaning. The Board must therefore render its interpretation of Schultz as it applies to the subject Petition.

The Schultz case arose from Carroll County. In that case, the property owners, Robert and Ann Pritts, owned a 2.74-acre tract located in a single-family, residential zone. They sought permission to operate a funeral establishment on the site, which was permissible only by special exception. The petition was initially denied by the Carroll County Board of Zoning Appeals. On appeal in the Circuit Court for Carroll County, that decision was reversed, but not on its merits. A further appeal was taken to the Court of Special Appeals which determined that the Circuit Court ruling was not a final appealable judgement. Certiorari was then granted to the Court of Appeals

which addressed all of the issues previously raised, including a determination of the Petition on its merits. Up until the time of Schultz, the standard for considering special exceptions was that which had been enunciated in Gowl v. Atlantic Richfield Company, 27 Md. App. 410, 341 A.2d 832 (1975). In Gowl, the Court of Special Appeals reviewed a Petition for Special Exception in context with the proposed use's impact versus the impact of a permitted use. In Schultz, this standard was specifically rejected.

The Court first recognized that a special exception is a valid use within a given zoning classification. Particularly, the Court noted that " a special exception use is a part of the comprehensive zoning plan sharing presumption that, as such, it is in the interest of the general welfare, and therefore, valid." (p. 1325) Thus, special exceptions are valid and permissible uses absent any adverse circumstances which negate that presumption.

The Court also ruled that the property owner was not required to show a benefit to the area by the implementation of the special exception use. Rather, in that the use was presumptively valid, only detrimental impact to the adjoining property could overcome this validity.

Thereafter, the Court cited a series of cases which it used in formulating a new standard upon which special exceptions were to be judged. Noted the Court: "Thus, these cases establish that the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone" (p. 1327), and stated again at p. 1331. Using that

standard, the Board will consider the impact of the proposed mining operation at this specific site.

The first area for consideration is the visual impact of the physical plant needed to conduct mining operations. Specifically, there was testimony that the tower necessary to conduct a mining operation would be detrimental to the surrounding locale. Although Board of County Commissioners v. Holbrook, 314 Md. 210, 550 A.2d 664 (1988) established the proposition that visual pollution is a factor which may be considered, we do not find the subject facility to be cause to prohibit the petitioned special exception. There was no testimony established that this visual intrusion was of any more a unique character here than elsewhere in the zone. As the Schultz Court noted, inherent depressing effects will not overcome the presumptive validity of the petitioned use unless there are strong and substantial existing facts that the particularized use has detrimental effects above and beyond the inherent ones ordinarily associated with such uses. See Anderson v. Sawyer, 23 Md. App. 612, 329 A.2d 716 (1974).

A second consideration to be evaluated in the context of the Schultz standard is the effect of the subject petition on the environment. Considerations in that regard are now more closely monitored than when this property was purchased by the Petitioner in 1974. With the enactment of the Chesapeake Bay Critical Areas Regulations and other legislation, the property owner is required to clear more hurdles in order to implement his plan. In this case, he has done so as evidenced by the report from DEPRM which provided acquiescence by that department of this project. Lacking consistent testimony to the contrary, the Board grudgingly accepts the conclusions of these experts that environmental damage, if at all, will be minimal. Nonetheless, the Board perceives the possibility of real and permanent damage to the eco-structure

of this area in the event of development without close monitoring and supervision.

A third factor to be considered is the effect of the development on domestic water consumption. The Board is unconvinced by the information offered by The Southern Four, Inc., in their petition regarding the aquifer supplying water to this region, giving reason for undue concern and doubt for property owners. Evidence presented by the Petitioner gave the impression that the investigation of well water resources was not current and was ascertained by site observations and previous statistical studies of the area. Testimony by knowledgeable witnesses describing past water deficiencies gave convincing facts of the adverse result of deep mining operations in the proximity of private residential wells, shallow and deep. In the Board's view, the Petition for Special Exception fails under the Schultz standard here in that the testimony was apparent that the ground water table unique to this area would be adversely affected by the proposed operation.

Lastly, the Board is bound to consider the impact of this operation on traffic. Testimony in this hearing gives irrefutable facts that Ebenezer Road, the only east-west artery of travel in this location, is inadequate. A rural, county-maintained connector road, with a width of 20 feet and no side shoulders for most of its length, Ebenezer Road cries out for extensive improvements to serve this area safely. Except for the new bridge construction at the western extremity, this heavily travelled road has not been changed since the last hearing in this matter. Ebenezer Road is basically the same rolling and winding substandard road of 1978. From the excavation site to the main highway, facts show that Ebenezer Road as the main route of conveyance for large trucks in an increasing number would add to an adverse safety condition

for local residents. It is abundantly clear that the Petition for Special Exception must fail on this basis alone. The highway/transportation system unique to this area is quite clearly incapable of adequately handling existing traffic demands, much less the increased impact of traffic generated from the proposed site.

In sum, the Board is therefore persuaded to deny the Petition for Special Exception in that the property owners have failed to meet their burden established under 502.1 of the B.C.Z.R. as applied by the standards set forth in Schultz. Specifically, this Board finds, as a matter of fact, that the proposed project's effect on domestic water consumption and traffic will detrimentally affect the unique surrounding area to a higher degree than would elsewhere be associated within the zone.

The Board has also considered the impact on this case of the prior decision denying a requested special exception for this site which was denied by this Board and sustained by the Court of Special Appeals of Maryland in Case No. 383, September Term, 1978, known as William T. Barkuloo, et al v. Stancill Contracting Company . Based upon that decision, the current protestants and Office of People's Counsel argue that the subject Petition cannot be granted. Specifically, they claim that, because the previous special exception was denied and that denial was sustained in Court, it cannot be later granted. In opposition to this argument, the Petitioner notes that the Petitioner herein is a completely different and distinct legal entity from the previous Petitioner and, secondly, that the standard set forth in Schultz in 1981 is a new and radical departure from the previous standard which had been considered by this Board in 1976.

As to the first prong of the Petitioner's argument, we must reject same. It is well settled that a special exception runs with the given property

and is not a personal right. Despite the change of the entity requesting this relief, the property remains the same. Thus, a mere alteration in the identity of the petitioner is not sufficient to set aside the Court's prior decision.

As to the second prong of the Petitioner's argument, that the Court of Appeals has adopted a new standard of review; this argument is well taken. All parties hereto agree that the subject Petition must be interpreted in light of the Court of Appeals' holding in Schultz. Likewise, it is apparent that that case was not decided until 1981. Further, the Court's opinion therein is clear wherein a new and different standard is adopted. Thus, the Petitioner is correct when he offers that "the rules of the game" have changed.

Notwithstanding the issuance of the Court's opinion in Schultz, the decision and record established in Barkuloo does have effect. The history of that case shows a clear and careful consideration by the trier of fact of issues which are also relevant in the subject Petition. For example, adverse impact on traffic was a specific concern to the Board in the Barkuloo case and a chief reason why the petition was denied. That consideration remains the same, in fact, the testimony in the subject case was clear that but for minor changes the road system and traffic patterns in the affected area have been unchanged in the past 10 years. Thus, the Board must give weight to the Court of Special Appeals' approval of the Board's recognition of the adverse impacts on traffic.

For the aforegoing reasons, the Board is of the opinion that the Petition for Special Exception must be denied and will so order.

ORDER

It is therefore this 19th day of June, 1989 by the County Board of Appeals of Baltimore County ORDERED that the Petition for

Special Exception in Case No. 86-195-X be and the same is hereby DENIED.

Any appeal from this decision must be made in accordance with Rules B-1 through B-13 of the Maryland Rules of Procedure.

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

Lawrence E. Schmidt, Acting Chairman

Harry E. Buchheister, Jr.

Henry H. Lewis

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 383

September Term, 1978

27

PEOPLE'S COUNSEL
Granted
INVITATION

WILLIAM A. BARKULOO, et al.

v.

STANCILL CONTRACTING COMPANY

3-7-79
Writ of Cert.
denied by Ct of Appeals
sh

Davidson
Couch
MacDaniel,
JJ.

Per Curiam

Filed: December 26, 1978

Protest No. 18

COURT OF SPECIAL APPEALS
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The appellants, William A. Barkuloo, et al.,[1] contest the decision of the Circuit Court for Baltimore County which reversed the denial by the Zoning Commissioner of Baltimore County and the County Board of Appeals of the petition by Stancill Contracting Company, the appellee, for a special exception for a sand and gravel quarry in a R.D.P. (rural deferred planning) zone.[2] The property is located at the northeast corner of Ebenezer and Bird River Beach Roads, in the 15th Election District of Baltimore County.

1. The appellants include area residents and People's Counsel. The office of People's Counsel was established in 1974 and is embodied in § 524.1(b) of the Baltimore County Charter. His duties include, in part:

> "He shall appear as a party before the zoning commissioner of Baltimore County, his deputy, the county board of appeals, and the courts on behalf of the interests of the public in general, to defend the comprehensive zoning maps as adopted by the county council, and in any matter or proceeding now pending or hereafter brought involving zoning reclassification and/or variance from or special exception under the Baltimore County Zoning Regulations, as now or hereafter in force and effect, in which he may deem the public interest to be involved. He shall have in such appearance, all the rights of counsel for a party in interest, including but not limited to the right to present his case, to cross examine, to object, to be heard, and to file and prosecute an appeal in his capacity as people's counsel from any order or act of the zoning commissioner of Baltimore County or his deputy, or of the county board of appeals to the courts as an aggrieved party pursuant to the provisions of section 604 of this Charter to promote and protect the health, safety and general welfare of the community."

2. The quarry is considered a "controlled excavation" as currently designated in the regulations governing land use in R.C. 2 (resource conservation) zones. The R.C. 2 designation replaced a prior R.D.P. (rural deferred planning) designation following the passage of Bill 98-75 and the 1976 comprehensive zoning map, enacted pursuant to Baltimore County Code Sections 22-20, et seq. Both the R.C. 2 and R.D.P. designations list uses permitted "as of right" and then list uses permitted by special exception.

On November 6, 1972, the Zoning Commissioner of Baltimore County denied the petition of the appellee's predecessor, Ida Surguy, for a special exception for a sand and gravel quarry in the R.D.P. zone. The Commissioner found that the petitioner had not sustained the burden of proving, pursuant to Section 502 of the Baltimore County Zoning Regulations (hereinafter "BCZR"),[3] that, inter alia, the proposed use would not adversely affect the public health, safety, and general welfare. This decision was not appealed.

3. Section 502 of the Baltimore County Zoning Regulations provides, in part:

> "In granting any Special Exception, the Zoning Commissioner and the Board of Zoning Appeals, upon appeal, shall be governed by the following principles and conditions. [B.C.Z.R., 1955]
>
> 502.1--Before any Special Exception shall be granted, it must appear that the use for which the Special Exception is requested will not: [B.C.Z.R., 1955.]
>
> a. Be detrimental to the health, safety, or general welfare of the locality involved; [B.C.Z.R., 1955.]
>
> b. Tend to create congestion in roads, streets or alleys therein; [B.C.Z.R., 1955.]
>
> c. Create a potential hazard from fire, panic or other dangers; [B.C.Z.R., 1955.]
>
> d. Tend to overcrowd land and cause undue concentration of population; [B.C.Z.R., 1955.]
>
> e. Interfere with adequate provisions for schools, parks, water, sewerage, transportation or other public requirements, conveniences, or improvements; [B.C.Z.R., 1955.]
>
> f. Interfere with adequate light and air. [B.C.Z.R., 1955.]" (Footnote omitted.)

On November 29, 1974, a similar petition by the Estate of Ida Surguy was denied by the Baltimore County Zoning Commissioner. This time, the decision was appealed to the County Board of Appeals by the Stancill Contracting Company, the purchaser of the subject property.

In the de novo hearing before the County Board of Appeals, the following evidence was introduced by the petitioner. Terry Stancill, Secretary-Treasurer of Stancill Contracting Company, described the proposed mining operation at the subject property. The property contains 129 acres, and approximately 45 acres would be mined to a maximum depth of about 75 feet, eventually creating a lake. A plant would be built for washing and grading the sand, and a six-foot-high earthen screening barrier planted with pine trees is proposed. The nearest home is 1,350 feet from the proposed plant.

The mining, at a rate of approximately 2,000 tons per work day, would last for about 15 years, and at the end of that time the tract would be developed residentially. Stancill testified that the capacity of the trucks to be used for hauling is approximately 20 tons, and that there would be about 75 to 100 loads per day, resulting in approximately 150 to 200 one-way trips per day at the site. Stancill also indicated that one-half of the Baltimore-area market for sand and gravel could be supplied from this property and that a quarrying operation at this site would be particularly desirable because of the high quality of the sand and gravel and its close proximity to the Baltimore market.

William Sudeck, an engineer, testified that the nearest home, referred to above, is about 270 feet from the edge of the mining operation itself. He also stated that the truck traffic would not tend to create congestion in the roads and that the adverse effect of

the quarry under the BCZR 502.1 criteria would not be greater than that of full residential development, a use permitted as of right in the R.D.P. zone.

James Humphreville, a consulting geologist, gave expert testimony that only one well, that of the nearest home, would be adversely affected by the quarrying.

David Mongan, a traffic expert, testified that the proposed use would not create more traffic congestion than the permitted residential development and that, based on accident statistics, the truck traffic would not be hazardous.

Finally, William H. Baldwin, a real estate expert, testified, without stating reasons, that in his opinion the mining operation would not depreciate the values of the surrounding residential properties.

On behalf of the protestants, four expert witnesses and a number of neighborhood residents testified. Carl W. A. Supp, a professional engineer and geologist, testified that it was "possible" that the lake would become polluted and that the polluted water could possibly enter wells in the area. Nathan Gerber, a planner for Baltimore County, indicated that the provision of public water to the area was planned for in about eleven to thirty years.

Michael Flanigan, a traffic engineer employed by Baltimore County, testified that Ebenezer Road is hazardous for trucks because it is of insufficient width. Ernest Radoci, Chief of the Structural Design and Approval Section of the Department of Public Works, testified that the two bridges on Ebenezer Road have 20-ton limits and that the replacement of these bridges and widening of Ebenezer Road was contemplated, the former for fiscal year 1980, the latter in the

indefinite future.

The neighborhood witnesses testified that they felt that the quarry would depreciate property values in the area and that the increased truck traffic would create safety problems. They indicated that accident statistics did not reflect the number of accidents actually caused by trucks in the past because the truck accidents had not been reported to the police. They were also concerned about the danger of the unfenced lake to children, the harmful effect of the quarry on their water supply and dust and noise pollution.

The County Board of Appeals denied the requested special exception on the ground that the petitioner had failed to satisfy BCZR Section 502.1. The petitioner appealed to the Circuit Court for Baltimore County. That court reversed the order of the County Board of Appeals, stating that there was no probative evidence of harm from the proposed use. The court added:

> "Sand and gravel are needed materials and can only be mined where they exist. The sui generis nature of this case weighs heavily in favor of the Exception."

We will reverse the decision of the circuit court and reinstate the order of the County Board of Appeals.

I

The appellee has moved to dismiss the present appeal on the ground that none of the appellants has standing to prosecute an appeal to this Court. This motion is denied.

The appellee argues, first, that the individual appellants (that is, area residents) were not proper parties and that the proposed special exception would not have sufficient adverse effect on them to give them standing in the case. Because these questions

could have been raised in the court below, but were not, they cannot now be raised on appeal. Maryland Rule 1085.

In addition, the appellee argues that People's Counsel does not have standing to appeal any case beyond the circuit court level. Section 524.1(b) of the Baltimore County Charter, supra, gives People's Counsel

> "... all the rights of counsel for a party in interest, including but not limited to the right to present his case, to cross examine, to object, to be heard, and to file and prosecute an appeal in his capacity as people's counsel from any order or act of the zoning commissioner of Baltimore County or his deputy, or of the county board of appeals to the courts as an aggrieved party ...." (Emphasis added.)

The appellee argues that, based on the italicized language above, this provision authorizes only a single appeal, which would be to the circuit court. We disagree. People's Counsel is clearly authorized to act as any aggrieved party, and he has the same rights of appeal. The language of the provision makes it clear that those rights would include appeals to this Court.

Next, the appellee argues that any right of People's Counsel to appeal to this Court under Section 524.1(b) violates Section 5(U) of Article 25A of the Annotated Code of Maryland,[4] which limits the

4. Section 5(U) of Article 25 A, of the Annoted Code of Maryland lists the express powers of the counties respecting County Boards of Appeal. It provides, in pertinent part:

> "Any person aggrieved by the decision of the board and a party to the proceeding before it may appeal to the circuit court .... Any party to the proceeding in the circuit court aggrieved by the decision of the said court may appeal from such decision to the Court of Special Appeals."

taking of appeals from decisions of county boards of appeal to "aggrieved parties." The appellee argues that People's Counsel is not an aggrieved party. We disagree. As indicated above, People's Counsel has been appointed as an aggrieved party to protect the public interest.

II

The appellant argues that the circuit court judge did not correctly apply the applicable standard of review to the decision of the County Board of Appeals and that that board's decision not to grant the special exception should not have been reversed. We agree.

This Court discussed the role of the special exception mechanism in zoning in Anderson v. Sawyer, 23 Md. App. 612, 617 (1974), where we said:

> "The conditional use or special exception is a part of the comprehensive zoning plan sharing the presumption that, as such, it is in the interest of the general welfare, and therefore, valid. The special exception is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any fact or circumstance negating the presumption. The duties given the Board are to judge whether the neighborhing properties in the general neighborhood would be adversely affected and whether the use in the particular case is in harmony with the general purpose and intent of the plan."

The burden is on the applicant for the special exception to

> "... [show] to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest..." Anderson v. Sawyer, 23 Md. App. at 617.

The applicant's burden is satisfied, and the special exception must be granted, if there is

> "... no probative evidence at all of harm or dis-

turbance in light of the nature of the zone involved or of factors causing disharmony to the operation of the comprehensive plan ..." Rockville Fuel and Feed Company, Inc. v. Board of Appeals of Gaithersburg, 257 Md. 183, 191 (1970).

Thus, the standard of judicial review which the circuit court should have applied to the decision of the County Board of Appeals is:

> "... whether the issue before the administrative body is 'fairly debatable,' that is, whether its determination is based upon evidence from which reasonable persons could come to different conclusions. If the questions involved are fairly debatable and the facts presented are sufficient to support the Board's decision, it must be upheld, ..." (Citations omitted.) Sembly v. County Bd. of Appeals of Baltimore County, 269 Md. 177, 182 (1973).

As the Court of Appeals said in Brouillett v. Eudowood Shopping Plaza, 249 Md. 606, 608 (1968):

> "The zoning authority is presumed to possess the expertise necessary for deciding the matters brought before it and if its decision is based on substantial evidence then the courts may not substitute their judgment for that of the zoning authority."

Regarding the type of evidence which may properly be the basis for a decision by the County Board of Appeals, the technical common law rules of evidence are not binding. The standard is that of "basic fairness," and the role of the circuit court in reviewing the proceedings before the County Board of Appeals is to "... verify that [the appellee] had received substantial justice during the deliberative period." Entzian v. Prince George's Co., 32 Md. App. 256, 270 (1976).

Turning, now, to the evidence presented to the County Board of Appeals, we find that the evidence made the question of the harmfulness of the proposed use under the special exception "fairly debatable" and that the circuit court should not have reversed the board's decision.

The appellants, as indicated above, presented substantial evidence that the additional truck traffic would be detrimental to health, safety, and general welfare (see BCZR 502.1 a, supra, footnote 3) and that it would tend to create congestion (see BCZR 502.1 b, supra, footnote 3).

The appellee questions the substantiality of this evidence on the ground that the appellants' traffic witness, Michael Flanigan, was not specifically designated as an "expert." The appellee refers to the extensive qualifications of the traffic expert in Dundalk Holding Company v. Horn, 266 Md. 280, 291 (1972), and complains that Mr. Flanigan was not as qualified. We do not believe, however, that in an administrative hearing a witness must be specifically designated as an "expert." Nor do we believe that only a particular background qualifies a witness to express his opinion. It is clear from the record that Mr. Flanigan had some expertise, and it was up to the County Board of Appeals to determine how much weight should be given to his opinion.

The appellee seems to discount the importance of the testimony of the other witnesses regarding the truck traffic problem. We believe, however, that the testimony that Ebenezer Road and the affected bridges would not be immediately improved was significant. In addition, the area residents' testimony regarding truck accidents was significant because of the light it sheds on the appellee's otherwise impressive accident statistics.

The appellants also presented significant evidence of the adverse effect of the proposed special exception on surrounding land values

when the area residents testified to that effect. In this State the testimony of area residents regarding effects of proposed changes on land values is considered of some weight even though their testimony is not based on any particular expertise. See Whittle v. Board of Zoning Appeals, 211 Md. 36, 47 (1956). We note that the appellee's real estate expert did not explain the basis for his belief that real estate values would not be adversely affected. Thus, there was no particular reason for the County Board of Appeals to give more weight to the testimony of the appellee's witness than to that of the area residents.

The appellee correctly argues that the testimony of Mr. Supp regarding "possible" pollution of area wells should not have been considered by the County Board of Appeals in reaching its decision. As this Court stated in Miller v. Kiwanis Club of Loch Raven, Inc., 29 Md. App. 285, 296 (1975), where

> "there is no evidence that those feared conditions presently exist, nor indeed that there is more than a possibility (as opposed to probability) that they will ever exist ... such fears cannot be deemed substantial or probative evidence supporting the Board's denial of the special exception." (Citation omitted.)

We feel that, disregarding the evidence of possible pollution, there was substantial evidence of the harmful effect of the proposed sand and gravel quarry. We note that it is not necessary that there be substantial evidence of every possible harm, but only that there be substantial evidence of some harm listed in BCZR 502.1.

Because the zoning power has been delegated to the counties,[5]

5. For a history of the delegation of the zoning power to the counties in Maryland, see Turf Valley Associates v. Zoning Board, 262 Md. 632, 639 (1971).

the only criteria to be considered in determining whether to grant a special exception are those specified by a county. We note that BCZR 502.1, supra, does not list "need" as one of the criteria. Accordingly, evidence of need for sand and gravel quarries is not material to this case, and it should not have been weighed against the evidence of resulting harm.

We concluded, therefore, that the circuit court erred in reversing the decision of the County Board of Appeals not to grant the requested special exception. There was substantial evidence supporting its decision and the question was "fairly debatable."

MOTION TO DISMISS DENIED.
JUDGMENT REVERSED.
COSTS TO BE PAID BY APPELLEE.

IN THE MATTER OF THE APPLICATION OF SOUTHERN FOUR, INC. FOR SPECIAL EXCEPTION FOR CONTROLLED EXCAVATION AND REMOVAL OF SAND AND RELATED MATERIALS Beginning at the C/L of Ebenezer Rd., 1248.75' E of C/L of Bird River Beach Rd., 15th District

* BEFORE THE COUNTY BOARD OF
* APPEALS OF BALTIMORE COUNTY
*
*
*
* Zoning Case No. 86-195-X
*

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PETITIONER'S POST-HEARING MEMORANDUM IN SUPPORT OF ITS APPLICATION FOR SPECIAL EXCEPTION

Southern Four, Inc., Petitioner, by its undersigned attorneys, respectfully submits the following post-hearing Memorandum in support of its Application for a Special Exception for controlled excavation and removal of sand and related materials and, in support thereof, states:

Introduction

In contrast with the protracted history of these proceedings and the emotional confrontations that have occurred between the Petitioner, its predecessor in title, and the Respondents, the decision of this Board is relatively straightforward. It rests simply on the application of the holding of Schultz v. Pritts, 291 Md. 1 (1981). In Schultz v. Pritts, the Court of Appeals established the test which zoning authorities must apply when considering an application for a special exception. That test is "whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone". Id. at 22-3. The Respondents may argue that there are other legal issues to be considered such as the consideration of the doctrines of res judicata, collateral estoppel, law of the case, or the arbitrary and capricious application of zoning laws. However, these purported issues are, at best, hypothetical. There is no evidence before this Board to support the underlying factual postulates necessary for the application of any of these legal principles. The Petitioner's application for a special exception must be considered on its own merit. When this application is reviewed in the light of present day law, there can be no doubt that this Board should grant it forthwith.

Statement of Facts

Southern Four, Inc. filed its Petition for a Special Exception on September 30, 1985.[1] Southern Four's decision to file this Petition was, in significant part, based on the

1 More than eight years before, Stancill Contracting Company, a different and distinct corporate entity from the Petitioner here, sought unsuccessfully to obtain a special exception to operate a gravel quarry. At the time that property was zoned R.D.P. In that proceeding, the Board of Appeals denied the requested exception because there was evidence of harm under BCZR 502.1. The Circuit Court for Baltimore County reversed the Board of Appeals, finding the evidence regarding potential harm unpersuasive. The Court of Special Appeals, in an unreported per curiam opinion, reversed the decision of the Circuit Court and reinstated the decision of the Board of Appeals, finding that the Cricuit Court had erred in substituting its factual conclusions for those of the Board. Barkuloo v. Stancill Contracting Company, Slip Opinion attached hereto and marked as Exhibit 1.

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developments in zoning law established through Schultz v. Pritts, supra, and its progency. In deciding Schultz v. Pritts in 1981, the Court of Appeals materially modified the standards under which applications for special exceptions were to be judged. Before Schultz, an applicant seeking a special exception had the affirmative burden of adducing testimony which demonstrated that the proposed special exception use would benefit the community by virtue of its being in harmony with the general purpose and intent of the zoning plan.[2]

After Schultz, the evidentiary standard and principles controlling applications for special exceptions changed dramatically. Indeed, it is now settled law in Maryland that when a local government legislates that a particular use is appropriate for designation as a special exception, the local government is, in essence, declaring not only that the particular use in fact promotes the health, safety and general welfare of the community but that the particular use merits a presumption of validity which can be defeated only by strong and substantial evidence demonstrating that it would have detrimental effects on adjoining properties above and beyond those inherently associated with such a use in that particular zone. See, e.g. Holbrook v. Board of County Comm'rs, 70 Md. App. 207, 216-217 (1987).

2 Indeed, the Court of Special Appeals relied heavily on this principle in deciding Barkuloo v. Stancill Contracting Company, when it held that there was substantial evidence before the Board of Appeals of harm under BCZR 502.1 such that the issue before the Circuit Court became "fairly debatable" and required the Circuit Court to affirm the Board's findings.

The Petitioner's application here was submitted with conscious regard of the standards the Courts have established since Schultz for considering applications for special exceptions. Southern Four, Inc. is seeking a special exception to use the subject property for controlled excavation and removal of sand and related materials, a use permitted by special exception. In accordance with Schultz and Holbrook, this use carries a presumption of validity. Southern Four's application and submissions to this Board and to various governmental agencies, including but not limited to the Baltimore County Office of Planning and Zoning, the Baltimore County Department of Environment and Resource Management, the Baltimore County Department of Health, the Baltimore County Department of Transportation, and various other county agencies, all of which are reflected in the record of this case, provide in excrutiating detail the nature and extent of Southern Four's proposed use. Southern Four's application has been microscopically examined. Virtually every County agency has had some input or comment about Southern Four's proposed use. Yet as the record reflects, not one of the involved county agencies has found that any aspect of Southern Four's proposed use would be detrimental to the general health, safety, and welfare of the residents of Baltimore County whatsoever, much less result in any adverse effects on Southern Four's immediate neighbors above and beyond those inherently associated with this use irrespective of where the use could be located within the zone. More importantly, the Respondents offered no evidence whatsoever

of any real adverse impacts that would occur at the proposed site which would be above and beyond than that might result if the proposed use were located somewhere else in the zone.

Summary of The Evidence

A review of the evidence presented at the hearing confirms this circumstance. Terry Stancill, Southern Four's President, testified at length about the history of the property and the prior zoning history.[3] He generally described the property, indicating the location of the point of ingress and egress, and not the location of the proposed mining operation, the buffer zones, and the proximity of the mining operation to immediate neighbors. Most importantly, Mr. Stancill succinctly described Southern Four's proposed use of the subject property. He testified that Southern Four intended to remove minerals from approximately 60 of the property's 129 acres, and to use approximately 15 more acres for a processing plant. He indicated that it was Southern Four's intention to mine the designated area until the minerals were gone[4] or the business

[3] He testified that Southern Four's predecessor in title, Stancil Contracting, had been involved in a hotly contested zoning battle between 1974 and 1978, culminating in the Barkuloo v. Stancill Contracting Company decision. He also testified about other failed efforts by Stancill Contracting Company to remove the minerals under a permit to construct a lake. None of these efforts, however, relate to or affect this Board's decision.

[4] Southern Four's intentions as to the acreage to mined and the period of time over which it will mine the property have since been limited by the requirements of County law relating to the Chesapeake Bay critical areas. Southern Four can now mine for only 25 years before it must return the property to a designated state.

became economically unfeasible and then to return the property to passive use as lakes. Mr. Stancill also described the trucking associated with Southern Four's proposed use. He testified that the trucks would be the same as those used by contractors frequenting the sand and gravel operation operated by Genstar south of Ebenezer Road and the A.V. Williams property west of Bird River Beach Road. He indicated that Southern Four was projecting that approximately 50 full truck loads would leave the premises daily, or, in other words, one hundred round trips per day. Furthermore, Mr. Stancill indicated that, because Southern Four would be in direct competition with Genstar most, if not all, of the haulers would be the same since they would otherwise be obtaining materials from Genstar. For that reason, Mr. Stancill indicated that Southern Four would not be adding a significant number of additional truck traffic to the road system.

Mr. Stancill testified, that vehicular traffic would access the site off Ebeneezer Road[5] more than 300 yards east of Bird River Beach Road and that the trucks would primarily travel west along Ebeneezer Road to Route 40, just as trucks leaving Genstar and Williams had been doing for years. He indicated that the bridge over Whitemarsh Run was then being widened and improved.

Michael Clar, President of Engineering Technologies Associates, Inc. and a registered geologist, then testified as

[5] More important testimony as to the road system followed from Timothy Ryan and neighbor Protestants.

to the environmental impacts of the proposed use. Mr. Clar testified that he was familiar with the proposed use of the property for mining sand and gravel and that he had studied the project from an envirmontal standpoint and in particular, for potential hydrological and pollution impacts. Mr. Clar's firm prepared a lengthy report summarizing the project and its potential impact on the environment of the immediate and general neighborhoods. This report is in evidence and the Petitioner will not attempt to summarize it here. Most importantly, Mr. Clar testified as to the envirmontal impacts, or lack thereof, which the project would have on the surrounding community. Confirming his report, Mr. Clar testifiedthat, in his expert opinion, the proposed use would have no adverse environmental impacts whatsoever, and that there would be no particular adverse impacts at the project location above and beyond those inherently associated with the proposed use. Mr. Clar's testimony and opinion went unchallenged.

Timothy Ryan, a consultant with Kidde Consultants, then testified as to potential impacts on traffic that would result from the proposed use. He indicated that he was familiar with the project and the traffic volume that the proposed use would generate onto Ebeneezer Road. He testified that he had studies Ebeneezer Road carefully for potential impacts on traffic. He indicated that the site lines from the access point to the property along Ebeneezer Road were clear and unobstructed for several hundred yards and that there would be no problem with either ingress or egress. He further indicated that in his

opinion the proposed use would not add a significant volume of traffic to Ebeneezer Road. He testified that he had studied the traffic history of Ebeneezer Road and found that the road had an average history of traffic accidents for roads of a comparable size. He indicated that Windless Run, a small culvert which Ebenezer Road crosses, was 1.8 miles west of the point of access to the subject property. Most importantly, Mr. Ryan testified that in his expert opinion, the proposed use would have no adverse impacts on traffic at the proposed location above and beyond those inherently associated with such a use irrespective of its location within the zone. Mr. Ryan's testimony was not only uncontroverted but was in fact later supported by evidence introduced by the Protestants.

Bernard Page also testified for the Petitioner. Mr. Page, a well qualified real estate appraiser, testified that he was familiar with the area and the project location. In his expert opinion, Mr. Page concluded that Southern Four's proposed sand and gravel operation at the proposed site would have no adverse impact on property values above and beyond those inherently associated with such a use regardless of where it was located within the zone. Mr. Page's opinion went uncontroverted.

After a lengthy delay in these proceedings (generated by the fact the County enacted new zoning laws to bring itself into compliance with the State's critical areas legislation), Mr. Clar again testified that the project has been scaled down and refined to meet applicable regulatory laws. He indicated that all propond project was in full compliance with these laws and

reaffirmed his earlier opinion as to the lack of any adverse environmental impacts.

The Protestants then presented their evidence in opposition to Southern Four's application. This evidence must be considered in light of the Schultz standard in determining whether it is sufficient to defeat the presumption of validity which Southern Four's proposed use enjoys. See Schultz v. Pritts, supra; Holbrook v. County Comm'rs, supra.

The Protestants first called a series of neighbors who testified of their fear that their wells would go dry if Southern Four's mining operation commenced. Their testimony was based on hearsay reports that the wells of others had gone dry after Genstar moved its operation near their homes. None of the property owners near Genstar actually testified. Furthermore, the Protestants offered no scientific evidence to support this claim. In fact, the Protestants next witness, Mr. Jollie, a County geohydrologist called to testify as to adverse impacts on the water table and on the wells of neighboring residents, actually testified that, in his expert opinion, the proposed use would have no impact whatsoever on wells in the surrounding community.

The Protestants then put on a series of neighborhood witnesses to testify as to potential adverse impact on traffic that would allegedly result from the proposed use. The primary focus of this testimony was the alleged dangerous situation existent at the bridge over the Windless Run culvert some 1.8 miles to the west of the subject property. Notwithstanding some

very serious evidentiary issues created by this line of testimony (including the qualification of any of these persons to express any opinion as to traffic safety), it is apparent that the evidence which the Protestants offered through these witnesses was not only insufficient to overcome the presumption of validity which Southern Four's proposed use enjoys, but that the evidence generally supported the Petitioner's application.

As a part of this line of evidence, the Protestants offered a home-made video tape which was apparently intended to demonstrate certain allegedly dangerous conditions along Ebeneezer Road. From an evidentiary standpoint, this video tape was inherently flawed. It was not filmed by a technician qualified as an expert. It was replete with unexplained deletions and cuts. It was totally void of any mechanism to monitor the passage of time. It was full of hearsay comments and opinions from unidentified persons present while the video was being filmed. Yet despite these fatal flaws, the video tape actually served some useful purpose. It allowed this Board to see (albeit primatively) that the sight lines from both sides of Windless Run are substantial and allow all approaching vehicles significant time to prepare to cross this very short bridge safely. Furthermore, the video tape confirmed that Windless Run is a significant distance from the point of ingress and egress to Southern Four's property. While the Petitioner maintains that the video tape is inadmissible, to the extent that this Board gives it any weight, the Petitioner submits that it confirms Mr. Ryan's testimony that Windless Run

evidences no serious traffic danger. It certainly confirms that Southern Four's proposed use does not create any traffic danger at the location of its property above and beyond that would exist if the use were located anywhere else in the zone. Indeed, the video tape offers no evidence of any danger at the site of Southern Four's use whatsoever.

Schultz and Its Progency

Recent Maryland case law on special exceptions confirms that Southern Four's application here must be granted. As noted above in Schultz v. Pritts, supra, the Court of Appeals established a new standard for review of an application for a special exception. Since 1981, Maryland Courts have consistently applied the Schultz test, which, in every case, has turned on the particular facts of the case.

For example, in Lawton T. Sharp Farm v. Somerlock, 152 Md. App. 207 (1982), the Petitioners sought a special exception for a private aircraft landing strip. A neighbor, who owned a farm located on the landing approach where she trained racehorses, testified that the low flying aircraft agitated the horses such that they were in danger of injuring themselves. After considering the peculiarly twisted procedural history of the case, the Court of Special Appeals remanded it for further testimony of special impact.[6] In doing so, the Court noted that

[6] The case was particularly complicated because it was decided contemporaneously with Schultz.

Schultz was a landmark case in which the Court of Appeals corrected the standard set forth in Gowl v. Atlantic Richfield Co., (citation omitted) Id. at 211.

In Holbrook v. Board of County Comm'rs, 70 Md. App. 207 (1987), the applicant sought a special exception to maintain a mobile home in an agricultural use district. The protestants therewere immediate neighbors who testified that the presence of this mobile home could be detrimental to the value of their property. The Board of Appeals denied the application and the Circuit Court affirmed. On appeal, the Court of Special Appeals reversed, with directions that the case be remanded to the Cecil County Board of Appeals for approval of the application. In applying the Schultz test, Judge Karwacki noted there was no substantial evidence of any adverse effects on neighboring properties above and beyond those inherently associated with this particular special exception use irrespective of its location within the affected zone. Id. at 217.

Holbrook is virtually on all fours with the case at bar. Like Holbrook, the neighbors here are complaining of speculative adverse effects. However, they have offered no substantial evidence of any peculiar adverse effects that will impact them above and beyond those that are typicallyassociated with this use had it been located anywhere in the zone.

In Gotach Center v. Board of County Comm'rs, 60 Md. App. 477 (1984), the applicant sought a special exception to operate a private school in a residentially zoned district.

- 2 -

the evidence of carelessness of the environment raises major doubts about the ability of the Petitioner to implement any approval in accord with the spirit of the law.

I. The Law of Special Exceptions

Judges Rita Davidson and James Couch sat on the Court of Special Appeals panel which emphatically rejected the idea of a sand and gravel operation situated on Ebenezer Road. A few short years later, they would both be on the Court of Appeals. The opinion in Barkuloo follows the standard articulated by Judge Davidson in her opinion in Schultz. The importance of this decision is that it closed off an improper avenue for proponents of special exceptions. That avenue was the comparison of the proposal with uses permitted by right to show the desired special exception no worse. That theory bit the dust when Judge Davidson wrote that special exceptions may be denied based on unusual problems affecting public safety, health, and welfare which are legislatively tolerated in uses permitted by right. The Schultz case also had to do with traffic problems, there involving access for a funeral home. But the problems in Schultz were nothing in contrast to the problems associated with the Southern Four plan.

Once again, counsel's repeated claim that Schultz breathes fresh air and new life into the proposal is a not very well disguised Trojan horse. The Court of Appeals underlined the restrictive character of the special exception once again in Board of County Comm'rs v. Holbrook, ___ Md. ____, 550 A.2d 664 (1988). There, the Cecil County Board of Appeals had denied a mobile home special exception in an agricultural zone, only to be reversed in the Court of Special Appeals. The higher court reinstated the denial. Judge Cole reviewed the Schultz standard:

> "In summary, where the facts and circumstances indicate that the particular special exception use and location would cause an adverse effect upon adjoining and surrounding properties unique and different, in kind or degree, than that inherently associated with such a use regardless of its location within the zone, the application should be denied." 550A.2d 668

Moreover, expanding on this point of view, he wrote:

> "As we explained in another zoning context, the neighborhood in any area must be an area which reasonably constitutes the immediate environs of the subject property." 550 A.2d 669

In this connection, the Board had properly denied the proposal because of the "conspicuous eyesore" and detrimental effect on property values. It was apparent, moreover, that "countless locations" in the agricultural zone would not pose a similar problem.

Remarkably, the problems associated with the proposed trailer in Holbrook seem minor compared with the sand and gravel operation here. And, there are thousands of acres zoned agricultural without the various problems existing at the Southern Four site. To be sure, the petitioner may argue for the importance of mining sand and gravel where it is found, but the economic or social benefit or cost to the wider metropolitan area is not relevant to the consideration of a special exception. See Turner v. Hammond, 270 Md. 41, 310 A.2d 543 (1973). The focus is on the adverse effects in the neighborhood.

II. Res Judicata-Ebenezer Road

Once a special exception is denied, and that denial is sustained in court, it cannot later be granted unless there is a material change which removes the reasons for denial. Whittle v. Board of Zoning Appeals, 211 Md. 36, 125 A.2d 41 (1956). See Woodlawn Area Citizens v. Board of County Comm'rs, 241 Md. 187, 215 A.2d 149 (1966). The Court of Special Appeals affirmed this Board's denial

a decade ago because Ebenezer Road was too narrow and winding for the truck traffic, and the bridges were inadequate. Ebenezer Road remains the same, except for increased vehicle traffic; and the bridge over Windlass Run remains unimproved. Only the bridge over Whitemarsh Run has had work done on it. Thus, the problem traffic conditions which are peculiar to this location persist and have worsened. They were judicially recognized before, and cannot lawfully be ignored now. On this ground alone, the petition must be denied.

III. Visual Intrusion - The Tower

There was uncontradicted testimony that the relocation of the tower works to the west central portion of the property, adjoining Bird River Beach Road, would make for a conspicuous eyesore and would contribute to the depreciation of property values. Indeed, there was testimony from a real estate sales agent familiar with the neighborhood that the Bird River Beach community would be specially affected.

The Holbrook case set the precedent for recognition of visual pollution in the case of a single mobile home affecting a single residence. The problem here is of much greater magnitude.

IV. Agriculture

The property is zoned agricultural, R.C. 2. The north side of Ebenezer Road has large tracts of land which have been or are used for farming. The subject property was farmed until recently stripped of topsoil. Petitioners have suggested they will return the property to aquaculture after mining, but this appears as an afterthought to comply with the letter of the critical area regulations.

Despite the relatively detailed environmental review, the fact remains that this proposal will adversely affect agriculture in the vicinity. It will affect other properties, and there is no credible evidence that the belated idea of post-closure aquaculture will come into being. For approval of a special exception in an R.C. 2 zone, there is the added requirement of absence of any detriment to agriculture in the vicinity. BCZR 1A01.2C. That requirement remains unsatisfied.

V. The Environment

Despite the more detailed environmental studies and relatively favorable critical areas review, some disturbing questions linger. The reports presented prior to critical area review were incomplete and inaccurate. The later reports still leave gaps.

There was no sludge analysis insisted upon through litigation. There was likewise no well monitoring in the neighborhood until demanded. The matter of monitoring wells on site is still in a state of confusion. The original wetlands delineation suffered from major errors and is a good reminder of the fallibility of attractive environmental presentations.

To all of this must be overlain the evidence of indifferent environmental sensitivity in the past operations. There was the stripping of topsoil and deposit of sludge of then unknown content. There was debris from trucks. Even without the evidence of zoning enforcement action on this site in the early 1980s, the record does not inspire confidence.

Evidence of a pattern of poor operation is probative of the character of future operations. Plans are meaningless in the absence of proper implementation. Indeed, without execution, the grandest proposals lead to the sorest disappointments and most bitter recriminations.

The protestants were neighbors and other witnesses, including a State Trooper, who testified about the hazardous nature of the access road through this entirely residential community. Most importantly, there was evidence introduced about a particularly dangerous curve within a few hundred feet of the access point of subject property. In Gotach, the application was denied because there was substantial evidence that the traffic generated by the case would create a greater impact on the road system in that area than would be the case generally in an R-3 zone.

In contrast to Gotach, the Protestants here were unable to offer any evidence that the traffic which Southern Four's mining operation would generate would be was significantly different from that which already travels Ebeneezer Road. Indeed, the Protestants own video tape confirms that significant truck and commercial traffic regularly traverses Ebeneezer Road now. Furthermore, Gotach is distinguishable for at least one other reason. Unlike Gotach, where the access site was within a few hundred feet of a dangerous curve, Southern Four's sight lines from its access point are clear and unobstructed for more than several hundred yards. There is no danger at the sites of Southern Four's access road as there was in Gotach.

Conclusion

The law is settled with regard to the standards that are to be followed by zoning authorities in considering an application for special exception. As the cases following Schultz have clearly held, an applicant for a special exception enjoys a

presumption that his proposed use is valid. The Protestants can defeat this presumption only by substantial evidence of a peculiar impact on them which is above and beyond that which is typically associated with the proposed use irrespective of where it might be in the zone. Southern Four's evidence proved that its proposed use would be in full compliance with all existing regulatory laws. And while it was not its burden, Southern Four also demonstrated clearly that its proposed use would have no adverse impacts on the health, safety or welfare of the immediate neighborhood. The Protestants, on the other hand, entirely failed to meet their burden. They offered no credible, admissible evidence of any adverse impacts whatsoever, much less evidence of adverse impacts that are peculiar to the project site. Absent such evidence, Southern Four's application for a special exception must be granted.

Respectfully submitted,

Michael E. Marr

Thomas C. Swiss

Thomas C. Swiss
MARR, SWISS & WOODS
301 North Charles Street
Suite 900
Baltimore, Maryland 21201
(301) 539-4252
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22 day of February, 1989, I caused a copy of the foregoing Memorandum to be mailed, by first class mail, postage prepaid to Lawrence E. Schmidt, Esquire, County Office Bldg., Room 315, 111 West Chesapeake Avenue, Towson, Maryland 21204; Peter Max Zimmerman, Esquire, County Office Bldg., Room 304, 111 West Chesapeake Avenue, Towson, Maryland 21204; and Michael P. Tanczyn, Esquire, 606 Baltimore Avenue, Suite 106, Towson, Maryland 21204.

Thomas C. Swiss

TCS/1C.45

Office of Lawrence E. Schmidt

RE: PETITION FOR SPECIAL EXCEPTION FOR CONTROLLED EXCAVATION AND REMOVAL OF SAND AND RELATED MATERIALS
Beginning at the Centerline of Ebenezer Rd., 1248.75' E of Centerline Bird River Beach Rd., 15th Election District
SOUTHERN FOUR, INC., Petitioner

: BEFORE THE COUNTY BOARD OF APPEALS
: OF BALTIMORE COUNTY
: Case No. 86-195-X

: : : : : : :

PEOPLE'S COUNSEL'S MEMORANDUM

Introduction

The Board of Appeals must deny the proposed special exception. The simple reason is that the Ebenezer Road and truck traffic problems and legal analysis behind the previous denial in Barkuloo v. Stancill Contracting Co. No. 383, September Term, 1978, still stand. Indeed, the traffic problems have worsened. Moreover, the Petitioner's counsel suggestion that Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319 (1981) worked a favorable change in the law is an outrageous misstatement. We will demonstrate that the law on special exceptions has tightened against unreasonable proposals such as this, under the very tutelage of judges on the panel of the Barkuloo case.

Even if the road and truck traffic were not an issue, there are other reasons to deny the petition. It burdens the Bird River Beach residential community with the stark visual intrusion of a tower in proximity to Bird River Beach Road. It fails to satisfy the particular requirement for agriculturally zoned land that there be no adverse effect on agriculture in the vicinity. Moreover, despite the more thorough critical areas review,

Conclusion

The Board of Appeals gave its attention to witnesses, plans, reports, videotape, and maps over several days of hearing. The hearings were, in addition, interrupted to provide for critical areas review and additional evidence. The record of the Barkuloo case is also in this record.

Despite the length of the proceedings, the issues are simple and straightforward. The zoning law of Baltimore County does not, properly applied, allow this petition to be granted.

It is unsatisfactory for reasons of traffic, visual intrusion, agriculture, and the environment. Moreover, the Court of Special Appeals decision in Barkuloo remains an insurmountable bar.

Phyllis Cole Friedman
Phyllis Cole Friedman
People's Counsel for Baltimore County

Peter Max Zimmerman
Peter Max Zimmerman
Deputy People's Counsel
Room 304, County Office Building
111 W. Chesapeake Avenue
Towson, Maryland 21204
(301-377-2554

I HEREBY CERTIFY that on this 22nd day of February, 1989, a copy of the foregoing People's Counsel's Memorandum was mailed to Michael E. Marr, Esquire, and Thomas C. Swiss, Esquire, MARR & BENNETT, 10 N. Calvert St., Baltimore, MD 21202; and Michael P. Tanczyn, Esquire, Suite 106, 606 Baltimore Ave., Towson, MD 21204.

Peter Max Zimmerman
Peter Max Zimmerman

87-83

County Board of Appeals of Baltimore County
Room 200 Court House
Towson, Maryland 21204
(301) 494-3180

June 27, 1988

Michael P. Tanczyn, Esquire
Suite 106, 606 Baltimore Avenue
Towson, MD 21204

RE: Case No. 86-195-X
The Southern Four, Inc.

Dear Mr. Tanczyn:

Enclosed is a copy of the Board's Ruling on Motion to Dismiss Appeal which was issued this date by the County Board of Appeals in the subject case.

Sincerely,

Kathleen C. Weidenhammer
Kathleen C. Weidenhammer
Administrative Secretary

Encl.

cc: Phyllis Cole Friedman, Esquire
Mr. William A. Barkuloo
Ms. Patricia Ecke
Mr. William Cosden
Michael E. Marr, Esquire
Thomas C. Swiss, Esquire
The Southern Four, Inc.
Mr. Jack Gease
Mr. Mark Kahler
Ms. Charlotte Rheinhardt
Mr. David C. Brown
Mr. Charles J. Hajek
Mrs. Carol Wenner
Ms. Diane Fielding
P. David Fields
James G. Hoswell
J. Robert Haines
Ann M. Nastarowicz
James E. Dyer
Docket Clerk -Zoning
Arnold Jablon, County Attorney

IN THE MATTER OF THE APPLICATION OF THE SOUTHERN FOUR, INC. FOR A SPECIAL EXCEPTION ON PROPERTY BEGINNING AT THE CENTERLINE OF EBENEZER ROAD, 1248.75' EAST OF THE CENTERLINE OF BIRD RIVER BEACH ROAD 15th ELECTION DISTRICT 5th COUNCILMANIC DISTRICT	:	BEFORE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY CASE NO. 86-195-X

: :

MOTION ON RULING

This matter comes before the Board as an appeal from the granting, with restrictions, of a Petition for Special Exception by the Zoning Commissioner on November 26, 1986. The Board has received three days of testimony pertaining to the merits of the Petition for Special Exception. All testimony and evidence received was presented by the Petitioner. At the conclusion of the third day of testimony, June 21, 1988, the Petitioner rested. At that time, a Motion to Dismiss the Appeal was raised by People's Counsel and the Protestants. Among the bases for this Motion was the enactment of Bill No. 32-88 adopted by the County Council and effective June 13, 1988.

The Board has considered the arguments offered and based on the applicable case law, it is clear that we are governed by this legislation, notwithstanding its recent enactment. As stated by the Court of Appeals in Charles H. O'Donnell, Jr., et al v. Alfred S. Bassler, et al, 289 Md. 501 (1981), the appellate court must base its decision upon the zoning regulations in effect at the time its decision is rendered and not the time of application unless the property rights of the Petitioner have vested. Clearly there has been no vesting in this case.

Because of the Board's ruling on the Motion as stated herein, we need not consider the other basis for the Motion but need only consider the effect of Bill No. 32-88. Bill No. 32-88 enacts significant amendments to the

Baltimore County Zoning Regulations as they apply to property within the critical areas. Specifically among these changes is the enactment of Section 500.14 regarding the duties of the Zoning Commissioner to obtain recommendations from the Department of Environmental Protection and Resource Management prior to entertaining and ruling on any special exceptions for property located within the critical areas.

It is uncontested that the subject property, or at least a portion thereof, lies within the critical areas. Additionally, it is clear that Section 500.14, as enacted, mandates that the Zoning Commissioner obtain the recommendations. The language within ("shall") is not discretionary but mandatory.

In our view, sitting as a de novo body, the Board steps into the shoes of the Zoning Commissioner. We will therefore stay this proceeding and obtain the recommendations as required under Section 500.14.

O R D E R

It is therefore this 27th day of June, 1988 by the County Board of Appeals of Baltimore County ORDERED that the matter be and is hereby STAYED until such time as recommendations from the Department of Environmental Protection and Resource Management can be obtained.

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

Lawrence E. Schmidt, Acting Chairman

IN THE MATTER OF THE APPLICATION OF SOUTHERN FOUR, INC. FOR SPECIAL EXCEPTION FOR CONTROLLED EXCAVATION AND REMOVAL OF SAND AND RELATED MATERIALS Beginning at the C/L of Ebenezer Rd., 1248.75' E of C/L of Bird River Beach Rd., 15th District	* * * *	BEFORE THE COUNTY BOARD OF BALTIMORE COUNTY Zoning Case No. 86-195X (Item 67)

* * * * * * * * * * * * *

MOTION FOR RECONSIDERATION

Southern Four, Inc., pursuant to the applicable Rules of Procedure of the County Board of Appeals, moves for reconsideration of the Board's ruling on the People's Counsel's Motion for Order to Direct Inspection of Property and in support thereof states:

1. On or about April 20, 1988, People's Counsel for Baltimore County filed a Motion for Order to Direct Inspection of Southern Four, Inc.'s property. People's Counsel alleged that this inspection was necessitated by questions which had come up in a March hearing about public health implications of the sludge deposited on Petitioner's property pursuant to permits issued by the State of Maryland in 1981 and 1982.

2. People's Counsel suggested in his Motion that the Petitioner had raised issues about public health implications from the removal of the sludge its environmental report.

3. People's Counsel also suggested that a comprehensive sampling program was necessary to assist the Board in evaluating these alleged public health implications.

4. On March 25, 1988, People's Counsel wrote to the

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ATTORNEYS AT LAW
SUITE 430
10 NORTH CALVERT STREET
BALTIMORE, MD 21202
(301) 539-4250

Petitioner's attorneys and requested that the Petitioner consent to an inspection and sampling of its property. The Petitioner, however, did not believe that there were any public health implications if the sludge-treated soil was disturbed or removed because there had been a significant passage of time since the sludge was applied. The Petitioner believed that People's Counsel was creating an issue that was not relevant to the zoning proceedings.

5. Accordingly, on April 5, 1988, one of the attorneys for the Petitioner informed the Deputy's People Counsel that the Petitioner would not consent to such inspection and sampling because this procedure was irrelevant and would result in unnecessary expense and delay of the zoning hearing. The Petitioner's attorneys then wrote to the State's Department of the Environment to obtain written confirmation that there would be no adverse environmental impacts if the soil was disturbed.

6. Thereafter, the People's Counsel filed its Motion to Direct Inspection.

7. On May 17, 1988, this Board granted the People's Counsel's Motion and ordered that County officials conduct the on-site testing in a reasonable manner at a time convenient to the parties but no later than June 7, 1988.

8. Subsequent to that ruling, the Petitioner received a letter from William E. Chicca, the Administrator of the Technical Services Program of the State of Maryland's Department of the Environment, confirming that disturbance or removal of the sewage sludge deposited on the Petitioner's property would

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(301) 539-4250

not create any adverse public health or environmental impacts. Upon receipt of that letter, the Petitioner forwarded the same to People's Counsel and to this Board.

9. In light of this recently received information, it is now apparent that the Petitioner was correct in its position that there was no reason to test the soil on its property for potential environmental impacts. It is also apparent that it would be unfair and unduly burdensome to require the Petitioner to incur the expense of having to defend this concocted issue or to gather evidence to counter any data that the People's Counsel might seek to introduce. Such a process most likely would require the engagement of additional independent experts to analyze soil samples, an expense which under the facts of this case should not be necessary.

10. As of June 2, 1988, the County's Health Department has not made any arrangements with the Petitioner to sample the soil.

11. This matter is scheduled to reconvene for hearing on June 21, 1988. The Petitioner believes and therefore alleges that some effort might be made to delay these proceedings pending receipt of the results of the County's yet unconducted tests of soil samples. Under the circumstances of this case, where this matter has already been delayed almost one year from its originally scheduled hearing date, and where the entire issue is clearly irrelevant, it would be unfair and burdensome to permit further delay to occur or to force the Petitioner to incur unnecessary expenses.

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10 NORTH CALVERT STREET
BALTIMORE, MD 21202
(301) 539-4250

For all of the aforegoing reasons, your Petitioner respectfully submits that this Court should reconsider its ruling on the People's Counsel's Motion to Direct Inspection of Property and, after reconsideration, deny the Motion.

Respectfully submitted,

Michael E. Marr
Michael E. Marr

Thomas C. Swiss
Thomas C. Swiss

MARR & BENNETT
Suite 430
10 North Calvert Street
Baltimore, Maryland 21202
(301) 539-4250

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3 day of June, 1988, a copy of the foregoing Motion for Reconsideration was hand delivered to Peter Max Zimmerman, Deputy People's Counsel, Room 223, Court House, Towson, Maryland 21204; and to Michael P. Tanczyn, Esquire, Suite 106, 606 Baltimore Avenue, Towson, Maryland 21204.

Thomas C. Swiss
Thomas C. Swiss

TCS/C.9

MARR & BENNETT
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10 NORTH CALVERT STREET
BALTIMORE, MD 21202
(301) 539-4250

C/I-88

County Board of Appeals of Baltimore County
Room 200 Court House
Towson, Maryland 21204
(301) 494-3180

May 17, 1988

Phyllis Cole Friedman, Esquire
Room 223, Old Courthouse
Towson, MD 21204

RE: Case No. 86-195-X
The Southern Four, Inc.

Dear Ms. Friedman:

Enclosed is a copy of the Board's Ruling on Motion to Direct Inspection of Property and Production of Documents which was issued this date by the County Board of Appeals in the subject case.

Sincerely,

Kathleen C. Weidenhammer
Administrative Secretary

Encl.

cc: Michael E. Marr, Esquire
Thomas C. Swiss, Esquire
Michael P. Tanczyn, Esquire
Arnold Jablon, County Attorney

IN THE MATTER OF THE APPLICATION OF SOUTHERN FOUR, INC. FOR SPECIAL EXCEPTION FOR CONTROLLED EXCAVATION AND REMOVAL OF SAND AND RELATED MATERIALS BEGINNING AT THE CENTERLINE OF EBENEZER ROAD, 1248.75' EAST OF C/L OF BIRD RIVER BEACH ROAD 15th ELECTION DISTRICT	:	BEFORE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY CASE NO. 86-195-X

: :

RULING ON MOTION
TO DIRECT INSPECTION OF PROPERTY AND PRODUCTION OF DOCUMENTS

The Board is in receipt of a Motion for Order to Direct Inspection of Property and Production of Documents in the above matter by the Office of People's Counsel. Specifically, the People's Counsel seeks an Order to allow it to conduct certain soil and other tests of the sludge deposits currently on the site. People's Counsel has proffered in their Motion that the property owner/Petitioner has refused permission to allow the technicians on site to make these tests. To date, the Board has received no response from the Petitioner in opposition, notwithstanding the expiration of the response time allowed to motions as set forth in the Maryland Rules.

Rule 5a of the Board's Rules of Procedure provides "the County Board of Appeals shall have the power to compel the attendance of witnesses and to require the production of records and documentary or other tangible evidence." (emphasis added) In our view, this rule is akin to Maryland Rule 2-422. Although administrative in nature, the Board is compelled to conduct matters before it in a manner that insures fairness to all parties (see Rule 7, Baltimore County Board of Appeals Rules of Procedure). Therefore, the Board is persuaded to grant that portion of the People's Counsel's Motion seeking onsite testing of the property. The testing will be done in a reasonable manner, at a time convenient to the parties but no later than June 7, 1988. Insofar as the People's Counsel's

Case No. 86-195-X
Southern Four, Inc. 2.

Motion for production of documents, the Board will deny same. It should be noted that the Office of People's Counsel has had the opportunity to review and examine documentary evidence presented by the Petitioner at the previous hearing. To allow the People's Counsel an opportunity to force disclosure beyond that which has been previously offered in open hearing would be unreasonable.

O R D E R

Upon the aforegoing Motion for Order to Direct Inspection of Property and Production of Documents, it is this 17th day of May, 1988 by the County Board of Appeals of Baltimore County ORDERED that the Office of People's Counsel or their duly appointed representatives shall be ALLOWED to conduct test samplings of soil and sludge conditions on the subject site under such conditions as shall be reasonable and nonharmful to the property. Such testing shall be scheduled at a time convenient to the parties; however, no later than June 7, 1988; and

IT IS FURTHER ORDERED that the People's Counsel's request for documents in connection with the deposit, transport and handling of sludge on the subject site be and is hereby DENIED.

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

Lawrence E. Schmidt, Acting Chairman

IN THE MATTER OF THE APPLICATION OF SOUTHERN FOUR, INC. FOR SPECIAL EXCEPTION FOR CONTROLLED EXCAVATION AND REMOVAL OF SAND AND RELATED MATERIALS Beginning at the C/L of Ebenezer Rd., 1248.75' E of C/L of Bird River Beach Rd., 15th District	:	BEFORE THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY Zoning Case No. 86-195-X (Item 67)

: : : : : : :

MOTION FOR ORDER TO DIRECT INSPECTION OF PROPERTY AND PRODUCTION OF DOCUMENTS

People's Counsel for Baltimore County, pursuant to Rule 5 of the Rules of the County Board of Appeals, and in order to assure administrative due process of law, states:

1. The petition for special exception presents questions as to the public health implications of sludge deposited at the site.

2. The Petitioner's environmental report included some information and sampling, but the scope of the program was extremely limited and the sampling not conducted nor verified by independent examiners.

3. Upon further review, it appears that a more comprehensive sampling program to be conducted by the Department of Environmental Protection would be appropriate in order to assist the Board in evaluating the public health implications of the sludge deposits which clearly exist.

4. On March 25, 1988, People's Counsel requested in writing that the petitioner consent to an inspection and sampling program, which could reasonably be accomplished prior to the next hearing scheduled June 21, 1988. (Exhibit A)

5. On April 5, 1988, counsel for the petitioner, Thomas Swiss, informed the undersigned Deputy People's Counsel that no consent would be given and that the issue was considered irrelevant in view of Petitioner's intent to

secure a separate permit to move the sludge.

6. People's Counsel reasonably believes that the further evaluation of the sludge deposits is relevant; that the future removal of any sludge, or obtention of a permit therefor, is speculative; and that, in any event, a sampling program is likely to produce information pertinent to all public health issues involving the sludge.

7. The deposit of sludge is the most significant environmental change to the site since the last time that the County Board of Appeals reviewed the property.

8. In addition, the Department of Environmental Protection is prepared to conduct the sampling as stated in the letter dated March 30, 1988. (Exhibit B)

9. Accordingly, People's Counsel requests that the County Board of Appeals issue an Order directing the Petitioner, Southern Four, Inc. to make available its property for examination of the relevant sludge application sites for inspection and sampling by the Department of Environmental Protection at reasonable and convenient times, and that the Petitioner produce all documents in its possession, custody, or control (or available to them) in connection with the deposit, transportation, and handling of sludge at the site.

WHEREFORE, People's Counsel prays that the County Board of Appeals grant this motion and allow the requested discovery.

Phyllis Cole Friedman
People's Counsel for Baltimore County

Peter Max Zimmerman
Deputy People's Counsel
Room 223, Court House
Towson, Maryland 21204
494-2188

I HEREBY CERTIFY that on this 20th day of April, 1988, a copy of the foregoing Motion for Order to Direct Inspection of Property and Production of Documents was mailed to Michael E. Marr, Esquire, and Thomas C. Swiss, Esquire, Marr & Bennett, Suite 430, 10 N. Calvert St., Baltimore, MD 21202; and Michael P. Tanczyn, Esquire, Suite 106, 606 Baltimore Ave., Towson, MD 21204.

Peter Max Zimmerman

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EXHIBIT A

Baltimore County, Maryland
PEOPLE'S COUNSEL
RM. 223. COURT HOUSE
TOWSON, MARYLAND 21204
494-2188

PHYLLIS COLE FRIEDMAN
People's Counsel

PETER MAX ZIMMERMAN
Deputy People's Counsel

March 25, 1988

Michael E. Marr, Esquire
Marr & Bennett
Suite 430, 10 N. Calvert St.
Baltimore, MD 21202

RE: Southern Four, Inc., Petitioner
Zoning Case No. 86-195-X

Dear Mr. Marr:

In view of the questions raised concerning sludge deposits on the site, and the involvement of various County agencies, this office is requesting the assistance of the Department of Environmental Protection and Resource Management to take soil samples and test them at appropriate locations on the site. Testing will be done elsewhere.

I should appreciate the cooperation of your client to arrange a convenient time and to work out the details. I trust that we can accomplish this on a voluntary basis and without the necessity of a formal request to the County Board of Appeals. It is my understanding that the matter would be handled by the Waste Management Division of the Department under the supervision of Eugene A. Siewierski.

In view of the hearing dates scheduled in June, I respectfully request a response within ten days.

Very truly yours,

Peter Max Zimmerman
Deputy People's Counsel for Baltimore County

cc: Robert W. Sheesley
Paul J. Solomon
Eugene A. Siewierski
Michael P. Tanczyn, Esquire

PMZ:sh

EXHIBIT B

Baltimore County
Department of Environmental Protection
& Resource Management
County Courts Building
401 Bosley Avenue
Towson, Maryland 21204
494-3753

Robert W. Sheesley
Director

Dennis F. Rasmussen
County Executive

March 30, 1988

Mr. Peter Max Zimmerman
Deputy People's Counsel for Baltimore County
Room 223, Court House
Towson, MD 21204

RE: Southern Four Inc., Petitioner
Zoning Case No. 86-195-X

Dear Mr. Zimmerman:

Reference is made to your correspondence of 3/25/88 concerning the Southern Four Inc. sludge application site. Please be advised that my staff is currently reviewing the technical information on the sludge application site and will be developing a proposed sampling plan. Actual sampling is tentatively scheduled for April, provided permission to sample the site is granted by the property owner.

Please direct any questions concerning this matter to Mr. Eugene G. Siewierski, of my office at 494-3745.

Very truly yours,

Robert W. Sheesley
Director

RWS:gc

cc: J. James Dieter
Paul Solomon

County Board of Appeals of Baltimore County
Room 200 Court House
Towson, Maryland 21204
(301) 494-3180

March 1, 1988

Michael E. Marr, Esquire
10 N. Calvert Street, Suite 430
Baltimore, MD 21202

RE: Case No. 86-195-X
The Southern Four, Inc.

Dear Mr. Marr:

Enclosed is a copy of the Board's Ruling on your Motion for Postponement of Hearing regarding the subject case.

Sincerely,

Kathleen C. Weidenhammer
Administrative Secretary

Encl.

cc: The Southern Four, Inc.
Jerry Stancill, Vice Pres.
Michael P. Tanczyn, Esquire
William A. Barkuloo
William Cosden
Patricia Ecke
Jack Gease
Mark Kahler
Charlotte Rheinhardt
David C. Brown
Diane Fielding
Carol Wehner
Charles J. Hajek

Phyllis Cole Friedman, Esquire
P. David Fields
James G. Hoswell
J. Robert Haines
Ann M. Nastarowicz
James E. Dyer
Robyn Clark
Arnold Jablon, County Attorney

IN THE MATTER OF THE APPLICATION OF THE SOUTHERN FOUR, INC. FOR A SPECIAL EXCEPTION ON PROPERTY BEGINNING AT THE CENTER-LINE OF EBENEZER ROAD, 1248.75' EAST OF THE CENTERLINE OF BIRD RIVER BEACH ROAD 15th ELECTION DISTRICT 5th COUNCILMANIC DISTRICT	:	BEFORE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY CASE NO. 86-195-X

RULING ON MOTION

The Board is in receipt of a Motion for Postponement of Hearing requested by the Petitioner herein, The Southern Four, Inc. As a basis therefor, the Petitioner notes that Counsel for the Petitioner, who has been intimately involved in the prosecution of this and former cases involving the property, is presently involved as counsel and a party in a jury trial pending in the Circuit Court of Maryland for Baltimore City. The Petitioner alleges that, due to unforeseen scheduling problems, the jury trial will continue through the date of the scheduled hearing before this Board of March 3, 1988.

In view of this conflict, and in that there has been no opposition to the Petitioner's request, and in that this matter is docketed on the Board's schedule for both March 3, 1988 and March 8, 1988, the Board is persuaded to grant the postponement as to the March 3 date only and will so order.

O R D E R

It is therefore this 1st day of March, 1988 by the County Board of Appeals of Baltimore County ORDERED that the Motion for Postponement of Hearing shall be GRANTED as to the March 3, 1988 date only, and proceedings in this case will be reconvened on March 8, 1988 at 10:00 a.m.

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

Lawrence E. Schmidt, Acting Chairman

THE SOUTHERN FOUR, INC. Appellant	*	IN THE CIRCUIT COURT
v.	*	FOR
BIRD RIVER COMMUNITY ASSOCIATION Appellee	*	BALTIMORE COUNTY CASE NO. 89CG2509

* * * * * * * * * * * * *

NOTICE OF APPEAL

Dear Mr Clerk:

Please note that the Appellant Southern Four, Inc. appeals the Memorandum Opinion and Order entered in this case on August 13, 1991 to the Maryland Court of Special Appeals.

Respectfully submitted,

MICHAEL E. MARR, P.C.

Michael E. Marr
301 N. Charles Street
Suite 900
Baltimore, Maryland 21201
(301) 539-4250
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 11th day of September, 1991, a copy of the above Notice of Appeal was mailed, postage prepaid to: Michael P. Tanczyn, Esquire, 606 Baltimore Avenue, Suite 106, Towson, Maryland 21204; Peter Max Zimmerman, Esquire, Room 304, County Office Building, 111 West Chesapeake Avenue, Towson, Maryland 21204; and the County Board of Appeals of Baltimore County, Room 315, County Office Building, Towson, Maryland 21204.

Michael E. Marr

COUNTY BOARD OF APPEALS
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THE SOUTHERN FOUR, INC. Appellant	)	IN THE CIRCUIT COURT
VS.	)	FOR
BIRD RIVER COMMUNITY ASSOCIATION Appellee	)	BALTIMORE COUNTY CASE NO. 89CG2509

MEMORANDUM OPINION AND ORDER

The matter before the Court on this appeal from the County Board of Appeals of Baltimore County ("Board") involves the denial of a special exception to the petitioner, The Southern Four, Inc. (Southern Four), to conduct a controlled excavation and removal of sand and related materials. The subject property is a 129 acre site located in the 15th Election District in eastern Baltimore County at the northeast corner of Ebenezer Road and Bird River Beach Road. The property, originally zoned R.C. 2, includes areas zoned R.C. 50 after the 1988 designation of the Chesapeake Bay Critical Areas.

In one form or another, this matter has been before the courts for nearly twenty years. In 1972, the first Petition for Special Exception was denied for its failure to conform with Section 502.1 of the Baltimore County Zoning Regulations (B.C.Z.R.). A second Petition was filed in 1974 and denied by Order of the Zoning Commissioner in November 1974. It was during this time that the subject property was purchased by the Stancill Contracting Company. Subsequently, the Board also denied the Petition in March 1976. Eventually, the Court of Special Appeals of Maryland affirmed the Board's denial in an

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unreported opinion, Barkuloo v. Stancill Contracing Co., No. 383, September Term, 1978.

In September 1985, Southern Four, an entity which comprises some members from the Stancill Contracting Company, filed a petition for special exception for the same property. After three hearings, the Zoning Commissioner granted the special exception by its Order dated November 20, 1986.

After the Order was twice amended reaffirming the original decision, the matter was appealed to the Board. After five hearing dates spanning thirteen months, the Board issued its Order on June 19, 1989 reversing the decision of the Zoning Commissioner and denying the Petition for a Special Exception. From that Order, Southern Four has appealed.

Specifically, Southern Four alleges that the Board erred in its application of the standard regarding special exceptions found in Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319 (1981), to the facts surrounding possible adverse impacts involving water and traffic. According to Southern Four, the protestants offered no evidence that Southern Four's proposed use would result in impacts on neighboring and adjoining areas that were unique when compared to those impacts that would occur elsewhere within the zone. As such, it is argued, the Board erred as a matter of law by finding for the protestants and that decision should be overturned. This Court disagrees and will affirm the Board's decision.

Initially, the Petitioner moved for the recusal of the entire membership of the Board of Appeals on the ground that no member

could objectively consider the application for Special Exception use which impacted on the property of the Board Chairman, William Hackett. The Board heard argument of counsel, recessed to consider the question and then declined to recuse itself. Each member of the Board made a declaration under oath that he would fairly and impartially try the case and decide it on the evidence as presented. The Chairman conducted a voir dire examination of the other panel members and made a statement on his own behalf. The record fails to reveal any evidence that would justify the recusal of any member of the panel. (See Montgomery County v. Walker, 228 Md. 574, 1961).

A. The Law of Special Exceptions

In Schultz, supra, the Court of Appeals was faced with an application for a special exception for a proposed funeral home. In remanding the case to the circuit court to determine whether the Board's decision was fairly debatable, the court rejected the previous standard used to govern applications for special exceptions from Gowl v. Atlantic Richfield Co., 27 Md. App. 410, 341 A.2d 832 (1975). In Gowl, The Court of Special Appeals stated, "[T]he duties given the board are to judge whether the neighboring properties would be adversely affected, and whether the use in the particular case is in harmony with the general purpose and intent of the zoning plan," Id. at 419, 341 A.2d at 837, citing Montgomery County v. Merlands Club, 202 Md. 279, 96 A.2d 261 (1953). The Court of Appeals recently stated the Gowl holding as:

> The adverse impact from a proposed special exception use should be compared with the same type of adverse impact that could arise under any use permitted by the zoning ordinance as a matter of right. Thus, under the Gowl test, an adverse impact relied on to refuse a special exception would have to be greater than the same type of adverse impact which could arise from the development of the property with a permitted use.

Harford County v. Preston, 322 Md. 493, 499, 588 A.2d 772, 775 (1991). Harford County makes it clear that the Gowl standard was rejected in favor of the Schultz standard which is a "more particularized, and normally a more stringent, test for an applicant to meet," Gotach Center v. Bd. of Co. Comm'rs, 60 Md. App. 477, 485, 483 A.2d 786, 790 (1984).

Schultz initially recognized that the special exception is a valid zoning mechanism which enjoys the presumption of validity absent any adverse facts or circumstances. The applicant does not have the affirmative burden of demonstrating that the proposed use will benefit the community. Instead, the applicant need only show that the proposed use will not create a real deteriment to the neighborhood.

After discussing relevant precedent, the court stated the new standard upon which petitions for special exceptions were to be judged:

> These cases establish that a special exception use has an adverse effect and must be denied when it is determined from the facts and circumstances that the grant of the requested special exception use would result in an adverse effect upon adjoining and surrounding properties unique and different from the adverse effect that would otherwise result from the development of such a special exception use located anywhere within the zone.

Schultz at 15, 432 A.2d at 1327. The court then continued on to hold:

> [T]he appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.

Id. at 15, 432 A.2d at 1327.

It is upon this standard that the Petition must be judged. This Court finds that the Board applied the standard enunciated in Schultz. While the Schultz standard is easily cited as the applicable law, it is not so easily implemented.

B. Standard of Review

The recognized general standard for judicial review of an administrative agency's decision is "whether a reasoning mind reasonably could have reached the factual conclusion the agency reached; this need not and must not be either judicial fact finding or a substitution of judicial judgment for agency judgment." Supervisor of Assess. v. Ely, 272 Md. 77, 84, 321 A.2d 166, 170 (1974).

Therefore, it is this Court's duty to determine from the record whether there are facts and circumstances upon which the Board could

have relied to determine that the proposed use and location would cause an adverse effect upon adjoining and surrounding properties unique and different, in kind or degree, than that inherently associated with such a use regardless of its location within the zone. Board of County Comm'rs v. Holbrook, 314 Md. at 217-18, 550 A.2d 664 (1988). If the record demonstrates that the issue of adverse effect or harm is fairly debatable, then the matter is solely for the Board to decide without being second-guessed on findings of fact by an appellate court. Id. at 218, 550 A.2d 664.

In this context, the decision in Snowden v. Mayor and C.C. of Balto., 224 Md. 443, 168 A.2d 390 (1961), is important especially with regard to the issue of adverse effects involving water. In Snowden, the court stated:

> The heart of the fact finding process often is the drawing of inferences from the facts. The administrative agency is the one to whom is committed the drawing of whatever inferences reasonably are to be drawn from the factual evidence. "The Court may not substitute its judgment on the question whether the inference drawn is the right one or whether a different inference would be better supported."

Id. at 448, 168 A.2d 392, citing 4 Davis, Administrative Law Treatise, Sec. 29.05, p. 139 (1958). As such, this Court gives due deference to the Board to draw reasonable inferences from the testimony presented before it. People's Counsel v. Mangione, 85 Md. App. 738, 751, 584 A.2d 1315 (1991); Holbrook, 314 Md. at 218, 550 A.2d 664.

C. The Board's Opinion

Pursuant to the standards of B.C.Z.R. 502.1, the Board analyzed the potential impacts of the proposed special exception use as to visual impact, the environment, domestic well water consumption and traffic. The Board denied the Petition based on its findings of

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As it currently exists, Section 502.1 is as follows:

502.1--Before any Special Exception may be granted, it must appear that the use for which the Special Exception is requested will not: (B.C.Z.R., 1955; Bill No. 45, 1982.)

a. Be detrimental to the health, safety, or general welfare of the locality involved; (B.C.Z.R., 1955.)

b. Tend to create congestion in roads, streets or alleys therein; (B.C.Z.R., 1955.)

c. Create a potential hazard from fire, panic or other danger; (B.C.Z.R., 1955.)

d. Tend to overcrowd land and cause undue concentration of population; (B.C.Z.R., 1955.)

e. Interfere with adequate provisions for schools, parks, water, sewerage, transportation or other public requirements, conveniences, or improvements; (B.C.Z.R., 1955.)

f. Interfere with adequate light and air; (B.C.Z.R., 1955; Bill No. 45, 1982.)

g. Be inconsistent with the purposes of the property's zoning classification nor in any other way inconsistent with the spirit or intent of these Zoning Regulations; nor (Bill No. 45, 1982.)

h. Be inconsistent with the impermeable surface and vegetative retention provisions of these Zoning Regulations. (Bill No. 45, 1982.)

unique adverse impact on water and traffic. It is on these two findings of fact that this appeal has been taken.

1. Domestic Well Water

Specifically, with regard to domestic well water, the Board stated, "In the Board's view, the Petition for a Special Exception fails under the Schultz standard here in that the testimony was apparent that the ground water table unique to this area would be adversely affected by the proposed operation." (Board's Opinion at p.11).

Southern Four argues that the protestants failed to introduce strong and substantial evidence of unique impact on domestic well water supplies. (Petitioner's Brief, p.12). In its opinion, however, the Board stated: "Testimony by knowledgeable witnesses describing past water deficiencies gave convincing facts of the adverse result of deep mining operations in the proximity of private residential wells, shallow and deep." (Board's Opinion at p.11) (emphasis added).

If the record demonstrates that this was a reasonable conclusion reasonably drawn from the testimony presented, the Board's decision must stand. To require the protestants to produce greater evidence to satisfy Schultz would appear to be an undue burden. Counsel for the Petitioner grudgingly conceded as much at oral argument.

The testimony reflects that while Mr. Jollie, the expert witness called by the protestants, actually testified that there would likely not be any adverse effects on domestic water[2] (T. Vol. IV, p. 55), other witnesses did testify to the contrary.

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[2]A point to which counsel for the protestant frankly agreed at oral argument.

Mr. Earl Bolling, a forty year resident of the area and a trustee of the Ebenezer United Methodist Church who is a plumber by trade, testified that in 1981 the Church's well water began to cloud up with sand as a result of Genstar's mining operation adjacent to the church. (T. Vol. V, p. 66). After attempting to correct the problem by installing filters, the problem remained until 1986 when the well pump eventually failed. (T. Vol. V, pp. 66-7). The church was forced to dig a new well to a depth of 135 feet at a cost of $1,740. (T. Vol. V, p. 67).

Mr. Harry Schlaicher, a thirty year resident of the neighborhood, testified that the water level in his well began to drop in 1981 when the Genstar dry mining operation came within a quarter of a mile of his property. (T. Vol. V, p. 99). He also testified that he began to get sand in the water of his hand dug well even after he tried to fix the problem by inserting casings. (T. Vol. V, p. 101). Only after a new well was drilled to 115 feet was the problem eliminated. (T. Vol. V, p. 102). Finally, he testified as to similar problems at two other properties with which he was familiar. (T. Vol. V, pp. 101-103).

While Southern Four argues that its proposed wet mining operation will not have the same deleterious effects on neighboring properties as Genstar's dry mining operation, it was certainly not unreasonable for the Board to consider this information probative to its decision.

The Petitioner argues that the opinions of the lay witnesses were speculative and of no probative value. Petitioner directs the Court's attention to Deen v. Baltimore Gas & Electric Co., 240 Md.

317, 214 A.2d 1146 (1965) (testimony of possibility of future developments); and Anderson v. Sawyer, 23 Md. App. 612, 329 A.2d 716 (1974) (neighbor testimony nothing more than generalized fear unsupported by facts or reasons).

However, under the facts of this case, the testimony of the neighbors, which contradicted that of the experts, concerned their prior personal experience at this location. As such, the testimony was neither too vague or generalized to be accorded some probative value. Anderson at 620, 329 A.2d 722. If the Court were permitted to substitute its judgment on this issue for the judgment of the Board, it would do so. However, the Court may not and therefore, does not.

Finally, even if the record was such that the Board could not have reasonably reached the conclusion it did with respect to well water, the record is much more extensive with regard to the unique adverse effects on traffic. On this basis alone, the Board could have reasonably denied the Petition for Special Exception.

In Gotach Center, supra, the court was dealing with the Frederick County Special Exception Ordinance, which while stated in affirmative language, is similar to B.C.Z.R. 502.1. In Gotach Center, the court held: "[A] negative conclusion on any one (factors to be considered in deciding whether to grant a special exception), if supported by substantial evidence, will suffice to justify denial." Id. at 485-86, 483 A.2d 791 (explanation added). Thus, it is on the basis of traffic impacts alone that the petition for special exception could be legally denied.

2. Traffic Impacts

On the issue of the impact of the proposed use on traffic, the Board stated: "The highway transportion system unique to his area is quite clearly incapable of adequately handling existing traffic demands, much less the increased impact of traffic generated from the proposal, etc." (Board's Opinion at p. 12).

Southern Four argues that the protestants failed to produce any evidence of adverse impact on traffic affecting neighboring and surrounding properties. It contends that the Board committed error by defining "neighborhood" too broadly to include the area of Windless Run, which is two miles away from the proposed site. (Petitioner's Brief, p. 31).

The issue then becomes whether the Board reasonably could have reached the decision it did with regard to potential adverse impacts on traffic. It is the opinion of this Court that the Board reasonably could have reached its decision.

Initially, as Schultz announced a new legal standard in the area of petitions for special exceptions, the 1978 Barkuloo decision does not apply to the determination of this petition. To the extent that the Board weighed the evidence, that was error. However, the evidence presented before the Board, aside from the consideration of the Barkuloo decision, was sufficient for the Board to reasonably reach its decision.

Mr. Terry Stancill, the president of T[illegible] Southern Four, Inc., testified that an estimated 50 truckloads a day would leave the proposed site and not create any additional burden than that which

already existed at the location. Mr. Stancill's testimony reflects an interesting anomaly. According to Mr. Stancill, Southern Four's proposed operations would simply subtract trucks from its competitor, Genstar, rather than add additional trucks to Ebenezer Road. Thus, the final number of trucks in the equation would remain the same. However, it was reasonable for the Board to conclude that by competing with Genstar, truck traffic would increase rather than remain the same at this location.

Mr. Timothy Ryan, the Petitioner's expert traffic engineer, testified on direct exmination that the proposed use would not have any more impact at the proposed location than at any other location within the zone. On cross-examination, however, he admitted that his opinion was based, in large part, on his drive-through examination of the area surrounding the proposed location. (T. Vol. III, p. 92). Mr. Ryan agreed that Ebenezer Road is a narrow, winding road (T. Vol. III, p. 56), which does not meet current design criteria (T. Vol. III, p. 65) and he would make it wider if it were to be built today. (T. Vol. III, pp. 66-7, 68). He further testified this is the road needed to be traveled to get to the proposed site from Route 40. (T. Vol. III, p. 74).

Finally, Mr. Elmer Yingling, the President of the Bird River Community Association, testified to the inadequacies of Ebenezer Road, the only east-west thoroughfare in the region. (T. Vol. V, p. 14). He testified that it was impossible for a large truck and car to pass on the bridge at Windless Run. (T. Vol. V, p. 17). The videotape admitted during Mr. Yingling's testimony demonstrated to the Board the realities of the traffic situation along Ebenezer Road

and in particular, Windless Run. In this area where the road narrows to only 18 feet, drivers are forced to be extra cautious and defensive.

As a result of the testimony presented, it was reasonable for the Board to conclude than an "adverse safety condition for local residents" existed at the proposed site with regard to traffic. In recognizing that Ebenezer Road is the main east-west artery at the location, it was proper for the Board to include Windless Run in its determination of traffic impact. A reasonable definition of neighborhood should include Windless Run.

With the narrow scope of review of this Court of an administrative agency's decision, and giving due deference to the inferences it draws from the facts before it, this Court will not overturn the decision of the Board in this case.

Accordingly, it is this 13 day of August, 1991, by the Circuit Court for Baltimore County,

ORDERED that the decision of the County Board of Appeals is hereby AFFIRMED.

J. William Hinkel

J. WILLIAM HINKEL, JUDGE

years from November of 1987 until the Board issued its Order of June 19, 1989. The Petitioner was afforded full and complete forum to present its case as is evidenced by the six volumes of testimony transcribed. Further, the Board prudently referred the Motion for recusal to the Office of Law of Baltimore County, which rendered a timely opinion the evening before the hearing that the Board should hear the case.

The Petitioner's argument essentially is that the Board must have gone back on its sworn promise to fairly and impartially decide the case on the evidence presented. It is noteworthy that nowhere in Petitioner's argument on that point does it present even a scintilla or scrap of evidence on which to base the very serious allegation of impropriety on the part of the members of the Board of Appeals. It is similarly noteworthy that neither Mr. Hackett nor Mr. Bollinger, who had recused themselves, attended any of the hearings concerning this case.

The Board acted properly and the Petition or Motion to disqualify the Board was properly denied.

ISSUE TWO

What is the proper scope of Judicial Review of the Decision by the Board of Appeals of June 19, 1989 to deny the Petitioner's request for special exception for a controlled excavation in an RC2 and an RC50 zone in Baltimore County?

It is settled law beyond serious dispute that on review of facts found by an agency or board, if there was evidence in the

record before the agency on which the Board's decision was based, the Court has not power to substitute its assessment of credibility for that made by the agency and by doing so reject any fact. Commissioner of Baltimore City vs Cason, 34 Md App 487, 368 A 2d 1067 (1977). Miller vs Kiwanis Club of Loch Raven, Inc., 29 Md App 285, 347 A 2d 572 (1975).

Since the Petition for Special Exception concerned request for a special exception in an RC2 zone at the start of the hearing before the Board of Appeals and following adoption of the zoning maps enacted by the Baltimore County Council on October 13, 1988, which subsequently rezoned part of the land RC50, the Board's decision of June 19, 1989 was for a parcel of 129 acres bordering the Bird River which was then zoned partially RC2 and partially RC50.

The RC50 zone was a new zone established as part of the comprehensive program of critical areas legislation for lands in Baltimore County bordering the Chesapeake Bay or its tributaries enacted in response to a mandate of the State of Maryland that the counties enact local comprehensive plans to protect the coastal areas and plains for lands lying within their respective jurisdictions. Baltimore County enacted its plan of protection known administratively as Bills 32 through 35-88 and 41-88 in the Spring of 1988, having an effective date of June 13, 1988, thereby becoming the law of the case effecting this Petition.

The Appellant's claims to the contrary notwithstanding,

the law of special exceptions has remained relatively constant in the State of Maryland. The seminal case of Montgomery County vs Merlands Club, Inc., 202 Md 279, 96 A 2d 261 (1953) set forth in great detail the law of special exceptions. The Honorable Hall Hammond in that case stated.

> ". . . The duties given the Board are to judge whether the neighboring properties and the general neighborhood would be adversely affected, and whether the use, in the particular case, is in harmony with the general purpose and intent of the zoning plan."

The Petitioner/Appellant in this case have concluded and vociferously argued that the passage of Schultz vs Pritts, 291 Md 1, was establishing a new order or standard for considering special exceptions, saying most recently in Board of County Commissioners of Cecil County vs Holbrook, 314 Md 210, 550 A 2d 664 (1988),

> "In Schultz v. Pritts, supra, this Court determined the applicable standard for judicial review of the grant or denial of a special exception use. We observed.
>
> The special exception use is a part of the comprehensive zoning plan sharing the presumption that, as such, it is in the interest of the general welfare, and therefore, valid. The special exception use is valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any fact or circumstance negating the presumption. The duties given the Board are to judge whether the neighboring properties in the general neighborhood would be adversely affected and whether the use in the particular case is in harmony with the general purpose and intent of the plan.
>
> * * * * * * * *
>
> The extent of any harm or disturbance to the neighboring area and uses is, of course,

material. If the evidence makes the question of harm or disturbance or the question of the disruption of the harmony of the comprehensive plan of zoning fairly debatable, the matter is one for the Board to decide. But if there is no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the operation of the comprehensive plan, a denial of an application for a special exception use is arbitrary, capricious, and illegal. Turner v. Hammond, 270 Md 41, 54-55, 310 A 2d 543, 550-51 (1973); Rockville Fuel & Feed Co. v. Board of Appeals of Gaithersburg, 257 Md 183, 187-88, 262 A 2d 499, 502 (1970); Montgomery County v. Merlands Club, Inc., 202 Md 279, 287, 96 A 2d 261, 264 (1953); Anderson v. Sawyer, 23 Md App 612, 617, 329 A 2d 716, 720 (1974). These standards dictate that if a requested special exception use is properly detemined to have an adverse effect upon neighboring properties in the general area, it must be denied.

291 Md at 11-13, 432 A 2d 1319 (emphasis in original).

We then defined the specific nature of the requisite adverse impact required to warrant denial of a special exception application.

> (A) special exception use has an adverse effect and must be denied when it is determined from the facts and circumstances that the grant of the requested special exception use would result in an adverse effect upon adjoining and surrounding properties unique and different from the adverse effect that would otherwise result from the development of such a special exception use located anywhere within the zone. Thus, these cases establish that the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.

291 Md at 15, 432 A 2d 1319 (emphasis supplied)."
314 Md at 216, 217.

An examination of the evidence adduced by both Petitioners and Protestants perhaps would next assist in evaluating the record to support the Board of Appeals' decision denying Petitioner's special exception on June 19, 1989. Before doing so as a relevant aside, since this case represents at least a third attempt by the Petitioner to obtain zoning approval for controlled excavation at this site, the question arises of the significance of earlier decisions affecting the property may have to the resolution of this case. Once a special exception is denied and that denial is sustained in Court, it cannot later be granted unless there is a material change which removes the reasons for denial. Whittle vs Board of Zoning Appeals, 211 Md 36, 125 A 2d 41 (1956), Woodlawn Area Citizens vs Board of County Commissioners, 241 Md 187, 216 A 2d 149 (1966).

In reviewing the Court of Special Appeals' decision in Barkuloo (supra), copy of which was attached to People's Counsel Memorandum to the Circuit Court, it is clear that the Court of Special Appeals affirmed the Board's previous denial nearly twelve years ago now because, in part, the same conditions which existed then continue to exist now in terms of Ebenezer Road remaining narrow and winding and inadequate for truck traffic and the bridges remaining inadequate. The vehicle traffic has increased and the poor alignment and width of Windless Run remains unimproved.

The testimony of Timothy Ryan, the Petitioner's traffic

expert, on June 21, 1988 (T65) stated that it did not meet current design criteria. He testified at Windless Run Ebenezer Road should be wider (T68) and it should have a shoulder and that current minimum standards would require twelve feet for each lane of the traveled portion of the road plus a shoulder and, according to his measurements, at Windless Run it measured nineteen feet six inches (T68). It was his opinion that drivers passing each other at the bridge at Windless Run would not have to hit their brakes and have their brake lights come on to pass each other if the road were safe (T74). He believed that the capacity of the bridge at White Marsh Run was posted for twenty tons (T79) and did not know what the capacity was at Windless Run (T80); that Ebenezer Road was a macadam road without shoulders for most of its length (T80). He agreed that the communities north of Ebenezer Road where the Protestants live by necessity relied on Ebenezer Road as a means of ingress and egress from Route 40 to Eastern Avenue (T86, 87).

The Protestants, residents of many years in the area, included William Barkuloo, whose testimony on the issue of traffic was succinct and to the point. Mr. Barkuloo had resided in the area since 1941 (T224) and he testified that the only way he could get in and out from his home to the outside was by way of Bird River Beach Road (T224). He testified as to the communities located north of Ebenezer Road between Ebenezer Road and the river in the vicinity of Petitioner's property, including Bird River Beach, Earl's Beach, Harewood Park, Twin River called West Wind

River, and Oliver Beach, and that all those communities relied on Ebenezer Road as the only way to Route 40 or Eastern Avenue (T229). He pointed out that Ebenezer Road was more or less the dividing line as far as zoning areas in that the manufacturing heavy areas were to the south side of Ebenezer Road and to the north side was the RC zoning (T230). He described the approaches to Windless Run as a constant source of emergency stopping, primarily by vehicles that have dual wheels (T239, 240).

On January 3, 1988 Elmer Yingling testified as a Protestant in this case, individually and as President of Bird River Community Association, about teams which took traffic counts because they were concerned about the amount of traffic. He testified that the rush hour began at 6:00 a.m. (T15), rather than 7:30 a.m. to 8:00 a.m. as had been testified to by Petitioner's expert, noting that if they had not been there earlier they could not have counted the cars.

He further testified that on November 2, 1987 he was present while a videotape was made of traffic at Windless Run and other places along Ebenezer Road (T15) which videotape was shown to the Board and those present beginning at T17, narrated by Mr. Yingling (T29). The videotape not only showed traffic conditions at Windless Run but also attempted to follow a truck from Route 40 to Eastern Avenue along Ebenezer Road to show the path of the truck and the topography and condition of Ebenezer Road on that same date, November 2, 1987.

Other witnesses who testified for the Protestants on January 3, 1989 included Earl Bolling beginning at T61, who lived on an extension of Bird River Beach Road for forty years, essentially between the Petitioner's property and Bird River. He was a plumber (T63) and a Trustee of Ebenezer United Methodist Church (T63).

He testified that he took care of the plumbing needed at the church (beginning at T65) and that at the time Genstar started moving their deep mining operation toward the church in approximately 1981 the water began to get cloudy and sand was being pumped into the system; that the commodes were running in the sunday school building; that the tanks were half full of sand; and that the tanks were fed from the well (T66); that matters became progressively worse and by August of 1986 they had to put in a new well because the sand had eaten the pump (T67); that Genstar was right up against the church property to an approximate depth of sixty feet from the original elevation (T67); that since the new deep well was dug they have not had problems concerning water quality (T68).

He expressed concern about additional traffic that would be on Ebenezer Road and that he would be close to the noise and the dust which would be created by the Petitioner's operation as he understood it (T71); that he had been one of the persons counting traffic on Ebenezer Road (T72, 73); that he had seen traffic backed up on Ebenezer Road trying to get onto Route 40 as

far back as Vincent Farm Lane in the forty years he had lived there (T73); and that traffic eastbound normally moves but that it is very heavy (T73).

Harry Schlaicher, who resided at 6543 Ebenezer Road near the Ebenezer United Methodist Church (T98), testified that when he first lived in the area where he had lived since 1959 (T98) he had a hand dug well (T99). In 1981 he started to lose his water level and it kept dropping faster and faster (T99). In 1981, although he had been losing water level before that (T100), he had originally carried ten to twelve feet of water and it kept dropping (T100). He started picking up sand in the water (T101) and since he had his well drilled to a deeper depth in 1982 he has had sufficient water (T102). His well was drilled to one hundred fifteen feet (T102).

He testified that he had seen the videotape concerning traffic (T103) and that it comported with his understanding of Ebenezer Road and the traffic volumes that it handles (T104).

The Board of Appeals in its decision, on pages 8 through 13, explicitely evaluated and applied the Schultz vs Pritts standard to the facts of this case as presented.

Essentially the Petitioners' first witness, Mr. Stancill, had essentially arrived at his calculation of fifty to seventy-five truck loads of sand per day (T107 of November 4, 1987 and T122, 123) by extending or doubling the extraction time he had testified to in the 1975 presentation of the case where he had

estimated one hundred trucks per day (T151). People's Counsel had proffered (T144, 145) and Mr. Stancill acknowledged that the same company involved in those cases was the previous Petitioner in Barkuloo vs Stancill in the cases of State of Maryland vs Stancill Contracting filed in Harford County, known as cases 22851 and 22852 in which Stancill Contracting Company entered into Consent Decrees involving alleged violations of Natural Resources Article (T144, 145).

He further testified that trucks coming to his site would travel to the east of Eastern Avenue and to the west of Route 40 (T146); that the predecessor in interest to The Southern Four, Inc.; namely, Stancill Contracting, had beer the subject of an injunctive proceeding in which an Order was entered in Baltimore County Circuit Court by the Honorable James Sfekas (T160), which was affirmed by the Court of Special Appeals (Protestants' Exhibit 2 in these proceedings). He testified that on the Petitioner's site approximately sixty acres of trees had been removed since they owned it (T170) and that sludge had been applied twice (T172), the first covering thirty-five acres and the second time covering forty to forty-two acres. He testified that the maximum weight of trucks would be thirty-two and one-half tons (T176) and that Windless Run had not been improved (T148).

Later, following the passage of critical areas legislation, including laws affecting controlled excavations prohibiting them if the extraction process would exceed twenty-

five years, although Mr. Stancill did not resume the stand to testify, the Petitioners, through Michael Clar of Environmental Associates, their expert witness, explaining their critical area plan testified that he believed the Petitioner's plan could be accomplished within the time period called for by the statute. If the timetable for the extraction of minerals were to be accelerated, that would facilitate the extraction of minerals and their sale at a more rapid rate, thereby requiring more truckloads of material to be moved daily than Stancill's first estimate, which he was clear to characterize as an estimate (T124), not to be restricted to fifty per day (T124), but to be seventy-five truckloads, in his estimate, at a peak (T125), fifteen hundred tons maximum daily (T125).

The standard of Schultz vs Pritts was not addressed by Petitioners, who chose to interpret the standard as a comparison of the effect of Petitioner's property on its neighbors alone in the immediate neighborhood rather than consider the effects of a gravel and sand operation if operated in another RC2 zone in Baltimore County in order to determine whether or not the effects visited on the neighboring community here were unique contrasted with its operation in any other RC2 zone in Baltimore County.

Having failed to adduce any proof on that point, the Petitioners also erred in their interpretation as illustrated by their testimony to the Board concerning the determination of what constituted the neighborhood under the law. Pattey vs County

Commissioners of Worcester County, 271 Md 352, 317 A 2d 142 (1974). The Court of Appeals set out the standard the Board of Appeals in stating its decision in either granting or denying a special exception in the case of Dundalk Holding Company vs Horn, 266 Md 280, 292 A 2d 77 (1972), at 79,

> ". . . There is no dispute between the parties with regard to the applicable law. If the action by the County Board was supported by any substantial evidence, then the matter before it was 'sparely debatable' and the lower court should not substitute its judgment for that of the administrative body. On the other hand, if the action of the County Board was not supported by any substantial evidence, then its action was arbitrary and capricious and a denial of due process of law. As prohibited by Article 23 of the Declaration of Rights of the Maryland Constitution and should have been reversed by the lower court for this reason."

and at 83,

> ". . . The County Board in its opinion described the subject property and its improvements as well as the proposals set forth in the application, it pointed out that the primary protestants were the operator of a nearby Pikes Theatre and the Pikesville businessmen who depends heavily upon the use of the Pikes Theatre parking lot to accomodate his customers. The Board considered the key question to be the traffic to be generated by the proposal and its impact upon the area. It noted that each side presented well qualified experts who noted their respective opinions on the subject. It stated its reasons why it was more impressed with the opinions of Dundalk's expert than with those of the expert of the Appellees. . . In our opinion, the opinion of the County Board taken as a whole complied with the requirement of Section 501.4."

The Petitioner's proof presented to the Board simply did not pursuade the Board that the Petitioner had met its burden under Section 502.1 and the requirements for controlled excavations under the critical areas legislation. The Board's

expressed opinion was that the Protestants had more than met their burden of showing unique adverse effects under the Schultz vs Pritts (supra) as well as the County Commissioners vs Holbrook (supra) cases and that the Petitioners had again failed to meet the standard.

There is substantial evidence to support the Board's decision and its decision should be affirmed.

CONCLUSION

The Appellees, Protestants below, respectfully request this Court after hearing to affirm the decision of the Board of Appeals of Baltimore County.

Respectfully Submitted,

MICHAEL P. TANCZYN, ESQ.
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Appellees
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I HEREBY CERTIFY that, on this 22nd day of January, 1990, a copy of the foregoing was mailed, postage prepaid, to Phyllis Cole Friedman, Esq., People's Counsel for Baltimore County, and Peter Max Zimmerman, Esq., Deputy People's Counsel, 111 West Chesapeake Avenue, Room 304, Towson, Maryland, 21204; and to Thomas C. Swiss, Esq. and Michael E. Marr, Esq., Marr, Swiss & Woods, 301 North Charles Street, Suite 900, Baltimore, Maryland, 21201, attorney for the Appellants.

MICHAEL P. TANCZYN, ESQ.

11-28-89

IN THE MATTER OF THE APPLICATION OF THE SOUTHERN FOUR, INC. FOR A SPECIAL EXCEPTION PROPERTY BEGINNING AT THE CENTERLINE OF EBENEZER ROAD, 1248.75' FAR" OF THE CENTERLINE OF BIRD RIVER BEACH ROAD 15TH ELECTION DISTRICT 5TH COUNCILMANIC DISTRICT * IN THE * CIRCUIT COURT * OF MARYLAND * FOR BALTIMORE COUNTY * CIVIL ACTION NO.: 89-CG-250G * Zoning Case No.: 86-195-X

* * * * * * * * * * * * *

MEMORANDUM OF APPELLANT, SOUTHERN FOUR, INC. IN SUPPORT OF ISSUES ON APPEAL FROM THE DECISION OF THE BOARD OF APPEALS

Southern Four, Inc., Appellant, by its undersigned attorneys, respectfully submits the following memorandum in support of issues on appeal from the Decision and Order of the Baltimore County Board of Appeals dated June 19, 1989, denying the Petition of Southern Four, Inc. for a special exception for controlled excavation and removal of sand and related materials. In support thereof, Southern Four, Inc. respectfully states as follows:

STATEMENT OF THE CASE

This protracted zoning appeal began on September 30, 1985 when Southern Four, Inc. filed its application for a special exception. Fourteen months later, on November 20, 1986, the Zoning Commissioner issued an Order granting to Southern Four, Inc. a special exception, with restrictions, to conduct the controlled excavation and removal of sand and related matierials from the proposed site. This Order was subsequently amended on November 26, 1986 and January 23, 19[illegible], reaffirming the original decision of November 20, 1986.

Thereafter, various individuals and community associations

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joined by People's Counsel for Baltimore County, took an appeal of the Zoning Commissioner's decision on the grounds that the proposed use violated the standards governing special exceptions contained within Section 502.1 of the Baltimore County Relations (B.C.Z.R.) and would be detrimental to the health, safety and general welfare of the residents of the locality involved and would also create traffic congestion.

The hearing before the Baltimore County Board of Appeals (hereinafter referred to as the "Board") commenced on November 3, 1987 and concluded thirteen months later after four additional hearing dates of March 8, 1988, June 21, 1988, January 3, 1989 and January 4, 1989. Thereafter, the parties submitted memoranda in which they presented their respective positions. On June 19, 1989 the Board issued its Opinion and Order denying Southern Four's Petition for a special exception. On July 17, 1989, Southen Four, Inc. noted a timely appeal of the Board's Opinion and Order. By stipulation, Appellant's brief is due on or before November 28, 1989.

THE BOARD'S DECISION

After discussing the case history[1], the Board reviewed

[1] The Board included a reference to several failed efforts by Stancill Contracting Company, Southern Four's predecessor in title, to obtain a special exception to use this property for mining sand and gravel. Barkuloo, et al. v. Stancill Contracting Co.. (See Opinion at p. 12). While the Board indicated that the litigation surrounding the history of this site shaped the respective positions of the parties, Southern Four believes that the Board erred as a matter of law in finding that any part of that history had any effect on the matter before the Board. Indeed, as shown herein, the Board erroneously ascribed weight to the testimony from prior proceedings concerning traffic impact since the standards under which traffic impact at the proposed site is to be judged changed dramatically after the time of the prior decision.

generally the testimony adduced at the hearing. The Board's review of this testimony was in summary fashion only and the Board indicated that its recitation of testimony addressed only "particular witnesses who most significantly contributed to the considerations before the Board[2]."

The Board's opinion was fortunately more direct as to issues and fact findings. From the outset, the Board revealed its misconception as to the applicable standards by which it was to consider Southern Four's zoning application. As shown herein, since Schultz v. Pritts, 291 Md. 1 (1981), applications for special exception use are presumed to be valid absent evidence that the neighboring properties in the general neighborhood would be adversely effected in a unique and different manner by the proposed use than would properties outside of the neighborhood if that use were to be located elsewhere in the zone.

The Board, however, construed its responsibility as a balancing test stating "this Board must determine, are the benefits to be reaped from this operation worth the cost". (See Opinion dated June 19, 1989, at p. 7). Southern Four submits that this was not the duty of the Board. For the Board to have construed its duty as such is a clear misapplication of the standards and principles of Maryland law governing applications for special exceptions under zoning law.

[2] For that reason, with respect to specific issues on appeal here, Southern Four will address all relevant witness testimony.

While the Board acknowledged that Schultz v. Pritts did in fact "enumerate the requirements of examining that standard" (i.e. the standard contained within Section 502.1 of the Baltimore County Zoning Regulations), its interpretation and application of that case and subsequent case law were in error.

Schultz v. Pritts And Its Progeny

As Southern Four stressed to the Board from the outset of the hearing (See Transcript, Vol. 1 at pp. 37-40) and in its legal memoranda, the overriding factor controlling the Board's consideration of Southern Four's petition for a special exception was the proper application of the principles established in Schultz. In Schultz, the Court of Appeals fixed the applicable standards for judicial review of the grant or denying of a special exception use. As Southern Four emphasized throughout the hearing, the Schultz test is "whether there are facts and circumstances that show that the particular use proposed at the particular location would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location with the zone. Id. at 22-23. In Schultz, the Court of Appeals significantly changed the standards under which applications for special exceptions were to be judged. Before Schultz, an applicant seeking a special exception had a specific burden of adducing testimony which demonstrated that the proposed special exception use would benefit the community by virtue of its being in harmony with the general purpose and intent of the zoning plan. After Schultz, the evidentiary standards and principles controlling applications for special exceptions changed

dramatically. As the Court of Appeals observed:

> The special exception use is a part of the comprehensive zoning plan sharing the presumption that, as such, it is in the interest of the general welfare, and therefore valid. The special exception use is a valid zoning mechanism that delegates to an administrative board the limited authority to allow enumerated uses to which the legislature determines permissible absent any fact or circumstance negating the presumption. The duties given the Board are to judge whether the neighboring properties in the general neighborhood would be adversely effected and whether the use in the particular case is in harmony with the general purpose and intent of the plan.

Id. at 11 (emphasis supplied). The Court of Appeals continued:

> The extent of any harm or disturbance to the neighboring area and uses is, of course, material. If evidence makes the question of harm or disturbance or the question of the disruption of the harmony of the comprehensive zoning plan fairly debatable, the matter is one for the Board to decide.

Id. at 11-12. Indeed, it is now settled law in Maryland that when a local government legislates that a particular use is appropriate for designation for special exception, the local government is, in essence, declaring not only that the particular use in fact promotes the health, safety and general welfare of the community, but that the particular use merits a presumption of validity which can be defeated only by strong and substantial evidence demonstrated that it would have detrimental effects on adjoining and surrounding properties above and beyond those inherently associated with such a use in a particular zone. The Court defined the specific nature of the requisite adverse impact sufficient to warrant denial of a special exception application as follows:

> A special exception use has adverse effect and must be denied when it is

> determined from the facts and circumstances that the grant of the requested special exception use would result in an adverse effect on adjoining and surrounding properties unique and different from the adverse effects that would otherwise result from the development of such a special exception use anywhere within the zone.

Id. at 15 (emphasis supplied); See also, Board of County Comm'rs v. Holbrook, 314 Md. 210, 217 (1988).

An application for special exception should therefore be granted unless there is evidence of and circumstances which show that the particular special exception use at the location proposed would result in adverse effects upon adjoining and surrounding properties unique and different, in kind or degree, then those inherently associated with such a use regardless of its location with in the zone. Board of County Comm'rs v. Holbrook, supra, (at pp. 217-18).

The Schultz standard has been consistently recognized in appellate cases since 1981. See Lawton T. Sharp Farm v. Somerlock, 152 Md. App. 207 (1982); Gotach Center v. Board of County Comm'rs, 60 Md. App. 477 (1984); Board of County Comm'rs v. Holbrook, supra.

In Schultz, the Court of Appeals also fixed the standard for appellate review of decisions by zoning authorities, including Boards of Appeal. Under Maryland law, if the evidence makes the issue of harm (as defined above to be unique and different at the site) fairly debatable, the matter is one for the Board's decision which should not be second-guessed by an appellate court. Board of County Comm'rs v. Holbrook, supra, at p. 218. However, if there is no probative evidence of harm or disturbance in light of the nature of the zone involved or of

factors causing disharmony to the operation of a comprehensive plan, denial of the application for a special exception use is arbitrary, capricious and illegal. Schultz, 291 Md. at pp. 11-13. This Court must judge the issues on appeal in light of these standards.

It was critically important to Southern Four that the Board understand and properly apply the Schultz test in considering this zoning application. Southern Four knew that its zoning application was politically sensitive and would rekindle a number of bitter feelings in surrounding neighborhoods. The Schultz case infused a rational, objective test into the process which Southern Four believed could clearly be met. Southern Four contended that the principles of res judicata and collateral estoppel were inapplicable not only because the parties were different from the Barkuloo case but also because the Schultz standard was so radically different from the standards which had previously governed applications for zoning exceptions under Gowl v. Atlantic Richfield Co., 27 Md. App. 410 (1975). Under pre-Schultz standards, an applicant seeking a special exception had an affirmative burden of demonstrating that the proposed special exception use would benefit the community and be in harmony with general purposes and intent of the zoning plan. With Schultz came the presumption of validity and the need for proof from the protestants of unique and different impact particularized to the proposed site.

The Board unfortunately did not recognize and consistently apply the principles of Schultz. The Board considered four areas of potential impact or harm that the Protestants claimed

at the hearing: visual impact; environmental impact; impact on domestic water supplies; and traffic impact. Curiously, and only with regard to the potentiality of adverse visual impact, the Board specifically applied Schultz's standard (See Opinion at p. 10). Indeed, in doing so, the Board found that there was no testimony or evidence which established that the alleged visual intrusion at the site was of any more a unique character than it would be were Southern Four's mining operation located any where else in the zone. Further, with regard to possible visual impact, the Board conceded that under Schultz, inherent depressing effects of the proposed use will not overcome the presumption of the validity unless there are strong and substantial existing facts that the use has detrimental effects above and beyond the inherent ones ordinarily associated with that use. (See Opinion at p. 10). Unfortunately, with regard to other areas of adverse harm, the Board quickly forgot the governing standards of Schultz.

With regard to environmental impacts, the Board did not apply the Schultz test. However, the Board did reach the correct conclusion because of the fact that environment experts from the County and elsewhere had concluded that the environmental impacts from the proposed use at the site were minimal (thus obviating the need for the Board to give any consideration to the issue whether these impacts were different and unique and therefore greater at the site than anywhere else in the zone). For that reason and not because of the tennents of Schultz, the Board "grudgingly" accepted the conclusions of the experts that there were no adverse environmental results.

Having once slipped from its duty of properly applying the Schultz standards, the Board fell all the way when considering the potential adverse impacts on domestic water supplies and traffic. As to impacts on domestic water supplies, the Board concluded that there would be adverse impacts on the ground water table. As shown herein, the Board did not determine whether the alleged adverse impact was unique to the site or even assuming the impact could occur, would be above and beyond the impact which would normally result from such a use regardless of where it might be located within the zone.[3] This failure to apply the Schultz test will become clear from the review of the evidence herein.

The Board continued its disregard of the Schultz standard when it considered impacts with the proposed use would have on traffic. Rather than considering whether the impacts on traffic indigenous to a mining operation would result in impacts on adjoining and surrounding properties different and unique from those which might otherwise occur if the proposed use located anywhere else within the zone, the Board merely determined that Ebenezer Road was inadequate and incapable of handling additional traffic. (See Opinion at pp. 11-12). As shown herein, truck traffic[4] is inherent to a mining operation. To

[3] The factual basis of this alleged impact is suspect. As shown herein, there was no cogent evidence offered by the Protestants to support their claim that wet mining would have any adverse impact in well water supplies at the site.

[4] There is a substantial question whether the Board disregarded Terry Stancill's uncontested testimony that Southern Four's operation would not create any additional truck traffic but merely redistribute existing truck traffic.

satisfy Schultz, the Protestants had to provide strong and substantial evidence that this inherent traffic impact (the extent of which is also at issue) would be more detrimental, that is, different and unique, to neighboring properties than it would be if the proposed use were located anywhere else within the zone. The Protestants did not introduce such evidence. The Board ignored not only this circumstance but also the Schultz standard. While the Board did not define its rationale for finding that there would be adverse traffic impact, it appears that the Board may have invoked principles of collateral estoppel or res judicata or may have used a pre-Schultz standard in considering traffic impact.

Finally, the Board specifically opined that the decision and record established in William T. Barkuloo, et al. v. Stancill Contracting Company had effect on the instant case. As noted above, this case involved a failed effort by Southern Four's predecessor in title to obtain a special exception. The Board acknowledged that this case was considered under a pre-Schultz standard and that the rules of the game had changed[5] (See Opinion at p. 13). Nevertheless, and for reasons uncertain to Southern Four, the Board expressly gave significant weight to the record and findings of the Court of Special Appeals in Barkuloo even though this case was overturned sub-silentio by the Court of Appeals in Schultz. For the reasons shown herein, Southern Four respectfully submits that the Board's actions in this respect were arbitrary, capricious and illegal.

[5] Southern Four presumes that the effect of this circumstance should have been that the legal principles of res judicata and collateral estoppel should not apply.

THE BOARD ERRED AS A MATTER OF LAW IN APPLYING THE PRINCIPLES AND STANDARDS OF MARYLAND LAW GOVERNING APPLICATIONS FOR ZONING EXCEPTIONS

As previously indicated, the Board at least acknowledged the fundamental importance of the Schultz case and its progeny on the case before it. Nevertheless, the Board applied the Schultz standard only when considering the visual impacts which Southern Four's proposed use would have on the adjoining and surrounding properties. For reasons unknown to Southern Four[6], the Board did not apply the Schultz test when considering the alleged adverse impacts on the environment, domestic well water supply and traffic. Because the Board reached the right conclusion, allbeit for the wrong reasons, as to environmental impact, Southern Four is not contesting the Board's finding on that particular area of impact. However, Southern Four does vigorously dispute the Board's fact finding methodology, application of the governing legal principles and conclusions with regard to alleged adverse impacts which its proposed use would have on domestic water supplies and on traffic.

Domestic Well Water

The Board concluded that the domestic well water supplies of neighboring and surrounding properties would be adversely impacted by Southern Four's proposed use.

> A third factor to be considered is the effect of the development on domestic water consumption. The Board is unconvinced by the information offered by the Southern Four,

[6] Quite conceivably, the Board's reasons for failing to apply the Schultz standard uniformly were those very reasons which led Southern Four to file a Motion to Disqualify at the outset of the case. (See pp. 34-37 infra).

> Inc., in their petition regarding the aquifer supplying water to this region, giving reason for undue concern and doubtful property owners. Evidence presented by the petitioner gave the impression that the investigation of well water resources was not current and was ascertained by site observations and previous statistical studies of the area. Testimony by knowledgeable witnesses describing past water deficiencies gave convincing facts to the adverse results in deep mining operations in the proximities of private residential wells, shallow and deep. In the Board's view, the petition for special exception fails under the Schultz standard here in that the testimony was apparent that the groundwater table unique to this area would be adversely affected by the proposed operation." (Opinion at p. 11).

When the record is reviewed, however, it is apparent that the Board could not have and did not apply the Schultz test with regard to this alleged adverse impact. In order for the Board to have properly applied Schultz, the Protestants would have had to introduce strong and substantial evidence that the inherent impact of Southern Four's mining operation on domestic water supplies would have been different and unique on neighboring and surrounding properties than it would otherwise be whereever else Southern Four's proposing mining operation might be located within the zone. The record is clear that the Protestants did not offer any such evidence. Absent such evidence, the Board's decision was arbitrary, capricious and illegal.

It is undisputed that Southern Four did not believe that its proposed mining operation would have any adverse effects on the groundwater table and therefore on domestic water supplies. Terry Stancill, a principal of Southern Four, testified that Southern Four engaged Environmental Technologies Associates to investigate and prepare a written opinion and report as to the environmental impacts that the proposed use might have on the

properties in the surrounding area (See Transcript, Vol. 1 at pp. 81-83). Michael Clar of Environmental Technologies Associates testified as an expert witness on these potential environmental impacts. Mr. Clar indicated that he acted as Southern Four's chief contact and liason with various county agencies, including the Department of Health and the Department of Environment and Resource Management. Among the issues that Mr. Clar's company addressed in its reports (Petitioner's Exhibit 3) was the effect, if any, that the proposed mining operation would have on domestic groundwater, both in quantity and quality. Mr. Clar testified his company had sophisticated abilities to simulate groundwater conditions. (See Transcript, Vol. 2 at pp. 22-24). Mr. Clar testified that it was Environmental Technology Associates' opinion that the groundwater depths or profiles at the site would not significantly change during the mining operation from that which existed prior to the project's inception. (See Transcript, Vol. 2 at p. 67). This opinion was grounded on the fact that Southern Four's proposed mining operation would use a wet process.[7] (See Transcript, Vol. 2 at p. 32). Mr. Clar identified the subsurface groundwater table to be approximately twelve feet, plus or minus two feet, depending upon the season of the year (See Transcript, Vol. 2 at p. 91). He indicated his Company's opinion that the groundwater table levels would remain

[7] A wet mining process is one in which the water is not removed from the excavation site but rather remains in the pit formed from the removal of minerals.

constant throughout the project because Southern Four intended to utilize a wet mining process. Significantly, Mr. Clar expressed the opinion that the neighboring properties could very well benefit from the lake or reservoir which would be formed during and as a result of the mining operation because this lake would hold existing groundwater, collect additional rain water and help maintain water pressure in the area (See Transcript, Vol. 2 at p. 165).

While Mr. Clar acknowledged that he was not a geohydrologist, his opinion was in fact confirmed by the testimony of Jeffrey Jollie, a employee of the Baltimore County Bureau of Environmental Services called by the Protestants. Mr. Jollie testified that he was in fact a geohydrologist with vocational background and experience in the field of hydrogeology. (See Transcript, Vol. 4 at p. 37). He was qualified as an expert by the Board. Mr. Jollie indicated that he reviewed Southern Four's proposed use on behalf of Baltimore County's Bureau of Environmental Services. He testified that his department had originally been concerned about potential groundwater contamination but was not concerned about groundwater quantity. He testified that his concerns as to groundwater contamination were assuaged by the results of sampling done at the site. (See Transcript, Vol. 4 at p. 42). Furthermore, he testified that he did not believe that any residential wells would be expected to be in the path of the groundwater flow. (See Transcript, Vol. 4 at p. 44). Mr. Jollie confirmed that the water table was certainly within twenty feet and probably as close to the surface as five feet

(See Transcript, Vol. 4 at p. 73). Indeed, he testified that he had reviewed Southern Four's proposed plan specifically as to groundwater related issues, since he wanted to determine whether the proposed use was going to create problems as to groundwater. He concluded that he did not believe the Southern Four's proposed use would create any problems either as to quantity or quality. (See Transcript, Vol. 4 at p. 55). He reconfirmed this opinion several times. (See Transcript, Vol. 4 at pp. 66; 81-82).

Therefore, there was agreement between two qualified experts on groundwater tables that Southern Four's proposed use would have no effect on the quantity or quality of groundwater available.

The only evidence of potential impacts on groundwater came from residents in the area. This testimony should be reviewed carefully in light of the Board's responsibility to apply the Schultz test.[8]

Elmer Yingling, the President of the Bird River Community Association, a community to the north of the proposed site, testified that there were no public utilities in the community and that all residents had wells and septic systems. (See Transcript, Vol. 4B at pp. 46-47). He indicated that he had an eighty-seven foot deep drilled well with which he had no

[8] In that regard, this Court's consideration should be whether there is any evidence that the groundwater tables in the vicinity will be more adversely effected then they otherwise would if Southern Four's mining operation would be located elsewhere in the zone. If there is not any such evidence, the Board's decision was arbitrary and capricious. If there was such evidence, this Court should not substitute its judgment for that of the Board.

problems. (See Transcript, Vol. 4B at p. 47). He expressed concern that his well might experience similar problems to those which the Church on Earls Road allegedly experienced, that being the Church's well water became cloudy and impregnated with sand at about the time that Genstar moved its sand and gravel operation northward towards Ebenezer Road. (See Transcript, Vol. 4B at p. 49). However, he did not testify as to personal familiarity with the Church's alleged problems, nor did he testify that he had any knowledge as the cause of those problems other than pure speculation. In a court of law, his testimony would have been inadmissible. Because it was grounded on rank speculation, his testimony merits absolutely no weight, particularly when balanced against contrary evidence from qualified experts that problems of this nature at the proposed site are improbable and not anticipated.

The Protestants next witness was Earl Bolling, another resident of Bird River Beach Community to the north of the proposed site. Mr. Bolling identified himself as a plumber and a trustee of the Ebenezer United Methodist Church. (See Transcript, Vol. 4B at p. 63). He indicated that from 1965 to 1986 the Church had an eighty-five foot drilled well with a steel sleeve. (See Transcript, Vol. 4B at pp. 65-66). He then testified that between 1984 and 1986, the Church began to get sand in its well which eventually destroyed the pump. (See Transcript, Vol. 4B at p. 67). He stated that this circumstance roughly coincided with Genstar's northward progress on its sand and gravel operation on Route 40 which began in 1981. (See Transcript, Vol. 4B at pp. 66-67). The Church eventually

drilled a new well and has had no further problems with water, either as to quality or quantity. On cross-examination, Mr. Bolling admitted that Genstar did not admit any responsibility to the Church or to officials for the sand in the Church's well. (See Transcript, Vol. 4B at p. 90). He admitted that the sand infiltrating the Church's well could have been a result of a cracked sleeve in the 1965 well, and he did not know that was not what had actually happened. (See Transcript, Vol. 4B at pp. 91-92).

The Protestants next witness was Harry Schlaicher, who lives on Ebenezer Road west of the Methodist Church. (See Transcript, Vol. 4B at p. 99). Mr. Schlaicher testified he originally had a twenty-six foot dug well. (See Transcript, Vol. 4B at p. 99). He testified that the water level in his well dropped about the same time Genstar moved its mining operation northward in 1981. (See Transcript, Vol. 4B at p. 100). He then testified that several of his neighbors along Ebenezer Road had to have wells drilled in about 1981. (See Transcript, Vol. 4B at pp. 102-103). On cross-examination, Mr. Schlaicher admitted that the water level in his well began dropping before Genstar moved closer. (See Transcript, Vol. 4B at p. 112). Mr. Schlaicher admitted that he was not a geologist and he knew nothing about the underground water table. (See Transcript, Vol. 4B at p. 113). More importantly, Mr. Schlaicher indicated from personal observation that Genstar used at least in part a dry mining operation which removed the water from the excavation holes. (See Transcript, Vol. 4B at pp. 114-115).

Louis Winkler, a long time resident of the Bird River Beach

Community, testified that he had an eighteen foot deep dug well, as opposed to a drilled well. (See Transcript, Vol. 5 at p. 172). He indicated his concern that the "well will become polluted and the water table will be reduced so I will then have to invest in another well." (See Transcript, Vol. 5 at p. 173).

William T. Barkuloo, another long time resident of Bird River Beach Community, testified that he had a twelve foot hand dug well with a sufficient quantity of water. (See Transcript, Vol. 5 at p. 232).

Not one of these witnesses has had any expertise in geohydrology. None of them could testify with any certainty that Genstar's mining operation was the cause of the domestic well water problems, both as to quantity and quality, which Genstar's neighbors along the southside of Ebenezer Road experienced. In fact, there was no evidence from anyone with expertise in mining as to the nature of the mining operation (i.e. wet or dry) Genstar was conducting to the south of Ebenezer Road. There is no evidence from the County or anyone else with expertise in geology or geohydrology that the underground water tables at or near the Genstar site were the same as those which existed at or near Southern Four's proposed site. The Protestants' evidence was, at best, an attempt to establish guilt by association, that being that because other areas may have experienced domestic water problems as result of mining operations, that same thing might happen at the site of Southern Four's project. This concern, however, arises out of hole-cloth because it flies in the face of the conclusions of experts in geohydrology that the conditions which neighboring

and surrounding residents fear simply will not occur.

Finally, and most importantly, it is clear that the Board could not have applied the Schultz test to this potential impact. The Protestants offered no evidence that there were other locations within the zone where the alleged adverse impacts on domestic water supply from a wet mining operation (even assuming that these adverse impacts could occur) would be less adverse than they would be at the project site. In fact, the Protestants did not offer any evidence whatsoever (much less strong and substantial evidence) of adverse impacts unique to the site. Their concern was not based on scientific fact, which indeed was undisputed to be to the contrary, but rather was based on gross irrational speculation. Speculative evidence simply does not suffice to overcome the presumption of validity Southern Four's proposed use enjoyed under Schultz. Strong and substantial evidence of unique harm is fundamental under Schultz. Absent such evidence, the Board clearly acted arbitrarily, capriciously and illegally in finding unique adverse impacts.

Traffic

The Board further concluded that Southern Four's Petition for a special exception use should be denied because of existing deficiencies in the area road system. The Board's findings as to traffic safety can be found at pp. 11-12 of its Opinion.

> "Lastly, the Board is bound to consider the impact of this operation on traffic. Testimony in this hearing gives irrefutable facts that Ebenezer Road, the only east-west artery of travel in this location, is inadequate. A rural, county maintained connected road, with the width of twenty feet and no side shoulders for most of its length, Ebenezer Road cries out for extensive

> improvements to serve this area safely. Except for the new bridge construction at the western extremity, this heavily travelled road has not been changed since the last hearing in this matter. Ebenezer Road is basicly the same rolling and winding substandard road of 1978. From the excavation site to the main highway, facts show that Ebenezer Road as a main route of conveyance for large trucks in an increasing number would add to an adverse safety condition for local residents. It is abundantly clear that the petition for special exception must fail on this basis alone. The highway/transportation system unique to this area is quite clearly incapable of adequately handling existing traffic demands, much less the increased impact of traffic generated from the proposed site."

The issue here is whether the Board did in fact apply the Schultz test to the question of traffic impact. Again, a careful review of the evidence is appropriate.

Terry Stancill described at length the nature and extent of Southern Four's mining operation. Mr. Stancill testified that mineral extraction, unlike many other commercial or industrial uses, can only occur where minerals exist and cannot be moved about other potential sites in the zone. (See Transcript, Vol. 1 at p. 149). Indeed, the Board conceded that the minerals Southern Four is seeking to extract are available only at a limited number of locations. (See Opinion at p. 7).

Mr. Stancill testified that mining inherently involves trucks moving minerals from the excavation site. Mr. Stancill indicated that the vehicles visiting the proposed site would primarily be a variety of dump trucks belonging to entities other than Southern Four. These trucks would access Southern Four's property on Ebenezer Road east of Bird River Beach Road. (See Transcript, Vol. 1 at. p. 106). The trucks would be removing minerals from the site during daylight hours. Mr.

Stancill acknowledged that Ebenezer Road was the primary east-west feeder route from the project to the two major north-south arteries, Route 40 on the west and Eastern Avenue on the east. Mr. Stancill testified that Southern Four projected that approximately sixty-five percent of vehicles exiting the site would proceed westbound towards Route 40 and approximately thirty-five percent would proceed eastbound towards Eastern Avenue. He indicated that Southern Four's mining operation would be coming into the market as a competitor for the supply of essential construction aggregates. Two other mining operations which supplied these minerals were already in the area, Genstar off Earls Road and A.V. Williams of Bird River Beach Road. As a result, the trucks frequenting these facilities were already on Ebenezer Road. Mr. Stancill indicated that as a competitor of these other mining operations, Southern Four would not be adding new customers to the market but rather was expecting to take existing customers. (See Transcript, Vol. 1 at pp. 105-106). For this reason, Mr. Stancill did not believe that the proposed use would add any additional truck traffic to the existing road system but would merely redistribute the same truck traffic among three distinct operations. Mr. Stancill testified that it was his hope and expectation that Southern Four could capture a percentage of the existing market that would allow an average of fifty truckloads of sand and gravel to be removed from Southern Four's site per day. (See Transcript, Vol. 1 at pp. 107-108). This projection mathmetically translates to one hundred truck-trips to and from

Southern Four's property along Ebenezer Road per day[9]. The key fact of Mr. Stancill's testimony which went undisputed was that this truck traffic would not be new to Ebenezer Road but rather was expected to be the same truck traffic that already exists and has existed on Ebenezer Road for fifteen years. (See Transcript, Vol. 1 at pp. 178-179).

Southern Four believed that it was critical that the Board appreciate Mr. Stancill's testimony as to this circumstance because if unchallenged it would establish as uncontroverted fact that truck traffic on Ebenezer Road would not change whatsoever as a result of Southern Four's proposed use.[10] Indeed, during the hearing, the Board recognized that impact is a function of the number of additional vehicles. The Board, however, either did not appreciate or did not acknowledge that Mr. Stancill's testimony was uncontroverted.

Southern Four also called as a witness Timothy Ryan, a senior associate in the Transportation Division of Kidde Consultants. Mr. Ryan's responsibilities with Kidde Consultants included traffic engineering and transportation planning activities. (See Transcript, Vol. 3 at p. 4). Mr. Ryan was accepted by the Board as an expert on traffic safety and traffic engineering. (See Transcript, Vol. 3 at p. 8). Mr. Ryan acknowledged that Ebenezer Road was the only east-west artery available to Southern Four and that trucks visiting and leaving

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9 This one hundred truckload figure would eventually become an unexpected premise for further consideration on traffic impact throughout the hearing.

10 Timothy Ryan, Southern Four's traffic expert, would later opine that this point of access was actually superior to other potential points on Ebenezer Road.

the site would travel this route. Mr. Ryan described Ebenezer Road as a rural, two lane highway passing through rolling terrain. Mr. Ryan stated he would classify Ebenezer Road as narrow under current design criteria. (See Transcript, Vol. 3 at pp. 56-57). Mr. Ryan testified that his firm conducted traffic counts at the project site and at another location closer to Route 40 on the west. From his study, he was able to express an unqualified opinion that Southern Four's proposed use of the property would not have any effects either on traffic congestion or on traffic safety on Ebenezer Road in the area of the project site that were different and unique than those inherently associated with such as use irrespective of its location within the zone. (See Transcript, Vol. 3 at p. 25). Mr. Ryan concluded that the site distances at the point of ingress and egress to the property were superior to other possible access points along Ebenezer Road. (See Transcript, Vol. 3 at p. 26). He further indicated that these sight distances significantly exceeded current road design criteria. He also concluded that whatever impacts Southern Four's proposed use would have on traffic congestion on Ebenezer Road would be the same at the site as it would be anywhere else along Ebenezer Road. (See Transcript, Vol. 3 at p. 26). Interestingly, Mr. Ryan's opinion as to congestion was not premised on Mr. Stancill's uncontested testimony that any truck traffic that would come from the proposed use would merely be traffic redistributed from other mining operations but rather on a presumption that the truck traffic would be new or additional. Even though this premise was incorrect, Mr. Ryan still concluded that Ebenezer Road had

the capacity to absorb a hypothetical ten additional truck trips per hour. (See Transcript, Vol. 3 at pp. 29-35).

Under Schultz, the Board was required to find that traffic impacts of the proposed use at the proposed site would be different and unique from those inherent to the proposed use regardless of where that use might be located within the zone. Southern Four submits that the record reflects that there was no evidence that the proposed use would have any impact on traffic at the site, much less that this impact might be different and unique at the site and therefore more adverse on surrounding neighbors than at other locations in the zone. Southern Four submits that the Protestants' evidence as to traffic impact involves a false premise, that is, that there will be additional truck traffic. Furthermore, the Protestants' evidence fails the Schultz test requiring strong and substantial evidence of impact at the site unique and different than that which would generically occur from a mining operation. Again, once the record is reviewed carefully, it will be seen that the Protestants failed to develop any evidence to overcome Southern Four's presumption of validity.[11]

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11 Some of that evidence was, even under the most primitive evidentiary standards, admissible, grossly prejudicial and entitled to absolutely no weight. Nevertheless, the Board for its own reasons, permitted it into the record.

The first witness called by the Protestants to testify regarding traffic was Elmer Yingling (See Transcript, Vol. 4B at pp. 60-61). Mr. Yingling indicated that an unspecified number of neighborhood people conducted a traffic count along Ebenezer Road near Windless Run.[12] This unidentified team came up with figures substantially different than those determined by Kidde Consultants. Unlike Mr. Ryan, however, neither Mr. Yingling nor his unnamed, unidentified companions were qualified as experts in traffic engineering or traffic safety. Furthermore, Mr. Yingling's testimony itself and the results of the count are at best suspect. Mr. Yingling did not identify or describe the means or integrity of his counting methodology. Absent such evidence, the reliability or accuracy of the count is extremely questionable. Furthermore, the traffic count was conducted more than two miles from Southern Four's property. Accordingly, it involved a condition outside the neighborhood and was therefore irrelevant.

Mr. Yingling was the source of a second, and even more suspect, line of evidence. He testified that he was present at the time when a videotape (Protestants' Exhibit 10) was made of traffic passing across Windless Run and travelling

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12 The record reflects that Windless Run is about two miles to the west of Southern Four's proposed point of access on Ebenezer Road. As argued herein, Southern Four takes issue whether this geographical point qualifies as "neighboring or surrounding property" under the Schultz test. It is the only location the Protestants seriously claimed presented an issue of traffic safety.

along Ebenezer Road. He did not testify that he personally operated the video camera or that he even had any qualifications to do so. The bulk of the videotape of footage involved two views of Windless Run, first from west to east and next, from east to west. The balance of the videotape was apparently filmed from the back of a pick-up truck travelling eastbound along Ebenezer Road from Route 40 towards Eastern Avenue. (See Transcript, Vol. 4B at pp. 15-28).

Certainly, this Court will recognize from the transcript and the videotape itself that this line of evidence was inherently flawed, and either should not have been admitted or should have been disregarded. The videotape was not made by a technician qualified as an expert. In fact, the camera operator was later identified as the Protestants' attorney, Michael Tanczyn, who was never sworn to testify even though he frequently did so as the tape was shown to the Board. The videotape was replete with unexplained deletions and cuts (See e.g. Transcript, Vol. 4B at pp. 19-20). There was no mechanism incorporated to monitor the passage of time. Even so, the attorney for the Protestants, unsworn, acknowledged that he had the camera on only when traffic approached Windless Run, thus leaving the time intervals between passages of traffic unknown, and creating, by necessity through its compressed nature, an impression of more frequent and/or intense traffic patterns. Furthermore, the transcript reflects numerous hearsay comments from unidentified or unsworn witnesses, particularly the Protestants' attorney, as the tape was shown (See e.g. Transcript, Vol. 4B at pp. 19, 20, 21, 24 and 27). Under these

circumstances, the admission of the videotape into evidence was seriously questionable even under the most liberal standards governing administrative hearings. Furthermore, even if the videotape proves to have been properly admitted, the Board should have afforded it very limited weight because of its inherently flawed, biased and structured state.

Fortunately, it appears that the Board did just that because the Board did not mention Windless Run, the focal point of the videotape, at all in its Opinion. Rather, the Board merely concluded that "Ebenezer Road is basically the same rolling, winding and substandard road of 1978". (See Opinion at p. 11).[13]

Mr. Yingling also testified that Ebenezer Road, with the exception of a fairly recent blacktopping, was essentially the same as it had been since the 1960. (See Transcript, Vol. 4B at p. 31). Mr. Yingling could not testify personally as to any accidents occurring on Windless Run and admitted relying on hearsay for much of his knowledge about Windless Run. (See Transcript, Vol. 4B. at p. 37). When asked specifically about

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13 Along the same line, the Board gave great weight (which Southern Four contends was patently improper) to facts developed in Barkuloo, et al. v. Stancill Contracting Company that the road system and traffic patterns in the area have been unchanged for ten years and that this circumstance established as a matter of fact the existence of present adverse impacts on traffic.

hic concern regarding Southern Four's proposed use, Mr. Yingling testified "I feel everyone is going to have to be more careful if there is another hundred trucks a day on Ebenezer Road because of the winding nature of the road, particularly at Windless Run". (See Transcript, Vol. 4B at p. 56).[14] He admitted later that the extent of aggravation of an existing traffic condition depended significantly on the amount of additional truck traffic generated by Southern Four's operation and he further admitted that he did not know what the extent of that truck traffic would be.[15] (See Transcript, Vol. 4B at p. 55-60).

Earl Bolling also testified as to traffic conditions on Ebenezer Road. He testified generally as to alleged existing traffic congestion. (See Transcript, Vol. 4B at pp. 71-75). He admitted that Baltimore County widened the road at some point in time, partly to accomodate existing truck traffic. (See Transcript, Vol. 4B at p. 78). He also testified that he

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[14] This testimony again depends entirely on a false premise that Southern Four's proposed use will put an additional one hundred truck trips on Ebenezer Road, a premise with no basis or foundation.

[15] Furthermore, Mr. Yingling acknowledged that the Genstar mining operation, which is closer to his property than Windless Run, was on the outskirts of his neighborhood. (See Transcript, Vol. 4B at p. 61).

believed that additional truck traffic would aggravate traffic safety along Ebenezer Road. (See Transcript, Vol. 4B at pp. 74-75).

Harry Schlaicher testified very generally of alleged traffic congestion in the area of United Methodist Church. (See Transcript, Vol. 4B at p. 104). Mr. Schlaicher was familiar with one fatal accident on Ebenezer Road west of Earls' Road (See Transcript, Vol. 4B at p. 108). His main concern about traffic was the addition of more trucks to the roadway. (See Transcript, Vol. 4B at p. 118). Other witnesses, including William Barkuloo and Louis Winkler testified generally as to traffic safety and congestion along Ebenezer Road. Both of these witnesses expressed concern that any additional truck traffic on the roadway would be a threat to safety.

The key issue for this Court to consider is whether the Protestants offered any evidence to satisfy the Schultz test. Under Schultz, the Board was obligated to and should have recognized that there were certain inherent impacts that a sand and gravel mining operation would have on traffic. One of these inherent characteristics was that the traffic generated would primarily be truck traffic. Indeed, Mr. Yingling and others testified that much of the existing truck traffic along Ebenezer Road was associated with the Genstar and A.V. Williams operations. Southern Four specifically offered evidence of the traffic relating to these mining operations, not to legitimize its own proposed use, but rather to show that truck traffic is indigenous to a mining operation, and that there was existing

truck traffic on Ebenezer Road from other mining operations.[16]

Secondly, under Schultz, the Board was obligated to find, from strong and substantial evidence, that the impact of truck traffic from Southern Four's proposed use upon neighboring and surrounding properties was different and unique from that which would otherwise result if Southern Four's mining operation were located anywhere else in the zone. In that regard, the Board should have but never did define the concept of "neighborhood" to the facts of the case before it. Interestingly, the Court of Appeals in both Schultz and Holbrook limited the concept of "neighborhood" to properties immediately adjacent to or surrounding the proposed site.[17]

The Court of Appeals certainly contemplated that the concept of neighborhood was meant to be narrowly defined because the focal point of a special use exceptions case was the particular impact in the area of site. In Holbrook, the Court of Appeals very narrowly defined the neighborhood to involve only the single affected neighbor who could see the offending mobile home. Interestingly, the Court observed that had not the protesting neighbor been able to see the mobile home which

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[16] As noted, Southern Four hopes to capture a portion of that business from its competitors.

[17] Under this narrow standard, Mr. Ryan's testimony about the safety and traffic congestion at the point of access to Southern Four's property went unchallenged.

was the subject of the special use exception application, the application would most likely have been granted.[18]

Had the Board here followed the directive of the Court of Appeals, it would have concluded there was no evidence of particular impact on neighboring and surrounding properties. The Board, however, appears to have extended "neighborhood" to include the entire course of Ebenezer Road, a distance of almost three miles westward from Southern Four's point of access. Even traditional zoning cases dealing with applications for zoning reclassification do not define neighborhood this broadly. In that regard, the Protestants presented a host of general testimony and lay opinion that traffic of all kinds along all of Ebenezer Road (as opposed to the immediate vicinity of the project site) was troublesome. The Protestants' principal area of concern was Windless Run. At two miles away from the proposed site, Windless Run was certainly outside the neighborhood and therefore irrelevant under Schultz. At the hearing, none of the Protestants' witnesses testified as to any unique impacts on traffic safety or traffic congestion in the immediate vicinity of Southern Four's property. Such evidence was fundamental for the Protestants to overcome the presumption of validity Southern Four enjoyed under Schultz. And certainly, such evidence was fundamental to counter Timothy Ryan's expert

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[18] No doubt, the Court was able to say this because the mobile home was entitled to a presumption of validity absent evidence of unique and different impact at the site.

opinion that the impacts on congestion and traffic safety at the proposed site were, if not less than, certainly no greater than anywhere else in the zone. In the absence of any evidence that the impact of Southern Four's proposed use at the proposed site would be greater than if that proposed use were located elsewhere in the zone, the Board's denial of Southern Four's Petition was clearly arbitrary and capricious. Furthermore, the Board's consideration of impacts beyond the immediate neighborhood was clearly outside of its scope of authority and therefore also improper, arbitrary and capricious. For that reason, most of the videotape was irrevelant and its admission into evidence inappropriate. Furthermore, the Board should not have given weight to any of witness testimony of general traffic problems existant along Ebeneser Road other than at the site of the project.

THE BOARD ERRED AS A MATTER OF LAW IN GIVING ANY WEIGHT TO THE FACTS ESTABLISHED IN BARKULOO, ET AL. V. STANCILL CONTRACTING CO.

As previously noted, the Court disagreed with Southern Four's position that the findings and conclusions of the Court of Special Appeals in Barkuloo, et al. v. Stancill Contracting Co. were irrevelant to and inappropriate for the Board's consideration of Southern Four's current application. In particular, the Board gave specific weight to the findings by the trier of fact in Barkuloo that there were adverse traffic impacts in the affected area. (See Opinion at pp. 12-13).

Southern Four is not bound under the doctrines of res judicata or colleteral estoppel by the facts found by the Court of Special Appeals in Barkuloo for several reasons. First,

Southern Four established that it is a completely different and distinct legal entity from Stancill Contracting Company, the unsuccessful party in the Barkuloo case. In order for the legal principles of res judicata and/or collateral estoppel to apply, the Board necessarily had to find that Southern Four, which was not a party to the Barkuloo case, was in privity with Stancill Contracting Company. In fact, Southern Four was not even in existence at the time of the Barkuloo decision. Thus, it could not have been in privity with Stancill Contracting Company. For the Board to have concluded otherwise (See Opinion at p. 13) was clearly erroneous.

Secondly, the Board should not have (as it appears to have) applied the doctrine of collateral estoppel. As Southern Four showed, the standards which the Court of Special Appeals followed in Barkuloo were expressly overturned by the Court of Appeals in Schultz v. Pritts. In fact, the Schultz standard was so radically different from the Gowl standard that the whole process of presenting evidence to the zoning authority and the focus of that evidence changed with Schultz. The entire fact finding process after Schultz was required to be site specific. The Board acknowledged that the rules of the game had changed because of Schultz. Nevertheless, the Board accepted the fact-finding in Barkuloo, apparently presuming that fact-finding the process was subject to the same evidentiary standards. However, the evidentiary fact-finding process and underlying premises that should have governed this case after Schultz was entirely different than that which was applied is Barkuloo. Nevertheless, the Board missed this fundamental legal principal,

and thereby improperly relieved the Protestants of their burden of proving specific and unique harm. The Board was bound to consider Southern Four's application on its own merit, and not examine that application in light of factual conclusions reached in a case employing a completely different legal standard. Southern Four submits the Board clearly erred in giving any weight whatsoever to the facts of a prior case. Indeed, the Board made a fundamental error of law in concluding that the facts as established in Barkuloo were even relevant to these proceedings. By allowing their admission and consideration in this proceeding, the Board acted arbitrarily, capriciously and illegally.

THE BOARD ERRED AS A MATTER OF LAW IN DENYING SOUTHERN FOUR'S MOTION FOR DISQUALIFICATION AND SITTING IN JUDGMENT AT THE HEARING

On or about November 2, 1987, just prior to the commencement of the hearing, Southern Four filed a Motion for Disqualification seeking to have all the members of the Board disqualified and from sitting in judgment on this matter. The Board heard argument on Southern Four's Motion on November 4, 1987 and denied the Motion that day. Southern Four contends that the Board, as a matter of law, erred in reaching that conclusion.

As Southern Four's attorney pointed out, Southern Four filed its Motion for Disqualification with great circumspection. (See Transcript, Vol. 1 at p. 7). Southern Four's property was directly across Bird River Beach Road from property owned by William Hackett, the Chairman of the Board. Mr. Hackett had been a vehement protestant of efforts by Stancill Contracting

Company, Southern Four's predecessor in title, to obtain a special use exception to mine sand and gravel and was well known to be opposed to Southern Four's application. However, because the Board's decision was critical to Southern Four's future use of its property and involved an understanding and appreciation of certain sophisicated principles of law which, among other things, afforded Southern Four a presumption that its proposed use was valid, Southern Four felt it had no choice but to file this Motion. It was important to Southern Four that the Board members, who were appointed by the County Council and charged with the responsibility of sitting in judgment on appeals from decisions from the Zoning Commissioner, perform their duties with complete objectivity and fidelity to the process. Southern Four was concerned that the members of the Board who would sit in judgment of this matter could not objectively do so.

Mr. Hackett, of course, disqualified himself from sitting on the panel. So to did Thomas Bollinger, who determined that his law firm's prior legal relationship with Mr. Hackett created an appearance of impropriety which procluded his participation. As Southern Four's pointed out in its motion, the remaining five members of the Board, from which a panel of three was in fact chosen, were faced with a terrible conflict by being called upon to decide a matter which affected valuable property rights of their Chairman with whom they would have to work in the future, and from whom they would have to accept hearing assignments during the balance of their term.

As public officials, the remaining five Board members had a duty to the public to ensure that the administrative process was

as free from suspicion of unfairness or bias as possible. Montgomery County v. Walker, 228 Md. 574, 580 (1961). Indeed, public policy and general administrative law prohibited any member of the Board from sitting in judgment of a matter in which he had a personal or pecuniary interest that might influence his judgment. Montgomery County v. Walker, supra, 228 Md. at 580; Williams v. State, 315 P.2d 981 (Ariz. 1957).

In Montgomery County v. Walker, supra, Judge Sybert quoted with approval the following language in a Connecticut zoning case,:

> "***It is the policy of the law to keep the official so far from temptation as to ensure this unselfish devotion to the public interest. *** The modification of zoning regulations *** whether it be denominated leglislative or quasi-judicial, should command the highest public confidence, since zoning restrictions limit a person's free use of his real estate in the interest of the general public good. Anything which tends to weaken public confidence and to undermine the sense of security of individual rights which a citizen is entitled to feel is against public policy.***"

Id. at pp. 580-581, quoting with approval Mills v. Town Plan and Zoning Commission, 134 A.2d 250, 253 (Conn. 1957).

Southern Four believed that the five remaining members of the Board were required to disqualify themselves because they were in a terrible "Catch 22" situation. Southern Four was certain that no matter how objective the remaining five members promised to be, there was no way that they could be free from a suspicion of unfairness not only in the minds of one of the parties, but also in the minds of the public in general, who had a right to expect the system to be free from any inappropriate influence. As Judge Sybert further noted in Montgomery County

v. Walker, supra,:

> "*** Even when conduct would not actually produce distrust in the minds of others but might only create suspicion of unfairness in the mind of the party to which the decision was adverse, it is far better 'that no room be given for suspicion or cavil ***'".

Id. at 581, quoting from Koslow v. Board of Zoning Appeals, 112 A.2d 513, 515 (Conn. 1955).

What Southern Four feared in fact occurred. The Board's failure to appreciate or apply the Schultz standard to the facts of this case has in fact created a suspicion of unfairness in Southern Four's mind. The Board's decision certainly holds out to the public circumstances from which it might conclude that the system was not free from inappropriate influences. The fact is that the Board did not properly remove themselves from this dilema and permit the matter to be heard by a panel which was free from any appearance of impropriety. That circumstance was so fundamentally erroneous that it merits reversal and reconsideration of Southern Four's application.

CONCLUSION

As shown herein, the Appellant, Southern Four, Inc., was entitled to a presumption that its proposed use was valid. That presumption could only be overcome by strong and substantial evidence that the proposed use resulted in impacts on neighboring and adjoining properties that were unique, that is, more intense, than those impacts indigenous to that use and that would otherwise occur if that use were located elsewhere in the zone. The Protestants offered no such evidence, yet the Board found for the Protestants. This finding is simply erroneous under Schultz and should be overturned.

Furthermore, the Board gave weight to irrelevant matters, particularly the findings of fact in Barkuloo v. Stancill Contracting Company. This action was an abuse of discretion requiring reversal.

For these and all of the reasons cited in this Memorandum, the Appellant respectfully submits that decision of the Board be reversed, and that the findings of the Zoning Commission be reinstated.

Respectfully submitted,

Thomas C. Swiss

Michael E. Marr

MARR, SWISS & WOODS
Suite 900, 301 N. Charles Street
Baltimore, Maryland 21201
(301) 539-4252

Attorneys for The Southern Four, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 28 day of November, 1989, a copy of the aforegoing Memorandum was mailed, by first class mail, postage prepaid to Board of Appeals of Baltimore County, Room 315, County Office Building, 111 W. Chesapeake Avenue, Towson, Maryland 21204; Michael B. Tanczyn, Esquire, Suite 106, 606 Baltimore Avenue, Towson, Maryland 21204; and to Peter Max Zimmerman, Esquire, County Office Building, Suite 304, 111 W. Chesapeake Avenue, Towson, Maryland 21204.

Thomas C. Swiss

TCS/3P.16

IN THE MATTER OF THE APPLICATION OF THE SOUTHERN FOUR, INC. FOR A SPECIAL EXCEPTION ON PROPERTY BEGINNING AT THE CENTERLINE OF EBENEZER ROAD, 1248.75' EAST OF THE CENTERLINE OF BIRD RIVER BEACH ROAD 15TH ELECTION DISTRICT 5TH COUNCILMANIC DISTRICT THE SOUTHERN FOUR, INC., PLAINTIFF ZONING FILE #86-195-X	*	IN THE CIRCUIT COURT FOR BALTIMORE COUNTY CG Doc. No. 70 Folio No. 109 File No. 89-CG-2509

* * * * * * * * *

PROCEEDINGS BEFORE THE ZONING COMMISSIONER AND THE BOARD OF APPEALS OF BALTIMORE COUNTY

TO THE HONORABLE, THE JUDGE OF SAID COURT:

And now come Lawrence E. Schmidt, Harry E. Buchheister, Jr. and Henry H. Lewis, constituting the County Board of Appeals of Baltimore County, and in answer to the Order for Appeal directed against them in this case, herewith return the record of proceedings had in the above-entitled matter, consisting of the following certified copies or original papers on file in the office of the Zoning Commissioner of Baltimore County:

No. 86-195-X

October 18, 1985	Certificate of Posting of property - file.
October 21	Comments of Baltimore County Zoning Plans Advisory Committee - file.
October 24	Publication in newspapers- file.
November 7	Additional Zoning Plans Advisory Committee Comments - file.
December 12	Additional Zoning Plans Advisory Committee Comments - file.
January 21, 1986	Petition of The Southern Four, Inc. for Special Exception for controlled excavation and removal of sand and related materials.
February 6	Publication in newspaper - file.
February, 1986	Certificate of Posting of property - file.
February 26	Hearing held on Petition by the Zoning Commissioner.
November 20	Order of the Zoning Commissioner that the Petition for Special Exception for controlled excavation and removal of sand and related materials be GRANTED with restrictions.
November 26	Amended Order of the Zoning Commissioner.
January 23, 1987	Amended Order of the Zoning Commissioner.

February 10, 1987	Notice of Appeal received from People's Counsel for Baltimore County.
February 19	Notice of Appeal received from William Barkuloo, President, Bird River Civic Association.
November 4	Hearing on appeal before the Board of Appeals.
March 3, 1988	Continued Hearing before the Board.
June 21	Continued Hearing before the Board.
June 27	Requested Critical Area Recommendations from DEPRM.
October 26	Letter forwarding Recommendations from DEPRM and related documents to the Critial Area Commission in Annapolis.
January 3, 1989	Continued Hearing before the Board.
January 4	Completed Hearing before the Board.
February 22	People's Counsel Memorandum.
February 24	Petitioner's Post-Hearing Memorandum in Support of its Application for Special Exception.
February 24	Protestants' Post-Hearing Memorandum.
March 9	Petitioner's Memorandum in Reply to the Memorandum of Protestants and People's Counsel.
March 13	Amended Petitioner's Memorandum in Reply to the Memorandum of Protestants and People's Counsel (clerical error).
June 19	Opinion and Order of the Board ordering that the Petition for Special Exception be DENIED.
July 17	Order for Appeal by The Southern Four, Inc., Petitioner filed in the Circuit Court for Baltimore County by Michael E. Marr, Esquire and Thomas C. Swiss, Esquire.
July 27	Petition to accompany Order for Appeal filed in the Circuit Court for Baltimore County.
July 18	Certificate of Notice sent to all interested parties.
October 13	Transcript of testimony filed.
	Petitioner's Exhibit No. 1 - Record of the case from the Zoning Commissioner.
	" " " 2 - Map of area and subject site (IN BOARD'S CLOSET).
	" " " 3 - Environmental Impact Report.
	" " " 4 - Resume of Michael Clar, P.E.
	" " " 5 - Draft Plan Baltimore County Mineral Resources.
	" " " 6 - Map of Existing Land Use (II-14) of Impact Report (IN BOARD'S CLOSET).
	" " " 7 - Map of Proposed Mining Operation (IN BOARD'S CLOSET).
	" " " 8 - Map of Final Land Use.

	Petitioner's Exhibit No. 9 - Curriculum Vitae of Timothy A. Ryan, P.E.
	" " " 10 - Qualification of Bernard Page, Appraiser.
	" " " 11 - Report by Engineering Technologies Associates - Environmental Impact Report Addendum B including Plat 1.
	" " " 12 - Report by Engineering Technologies Associates - Critical Areas Findings Plan.
	Protestants' Exhibit No. 1 - List of names of people in attendance in opposition.
	" " " 2 - Disposition of Appeal in Court of Special Appeals.
	" " " 3 - Map - Site Drainage area of the site which is the same as II-17 in the Environmental Impact Report.
	" " " 4 - A & B - Data of Mr. Ryan's study of traffic - Vehicle Classification Count Sheets.
	" " " 5 - Record Extract from Court of Special Appeals brief showing aerial view of sand and gravel sites.
	" " " 6 - List of names of people in attendance on June 21, 1988.
	" " " 7 - List of names of people in attendance on January 3, 1989.
	" " " 8 - A through N - Aerial Photographs. (A-Bird River & Owens Creek & Bird River Beach Community & Earl's Beach, B-Bird River to Earl's Beach & Harewood Park)
	" " " 9 - A & B - Baltimore County Maps.
	" " " 10 - Video Tape of traffic on Ebenezer Rd.
	" " " 11 - Accident Report of Baltimore County Police.
	" " " 12 - Invoice from Frank's Well Drilling.
	" " " 13 - List of names of people in attendance on January 4, 1989.
	" " " 14 - A-Accident Count (1987) Ebenezer Road to Eastern Avenue.
	" " " 14 - B-Accident Count of 1983-1985 Ebenezer Road to Harewood.
	" " " 14 - C-Letter authorizing Mrs. Ecke to speak for Harewood Park Association.
	" " " 15 - Baltimore County Average Daily Traffic Count.
	" " " 16 - Order of Judge Fader (1980).

	Protestants' Exhibit No. 17 - Court of Special Appeals - Barkuloo v. Stancill (yellow booklet).
	" " " 18 - Writ of Certiorari - DENIED by Court of Appeals.
	" " " 19 - A through E - County Council of Baltimore County Bill Nos. 32-88, 33-88, 34-88, 35-88 and 41-88, respectively.
	" " " 20 - A-Resolution appointing Mr. Barkuloo.
	" " " 20 - B-Opposition to Petition.
	" " " 20 - C-Affidavit of Mr. Barkuloo.
	People's Counsel's Exhibit No. 1 - Letter from Gerber to Jablon. (February 6, 1986)
	" " " " 2 - Letter from Gerber to Jablon. (February 6, 1986)
	" " " " 3 - Three page letter from Gerber to Jablon dated March 13, 1986 regarding Chesapeake Bay Critical Area.
	Board's Exhibit No. 1 - Inter-office correspondence - Robert W. Sheesley.
October 13, 1989	Record of Proceedings filed in the Circuit Court for Baltimore County.

Record of Proceedings pursuant to which said Order was entered and upon which said Board acted are hereby forwarded to the Court, together with exhibits entered into evidence before the Board. However, all tangible material or evidence of an unwieldy or bulky nature will be retained in the Board of Appeals' office and upon request of the parties or the Court will be transmitted to the Court by whomever institutes the request.

Respectfully submitted,

Lindalee M. Kuszmaul, Legal Secretary
County Board of Appeals of Baltimore County

cc: Michael E. Marr, Esquire
Thomas C. Swiss, Esquire
The Southern Four, Inc.
Michael P. Tanczyn, Esquire
Mr. William A. Barkuloo, et al
Phyllis C. Friedman, Esquire

IN THE MATTER OF THE APPLICATION OF THE SOUTHERN FOUR, INC. FOR A SPECIAL EXCEPTION PROPERTY BEGINNING AT THE CENTERLINE OF EBENEZER ROAD, 1248.75' EAST OF THE CENTERLINE OF BIRD RIVER BEACH ROAD 15TH ELECTION DISTRICT 5TH COUNCILMANIC DISTRICT	*	IN THE CIRCUIT COURT OF MARYLAND FOR BALTIMORE COUNTY CIVIL ACTION NO.: 89-CG-2506 Zoning CAse No.: 86-195-X

* * * * * * * * * * * * *

ORDER

The Motion of the Appellant, Southern Four, Inc. having came before this Court, and good cause having been shown, it is this 1st day of August 1989,

ORDERED, that the time by which the Appellant must transmit the transcript of the hearing before the Board of Appeals be and is hereby extended until October 13, 1989.

Judge

TCS/3P.2/tl

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For Gloria Buttz
Deputy Clerk

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IN THE MATTER OF THE APPLICATION OF THE SOUTHERN FOUR, INC. FOR A SPECIAL EXCEPTION PROPERTY BEGINNING AT THE CENTERLINE OF EBENEZER ROAD, 1248.75' EAST OF THE CENTERLINE OF BIRD RIVER BEACH ROAD 15TH ELECTION DISTRICT 5TH COUNCILMANIC DISTRICT

* IN THE
* CIRCUIT COURT
* OF MARYLAND
* FOR BALTIMORE COUNTY
* CIVIL ACTION NO.: 89-CG-250G
* Zoning Case No.: 86-195-X

* * * * * * * * * * * * *

SOUTHERN FOUR, INC.'S MOTION FOR EXTENSION OF TIME TO FILE TRANSCRIPT

Southern Four, Inc., Appellant, by its undersigned attorneys, moves pursuant to the provisions of Rule B7 of the Maryland Rules of Procedure for an extension of time to file the transcript of the hearing before the Baltimore County Board of Appeals and, in support thereof states:

1. Southern Four, Inc. timely filed its Order for Appeal and Petition in the above captioned matter.

2. On August 2, 1989, the Appellant's counsel was advised by Carol Peatt, the Court Reporter, that the transcript of the hearing would total approximately 900 pages and could take more than thirty days to prepare. The Appellant has paid Ms. Peatt a substantial deposit for the preparation of this transcript. Ms. Peatt asked that counsel request an extension of sixty days to complete and submit the transcript.

3. As the record reflects, this matter took more than six full days to present and argue before the Board of Appeals. The issues are complicated and will require this Court to

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carefully consider the facts presented before the Board. The Court Reporter has advised she needs additional time to prepare the transcript and this request is understandable and justified.

WHEREFORE, Southern Four, Inc., Appellant, prays that this Court pass an Order extending the time for the transcript to be filed until October 13, 1989.

Respectfully submitted,

Michael E. Marr

Thomas C. Swiss
MARR, SWISS & WOODS
301 North Charles Street
Suite 900
Baltimore, Maryland 21201
(301) 539-4252

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11 day of August, 1989, a copy of the aforegoing Motion for Extension of Time to File Transcript was mailed first class, postage prepaid to Board of Appeals of Baltimore County, Room 315, County Office Building, 111 West Chesapeake Avenue, Towson, Maryland 21204; Michael B. Tanczyn, Esquire, Suite 106, 606 Baltimore Avenue, Towson, Maryland 21204; and Phyllis C. Friedman, Esquire, County Office Building, Suite 304, 111 West Chesapeake Avenue, Towson, Maryland 21204.

Thomas C. Swiss

TCS/3P.2/rl

IN THE MATTER OF THE APPLICATION OF THE SOUTHERN FOUR, INC. FOR A SPECIAL EXCEPTION PROPERTY BEGINNING AT THE CENTERLINE OF EBENEZER ROAD, 1248.75' EAST OF THE CENTERLINE OF BIRD RIVER BEACH ROAD 15TH ELECTION DISTRICT 5TH COUNCILMANIC DISTRICT

* IN THE
* CIRCUIT COURT
* OF MARYLAND
* FOR BALTIMORE COUNTY
* CIVIL ACTION NO.: 89-CG-250G
* Zoning Case No.: 86-195-X

* * * * * * * * * * * * *

ORDER

The Motion of the Appellant, Southern Four, Inc. having came before this Court, and good cause having been shown, it is this __ day of _____ 1989,

ORDERED, that the time by which the Appellant must transmit the transcript of the hearing before the Board of Appeals be and is hereby extended until October 13, 1989.

Judge

TCS/3P.2/rl

IN THE MATTER OF THE APPLICATION OF THE SOUTHERN FOUR, INC. FOR A SPECIAL EXCEPTION PROPERTY BEGINNING AT THE CENTERLINE OF EBENEZER ROAD 1248.75' EAST OF THE CENTERLINE OF BIRD RIVER BEACH ROAD 15TH ELECTION DISTRICT 5TH COUNCILMANIC DISTRICT

: IN THE CIRCUIT COURT
: FOR BALTIMORE COUNTY
: Case No. 89-CG-2509

: : : : : : : : :

PEOPLE'S COUNSEL'S ANSWER TO PETITION OF SOUTHERN FOUR, INC.

People's Counsel for Baltimore County, Protestant below and Appellee herein, answers the Petition of Southern Four, Inc., Appellant, in the above-captioned matter, as follows:

1. Appellee admits the allegations made and contained in the first, second, fifth, seventh, eighth and ninth paragraphs of said Petition.

2. Appellee denies the allegations made and contained in the third, fourth, sixth, tenth (and each subparagraph therein), and eleventh paragraphs of said Petition.

3. The Board properly rejected the Motion for Disqualification.

4. The decision of the Board was supported by substantial evidence, and was not arbitrary, capricious or unreasonable.

5. The Board's decision, moreover, was compelled because there was no significant change in circumstances, factual or legal, which would justify any departure from the prior Board decision denying the special exception on this property,

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which decision was affirmed in the Court of Special Appeals of Maryland.

WHEREFORE, the decision of the County Board of Appeals should be affirmed.

Phyllis Cole Friedman
People's Counsel for Baltimore County

Peter Max Zimmerman
Deputy People's Counsel
Room 304, County Office Building
111 W. Chesapeake Avenue
Towson, Maryland 21204
(301) 887-2188

I HEREBY CERTIFY that on this 14th day of August, 1989, a copy of the foregoing People's Counsel's Answer to Petition of Southern Four, Inc. was delivered to the Administrative Secretary, County Board of Appeals, Room 315, County Office Building, 111 W. Chesapeake Ave., Towson, MD 21204; and a copy mailed to Michael E. Marr, Esquire, and Thomas C. Swiss, Esquire, Marr, Swiss & Woods, 301 North Charles Street, Suite 900, Baltimore, MD 21201; and Michael P. Tanczyn, Esquire, Ssuite 106, 606 Baltimore Ave., Towson, MD 21204.

Peter Max Zimmerman

COPY

Law Offices
Michael P. Tanczyn, P.A.
Suite 106, 606 Baltimore Avenue
Towson, Maryland 21204
(301) 296-8823 (301) 296-8824
FAX (301) 296-8827

July 31, 1989

Baltimore County Circuit Court
County Courts Building
401 Bosley Avenue
Towson, MD 21204

Re Petition of Southern Four, Inc.
Case Number 89-CG-250G

Gentlemen

Enclosed herewith please find Protestants-Appellees' Answer to Petition of Southern Four, Inc. in the above captioned matter.

Very truly yours,

Michael P. Tanczyn

MPT/ed
Enclosure

cc Michael E. Marr, Esq. and
Thomas C. Swiss, Esq.
Phyllis Cole Friedman, Esq.
Baltimore County Board of Appeals
Mr. William Barkuloo
Mr. Elmer E. Yingling

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IN THE MATTER OF THE APPLICATION OF THE SOUTHERN FOUR, INC. FOR A SPECIAL EXCEPTION PROPERTY BEGINNING AT THE CENTERLINE OF EBENEZER ROAD 1248.75' EAST OF THE CENTERLINE OF BIRD RIVER BEACH ROAD 15th ELECTION DISTRICT 5th COUNCILMANIC DISTRICT

* IN THE CIRCUIT COURT
* FOR BALTIMORE COUNTY
* Zoning Case No. 86-195-X
* Case No. 89-CG-250G

* * * * * * * * * * * * *

PROTESTANTS-APPELLEES' ANSWER TO PETITION OF SOUTHERN FOUR, INC.

NOW COMES, Bird River Community Association, et al, Protestants-Appellees, by their attorney, Michael P. Tanczyn, Esq., and for answer to the Petition of Southern Four, Inc., states

1. That they admit the allegations contained in paragraphs numbered "1", "2", "5", "7" and "8" of the Petition.

2. That as to paragraph numbered "3" they admit that an appeal was taken but deny the Appellant's characterization of the Appellees' grounds for objections to Petitioner's proposal which were numerous and include those stated plus many more.

3. That they deny the allegations contained in paragraph numbered "4" of the Petition.

4. That as to paragraph numbered "6", they admit that Petitioner moved to recuse the entire Board but generally deny the remaining allegations other than admitting that the Board denied the Petitioner's motion, which speaks for itself upon review.

Further answering they state that following the denial of its motion, the Petitioner proceeded and, at the conclusion of the case, advised the Board through counsel that it felt it had received a fair hearing.

5. That they are without knowledge as to the allegations contained in paragraph numbered "9" of the Petition since the Petitioner did not forward any copy of the Order to the Appellees.

6. That as to the allegations of paragraph numbered "10", they deny those allegations. Further answering they state that the Board as an administrative body took exhaustive testimony over five full hearing days and within the discretion afforded it under appurtenant case law denied the Petition of Southern Four, Inc.

7. That paragraph numbered "11" states its opinion that the Board of Appeals was incorrect and should be reversed and the decision of the Zoning Commissioner should be reinstated, which does not require an answer as it is the Appellant's opinion as contrasted to a factual allegation.

WHEREFORE, the Protestant-Appellees respectfully pray that the decision of the Board of Appeals be affirmed.

MICHAEL P. TANCZYN, ESQ.
Attorney for the Appellees
Suite 106, 606 Baltimore Avenue
Towson, Maryland 21204
Telephone (301) 296-8823

I HEREBY CERTIFY that, on this 31st day of July, 1989, a copy of the foregoing was mailed, postage prepaid, to Michael E. Marr, Esq. and Thomas C. Swiss, 301 North Charles Street, Suite 900, Baltimore, Maryland, 21201, attorneys for the Appellants; to Phyllis Cole Friedman, Esq., Baltimore County People's Counsel, County Office Building, Room 304, 111 West Chesapeake Avenue, Towson, Maryland, 21204; and to Board of Appeals of Baltimore County, County Office Building, Room 315, 111 West Chesapeake Avenue, Towson, Maryland, 21204.

MICHAEL P. TANCZYN, ESQ.

7-28-89

IN THE MATTER OF THE APPLICATION OF THE SOUTHERN FOUR, INC. FOR A SPECIAL EXCEPTION PROPERTY BEGINNING AT THE CENTERLINE OF EBENEZER ROAD, 1248.75' EAST OF THE CENTERLINE OF BIRD RIVER BEACH ROAD 15TH ELECTION DISTRICT 5TH COUNCILMANIC DISTRICT	*	IN THE
	*	CIRCUIT COURT
	*	OF
	*	BALTIMORE COUNTY
	*	CIVIL ACTION NO.: 89-CG-250G
	*	Zoning Case No.: 86-195-X

* * * * * * * * * * * * *

PETITION OF SOUTHERN FOUR, INC.

Southern Four, Inc., Petitioner, by its undersigned attorneys, pursuant to Rule B2(e) of the Maryland Rules of Procedure, hereby submits the following Petition in Support of its Order of Appeal filed on July 17, 1989. Petitioner respectfully states:

1. On or about September 30, 1985, the Petitioner filed an Application for a Special Exception regarding the zoning of its property located in eastern Baltimore County beginning at the centerline of Ebenezer Road, 1248.75' east of the centerline of Bird River Beach Road, 15th Election District, 5th Councilmanic District. The subject property is zoned R.C.2 and R.C.20 and is located at the northeast corner of Ebenezer road and Bird River Beach Road. The Petitioner in its application sought a special exception to conduct a controlled excavation and remove sand and related materials from the site.

2. On or about January 23, 1987, the Zoning Commissioner passed an Amended Order, which clarified an earlier Order of November 20, 1986, granting the special exception, with

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restrictions.

3. An appeal of the Zoning Commission's Amended Order was taken to the County Board of Appeals by the Bird River Civic Association, Appellant, which contended that the proposed excavation operation violated the standards governing special exceptions contained within Section 502.1 of the Baltimore County Zoning Regulations (B.C.Z.R.) and would be detrimental to the health, safety and general welfare of the residents in the involved locality and would create traffic congestion.

4. Thereafter, The People's Counsel of Baltimore County filed an interpleader and became a party- Appellant.

5. The hearing before the Board of Appeals commenced on November 3, 1987 and concluded after five hearing dates.

6. At the outset of the proceeding, prior to any testimony, the Petitioner moved to recuse the entire Board of Appeals, including the panel sitting in judgment at this hearing. The grounds for the Motion was that the no member of the Board of Appeals, including those members of the panel hearing the case (Schmidt, Buckheister & Lewis), could objectively consider an application which impacted the property of William Hackett, the Chairman of the Board of Appeals. Mr. Hackett's property was directly across Bird River Beach Road from the excavation site. Mr. Hackett had publically expressed vehement objections to the proposed use. After a hearing, the Board denied the Petitioner's Motion.

7. Following the conclusion of all testimony, the parties submitted Memoranda in support of their respective positions.

8. On or about June 19, 1989, the Board of Appeals issued an Opinion denying the Petition For Special Exception.

9. On July 17, 1989, the Petitioner duly filed an Order for Appeal of the Board's June 19, 1989 Opinion pursuant to the provisions of Maryland Rule B2(a).

10. The Petitioner submits that the Board of Appeal's Opinion and Order is erroneous and should be reversed, and that the decision of Zoning Commissioner should be reinstated, on the following grounds:

A. That the Board of Appeals erred, as a matter of law, in denying the Petitioner's Motion to Recuse.

B. That the Board erred, as a matter of law, in applying the principles and standards of Maryland law governing applications for zoning exceptions (as espoused in Schultz v. Pritts, 291 Md. (1981), and consistently followed in subsequent appellate cases) to the facts of the case. In particular, but not in limitation, the Petitioner contends that the Board failed to properly apply the Schultz standard to the issues of impact on domestic water supplies, traffic and residential real property values.

C. That the Board of Appeals erred as a matter of law in allowing certain inadmissable testimony and evidence into the record regarding alleged adverse impacts on domestic water supplies, traffic and resident real estate values.

D. That the Board of Appeals abused its discretion in finding that there were sufficient facts in evidence to support the conclusion that the proposed use at the proposed site would

have adverse impacts on domestic water supplies, traffic or residential real estate values which were above and beyond those inherently associated with the proposed use regardless of where that use might be located within the zone.

E. That the Board of Appeals erred, as a matter of law, in finding that the decision in William T. Barkuloo, et al. v. Stancill Contracting Company, an Unreported Opinion of the Court of Special Appeals of Maryland, Case No. 383, September Term 1978, (which case concerned an earlier application for special exception as to this same property by a prior owner) had effect on the disposition of this case. The Barkuloo case was decided before Schultz v. Pritts and its progency and followed a standard which was overturned in Schultz.

F. That the Board of Appeals erred, as a matter of law, in shifting the burden of proof regarding adverse impacts to the Petitioner.

G. That tne Board abused its discretion in affording any weight to evidence and testimony presented by the Appellants below regarding alleged adverse impacts on domestic water supplies, traffic and residential real estate values.

11. That Petitioner respectfully submits that because of the errors listed above, the decision of the Board of Appeals is incorrect and should be reversed, and that the decision of the Zoning Commissioner should be reinstated.

WHEREFORE, your Petitioner respectfully prays:

1. That this Honorable Court, after due consideration of the merits, as presented in Briefs to be filed, pass an Order

reversing the decision of the Board of Appeals and reinstating the decision of the Zoning Commissioner granting the Petitioner's Application for a Special Exception.

2. That this Honorable Court set this matter in for a scheduling conference to set the date for submission of Briefs and oral argument.

3. That this Honorable Court grant such other and further relief as the nature of this case may require.

Michael E. Marr

Thomas C. Swiss
MARR, SWISS & WOODS
301 North Charles Street
Suite 900
Baltimore, Maryland 21201
(301) 539-4252

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28 day of July, 1989, a copy of the foregoing Petition of Southern Fourt, Inc. was hand-delivered to the Board of Appeals of Baltimore County, Room 315, County Office Building, 111 West Chesapeake Avenue, Towson, Maryland 21204; Michael B. Tanczyn, Esquire, Suite 106, 606 Baltimore Avenue, Towson, Maryland 21204 and to Phyllis C. Friedman, Esquire, County Office Building, Suite 304, 111 West Chesapeake Avenue, Towson, Maryland 21204.

Thomas C. Swiss

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7-18-89

IN THE MATTER OF THE APPLICATION OF THE SOUTHERN FOUR, INC. FOR A SPECIAL EXCEPTION ON PROPERTY BEGINNING AT THE CENTERLINE OF EBENEZER ROAD, 1248.75' EAST OF THE CENTERLINE OF BIRD RIVER BEACH ROAD 15TH ELECTION DISTRICT 5TH COUNCILMANIC DISTRICT	*	IN THE CIRCUIT COURT
	*	FOR BALTIMORE COUNTY
	*	CG Doc. No. 70
	*	Folio No. 109
	*	File No. 89-CG-2509

* * * * * * * * *

CERTIFICATE OF NOTICE

Madam Clerk:

Pursuant to the provisions of Rule B-2(d) of the Maryland Rules of Procedure, Lawrence E. Schmidt, Harry E. Buchheister, Jr. and Henry H. Lewis, constituting the County Board of Appeals of Baltimore County, have given notice by mail of the filing of the appeal to the representative of every party to the proceeding before it; namely, Michael E. Marr, Esquire and Thomas C. Swiss, Esquire, Marr, Swiss & Woods, 301 N. Charles Street, Suite 900, Baltimore, Maryland 21201, Counsel for Petitioner; The Southern Four, Inc., 499 Mountain Hill Road, Perryville, Maryland 21903, Petitioner; Michael P. Tanczyn, Esquire, 606 Baltimore Avenue, Suite 106, Towson, Maryland 21204, Counsel for Protestants; Mr. William A. Barkuloo, President, Bird River Civic Association, et al, 6612 Blackhead Road, Baltimore, Maryland 21220, Protestants; Phyllis C. Friedman, Esquire, People's Counsel for Baltimore County, County Office Building, Room 304, 111 W. Chesapeake Avenue, Towson, Maryland 21204 and Arnold G. Foreman, Esquire, c/o County Board of Appeals of Baltimore County, County Office Building, Room 315, 111 W. Chesapeake Avenue, Towson, Maryland 21204, a copy of which Notice is attached hereto and prayed that it may be made a part hereof.

LindaLee M. Kuszmaul, Legal Secretary
County Board of Appeals of Baltimore County, Room 315, County Office Building, Towson, Maryland 21204
(301) 887-3180

I HEREBY CERTIFY that a copy of the aforegoing Certificate of Notice has been mailed to Michael E. Marr, Esquire and Thomas C. Swiss, Esquire, Marr, Swiss & Woods, 301 N. Charles Street, Suite 900, Baltimore, Maryland 21201, Counsel for Petitioner; The Southern Four, Inc., 499 Mountain Hill Road, Perryville, Maryland 21903, Petitioner; Michael P. Tanczyn, Esquire, 606 Baltimore Avenue, Suite 106, Towson, Maryland 21204, Counsel for Protestants; Mr. William A. Barkuloo, President, Bird River Civic Association, et al, 6612 Blackhead Road, Baltimore, Maryland 21220, Protestants; Phyllis C. Friedman, Esquire, People's Counsel for Baltimore County, County Office Building, Room 301, 111 W. Chesapeake Avenue, Towson, Maryland 21204 and Arnold G. Foreman, Esquire, c/o County Board of Appeals of Baltimore County, County Office Building, Room 315, 111 W. Chesapeake Avenue, Towson, Maryland 21204 on this 18th day of July, 1989.

LindaLee M. Kuszmaul, Legal Secretary
County Board of Appeals of Baltimore County

7-17-89

IN THE MATTER OF THE APPLICATION OF THE SOUTHERN FOUR, INC. FOR A SPECIAL EXCEPTION PROPERTY BEGINNING AT THE CENTERLINE OF EBENEZER ROAD, 1248.75' EAST OF THE CENTERLINE OF BIRD RIVER BEACH ROAD 15TH ELECTION DISTRICT 5TH COUNCILMANIC DISTRICT

* IN THE
* CIRCUIT COURT
* OF
* BALTIMORE COUNTY
* CIVIL ACTION NO.:
*

* * * * * * * * * * * * *

ORDER FOR APPEAL BY THE SOUTHERN FOUR, INC., PETITIONER

MR. CLERK:

Please enter an appeal by The Southern Four, Inc., Appellant, to the Circuit Court of Baltimore County from the Opinion of the County Board of Appeals of Baltimore County, Case No. 86-195-X, entered on June 19, 1989.

Michael E. Marr

Thomas C. Swiss
MARR, SWISS & WOODS
301 North Charles Street
Suite 900
Baltimore, Maryland 21201
(301) 539-4252

TCS/2P.33/rl

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COUNTY BOARD OF APPEALS
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7-17-89

IN THE MATTER OF THE APPLICATION OF THE SOUTHERN FOUR, INC. FOR A SPECIAL EXCEPTION PROPERTY BEGINNING AT THE CENTERLINE OF EBENEZER ROAD, 1248.75' EAST OF THE CENTERLINE OF BIRD RIVER BEACH ROAD 15TH ELECTION DISTRICT 5TH COUNCILMANIC DISTRICT

* IN THE
* CIRCUIT COURT
* OF
* BALTIMORE COUNTY
* CIVIL ACTION NO.:
*

* * * * * * * * * * * * *

CERTIFICATE OF COMPLIANCE

I, THOMAS C. SWISS, one of the attorneys for The Southern Four, Inc., hereby certify that on the 17 day of July, 1989 I caused a copy of the Order for Appeal by The Southern Four, Inc., to be served upon the Board of Appeals of Baltimore County by hand-delivering the same to the offices of the Board of Appeals, County Office Building, Room 315, 111 West Chesapeake Avenue, Towson, Maryland 21204, in care of Lawrence E. Schmidt, Acting Chairman.

Thomas C. Swiss
MARR, SWISS & WOODS
301 North Charles Street
Suite 900
Baltimore, Maryland 21201
(301) 539-4252

Attorneys for The Southern Four, Inc.

TCS/2P.34/rl

MARR & BENNETT
ATTORNEYS AT LAW
SUITE 430
10 NORTH CALVERT STREET
BALTIMORE, MD 21202
(301) 539-4250

RE: PETITION FOR SPECIAL EXCEPTION

Beginning in the Center of Ebenezer Road, 1248 75 E of the Center of Bird River Beach Road 15th District

THE SOUTHERN FOUR, INC.

Petitioner

* BEFORE THE
* ZONING COMMISSIONER
* OF
* BALTIMORE COUNTY
* Case No: 86-195-X
*
*

* * * * * * * * * * * * *

MOTION FOR POSTPONEMENT OF HEARING

The Southern Four, Inc., Petitioner, by its undersigned attorneys, pursuant to Board Rule 2(b), moves for a postponement of the hearing in the above-captioned matter scheduled for March 3, 1988 on the following grounds:

1. The Petitioner filed a Petition for Special Exception on or about September 30, 1985.

2. On or about November 12, 1985, a public hearing was held before the Zoning Commissioner. On November 20, 1986, the Zoning Commissioner issued a decision which was amended by Order dated January 23, 1987.

3. On or about February 10, 1987, People's Counsel for Baltimore County served Notice that it was taking an appeal of the Zoning Commissioner's decision on behalf of the Protestants.

4. The hearing on the appeal in the above case commenced on or about October 29, 1987. Testimony was not concluded on October 29, 1987; and the matter was therefore continued to the next available date, March 3, 1988 and March 8, 1988.

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BALTIMORE, MD 21202
(301) 539-4250

5. At the time that the matter was rescheduled for continuation, counsel for the Petitioner, Michael E. Marr, did not have any conflict existing on his calendar. Mr. Marr was scheduled for a two-week jury trial commencing February 1, 1988. Marr v. Langhoff, et al., Circuit Court for Baltimore City, Case No. 86030075/CL45614. However, it was anticipated that case would end at least two weeks prior to the continuation of the instant case.

6. Because of Motions filed by counsel for the Defendant in the Marr v. Langhoff case, however, trial did not commence until February 15, 1988. Furthermore, counsel for the Defendan in Marr v. Langhoff became ill with the flu during trial; and the case was therefore recessed for three days. The case is still ongoing as of the date of this Motion.

7. As of the date hereof, counsel for the Petitioner is unsure whether Marr v. Langhoff will conclude as of March 3, 1988.

8. On February 24, 1988, counsel for the Petitioner contacted People's Counsel and counsel for the Protestants to advise them of this situation. Counsel for the Protestants advised the undersigned that the Protestants have numerous scheduling conflicts, including work commitments and bus schedules, that need to be addressed immediately if the case is to be postponed and asked counsel for the Petitioner to advise him immediately whether a postponement will be necessary. Counsel for the Petitioner cannot say with certainty that Marr v. Langhoff will be concluded by March 3.

9. In light of the fact that the Protestants apparently do have work committments and charter bus arrangements that need to be addressed, the Petitioner has determined to request the postponment of the March 3, 1988 hearing date even though Mr. Marr may ultimately prove to be available on that date. The Petitioner, however, does request that the March 8, 1988 date should remain on the Board's calendar.

10. For all of the above reasons, the Petitioner respectfully requests that the hearing scheduled for March 3, 1988 be postponed and that the matter be continued for hearing on March 8, 1988.

Respectfully submitted,

Michael E. Marr

Thomas C. Swiss

MARR & BENNETT
Suite 430
10 North Calvert Street
Baltimore, Maryland 21202
(301) 539-4250

Attorneys for Petitioner

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COUNTY BOARD OF APPEALS
1988 FEB 26 P 3:56

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26 day of February, 1988, a copy of the foregoing Motion was mailed, postage prepaid, to Phyllis C. Friedman, Esquire and Peter Max Zimmerman, Esquire, Room 223, Courthouse, Towson, Maryland 21204; William A. Bathelus, 6612 Blackhead Road, Baltimore, Maryland 21220; Kimberly A. Tanczyn, Esquire, Suite 106, Baltimore Avenue,

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ATTORNEYS AT LAW
SUITE 430
10 NORTH CALVERT STREET
BALTIMORE, MD 21202
(301) 539-4250

Towson, Maryland 21204; William Losden, P.O. Box 130, Chase, Maryland 21027; and to Patricia Ecke, 12929 Community Road, Baltimore, Maryland 21220.

Thomas C. Swiss

TCS/A.20:sh

RECEIVED
COUNTY BOARD OF APPEALS
1988 FEB 26 P 3:56

MARR & BENNETT
ATTORNEYS AT LAW
SUITE 430
10 NORTH CALVERT STREET
BALTIMORE, MD 21202
(301) 539-4250

RE: PETITION FOR SPECIAL EXCEPTION

Begining in the Center of Ebenezer Road, 1248 75 E of the Center of Bird River Beach Road 15th District

THE SOUTHERN FOUR, INC.,

Petitioner

* BEFORE THE
* ZONING COMMISSIONER
* OF
* BALTIMORE COUNTY
* Case No. 86-195-X
*
*

* * * * * * * * * * * * *

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR DISQUALIFICATION

The Southern Four, Inc., Petitioner, by its undersigned attorneys, submits the following Memorandum of Law in support of its Motion for Disqualification.

Statement Of The Case

This matter is presently before the Board of Appeals on an appeal from the Zoning Commissioner's grant of a Petition for a Special Exception allowing Petitioner to use the subject property for controlled excavation and mining of sand and related minerals.

Statement Of Facts

The involved property has been the subject of a long, involved history of disputes between its owners and its surrounding neighbors regarding its proposed use for controlled excavation and mining, a use allowed by special exception. The present Chairman of the Board of Appeals, William Hackett, owns property directly across Bird River Beach Road from the Petitioner's property. He has been intimately involved both as a property owner and advocate on behalf of other property owners

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in opposition to efforts by the Petitioner and its predecessors to obtain a special exception.

Argument

The Board of Appeals is appointed by the County Council, and is charged with the responsibility, among other things, of sitting in judgment on appeals from decisions of the Zoning Commissioner. When each member of the Board accepted his position on the Board, he or she assumed a responsibility to perform the duties imposed upon him or her with complete fidelity. Public policy and general administrative law prohibit a member from sitting in judgment where he or she has a personal or pecuniary interest in the matter before them which might influence his or her decision. Montgomery County v. Walker, 228 Md. 574, 580 (1961); Williams v. State, 315 P.2d 981 (Ariz. 1957).

In Montgomery County v. Walker, supra, Judge Sybert quoted with approval the following language from a Connecticut zoning case,:

> "***It is the policy of the law to keep the official so far from temptation as to ensure his unselfish devotion to the public interest. ***The modification of zoning regulations *** whether it be denominated legislative or quasi-judicial, should command the highest public confidence, since zoning restrictions limit a person's free use of his real estate in the interest of the general public good. Anything which tends to weaken public confidence and to undermine the sense of security of individual rights which a citizen is entitled to feel is against public policy. ***"

Id at pp. 580-581, quoting with approval Mills v. Town Plan and Zoning Commission, 134 A. 2d 250, 253 (Conn. 1957).

In the instant case, Mr. Hackett clearly is in a position which

IN THE MATTER OF THE APPLICATION OF SOUTHERN FOUR, INC. FOR SPECIAL EXCEPTION FOR CONTROLLED EXCAVATION AND REMOVAL OF SAND AND RELATED MATERIALS Beginning at the C/L of Ebenezer Rd., 1228.75' E of C/L of Bird River Beach Rd., 15th District

BEFORE THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY

Zoning Case No. 86-195-X

PETITIONER'S MEMORANDUM IN REPLY TO THE MEMORANDA OF PROTESTANTS AND PEOPLE'S COUNSEL

Southern Four, Inc., Petitioner, by its undersigned attorneys, respectfully submits the following Memorandum in Reply to the Memoranda submitted by the Protestants and by the People's Counsel.

INTRODUCTION [1]

PETITIONER'S REPLY TO THE PROTESTANTS' MEMORANDUM

Not unexpectedly, the Protestants [2] argue that the case of Barkuloo v. Stancill Contracting Company (See Protestant's Memorandum, at page 2) prohibits the Board from granting the Petitioner's application here (See Protestants' Memorandum, at page 15). This argument is easily disposed of both on the law and the facts.

[1]. For the sake of clarity, the Petitioner will respond to the arguments presented by the Protestants and by People's Counsel in their Memoranda separately. Petitioners will, on occasion, refer to its original Post-Hearing Memorandum as "Petitioner's Original Memorandum".

[2]. While the Protestants have suggested that there are five enumerated communities around the Petitioner's property, the only communities of record as Protestants are Bird River Association and Hazelwood Park

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As authority for their position, the Protestants cite Randolf Hill, Inc. v. Whitley, 249 Md. 78 (1968) and Polinger v. Briefe, 244 Md. 538 (1966). Both of these cases involved an applicant for rezoning who had alleged that there had been a mistake in the original zoning and argued re-zoning was justified because of a material change in the character of the neighborhood. [3] The case at bar has nothing whatsoever to do with any of the issues presented in those cases. The Petitioner here is not suggesting that there was a mistake in the zoning maps or classifications. It is not suggesting that the Court of Appeals erred in Barkuloo. Indeed, it is not even seeking rezoning. What the Petitioner is asserting is (1) that Southern Four, Inc. is a completely different and distinct legal entity from Stancill Contracting Company, the party which was unsuccessful in obtaining a special exception in 1978 after a four year battle and (2) that the standard expressed by the Court of Appeals in Schultz v. Pritts in 1981 was a new and radical departure from that by which

[3]. The Petitioner anticipated that the Protestants would raise this argument. Early in these preceedings, the Protestants made reference to the case of Woodlawn Area Cit. Ass'n, the Board of County Comm'rs, 241 Md. 187 (1966), yet another case involving multiple applications for re-zoning based on changed circumstances. The Court in Woodlawn concluded that the principles of res judicata and fairness barred the Prince George's County District Council from re-zoning the parcel in question because there were no changed circumstances in the character of the community. Here, the principle of res judicata simply cannot apply because (1) the property owner seeking the relief by way of special exception (a proceeding entirely distinct from re-zoning) is not the same; (2) the nature of the relief sought is not the same; and (3) the governing law is not the same.

applications for special exceptions had previously been considered. As this Board has ruled, the Petitioner's application is to be considered on its own merits according to the law existing at the time the application is decided. The Petitioner is confident that this Board will do just that.[4]

The Site Plan

After a lengthly recitation of what they perceive to be the applicable law, (See Protestant's Memorandum, at page 13) the Protestants argue that the Petitioner failed to meet the Zoning Commissioner's requirements by not updating its Site Plan to show the current zoning for the subject property and its adjacent neighbors. The current zoning went into effect several months before the final hearing date. The Petitioner advised this Board at the close of the evidence that it was prepared to update its Site Plan if the Board determined that was necessary. Furthermore, even if the Petitioner were required to update the Site Plan, any failure to do so is technical and would elevate form over substance. The new zoning maps have not substantively changed the nature of the

[4]. The Protestants also pointed out that the Petitioner initially sought to recuse the entire Board at the outset of this case (Protestants Memorandum, at page 1). As Petitioner's counsel argued, the Petitioner sought this relief with great circumspection, out of concern that this Board might not be able to disengage itself from the influence of its Chairman, William Hackett, who owned property immediately adjacent to the subject property and who had previously expressed vehement objection to the use of the property for mining sand and gravel. This Board has since allayed the Petitioner's fears.

zoning for either the Petitioner's property or that of the adjacent property owners. The Petitioner's property is still zoned "resource conservation" (RC-2 and RC-20). Both categories still require issuance of a special exception for controlled excavation.

The Protestants suggestion that this circumstance is an example of the Petitioner having disregarded procedural obligations throughout these proceedings is uncalled for and unfounded. The hearings process alone has been one of extraordinary length, taking almost two years to complete. In that time, the County has passed at least two additional sets of regulations which the Petitioner has been required to satisfy. Compliance with these new stringent regulations (the substance of which the Petitioner has no quarrel with) has cost the Petitioner more than $10,000.00 to environmental and other experts for studies, data analyses, and reports. As to the latest of these, the Baltimore County Department of Environmental Protection and Resource Management (DEPRM) approved the Petitioner's project and plan without qualification. Contrary to the Protestants' misleading assertions (See Protestant's Memorandum, at pages 13-14), the Petitioner's compliance with DEPRM requirements including meeting the County's requirements as to habitat.[5]

[5]. Representative of ETA met with County representatives during the submission process, and were advised the property was not the habitat of any rare or endangered species and there was no problem in this regard. For that reason the Critical Areas Plan was silent as to habitat.

The Period During Which The Property Will Be Mined

The Protestants argue that the application must be denied because the evidence regarding length of time over which the property will be mined was vague and inconsistent. This argument is factually incorrect. It is clear from applicable County law governing the critical areas that the Petitioner can only mine that property for a maximum of 25 years before returning it to agricultural use, and that the Petitioner's plan was approved subject to this qualification.

Traffic

The Protestants' argument that the Petitioner's use will result in adverse impacts on traffic patterns in the area is also misplaced. While the Petitioner was not required to show any change in the traffic patterns in the area (since its burden was only to show that its use would not create a particular adverse impact at the site of the property over and above any impact that would be created if the use were located anywhere else in the zone), it did introduce evidence to show that the its use would not add significant traffic to the existing road system, much less at the project site. Terry Stancill testified that most of the trucks that would frequent the Petitioner's facility would otherwise frequent the facilities of Genstar or A.V. Williams. He further testified that the trucks were already on Ebeneezer Road, regardless of whether the Petitioner ever conducts mining operations on the subject property. Since most of the developments that use Ebeneezer Road to access Route 40 are

to the west of the Petitioner's site, these trucks will be on the road before any of the other traffic and not after. Furthermore, using the figures to which Mr. Stancill and Mr. Ryan testified, an average of only four to seven full truckloads per hour will exit the Petitioner's facility onto Ebeneezer Road. Mr. Ryan testified that in his opinion, the Petitioner's proposed use, would have virtually no impact on the whole road system, (much less at the project site). The Protestants offered no cogent rebuttal evidence to counter this opinion. With regard to the road system, it is uncontraverted that the trucks will not be using Bird River Beach Road, the access road to the Protestants' communities.

As to Windless Run, the Board should first note that this very short bridge is far outside the neighborhood where the Petitioner's property lies. For this reason alone, any alleged dangerous condition existing at Windless Run is irrelevant to this dispute (See Schultz v. Pritts, infra). Futhermore, The Protestants presented no real evidence that the bridge over Windless Run is misaligned or dangerous. The Protestants offer no credible evidence of a history of accidents at the site. No witness testified as to having been involved in an accident at Windless Run. The only evidence of accidents was the purest of hearsay. And, as the Petitioner noted in its Original Memorandum, the Protestants' own videotape, even with all of its evidentiary shortcomings, showed both how and why Windless Run has no history of accidents. (See Petitioner's Original Memorandum, at page 10).

In addition, there is no evidence that a dangerous condition exists at or near the point of ingress and egress to the Petitioner's property. The fatal accident to which the Protestants refer occurred to the east of the Petitioner's point of access. Furthermore, the police report which the Protestants introduced indicates that the accident occurred because of operator negligence.[6] There is no evidence that a dangerous road condition contributed to this accident. The Protestants statement that a "high bank" (See Protestants Memorandum, at page 9) across Ebeneezer Road played some part in this accident is made entirely out of whole cloth. There is no factual support in the record for this statement and it should be disregarded entirely.

Schultz v. Pritts

Both the Protestants and People's Counsel have suggested in their Memoranda that the Petitioner has consistently misinterpreted Schultz v. Pritts. But they offer no other interpretation. Neither the Protestants nor the People's Counsel dispute that Schultz requires that the involved zoning authority must determine whether the neighboring properties in the general neighborhood would be adversely affected and whether the proposed use is in harmony with the general purpose and intent of the zoning plan. In addition,

[6]. The operator failed to heed a caution sign indicating that a flagman was ahead and was unable to stop.

they cannot truly dispute that the Court of Appeals in Schultz established the test for defining the nature of the adverse impact that must be shown to warrant denial of a special exception. The Court expressly stated its holding. If the proposed use has an adverse effect upon adjoining and surrounding properties unique and different from the adverse effect that would otherwise result if such a use were located anywhere within the zone, the special exception should be denied. Schultz, at p. 22-23. See also, Board of County Comm'rs v. Holbrook, 314 Md. 210, 216-17 (1988). And while the concept of "neighborhood" remains undefined under Maryland law, the Petitioner submits that the Courts since Schultz have considered the properties immediately adjacent to the property in question to determine adverse impact on the neighborhood. Indeed, this makes sense. If the concept of "neighborhood" were expanded to include remote properties within the zone, it would emasculate the standard established in Schultz. For that reason, the Petitioner was careful to adduce from all witnesses who testified the distance and location of various sites where any alleged adverse impacts would occur. The only evidence of alleged adverse traffic impact was at Windless Run. Whatever the condition that exists at Windless Run may be, this condition is not within the neighborhood and does not fit the Schultz test.

Other Mining Operations in the Neighborhood

Moreover, the Protestants misinterpret the Petitioner's purpose in pointing out that there were ongoing mining

requires that he be disqualified since, as an adjacent property owner, he has a personal and pecuniary interest in the outcome of this hearing. Turf Valley v. Zoning Board, 262 Md. 632, 644 (1971). Another member of the Board of Appeals, Thomas Bollinger, has also recognized that he has a conflict because his law partner has represented Mr. Hackett on occasion. Mr. Bollinger has advised counsel for the Petitioner that he will not sit in judgment on a matter which affects the Chairman of the Board of Appeals.

The five remaining members of the Board are in the very same situation as Mr. Bollinger. Three of them could be called upon to decide a case which impacts on Mr. Hackett's property. No matter how objective these remaining five members may try to be, if they were to hear and determine this case, there is no way that they can be free from a suspicion of unfairness not merely in the minds of one of the parties but also in the mind of the public in general who have a right to expect the system to be free from any inappropriate influences. As Judge Sybert furcher noted in Montgomery County v. Walker, supra,

> "*** Even when conduct would not actually produce distrust in the minds of others but might only create a suspicion of unfairness in the mind of the party to which the decision was adverse, it is far better 'that no room be given for suspicion or cavil***!"

Id. at 581, quoting from Koslow v. Board of Zoning Appeals, 112 A. 2d 513, 515 (Conn. 1955).

In the instant case, there is no question that all of the members of the Board are in a "Catch-22" situation which demands that they disqualify themselves in order to secure public

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(301) 539-4250

confidence in the integrity of the determination of this case and of the system itself.

Conclusion

For the aforegoing reasons, the Petitioner respectfully submits that its Motion be granted and that all of the members of the Board, as presently constituted, be disqualified. The Petitioner respectfully submits that the Chairman should advise the County Council immediately in order that the Council might appoint a special panel members who are free from any relationships which might call their objectivity into question.

Respectfully submitted,

Michael E. Marr

Thomas C. Swiss

MARR & BENNETT
Suite 430
10 North Calvert Street
Baltimore, Maryland 21202
(301) 539-4250

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of November, 1987, a copy of the aforegoing Memorandum of Law in Support of Motion for Disqualification was mailed by first class mail, postage prepaid to Phyllis C. Friedman, Esquire and Peter M. Zimmerman, Esquire, Room 223 Courthouse, Towson, Maryland 21204, William A. Barkaloo, 6612 Blackhead Road, Baltimore, Maryland 21220, Michael P. Tanczyn, Esquire, Suite 106 Baltimore Avenue, Towson, Maryland 21204, William Cosden, P.O. Box 130, Chase, Maryland 21027 and Patricia Ecke, 12929 Community Road, Baltimore, Maryland 21220.

Thomas C. Swiss

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RE: PETITION FOR SPECIAL EXCEPTION
Begining in the Center of Ebenezer Road, 1248 75 E of the Center of Bird River Beach Road 15th District
THE SOUTHERN FOUR, INC., Petitioner

* BEFORE THE
* ZONING COMMISSIONER
* OF
* BALTIMORE COUNTY
* Case No. 86-195-X

* * * * * * * * * * * * * *

MOTION FOR DISQUALIFICATION

The Southern Four, Inc., Petitioner, by its undersigned attorneys, pursuant to applicable Maryland and local rules and relevant case law, moves that the entire Board of Appeals, as presently constituted, be disqualified from hearing the Petition for Special Exception scheduled for hearing on November 4, 1987. The grounds for this Motion are as follows:

1. The Petitioner filed its Petition for Special Exception on or about September 30, 1985. Thereafter, the subject matter of the Petition was duly advertised and the property involved was duly posted.

2. On or about November 12, 1985, a public hearing was held before the Zoning Commissioner. On November 20, 1986 the Zoning Commissioner issued a decision, which was amended by Order dated January 23, 1987.

3. On or about February 10, 1987, People's Counsel for Baltimore County served notice that it was taking an appeal of the Zoning Commissioner's decision on behalf of the Protestants.

4. The property involved in this appeal is a parcel located on the northeast corner of Ebenezer and Bird River Beach Roads. The Petitioner is seeking a special exception to use the property for controlled excavation of sand and related minerals.

5. The involved property directly faces (i.e. is directly across Bird River Beach Road from) property owned by William Hackett, the Chairman of the Board of Appeals. As a property owner and as an advocate on behalf of the other neighboring property owners, Mr. Hackett has been intimately involved in the long history of disputes between owners of the involved property and its neighbors over the Petitioner's proposed use of the property for mining and excavation. In a matter unrelated to this proceding, Mr. Hackett acknowledged to counsel for the Petitioner that he may have a predisposition about the present action and as a result, disqualified himself from that other unrelated matter.

6. Another member of this Board, Thomas Bollinger, has indicated to counsel for the Petitioner that he will disqualify himself because his law partner represented Mr. Hackett on occasion, a circumstance which Mr. Bollinger correctly concluded creates a conflict or gives rise to an appearance of impropriety if he were to sit in judgment.

7. The remaining five members of this Board, namely Arnold Foreman, Henry Lewis, Harry Buchheister, Patricia Phipps and Lawrence Schmidt, are inextricably caught on the horns of the same dilemma which Mr. Bollinger confronted. Like Mr. Bollinger, they may be called upon to decide a matter which affects valuable property rights of the Petitioner and the Chairman of the very same Board on which they sit, knowing that

their Chairman's opposition to the subject matter of the Petition is a matter of public record.

8. Regardless of whether the remaining five members concider themselves able to hear and decide the matter fairly and objectively, in accordance with the charge of the office to which they have been appointed, were they to sit in judgment on this case, they must decide in favor of either the Petitioner or the Protestants. Thus, they cannot avoid creating a suspicion of unfairness in the minds of at least one of the parties by any decision they make. This circumstance, in turn, would cast a cloud over the public's image of the fairness and objectivity of the process itself.

9. Such doubt, suspicion, or appearance of impropriety, however subtle, weakens public confidence in the process and undermines the sense of security of individual rights to which every citizen is entitled in the fair and just application of the zoning laws.

10. For these reasons, all of the present members of the Board of Appeals should disqualify themselves and the Chairman should refer the matter to the Chairman of the County Council, in order that a spucial meeting of the County Council be called in order to appoint a special panel of impartial persons to hear this appeal.

11. In further support of this Motion, the Petitioner submits the accompanying Memorandum of Points and Authorities.

WHEREFORE, your Petitioner respectfully prays:

(1) That all of the present members of the Board of Appeals should disqualify themselves; and

(2) That the matter be referred to the Chairman of the Baltimore County Council in order that a special session of the Council be called for the appointment of an impartial panel to sit as the Board of Appeals on this matter.

Respectfully submitted,

Michael E. Marr

Thomas C. Swiss

MARR & BENNETT
Suite 430
10 North Calvert Street
Baltimore, Maryland 21202
(301) 539-4250

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of November, 1987, a copy of the aforegoing Motion for Disqualification was mailed by first class mail, postage prepaid to Phyllis C. Friedman, Esquire and Peter Max Zimmerman, Esquire, Room 223 Courthouse, Towson, Maryland 21204, William A. Barkaloo, 6612 Blackhead Road, Baltimore, Maryland 21220, Michael P. Tanczyn, Esquire, Suite 106, Baltimore Avenue, Towson, Maryland 21204, William Losden, P.O. Box 130, Chase, Maryland 21027 and Patricia Ecke, 12929 Community Road, Baltimore, Maryland 21220.

Thomas C. Swiss

DL:2

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RE: PETITION FOR SPECIAL EXCEPTION : BEFORE THE ZONING COMMISSIONER OF BALTIMORE COUNTY

THE SOUTHERN FOUR, INC., Petitioner : Case No. 86-195-X

NOTICE OF APPEAL

Please note an appeal from your decision dated November 20, 1986, and your Amended Order dated January 23, 1987, to the County Board of Appeals and forward all papers in connection therewith to the Board for hearing.

William Barkaloo, President
Bird River Civic Association
6612 Blackhead Road
Baltimore, Maryland 21220

RECEIVED
FEB 19 1987
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FEB 10 1987
ZONING OFFICE

RE: PETITION FOR SPECIAL EXCEPTION : BEFORE THE ZONING COMMISSIONER
Beginning in the Center of Ebenezer Rd., 1248.75' E of the Center of Bird River Beach Rd. 15th District : OF BALTIMORE COUNTY

THE SOUTHERN FOUR, INC., Petitioner : Case No. 86-195-X

NOTICE OF APPEAL

Please note an appeal from your decision dated November 20, 1986, and your Amended Order dated January 23, 1987, to the County Board of Appeals and forward all papers in connection therewith to the Board for hearing.

Phyllis Cole Friedman
People's Counsel for Baltimore County

Peter Max Zimmerman
Deputy People's Counsel
Room 223, Court House
Towson, Maryland 21204
494-2188

I HEREBY CERTIFY that on this 10th day of February, 1987, a copy of the foregoing Notice of Appeal was mailed to Michael E. Marr, Esquire, Suite 430, 10 North Calvert St., Baltimore, MD 21202; William Barkuloo, 6612 Blackhead Rd., Baltimore, MD 21220; and Patricia Ecke, 6900 Harewood Park Dr., Baltimore, MD 21220.

Peter Max Zimmerman

IN RE: PETITION FOR SPECIAL EXCEPTION * BEFORE THE ZONING COMMISSIONER
The Southern Four, Inc. * OF BALTIMORE COUNTY
* Case No. 86-195-X

* * * * * * *

AMENDED ORDER

Pursuant to my Amended Order, dated 26th of November, 1986, the Protestants in this instant matter filed a memorandum dated 23 December 1986 responding to the recommendations made by the Office of Planning & Zoning to the Zoning Commissioner, dated 18 September 1986, pursuant to the Chesapeake Bay Critical Area legislation, section 8-1813, et. seq., of the Natural Resource Article, Maryland Code. The opportunity to respond to the Protestants' comments was provided to the Petitioner but it has elected not to do so.

After a careful review of the Protestants memorandum, it has been determined that no further public hearing will be required.

The comments provided by the Protestants focus on two main issues: The history of the Petitioner's attempt to seek a special exception and the recommendations made by the Department of Health, Bureau of Environmental Services. The former, as important as it is to understand the complex and emotional feelings held by the Protestants, can not be extrapolated to provide the Protestants the relief they seek: the denial of the special exception requested here. While true that the history does provide an important context within which one can come to understand the intricacies and deep involvement of those who live in the area with the potential impact of this special exception if granted, it of itself provides no factual bases upon which the specific request made herein can be denied. Section 502.1 is specific. There is a definite burden of proof which the Petitioner must satisfy for it to gain the relief requested. Overlying this burden of proof has been placed the

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Date January 23, 1987
By

requirements delineated by the Chesapeake Bay Critical Area legislation. Providing that the Petitioner can comply with the conditions precedent as set forth in section 502.1 and can satisfy the strictures as determined by the Critical Area legislation, the request for special exception must be granted. The Petitioner has indeed done both, as described in my original decision dated 20 November 1986.

The latter issue raised by the Protestants revolves around the comments made by Mr. Ian Forrest, Director of the Bureau of Environmental Services, which led him to recommend that the special exception be denied in comments provided on 27 August 1985. However, on 28 August 1986, Mr. Forrest in a memo to Paul Solomon, of the Environmental Section of the Office of Planning, indicated that the project had been under review by his office since March of 1986 and that further information was required of the Petitioner before an evaluation could be made as to whether the Health Department requirements would be or could be satisfied. On 18 April 1986, in a memo to me, Mr. Forrest indicated that his office and the Waste and Water Quality Management Division of the Health Department were continuing their review of this project, and that further information was still needed from the Petitioner. It is important, vital, for the Protestants to recognize the last sentence of this memo from Mr. Forrest: "The petitioner should be advised that all Health Department requirements must be met prior to issuance of a permit to operate."

Notwithstanding the grant of the special exception herein, and notwithstanding successful compliance with the Critical Area legislation, the Petitioner must still conform and comply with all Health Department requirements before any permit is issued for operation of the stated use. If for any reason the Petitioner cannot satisfy the Health Department on the protection of wetlands and water quality, the limitations on disturbances to the identi-

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By

fied wetlands, the potential impact on surface and groundwater quality, the Petitioner will not be permitted to operate. The very concerns raised by the Protestants in their memo to me dated 23 December 1986 either have been addressed to the satisfaction of the Zoning Regulations or will be addressed by the Health Department before any permit is issued. It is not the function nor the intent of this Hearing to usurp the responsibilities of the Health Department; it will be up to the Health Department to determine whether the Petitioner can comply with those laws and regulations which are its specific responsibility and which are best left to its legislatively mandated expertise.

Certainly, the history of this site cannot be ignored; to do so would be to minimize the legitimate concerns of the community. Although the special exception requested by the Petitioner will be granted, it must be pointed out that the conditions precedent for said approval delineated in my 20 November 1986 decision, which here will be adopted in its entirety by reference, were done in recognition of the particular concerns raised by the Protestants at the Hearing. The special exception, in my opinion, cannot be denied for the reasons expressed in this Amended Order and as expressed in my original decision, but the conditions established for said approval upon the Petitioner can provide a measure of protection to the community.

THEREFORE, it is this 23 day of January, 1987, ORDERED that the decision rendered in this matter, dated 20 November 1986, be and is hereby adopted in its entirety as the decision of the Zoning Commissioner of Baltimore County in this matter; and

ORDER RECEIVED FOR FILING
Date January 23, 1987
By

FURTHER, that the facts and conclusions as set forth in this Amended Order be made part of that decision; and

FURTHER, that the 20 November 1986 decision and this Amended Order be and hereby constitutes the final Order, from which the appeal period is to run.

Zoning Commissioner of Baltimore County

AJ/aj

cc: Michael E. Marr, Esq.
Mr. William Barkuloo
Ms. Patricia Ecke
People's Counsel

ORDER RECEIVED FOR FILING
Date January 23, 1987
By

87-1199

12/15/86 To file

RECEIVED
DEC 15 1986
ZONING OFFICE

December 11, 1986

Office of Planning and Zoning for
Baltimore County
401 Bosley Avenue
Towson, Maryland 21204

RE: Petition Special Exception
Case No. 86-195-X

Gentlemen:

Enclosed please find a Motion to Stay/Reconsider Order which I would appreciate your filing in the above-captioned matter. This Motion is for recording purposes only as I realize that an Order has already been signed.

Thank you for your kind cooperation.

Sincerely,

William Barkuloo

WB/mas
Enclosure
0017B.1

cc: Michael E. Marr, Esquire
Peoples Counsel for
Baltimore County

IN RE: PETITION SPECIAL EXCEPTION * BEFORE THE
Beginning at the centerline
of Ebenezer Road, 1,248.75'E * ZONING COMMISSIONER
of the centerline of Bird
River Beach Road - 15th * OF BALTIMORE COUNTY
Election District
* Case No: 86-195-X

* *

MOTION TO STAY/RECONSIDER ORDER

Now comes the Protestants, by William Barkuloo, on behalf of himself and the Bird River Civic Association, and requests the Zoning Commissioner of Baltimore County to stay the entering of his Order, or in the alternative, to reconsider its Order of November 20, 1986, and for reasons, states:

1. That the Petitioner in this case requested a special exception for a controlled excavation operation for the removal of sand and related materials, at the site indicated above.

2. That a hearing was held on the Petitioner's request for a special exception and testimony and evidence was received by the Zoning Commissioner on behalf of both the Petitioner and the Protestants.

3. That at said hearing, Commissioner Jablon, Ordered the Petitioner, the Southern Four, Inc., to, among other things, caused to be prepared and produce before the said Commission: (a) Critical Areas Commission Report; (b) Health Department Report.

4. That concomitently with that Order the Commissioner advised the Protestants that upon the Commission's

receipt of the reports indicated above in Paragragh 3, there would be an opportunity for comment or rebuttal, or that additional testimony would be received on the content of said reports.

5. That the Petitioner has filed the reports indicated above in Paragraph 3 with the Commission, but, prior to the issuance of its November 20, 1986, Order, the Protestants have not received a copy of said reports nor have they been given the opportunity to rebut or comment thereon.

6. That the Protestants desire and request the Commissioner to make available to them copies of said reports and to allow them the opportunity to inspect said reports, to rebut and comment upon them, or in the alternative, to provide additional testimony and evidence thereon.

WHEREFORE, the Protestants, by William Barkuloo, on behalf of himself and the Bird River Civic Association, prays the Zoning Commissioner:

A. Stay the Order of the Zoning Commissioner of Baltimore County dated November 20, 1986;

B. Order the Petitioner to produce the Critical Areas Commission Report and Health Department Report to the Protestants;

C. Reopen this Petition to allow the Protestants to comment/rebut the materials contained within said reports;

D. Schedule this matter for a hearing for the purpose of receiving additional testimony and evidence on behalf of the Protestants;

E. And for such other and further relief as the nature of their cause may require.

WILLIAM BARKULOO, on behalf of himself and the Bird River Civic Association, Protestants
6612 Blackhead Road
Baltimore, Maryland 21220

MEMORANDUM OF POINTS AND AUTHORITIES

1. Maryland Rule of Procedure 2-535 which states in pertinent part:

"On Motion of any party filed within thirty (30) days after entry of Judgment, the Court may exercise revisory power or control over the Judgment..."

2. The record in this case.

I HEREBY CERTIFY that on this 1st day of December, 1986, a copy of the aforegoing Motion To Stay/Reconsider Order was mailed to Michael Edward Marr, Esquire, Suite 430, 10 North Calvert Street, Baltimore, Maryland 21202 and to Peoples Counsel for Baltimore County, County Courts Building, 401 Bosley Avenue, Towson, Maryland 21204.

WILLIAM BARKULOO

0524A.1-3

IN RE: PETITION SPECIAL EXCEPTION
Beginning at the centerline of Ebenezer Road, 1,248.75'E of the centerline of Bird River Beach Road - 15th Election District

* BEFORE THE
* ZONING COMMISSIONER
* OF BALTIMORE COUNTY
* Case No: 86-195-X

* * *

ORDER

Upon consideration of the Protestants' Motion to Stay or in the alternative, to reconsider the Commission's Order of November 20, 1986, it is this ____ day of _____, 198__, by the Zoning Commissioner of Baltimore County,

ORDERED, that the Order of this Commission dated November 20, 1986, is stayed and the Protestants will be given an opportunity to appear and testify and produce evidence at the convenience of this Commission in regard to this matter.

ARNOLD JABLON, Zoning Commissioner
Of Baltimore County

0524A.4

IN RE: PETITION FOR SPECIAL EXCEPTION
The Southern Four, Inc.

* BEFORE THE ZONING COMMISSIONER
* OF BALTIMORE COUNTY
* Case No. 86-195-X

* * * * *

AMENDED ORDER

At the conclusion of the public hearing held on this matter, 26 February 1986, the Zoning Commissioner stated that he would provide the opportunity for either side, the Protestants or the Petitioner, to provide comments in response to the recommendations made by the Office of Planning relative to the requirements of the Chesapeake Bay Critical Area legislation. It was assumed by the Zoning Commissioner that the Protestants had reviewed the said recommendations, which were provided to the Zoning Commissioner on 18 September 1986, and had elected not to respond thereto. However, it has been brought to the attention of the Zoning Commissioner that the Protestants had not such opportunity.

THEREFORE, it is this 26th day of NOVEMBER, 1986, ORDERED that the decision rendered in this matter dated 20 November 1986 will be stayed and the Protestants given thirty days (30) from the date of this Amended Order to provide any comments they wish in response to the Office of Planning's recommendations as to compliance with the Critical Area legislation (a copy of which has been forwarded to the Protestants); and further, that the Order dated 20 November 1986 have no force or effect until such time as the Zoning Commissioner issues a further Amended Order in this matter, which will be a final Order and from which time any appeal period will be determined.

Zoning Commissioner of Baltimore County

cc: Michael E. Marr, Esq.
Mr. William Barkuloo
Ms. Patricia Ecke
People's Counsel

ORDER RECEIVED FOR FILING
Date November 26 1986
By Merle L. Lawrence

IN RE: PETITION SPECIAL EXCEPTION
Beginning at the centerline of Ebenezer Road, 1,248.75' E of the centerline of Bird River Beach Road - 15th Election District

The Southern Four, Inc.
Petitioner

* BEFORE THE
* ZONING COMMISSIONER
* OF BALTIMORE COUNTY
* Case No. 86-195-X

* * * * * * * * * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Petitioner herein requests a special exception for a controlled excavation operation for the removal of sand and related materials, as more particularly described on Petitioner's Exhibit 2.

The Petitioner, by Terry Stancill, an officer of the corporation, appeared and testified and was represented by Counsel. Testifying on behalf of the Petitioner were Michael E. Clar, a registered civil engineer, and Timothy Ryan, a traffic engineer with Kidde Consultants. William Barkuloo, on behalf of himself and the Bird River Civic Association, testified in opposition, as did numerous other residents of the community.

Testimony indicated that the subject property, bounded by Ebenezer Road on the south, Bird River Beach Road on the east, and Bird River on the north, is zoned R.C.2 and contains 129 acres. The Petitioner proposes to extract sand and gravel from the site, process it, and remove it for sale commercially. The family owned and operated business is located in Cecil County, but the Petitioner proposes to excavate this site and to process and sell the minerals. Access will be from Ebenezer Road, with materials being transported by dump trucks or tractor trailers. A maximum of 50 truckloads is expected to leave the site per day. Approximately 7,200,000 tons of sand and gravel is proposed to be extracted over a 15-year period, planned in five phases. Sixty

ORDER RECEIVED FOR FILING
Date November 26 1986
By Merle L. Lawrence

acres will be mined and another 15 will be used for support services, i.e., processing, washing, stockpiling, and internal roads. Reclamation of the land is planned concurrently with the mining operations by creating a series of lakes and wetland areas.

The property lies within the Chesapeake Bay Critical Area.

The Petitioner pointed out that there are other similar operations in the area and that its operation will comply with all State and local environmental requirements. A buffer of existing vegetation and trees, approximately 150 feet deep, will be maintained between the proposed operation and the rear property line. In fact, the Petitioner pointed out that the State would prohibit development in that area anyway, and a bond would have to be posted with the State before proceeding in order to guarantee appropriate and required reclamation. Existing buffers between property lines and the processing plant will be maintained, and special equipment will be utilized to limit the processing noise.

Mr. Clar, a consulting civil and mining engineer, testified that, in his expert opinion, the proposed use would not create a negative impact on the environment. He further testified that the use would not create any more of a problem than in any R.C.2-zoned site and that the requirements of the Chesapeake Bay Critical Area legislation will be met. Further, all of the conditions precedent in Section 502.1, Baltimore County Zoning Regulations (BCZR), will be satisfied.

Mr. Ryan, who is familiar with the property and has examined the roadways surrounding it, testified that 100 truck trips per day should not cause a problem in the area. He did a capacity analysis at the access point and determined the level of service to be an "A", the highest level of acceptability. This was based on 40 trips per hour or 400 trips per an 18-hour day, and

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Date November 26 1986
By Merle L. Lawrence

even at that level, the rating was an "A". It is his opinion that the proposed use would not create a traffic hazard.

The Protestants argued conversely. Mr. Barkuloo testified regarding the past interaction between the community and the Petitioner and described the prior quasi-judicial and judicial actions. He expressed the community's concerns about potential contamination of underground water which serves the neighboring communities. He also disagreed with Mr. Ryan and believes that the roads and bridges currently existing cannot handle the large trucks that will serve the site. Noise and drainage into Bird River are also concerns. The other Protestants testifying concurred in their objections.

The Petitioner seeks relief from Section 1A01.2.C.7, pursuant to Sections 502.1 and 403, BCZR.

Although the Protestants believe that the Petitioner cannot be trusted to fulfill its obligations, based on prior experience, there are many safeguards provided by State and County laws to ensure that the proposal, as reviewed and analyzed by the appropriate governmental authorities, shall be carried out.

The State of Maryland and Federal government have assumed a major, if not total, responsibility of governing such an operation as proposed. Surface mining operations, under the Natural Resources Article, Section 7-6A-01, et. seq., Annotated Code of Maryland, have been the responsibility of the State since 1977, and licenses and/or permits necessary to run a surface mining operation must be issued by the State Department of Natural Resources. Also, the effects of surface mining on air and water, surface and underground, and noise resulting from the operation are continually and periodically monitored by the State Department of Health and Mental Hygiene. Standards and regulations have been promulgated by each State agency, found in COMAR, and must be

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By Merle L. Lawrence

followed by any surface mining operator. Permits are issued only if there has been compliance with all such appropriate standards and regulations. If there is no compliance, the permits are either withheld or revoked, and the operation must cease until compliance is obtained.

County Agencies as well are and will be involved to ensure that the fears of the Protestants do not materialize. The Waste and Water Quality Management and Environmental Services sections of the County Health Department must review the proposed use to ensure compliance with State and County health regulations to also ensure that there would be no adverse impact to the surrounding community, especially regarding contamination of the water supply which does or may supply water to those surrounding residential properties. No permit would be issued to proceed without the requisite approvals from the State and County, including the County Health Department.

Finally, the Petitioner is required to comply with the Chesapeake Bay Critical Area legislation before this special exception can be granted. Section 8-1813, Natural Resources Article, Annotated Code of Maryland, requires that all special exceptions affecting any land or water area located within the area identified as being within the critical area of the Bay be reviewed by the appropriate "approving authority" of the local subdivision and that the approving authority make specific findings that: (1) the proposed use (defined as any activity materially affecting the condition or use of dry land, land under water, or any structure, Section 8-1801(a)(3)) will minimize adverse impact on water quality resulting from pollutants discharged from structures or conveyances or which have run off surrounding lands; and (2) the applicant has identified fish, wildlife, and plant habitat which may be adversely affected and has designed the use so as to protect those identified habitats.

ORDER RECEIVED FOR FILING
Date November 26 1986
By Merle L. Lawrence

At the request of the Zoning Commissioner, the Office of Planning and Zoning reviewed the plans submitted to determine whether there would be compliance with Section 8-1813. In correspondence dated September 18, 1986, it was concluded that the proposed use would minimize adverse impact on water quality and that it had been designed for appropriate habitat protection. However, recommendations were made to ensure such compliance to be incorporated into this Order if the special exception were granted. If followed, the proposed use would not "materially affect" the condition or use of any dry land, land under water, or any structure. The Petitioner, therefore, will meet the burden of Section 8-1813(a) if the recommendations delineated by the Office of Planning and Zoning are satisfied.

The remaining concern raised by the Protestants, i.e., traffic, is important. The Department of Traffic Engineering recommended that two conditions be required in order for the special exception to be granted: (1) that the existing culvert on Ebenezer Road over White Marsh Run be upgraded to a 40-ton weight limit; and (2) that the hours of operation be restricted to daylight hours only. Traffic congestion was not an issue. This does not mitigate the valid concerns of the Protestants, concerns which were taken seriously into consideration here, but the cumulative testimony presented forces the conclusion that the proposed use would not adversely impact the public health, safety, and general welfare. In fact, money has been included in the Capital Budget to upgrade the culvert on Ebenezer Road.

It is clear that the BCZR permits the use requested by the Petitioner in an R.C.2 Zone by special exception. It is equally clear that the proposed use would not be detrimental to the primary uses in the vicinity. Therefore, it must be determined whether the conditions as delineated in Section 502.1 are satisfied by the Petitioner.

ORDER RECEIVED FOR FILING
Date November 26 1986
By Merle L. Lawrence

After reviewing all of the testimony and evidence presented, it appears that the special exception should be granted with certain restrictions, as more fully described below.

The Petitioner had the burden of adducing testimony and evidence which would show that the proposed use met the prescribed standards and requirements set forth in Section 502.1. In fact, the Petitioner has shown that the proposed use would be conducted without real detriment to the neighborhood and would not adversely affect the public interest. The facts and circumstances do not show that the proposed use at the particular location described by Petitioner's Exhibit 1 would have any adverse impact above and beyond that inherently associated with such a special exception use, irrespective of its location within the zone. Schultz v. Pritts, 432 A.2d 1319 (1981).

The proposed use will not be detrimental to the health, safety, or general welfare of the locality, nor tend to create congestion in roads, streets, or alleys therein, nor be inconsistent with the purposes of the property's zoning classification, nor in any other way be inconsistent with the spirit and intent of the BCZR.

Pursuant to the advertisement, posting of property, and public hearing held, and it appearing that by reason of the requirements of Section 502.1 having been met and the health, safety, and general welfare of the community not being adversely affected, the special exception should be granted.

Therefore, IT IS ORDERED by the Zoning Commissioner of Baltimore County, this 20th day of November, 1986, that the Petition for Special Exception for a controlled excavation operation for the removal of sand and related materials be and is hereby GRANTED, from and after the date of this Order, subject, however, to the following restrictions which are conditions precedent to the relief granted herein:

ORDER RECEIVED FOR FILING
Date November 26 1986
By Merle L. Lawrence

1. The correspondence from the Office of Planning and Zoning, dated September 18, 1986, shall be attached hereto and incorporated herein in its entirety, and the comments delineated on page 2 shall be complied with in their entirety.

2. The Petitioner may not proceed until approval from the State and County Health Departments have been obtained, all requisite permits are obtained, and all regulations are satisfied. Any recommendations made by the Health Departments to ensure compliance with their regulations shall be forwarded to the Zoning Commissioner and be made a part of this Order.

3. The hours of operation shall be from 9:30 a.m. to 5:00 p.m., Monday through Friday. No truck shall be permitted to enter or leave the property prior to or after the time stated.

4. Upon conclusion of the use permitted by the special exception herein, all buildings, machinery, and equipment not permitted by the then underlying zone of the property shall be removed within six months from the date the operation ceases.

5. The Petitioner shall comply with all standards and regulations promulgated by any local, State, or Federal governmental agency that are applicable to the operation of a surface and sub-surface mining operation, including but not necessarily limited to those of the State Departments of Nature Resources and Health and Mental Hygiene.

Zoning Commissioner of
Baltimore County

AJ/srl

Attachment

cc: Michael E. Marr, Esquire
Mr. William Barkuloo
Ms. Patricia Ecke
People's Counsel

ORDER RECEIVED FOR FILING
Date Thursday, Oct. 17th
By Linda L. Lamm

- 7 -

IN RE: * BEFORE THE
SOUTHERN FOUR, INC., * ZONING COMMISSIONER
Petitioner * OF
* BALTIMORE COUNTY
* Case No. 86-195-X

* * * * * * * * * * * * *

ORDER POSTPONING HEARING

Upon the aforegoing Motion, and this Commission believing it to be in the best interest of this proceeding to grant the relief prayed, it is this 17th day of October, 1985, by the Zoning Commissioner of Baltimore County:

ORDERED:

1. That the Hearing scheduled for November 12, 1985 in the above-captioned matter is hereby postponed; and

2. That the Hearing shall be rescheduled for a date and time after January 1, 1986.

Zoning Commissioner
of Baltimore County

Pet responsible for advertising & posting for 11/12 date & for new date wherever scheduled

MARR, BENNETT
ATTORNEYS AT LAW
SUITE 430
10 NORTH CALVERT STREET
BALTIMORE, MD 21202
(301) 539-4250

IN RE: * BEFORE THE
SOUTHERN FOUR, INC., * ZONING COMMISSIONER
Petitioner * OF
* BALTIMORE COUNTY
* Case No. 86-195-X

* * * * * * * * * * * * *

MOTION FOR POSTPONEMENT

Southern Four, Inc., Petitioner, by its attorneys, Michael E. Marr, Robert B. Scarlett and MARR & BENNETT, hereby prays for a postponement of the hearing presently scheduled in the above-captioned matter, and in support of this Motion, respectfully states:

1. That a hearing on the Petitioner's Petition for Special Exemption is presently scheduled for Tuesday, November 12, 1985 at 1:30 p.m. (the "Hearing").

2. That at the date and time of the Hearing, the Petitioner's attorneys will be involved in an eight (8) week trial entitled State v. The LaRosa's International Fuel Company, Inc., et al. (Case Nos. 29966, 29967 & 29968) filed in the Circuit Court for Anne Arundel County.

3. That because of the Petitioner's attorneys' conflict, the Petitioner believes, and therefore avers, it would be in the interest of justice if the Hearing scheduled in this matter was postponed until after January 1, 1986.

WHEREFORE, the Petitioner prays that the Hearing be postponed until after January 1, 1986.

Respectfully submitted,

MARR, BENNETT
ATTORNEYS AT LAW
SUITE 430
10 NORTH CALVERT STREET
BALTIMORE, MD 21202
(301) 539-4250

Michael E. Marr

Robert B. Scarlett

MARR & BENNETT
Suite 430, 10 North Calvert Street
Baltimore, Maryland 21202
(301) 539-4250

Attorneys for Petitioner

MARR, BENNETT
ATTORNEYS AT LAW
SUITE 430
10 NORTH CALVERT STREET
BALTIMORE, MD 21202
(301) 539-4250

RE: PETITION FOR SPECIAL EXCEPTION : BEFORE THE ZONING COMMISSIONER
Beginning in the Center of
Ebenezer Rd., 1248.75' E of the : OF BALTIMORE COUNTY
Center of Bird River Beach Rd.,
15th District :

THE SOUTHERN FOUR, INC., : Case No. 86-195-X
Petitioner
: : : : : : :

ENTRY OF APPEARANCE

Please enter the appearance of the People's Counsel in the above-captioned matter. Notices should be sent of any hearing dates or other proceedings in this matter and of the passage of any preliminary or final Order.

Phyllis Cole Friedman
People's Counsel for Baltimore County

Peter Max Zimmerman
Deputy People's Counsel
Rm. 223, Court House
Towson, MD 21204
494-2188

I HEREBY CERTIFY that on this 15th day of October, 1985, a copy of the foregoing Entry of Appearance was mailed to Michael E. Marr, Esquire, and Robert B. Scarlett, Esquire, Suite 430, 10 N. Calvert St., Baltimore, MD 21202, Attorneys for Petitioner.

Peter Max Zimmerman
Peter Max Zimmerman

86-195-X #67

PETITION FOR SPECIAL EXCEPTION

TO THE ZONING COMMISSIONER OF BALTIMORE COUNTY:

The undersigned, legal owner(s) of the property situate in Baltimore County and which is described in the description and plat attached hereto and made a part hereof, hereby petition for a Special Exception under the Zoning Law and Zoning Regulations of Baltimore County, to use the Controlled
herein described property for excavation and removal of sand and related materials.

Property is to be posted and advertised as prescribed by Zoning Regulations.

I, or we, agree to pay expenses of above Special Exception advertising, posting, etc., upon filing of this petition, and further agree to and are to be bound by the zoning regulations and restrictions of Baltimore County adopted pursuant to the Zoning Law for Baltimore County.

I/We do solemnly declare and affirm, under the penalties of perjury, that I/we are the legal owner(s) of the property which is the subject of this Petition.

Contract Purchaser:	Legal Owner(s):
(Type or Print Name)	The Southern Four, Inc (Type or Print Name)
Signature	By: Gerry L. Stancill (Signature Gerry L. Stancill, Vice President)
Address	(Type or Print Name)
City and State	Signature

Attorney for Petitioner:
Michael E. Marr, Esquire
Robert B. Scarlett, Esquire (Type or Print Name)
Signature
Suite 430, 10 N. Calvert Street
Address
Baltimore, MD 21202
City and State

Attorney's Telephone No.: 539-4250

499 Mountain Hill Road 939-2224
Address Phone No.
Perryville, MD 21903
City and State

Name, address and phone number of legal owner, contract purchaser or representative to be contacted
Robert B. Scarlett, Esquire
Suite 430, 10 N. Calvert Street
Name
Baltimore, MD 21202 539-4250
Address Phone No.

ORDERED By The Zoning Commissioner of Baltimore County, this 30th day of ~~September~~ January, ~~85~~ 86, that the subject matter of this petition be advertised, as required by the Zoning Law of Baltimore County, in two newspapers of general circulation throughout Baltimore County, that property be posted, and that the public hearing be had before the Zoning Commissioner of Baltimore County in Room 106, County Office Building in Towson, Baltimore County, on the ~~12th~~ 26th day of ~~November~~ February, ~~85~~ 86, at ~~1:30~~ 10:00 o'clock A.M.

Zoning Commissioner of Baltimore County

ORDER RECEIVED FOR FILING
Date Thursday, Sept. 19th
By Linda L. Lamm

Phone: 687-6922

67

FRANK S. LEE
Registered Land Surveyor
1277 NEIGHBORS AVE. — BALTIMORE, MD. 21237

July 27, 1985

Ebenezer Road and Bird River Beach Road
15th District Baltimore County, Maryland

Beginning for the same in the center of Ebenezer Road at the distance of 1248.75 feet measured easterly along Ebenezer Road from the center of Bird River Beach Road, thence running on or near the center of Ebenser Road as follows: North 84 degrees 04 minutes 40 seconds East 577.50 feet and South 76 degrees 55 minutes 20 seconds East 231.00 feet, thence running South 53 degrees 51 minutes East 143.10 feet, thence running for thirteen lines of division as follows: North 28 degrees 51 minutes 30 seconds West 3778.10 feet (crossing Ebenser Road at the distance of 115 feet more or less from the beginning of this line),South 54 degrees 11 minutes 20 seconds West 1399.20 feet, South 26 degrees 06 minutes 21 seconds East 12 feet, South 29 degrees 33 minutes 40 seconds West 111.71 feet, South 17 degrees 42 minutes 40 seconds West 94 feet, South 31 degrees 47 minutes 40 seconds West 113.60 feet, South 10 degrees 31 minutes 40 seconds West 145.70 feet, South 2 degrees 17 minutes 40 seconds West 91.70 feet, South 25 degrees 17 minutes 20 seconds East 128.90 feet, South 31 degrees 46 minutes 50 seconds East 99.13 feet to or near the east side of Bird River Beach Road, South 23 degrees 26 minutes 20 seconds East 150 feet, South 26 degrees 11 minutes 20 seconds East 350 feet and South 17 degrees 26 minutes 20 seconds East 69 feet, thence crossing Bird River Beach Road South 64 degrees 18 minutes 40 seconds West 30.50 feet, thence running and binding on or near the center of Bird River Beach Road South 25 degrees 41 minutes 20 seconds East 1350.71 feet, thence leaving Bird River Road and running for three lines of division as follows: North 77 degrees 30 minutes 40 seconds East 482.90 feet, North 74 degrees 39 minutes 50 seconds East 360 feet and South 26 degrees 50 minutes 10 seconds East 210 feet (crossing Ebenezer Road at the distance of 42 feet more or less from the end of this line), and thence running North 78 degrees 39 minutes 10 seconds East 101.13 feet and North 75 degrees 34 minutes 40 seconds East 290.37 feet to the place of beginning.

Containing 128.92 acres of land more or less.

STATE OF MARYLAND
FRANK S. LEE
No. 5111
REGISTERED
PROPERTY LINE SURVEYOR

Case No. 86-195-X

BALTIMORE COUNTY OFFICE OF PLANNING & ZONING

County Office Building
111 W. Chesapeake Avenue
Towson, Maryland 21204

Your petition has been received and accepted for filing this 30th day of September, 1985.

ARNOLD JABLON
Zoning Commissioner

Petitioner The Southern Four, Inc. Received by:
Petitioner's
Attorney Robert B. Scarlett, Esquire

Chairman, Zoning Plans
Advisory Committee

86-195-X

CERTIFICATE OF PUBLICATION

TOWSON, MD., October 24, 19 85

THIS IS TO CERTIFY, that the annexed advertisement was published in THE JEFFERSONIAN, a weekly newspaper printed and published in Towson, Baltimore County, Md., appearing on October 24, 19 85.

PETITION FOR SPECIAL EXCEPTION
15th Election District

LOCATION: Beginning in the center of Ebenezer Road, 1248.75' of the Center of Bird River Beach Road
DATE AND TIME: Tuesday, November 12, 1985 1:30 p.m.
PUBLIC HEARING: Room 106, County Office Building, 111 W. Chesapeake Avenue, Towson, Maryland

The Zoning Commissioner of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing:

Petition for Special Exception for the controlled excavation and removal of sand and related materials.

Being the property of The Southern Four, Inc. as shown on the plat filed with the Zoning Office.

In the event that this Petition is granted, a building permit may be issued within the thirty (30) day appeal period. The Zoning Commissioner will, however, entertain any request for a stay of the issuance of said permit during this period for good cause shown. Such request must be received in writing by the date of the hearing set above or made at the hearing.

By Order Of
ARNOLD JABLON,
Zoning Commissioner
of Baltimore County

Oct. 24.

THE JEFFERSONIAN,

Publisher

Cost of Advertising

22

86-195-X

Petition For Special Exception

15th Election District

LOCATION: Beginning in the center of Ebenezer Road, 1248.75' East of the Center of Bird River Beach Road.

DATE AND TIME: Tuesday, November 12, 1985 at 1:30 p.m.

PUBLIC HEARING: Room 106, County Office Building, 111 West Chesapeake Avenue, Towson, Maryland.

The Zoning Commissioner of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing:

Petition for Special Exception for the controlled excavation and removal of sand and related materials.

Being the property of The Southern Four, Inc. as shown on the plat filed with the Zoning Office.

In the event that this Petition is granted, a building permit may be issued within the thirty (30) day appeal period. The Zoning Commissioner will, however, entertain any request for a stay of the issuance of said permit during this period for good cause shown. Such request must be received in writing by the date of the hearing set above or made at the hearing.

BY ORDER OF
Arnold Jablon
Zoning Commissioner
Of Baltimore County

The Times

Middle River, Md., Oct 24 1985

This is to Certify, That the annexed

Petition
Reg # 83471

was inserted in The Times, a newspaper printed and published in Baltimore County, once in each of One successive weeks before the 24th day of Oct, 1985

Publisher.

#86-195-X 15th District

Beg. at the centerline Ebenezer Rd., 1248.75' E of the centerline Bird River Beach Rd.

The Southern Four, Inc.

4 SIGNS

CERTIFICATE OF POSTING 86-195-X
ZONING DEPARTMENT OF BALTIMORE COUNTY
Towson, Maryland

District 15th Date of Posting 10/5/85
Posted for: Special Exception
Petitioner: The Southern Four, Inc.
Location of property: Beg. Ebenezer Rd. 1248.75' E/Bird River Beach Rd. & Approx 2000' N/Belvue Bird River Beach Rd.
Location of Signs: (1) Approx 300' E/O Access, 1200' N/W Ebenezer Rd. on Bird River Beach Rd. (2) Approx 1000' E/O Access, 1900' E/Ebenezer Bird River Beach Rd. on Ebenezer Rd.
Remarks: All on property of Petitioner, Leaving road west.
Posted by [signature] Date of return: 10/15/85
Signature
Number of Signs: 4

CERTIFICATE OF POSTING 86-195-X
ZONING DEPARTMENT OF BALTIMORE COUNTY
Towson, Maryland

District 15th Date of Posting 2/27/86
Posted for: Appeal
Petitioner: The Southern Four, Inc.
Location of property: Beg. of Ebenezer Rd., 1248.75' E of Bird River Beach Rd.
Location of Signs: Two signs facing Ebenezer Rd. 1900' E. of Bird River Rd. One sign facing Bird River Rd. 1700' E. of Ebenezer Rd. on property of Petitioner
Remarks:
Posted by [signature] Date of return: 2/28/86
Signature
Number of Signs: 4

CERTIFICATE OF POSTING
ZONING DEPARTMENT OF BALTIMORE COUNTY
Towson, Maryland

District 15th Date of Posting 86-195-X
Posted for: Special Exception
Petitioner: The Southern Four, Inc.
Location of property: E/s Bird River Rd., beg. 200' S/W of Ebenezer Rd. & NW Ebenezer Rd. beginning, 50' wide 125' N/Each Rd. Across 300' N/Ebenezer Rd.
Location of Signs: (1) 400' N/W Ebenezer Rd. & Bird River Rd. (2) 1000' E. on Ebenezer Rd. & (3) 1420' E. on Ebenezer Rd., 800' N/W Ebenezer Rd.
Remarks: Above Postings Were Intersection of Ebenezer Rd. & Bird River Rd.
Posted by [signature] Date of return: 2/14/86
Signature
Number of Signs: 4

BALTIMORE COUNTY, MARYLAND
OFFICE OF FINANCE - REVENUE DIVISION
MISCELLANEOUS CASH RECEIPT
No. 33081

DATE 2/24/86 ACCOUNT R-001-615-000
AMOUNT $200.00
RECEIVED FROM: Elmer Yingling, Bird River Beach Comm. Assoc.
FOR: Appeal filing fee and Posting for Case #86-195-X
B 5[illegible]
VALIDATION OR SIGNATURE OF CASHIER

CERTIFICATE OF PUBLICATION

TOWSON, MD., February 6, 1986

THIS IS TO CERTIFY, that the annexed advertisement was published in THE JEFFERSONIAN, a weekly newspaper printed and published in Towson, Baltimore County, Md., appearing on February 6, 1986

THE JEFFERSONIAN,

Publisher

Cost of Advertising

24.75

PETITION FOR SPECIAL EXCEPTION
15th Election District

LOCATION: Beginning at the Centerline of Ebenezer Road, 1248.75 feet East of the Centerline Bird River Beach Road.

DATE AND TIME: Wednesday, February 26, 1986, at 10:00 a.m.

PUBLIC HEARING: Room 106, County Office Building, 111 W. Chesapeake Avenue, Towson, Maryland.

The Zoning Commissioner of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing:

Petition for Special Exception to use the property for controlled excavation and removal of sand and related materials.

Being the property of The Southern Four, Inc., as shown on plat filed with the Zoning Office.

In the event that this Petition(s) is granted, a building permit may be issued within the thirty (30) day appeal period. The Zoning Commissioner will, however, entertain any request for a stay of the issuance of said permit during this period for good cause shown. Such request must be received in writing by the date of the hearing set above or made at the hearing.

By Order Of
ARNOLD JABLON,
Zoning Commissioner
of Baltimore County

Feb. 6.

86-195-X

County Board of Appeals of Baltimore County
ROOM 315, COUNTY OFFICE BUILDING
TOWSON, MARYLAND 21204

HOLD FOR DAVE MILLER OF MILES & STOCKBRIDGE

(Receipt for photocopies of The Southern Four, Inc. - Case No. 86-195-X)

BALTIMORE COUNTY, MARYLAND
OFFICE OF FINANCE - REVENUE DIVISION
MISCELLANEOUS CASH RECEIPT
No. 53445

DATE 12/4/89 ACCOUNT R-001-7120
AMOUNT $ 14.00
RECEIVED FROM: Dave Miller of Miles & Stockbridge
FOR: photocopies of File No. 86-195-X (The Southern Four, Inc.)
VALIDATION OR SIGNATURE OF CASHIER

BALTIMORE COUNTY, MARYLAND
OFFICE OF FINANCE - REVENUE DIVISION
MISCELLANEOUS CASH RECEIPT
No. 018507

DATE 2/27/86 ACCOUNT R-01-615-000
AS OF 2/27/86, 4 SIGNS & POSTS TO BE RETURNED TO BALTO. CO. ZONING OFFICE
AMOUNT $ 63.00
RECEIVED FROM: Robert B. Scarlett
FOR: Advertising & Posting re Case #86-195-X
B 0062******6300:a 0278F
VALIDATION OR SIGNATURE OF CASHIER

BALTIMORE COUNTY
OFFICE OF PLANNING & ZONING
TOWSON, MARYLAND 21204
494-3353

ARNOLD JABLON
ZONING COMMISSIONER

JEAN M. H. JUNG
DEPUTY ZONING COMMISSIONER

February 18, 1986

Michael E. Marr, Esquire
Robert B. Scarlett, Esquire
Suite 430, 10 North Calvert Street
Baltimore, Maryland 21202

RE: Petition for Special Exception
Beg. @ the c/l of Ebenezer Rd., 1248.75' E of the c/l
Bird River Beach Rd. - 15th Election District
The Southern Four, Inc. - Petitioner
Case No. 86-195-X

Dear Messrs. Marr and Scarlett:

This is to advise you that $68.00 is due for advertising and posting of the above property. This fee must be paid before an Order is issued.

THIS FEE MUST BE PAID AND THE ZONING SIGN AND POST RETURNED ON THE DAY OF THE HEARING OR THE ORDER SHALL NOT BE ISSUED.

Do not remove sign from property from the time it is placed by this office until the day of the hearing itself.

Please make the check payable to Baltimore County, Maryland, and remit to Zoning Office, Room 113, County Office Building, Towson, Maryland 21204, before the hearing.

Sincerely,

Arnold Jablon
Zoning Commissioner

Ajmed

2/27/86
4 signs
* Copy sent to
be returned & office
notified
2/28/86 returned
Sign not
posted

BALTIMORE COUNTY
OFFICE OF PLANNING & ZONING
TOWSON, MARYLAND 21204
494-3353

ARNOLD JABLON
ZONING COMMISSIONER

JEAN M. H. JUNG
DEPUTY ZONING COMMISSIONER

November 6, 1985

Robert B. Scarlett, Esquire
Suite 430
10 N. Calvert Street
Baltimore, Maryland 21202

Re: Petition for Special Exception
Beg. in center of Ebenezer Rd., 1248.75' E of the Center of Bird River Beach Rd.
Southern Four, Inc. - Petitioner
Case No. 86-195-X

Dear Mr. Scarlett:

This is to advise you that $62.84 is due for advertising and posting of the above property. This fee must be paid before an Order is issued.

THIS FEE MUST BE PAID AND THE ZONING SIGN AND POST RETURNED ON THE DAY OF THE HEARING OR THE ORDER SHALL NOT BE ISSUED.

Do not remove sign from property from the time it is placed by this office until the day of the hearing itself.

Please make the check payable to Baltimore County, Maryland, and remit to Zoning Office, Room 113, County Office Building, Towson, Maryland 21204, before the hearing.

Sincerely,

Arnold Jablon
Zoning Commissioner

BALTIMORE COUNTY, MARYLAND
OFFICE OF FINANCE - REVENUE DIVISION
MISCELLANEOUS CASH RECEIPT
No. 012461

DATE 12-23-85 ACCOUNT R-01-615-000
AMOUNT $ 62.84
RECEIVED FROM: Marr & Scarlett
FOR: Ord'g Posting & Printing 86-195-X
B 0045******6284:a 7225F
VALIDATION OR SIGNATURE OF CASHIER

October 10, 1985

Robert R. Scarlett, Esquire
Suite 430
10 N. Calvert Street
Baltimore, Maryland 21202

NOTICE OF HEARING

RE: Petition for Special Exception
Beg. in center of Ebenezer Rd., 1248.75' E of the Center of Bird River Beach Rd.
Southern Four, Inc. - Petitioner
Case #86-195-X

TIME: 1:30 p.m.

DATE: Tuesday, November 12, 1985

PLACE: Room 106, County Office Building, 111 West Chesapeake Avenue, Towson, Maryland

Zoning Commissioner
of Baltimore County

BALTIMORE COUNTY, MARYLAND
OFFICE OF FINANCE - REVENUE DIVISION
MISCELLANEOUS CASH RECEIPT

No. 006868

DATE 8/15/85 ACCOUNT 01-615-000

AMOUNT $ 100.00

RECEIVED Nolan + Plumhoff

FOR SE #67

VALIDATION OR SIGNATURE OF CASHIER

PETITION FOR SPECIAL EXCEPTION

15th Election District

LOCATION: Beginning in the center of Ebenezer Road, 1248.75' East of the Center of Bird River Beach Road

DATE AND TIME: Tuesday November 12, 1985 at 1:30 p.m.

PUBLIC HEARING: Room 106, County Office Building, 111 West Chesapeake Avenue, Towson, Maryland

The Zoning Commissioner of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing:

Petition for Special Exception for the controlled excavation and removal of sand and related materials

Being the property of The Southern Four, Inc. as shown on the plat filed with the Zoning Office.

In the event that this Petition is granted, a building permit may be issued within the thirty (30) day appeal period. The Zoning Commissioner will, however, entertain any request for a stay of the issuance of said permit during this period for good cause shown. Such request must be received in writing by the date of the hearing set above or made at the hearing.

BY ORDER OF
ARNOLD JABLON
ZONING COMMISSIONER
OF BALTIMORE COUNTY

Michael E. Marr, Esquire
Robert B. Scarlett, Esquire
Suite 430, 10 North Calvert Street
Baltimore, Maryland 21202

January 24, 1986

NOTICE OF HEARING

RE: PETITION FOR SPECIAL EXCEPTION
Beg. @ the c/l of Ebenezer Rd., 1248.75' E of the c/l Bird River Beach Rd.
15th Election District
The Southern Four, Inc. - Petitioner
Case No. 86-195-X

TIME: 10:00 a.m.

DATE: Wednesday, February 26, 1986

PLACE: Room 106, County Office Building, 111 West Chesapeake Avenue, Towson, Maryland

Zoning Commissioner
of Baltimore County

AJ:med

PETITION FOR SPECIAL EXCEPTION

15th Election District

LOCATION: Beginning at the Centerline of Ebenezer Road, 1248.75 feet East of the Centerline Bird River Beach Road

DATE AND TIME: Wednesday, February 26, 1986, at 10:00 a.m.

PUBLIC HEARING: Room 106, County Office Building, 111 W. Chesapeake Avenue, Towson, Maryland

The Zoning Commissioner of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing:

Petition for Special Exception to use the property for controlled excavation and removal of sand and related materials.

Being the property of The Southern Four, Inc., as shown on plat plan filed with the Zoning Office.

In the event that this Petition(s) is granted, a building permit may be issued within the thirty (30) day appeal period. The Zoning Commissioner will, however, entertain any request for a stay of the issuance of said permit during this period for good cause shown. Such request must be received in writing by the date of the hearing set above or made at the hearing.

BY ORDER OF
ARNOLD JABLON
ZONING COMMISSIONER
OF BALTIMORE COUNTY

County Board of Appeals of Baltimore County
Room 200 Court House (Hearing Room #218)
Towson, Maryland 21204
(301) 494-3180

April 20, 1987

NOTICE OF ASSIGNMENT

NO POSTPONEMENTS WILL BE GRANTED WITHOUT GOOD AND SUFFICIENT REASONS. REQUESTS FOR POSTPONEMENTS MUST BE IN WRITING AND IN STRICT COMPLIANCE WITH BOARD RULE 2(b). ABSOLUTELY NO POSTPONEMENTS WILL BE GRANTED WITHIN FIFTEEN (15) DAYS OF SCHEDULED HEARING DATE IN ACCORDANCE WITH RULE 2(c), COUNTY COUNCIL BILL #59-79

CASE NO. 86-195-X

THE SOUTHERN FOUR, INC.

BEGINNING AT c/l EBENEEZER ROAD, 1248.75' E OF c/l BIRD RIVER BEACH ROAD

15th ELECTION DISTRICT
5th COUNCILMANIC DISTRICT

SE -CONTROLLED EXCAVATION AND REMOVAL OF SAND AND RELATED MATERIALS

1/23/87 -Z.C.'s AMENDED ORDER ADOPTING Z.C.'s DECISION OF 11/20/86 GRANTING SPECIAL EXCEPTION WITH RESTRICTIONS

ASSIGNED FOR: TUESDAY, July 28, 1987 at 10:00 a.m. and WEDNESDAY, July 29, 1987 at 10:00 a.m.

cc: Phyllis Cole Friedman, Esq. — Appellant/People's Counsel
William A. Barkuloo, Pres. Bird River Civic Assn. — Appellant/Protestant
William Cosden, President Bengies & Chase Democratic Club
The Southern Four, Inc. Jerry Stancill, Vice President — Petitioner
Michael E. Marr, Esq. — Counsel for Petitioner
Robert B. Scarlett, Esq. — " "
Patricia Ecke, Vice Pres. Harewood Park Community League, Inc. — Requests Notification
Mark Kahler
Charlotte Rheinhardt
David C. Brown
Diane Fielding
Carol Wehner
Charles J. Hajek
Norman E. Gerber
James G. Hoswell
Arnold Jablon
Jean M. H. Jung
James E. Dyer
Margaret E. du Bois

Kathi C. Weidenhammer
Administrative Secretary

RECEIVED
APR 22 1987
ZONING OFFICE

County Board of Appeals of Baltimore County
Room 200 Court House
Towson, Maryland 21204
(301) 494-3180
June 1, 1987

NOTICE OF POSTPONEMENT and REASSIGNMENT

NO POSTPONEMENTS WILL BE GRANTED WITHOUT GOOD AND SUFFICIENT REASONS. REQUESTS FOR POSTPONEMENTS MUST BE IN WRITING AND IN STRICT COMPLIANCE WITH BOARD RULE 2(b). ABSOLUTELY NO POSTPONEMENTS WILL BE GRANTED WITHIN FIFTEEN (15) DAYS OF SCHEDULED HEARING DATE IN ACCORDANCE WITH RULE 2(c), COUNTY COUNCIL BILL #59-79

CASE NO. 86-195-X

THE SOUTHERN FOUR, INC.

Beginning at c/l Ebenezer Road, 1248.75' E of c/l Bird River Beach Road

15th Election District
5th Councilmanic District

SE -Controlled excavation and removal of sand and related materials

1/23/87 -Z.C.'s Amended Order adopting Z.C.'s Decision of 11/20/86 granting Special Exception w/restrictions

which had been set for hearing on July 28 and July 29, 1987 has been POSTPONED at the request of Counsel for Protestants due to schedule conflict and has been

REASSIGNED FOR: WEDNESDAY, September 2, 1987 at 10:00 a.m. and THURSDAY, September 3, 1987 at 10:00 a.m.

cc: Phyllis Cole Friedman, Esq. — Appellant/People's Counsel
William A. Barkuloo, Pres. Bird River Civic Assn. — Appellant/Protestant
Michael P. Tanczyn, Esquire — Counsel for Protestant
William Cosden, President Bengies & Chase Democratic Club
The Southern Four, Inc. Jerry Stancill, Vice President — Petitioner
Michael E. Marr, Esquire — Counsel for Petitioner
Robert B. Scarlett, Esquire — Counsel for Petitioner
Patricia Ecke, Vice President Harewood Park Comm. League, Inc.
Mark Kahler
Charlotte Rheinhardt
David C. Brown
Diane Fielding
Carol Wehner
Charles J. Hajek
Norman E. Gerber
James G. Hoswell
Arnold Jablon
Jean M. H. Jung
James E. Dyer
Margaret E. du Bois

Kathi Weidenhammer
Administrative Secretary

RECEIVED
JUN 2 1987
ZONING OFFICE

D. du Bois

494-3180

County Board of Appeals
Room 219, Court House
Towson, Maryland 21204

July 13, 1987

NOTICE OF POSTPONEMENT and REASSIGNMENT

NO POSTPONEMENTS WILL BE GRANTED WITHOUT GOOD AND SUFFICIENT REASONS. REQUESTS FOR POSTPONEMENTS MUST BE IN WRITING AND IN STRICT COMPLIANCE WITH BOARD RULE 2(b). ABSOLUTELY NO POSTPONEMENTS WILL BE GRANTED WITHIN FIFTEEN (15) DAYS OF SCHEDULED HEARING DATE IN ACCORDANCE WITH RULE 2(c), COUNTY COUNCIL BILL #108

CASE NO. 86-195-X

THE SOUTHERN FOUR, INC.

Beg. at c/l Ebenezer Rd., 1248.75' E of c/l Bird River Beach Rd.

15th Election District
5th Councilmanic District

SE-Controlled excavation and removal of sand and related materials

1/23/87 - Z.C.'s Amended Order adopting Z.C.'s Decision of 11/20/86 granting Special Exception w/restrictions

which had been set for hearing on September 2 and 3, 1987, has been POSTPONED at the request of Counsel for the Petitioner due to schedule conflict and has been

REASSIGNED FOR: WEDNESDAY, NOVEMBER 4, 1987, at 10 a.m.

cc: Phyllis C. Friedman — Appellant/People's Counsel
William A. Barkuloo, Pres Bird River Civic Assn. — Appellant/Protestant
Michael P. Tanczyn, Esq. — Counsel for Protestant
William Cosden, Pres. Bengies & Chase Democratic Club
The Southern Four, Inc. Jerry Stancill, Vice President — Petitioner
Michael E. Marr, Esq. — Counsel for Petitioner
Robert B. Scarlett, Esq. — Counsel for Petitioner
Patricia Ecke, Vice President Harewood Park Comm. League, Inc.
Mark Kahler
Charlotte Rheinhardt
David C. Brown
Diane Fielding
Carol Wehner
Charles J. Hajek
Norman E. Gerber
James Hoswell
Arnold Jablon
Jean Jung

June Holmen, Secretary

RECEIVED
JUL 15 1987
ZONING OFFICE

11/87

County Board of Appeals of Baltimore County
Room 200 Court House
Towson, Maryland 21204
(301) 494-3180

HEARING ROOM #218

January 18, 1988

NOTICE OF ASSIGNMENT

NO POSTPONEMENTS WILL BE GRANTED WITHOUT GOOD AND SUFFICIENT REASONS. REQUESTS FOR POSTPONEMENTS MUST BE IN WRITING AND IN STRICT COMPLIANCE WITH BOARD RULE 2(b). NO POSTPONEMENTS WILL BE GRANTED WITHIN FIFTEEN (15) DAYS OF SCHEDULED HEARING DATE UNLESS IN FULL COMPLIANCE WITH RULE 2(c), COUNTY COUNCIL BILL NO. 59-79.

(CONTINUED FROM 11/04/87)

CASE NO. 86-195-X

THE SOUTHERN FOUR, INC.

Beginning at c/l Ebenezer Rd., 1248.75' E of c/l Bird River Beach Road

15th Election District; 5th Councilmanic District

SE -Controlled excavation and removal of sand and related materials

1/23/87 -Z.C.'s Amended Order adopting Z.C.'s Decision of 11/20/86 granting SE w/restrictions

ASSIGNED FOR: THURSDAY, MARCH 3, 1988 at 10:00 a.m. and TUESDAY, MARCH 8, 1988 at 10:00 a.m.

cc: Phyllis C. Friedman, Esquire — Appellant/People's Counsel
William A. Barkuloo, Pres. Bird River Civic Assn. — Appellant/Protestant
Michael P. Tanczyn, Esquire — Counsel for Appellant/Protestant
William Cosden, Pres. Bengies & Chase Democratic Club
The Souther Four, Inc. Jerry Stancill, VP — Petitioner
Michael E. Marr, Esquire, Robert B. Scarlett, Esquire — Counsel for Appellee/Petitioner
Patricia Ecke, VP Harewood Park Comm. League, Inc.
Mark Kahler
Charlotte Rheinhardt
David C. Brown
Diane Fielding
Carol Wehner
Charles J. Hajek
Jack Geaer
P. David Fields
James G. Hoswell
J. Robert Haines
Ann M. Nastarowicz
James E. Dyer
Robyn Clark
Arnold Jablon, County Attorney

Kathleen C. Weidenhammer
Administrative Secretary

11/87

County Board of Appeals of Baltimore County

Room 200 Court House
Towson, Maryland 21204
(301) 494-3180

HEARING ROOM #218

March 11, 1988

NOTICE OF ASSIGNMENT

NO POSTPONEMENTS WILL BE GRANTED WITHOUT GOOD AND SUFFICIENT REASONS. REQUESTS FOR POSTPONEMENTS MUST BE IN WRITING AND IN STRICT COMPLIANCE WITH BOARD RULE 2(b). NO POSTPONEMENTS WILL BE GRANTED WITHIN FIFTEEN (15) DAYS OF SCHEDULED HEARING DATE UNLESS IN FULL COMPLIANCE WITH RULE 2(c), COUNTY COUNCIL BILL NO. 59-79.

(CONTINUED FROM 3/08/88)

CASE NO. 86-195-X — THE SOUTHERN FOUR, INC.

Beginning at c/l Ebenezer Road, 1248.75' E of c/l Bird River Beach Road

15th Election District; 5th Councilmanic District

SE -controlled excavation and removal of sand and related materials

1/23/87 -Z.C.'s Amended Order adopting Z.C.'s Decision of 11/20/86 granting SE w/restrictions

ASSIGNED FOR: TUESDAY, JUNE 21, 1988 at 10:00 a.m. and THURSDAY, JUNE 23, 1988 at 10:00 a.m.

cc: Phyllis C. Friedman, Esquire — Appellant/People's Counsel
William A. Barkuloo, President, Bird River Civic Association — Appellant/Protestant
Michael P. Tanczyn, Esquire — Counsel for Appellant/Protestant
William Cosden, President, Bengies & Chase Democratic Club
The Southern Four, Inc., Jerry Stancill, Vice President — Appellee/Petitioner
Michael E. Marr, Esquire, Thomas C. Swiss, Esquire — Counsel for Appellee/Petitioner
Patricia Ecke, Vice President, Harewood Park Community League, Inc.

Mark Kahler
Charlotte Rheinhardt
David C. Brown
Diane Fielding
Carol Wehner
Charles J. Hajek
Jack Gease
Arnold Jablon, County Attorney
P. David Fields
James G. Hoswell
J. Robert Haines
Ann M. Nastarowicz
James E. Dyer
Robyn Clark

Kathleen C. Weidenhammer
Administrative Secretary

BALTIMORE COUNTY ZONING PLANS ADVISORY COMMITTEE

October 21, 1985

COUNTY OFFICE BLDG.
111 W. Chesapeake Ave.
Towson, Maryland 21204

ooo

MEMBERS
Bureau of Engineering
Department of Traffic Engineering
State Roads Commission
Bureau of Fire Prevention
Health Department
Project Planning
Building Department
Board of Education
Zoning Administration
Industrial Development

Michael E. Marr, Esquire
Robert B. Scarlett, Esquire
Suite 430, 10 N. Calvert Street
Baltimore, Maryland 21202

RE: Item No. 67 - Case No. 86-195-X
Petitioner - The Southern Four, Inc.
Special Exception Petition

Dear Sirs:

The Zoning Plans Advisory Committee has reviewed the plans submitted with the above-referenced petition. The following comments are not intended to indicate the appropriateness of the zoning action requested, but to assure that all parties are made aware of plans or problems with regard to the development plans that may have a bearing on this case. The Director of Planning may file a written report with the Zoning Commissioner with recommendations as to the suitability of the requested zoning.

Enclosed are all comments submitted from the members of the Committee at this time that offer or request information on your petition. If similar comments from the remaining members are received, I will forward them to you. Otherwise, any comment that is not informative will be placed in the hearing file. This petition was accepted for filing on the date of the enclosed filing certificate and a hearing scheduled accordingly.

Very truly yours,

James E. Dyer, Chairman
JAMES E. DYER
Chairman
Zoning Plans Advisory Committee

JED:nr

Enclosures

cc: Mr. Frank S. Lee
1277 Neighbors Avenue
Baltimore, Maryland 21237

BALTIMORE COUNTY
OFFICE OF PLANNING AND ZONING
TOWSON, MARYLAND 21204
494-3211

NORMAN E. GERBER
DIRECTOR

Mr. Arnold Jablon
Zoning Commissioner
County Office Building
Towson, Maryland 21204

NOVEMBER 1, 1985
(CRITICAL AREA)

Re: Zoning Advisory Meeting of AUGUST 27, 1985
Item # 67
Property Owner: SOUTHERN FOUR, INC.
Location: ℄ EBENEZER RD., 1248.75' E.OF ℄ BIRDRIVER RD.

Dear Mr. Jablon:

The Division of Current Planning and Development has reviewed the subject petition and offers the following comments. The items checked below are applicable.

(X) There are no site planning factors requiring comment.
( ) A County Review Group Meeting is required.
( ) A County Review Group meeting was held and the minutes will be forward by the Bureau of Public Services.
( ) This site is part of a larger tract; therfore it is defined as a subdivision. The plan must show the entire tract.
( ) A record plat will be required and must be recorded prior to issuance of a building permit.
( ) The access is not satisfactory.
( ) The circulation on this site is not satisfactory.
( ) The parking arrangement is not satisfactory.
( ) Parking calculations must be shown on the plan.
( ) This property contains soils which are defined as wetlands, and development on these soils is prohibited.
( ) Construction in or alteration of the floodplain is prohibited under the provisions of Section 22-98 of the Development Regulations.
( ) Development of this site may constitute a potential conflict with the Baltimore County Master Plan.
( ) The amended Development Plan was approved by the Planning Board on
( ) Landscaping: Must comply with Baltimore County Landscape Manual.
( ) The property is located in a deficient service area as defined by Bill 178-79. No building permit may be issued until a Reserve Capacity Use Certificate has been issued. The deficient service is
( ) The property is located in a traffic area controlled by a "D" level intersection as defined by Bill 178-79, and as conditions change traffic capacity may become more limited. The Basic Services Areas are re-evaluated annually by the County Council.
(X) Additional comments:
THIS SITE IS LOCATED IN THE CHESAPEAKE BAY CRITICAL AREA. ADDITIONAL COMMENTS WILL BE PROVIDED BY THE COMPREHENSIVE PLANNING DIVISION.

Eugene A. Bober
Chief, Current Planning and Development

cc: James Hoswell

BALTIMORE COUNTY
FIRE DEPARTMENT
TOWSON, MARYLAND 21204-2586
494-4500

PAUL H. REINCKE
CHIEF

August 30, 1985

Mr. Arnold Jablon
Zoning Commissioner
Office of Planning and Zoning
Baltimore County Office Building
Towson, Maryland 21204

Attention: Nick Commodari, Chairman
Zoning Plans Advisory Committee

RE: Property Owner: Southern Four, Inc.

Location: Centerline Ebenezer Rd., 1248.75' E of centerline Bird River Beach Road

Item No.: 67 Zoning Agenda: Meeting of August 27, 1985

Gentlemen:

Pursuant to your request, the referenced property has been surveyed by this Bureau and the comments below marked with an "X" are applicable and required to be corrected or incorporated into the final plans for the property.

( ) 1. Fire hydrants for the referenced property are required and shall be located at intervals or _____ feet along an approved road in accordance with Baltimore County Standards as published by the Department of Public Works.

( ) 2. A second means of vehicle access is required for the site.

( ) 3. The vehicle dead end condition shown at _____

_____ EXCEEDS the maximum allowed by the Fire Department.

( ) 4. The site shall be made to comply with all applicable parts of the Fire Prevention Code prior to occupancy or beginning of operation.

( ) 5. The buildings and structures existing or proposed on the site shall comply with all applicable requirements of the National Fire Protection Association Standard No. 101 "Life Safety Code", 1976 edition prior to occupancy.

( ) 6. Site plans are approved, as drawn.

(X) 7. The Fire Prevention Bureau has no comments, at this time.

REVIEWER: Capt. Joseph Kelly 9-3-85 — Noted and Approved: John L. O'Neill
Planning Group
Special Inspection Division
Fire Prevention Bureau

/mb

BALTIMORE COUNTY
DEPARTMENT OF PERMITS & LICENSES
TOWSON, MARYLAND 21204
494-3610

September 18, 1985

TED ZALESKI, JR.
DIRECTOR

Mr. Arnold Jablon, Zoning Commissioner
Office of Planning and Zoning
Towson, Maryland 21204

Dear Mr. Jablon:

Comments on Item # 67 Zoning Advisory Committee Meeting are as follows:

Property Owner: Southern Four, Inc.
Location: C/L Ebenezer Road, 1248.75' E of c/l Bird River Beach Road
Districts: 15th.

APPLICABLE ITEMS ARE CIRCLED:

(A) All structures shall conform to the Baltimore County Building Code as adopted by Council Bill #17-85, the Maryland Code for the Handicapped and Aged (A.S.S.I. #117-1 1980) and other applicable Codes and Standards.

(B) A building and other miscellaneous permits shall be required before the start of any construction.

C. Residential: Two sets of construction drawings are required to file a permit application. The seal of a registered in Maryland Architect or Engineer is/is not required on plans and technical data.

(D) Commercial: Three sets of construction drawings sealed and signed by a registered in Maryland Architect or Engineer shall be required to file with a permit application. Reproduced seals are not acceptable.

E. All Use Groups except R-4 Single Family Detached Dwellings require a minimum of 1 hour fire rating for exterior walls closer than 6'-0 to an interior lot line. R-4 Use Groups require a one hour wall if closer than 3'-0 to an interior lot line. Any wall built on an interior lot line shall require a fire or party wall. See Table 401, Section 1B-7, Section 1406.2 and Table 1402. No openings are permitted in an exterior wall within 3'-0 of an interior lot line.

F. The structure does not appear to comply with Table 505 for permissable height/area. Reply to the requested variance by this office cannot be considered until the necessary data pertaining to height/area and construction type is provided. See Table 401 and 505 and have your Architect/Engineer contact this department.

G. The requested variance appears to conflict with Section(s) _____, _____, of the Baltimore County Building Code.

H. When filing for a required Change of Use/Occupancy Permit, an alteration permit application shall also be filed along with three sets of acceptable construction plans indicating how the existing structure is to be altered in order to comply with the Code requirements for the new use. Maryland Architectural & Engineer seals are usually required. The change of Use Groups are from Use _____ to Use _____, or to Mixed Uses _____, _____, _____, _____. See Section 312 of the Building Code.

I. The proposed project appears to be located in a Flood Plain, Tidal/Riverine. Please see the attached copy of Section 516.0 of the Building Code as adopted by Bill #17-85. Site plans shall show the correct elevations above sea level for the lot and the finish floor levels including basement.

NOTE: (A) Comments: Quarries or Quarry operations shall be fenced in compliance with Section 517.0 of County Council Bill #17-85.

K. These abbreviated comments reflect only on the information provided by the drawings submitted to the Office of Planning & Zoning and are not intended to be construed as the full extent of improvements. If desired the applicant may obtain additional information by visiting Room 122 of the County Office Building at 111 W. Chesapeake Avenue, Towson, Maryland 21204.

S. H. Reincke, Chief
Building Plans Review

9/22/85

BALTIMORE COUNTY
OFFICE OF PLANNING & ZONING
TOWSON, MARYLAND 21204
494-3353

ARNOLD JABLON
ZONING COMMISSIONER

JEAN M. H. JUNG
DEPUTY ZONING COMMISSIONER

September 29, 1986

Robert B. Scarlett, Esquire
Suite 430, 10 North Calvert Street
Baltimore, Maryland 21202

Mr. Frank Lee
1277 Neighbors Avenue
Baltimore, Maryland 21237

RE: PETITION FOR SPECIAL EXCEPTION
Beg. @ the c/l of Ebenezer Rd., 1248.75' E of the c/l of Bird River Beach Rd.
15th Election District
The Southern Four, Inc. - Petitioner
Case No. 86-195-X

Gentlemen:

Enclosed for your information and files are copies of the following material in connection with this case:

1. Memorandum from Ian J. Forrest, Director, Bureau of Environmental Services, to Arnold Jablon, Zoning Commissioner, dated April 18, 1986;

2. Memorandum from Ian J. Forrest to Paul J. Solomon, Head, Environmental Planning Section, dated August 28, 1986, and

3. Memorandum from Norman E. Gerber, AICP, Director, Office of Planning and Zoning, to Arnold Jablon, Zoning Commissioner, dated September 18, 1986.

Very truly yours,

Margaret E. du Bois, Hearings Clerk
Zoning Office

Enclosures

BALTIMORE COUNTY ZONING PLANS ADVISORY COMMITTEE

November 7, 1985

COUNTY OFFICE BLDG.
111 W. Chesapeake Ave.
Towson, Maryland 21204

ooo

Chairman

MEMBERS
Bureau of Engineering
Department of Traffic Engineering
State Roads Commission
Bureau of Fire Prevention
Health Department
Project Planning
Building Department
Board of Education
Zoning Administration
Industrial Development

Michael E. Marr, Esquire
Robert B. Scarlett, Esquire
Suite 430, 10 N. Calvert Street
Baltimore, Maryland 21202

RE: Item No. 67 - Case No. 86-195-X
Petitioner - The Southern Four, Inc.
Special Exception Petition

Dear Sirs:

Enclosed please find additional comments submitted after my original comments of October 21, 1985.

Very truly yours,

James E. Dyer, Chairman
JAMES E. DYER
Chairman
Zoning Plans Advisory Committee

JED:bsc

Enclosures

cc: Mr. Frank S. Lee
1277 Neighbors Avenue
Baltimore, Md. 21237

NOV. 1, 1985
Date

BALTIMORE COUNTY DEPARTMENT OF HEALTH

Zoning Commissioner
Office of Planning and Zoning
County Office Building
Towson, Maryland 21204

Zoning Item # 67, Zoning Advisory Committee Meeting of August 27, 1985

Property Owner: The Southern Four, Inc.

Location: C/Line Ebenezer Rd., 1248.75' E of C/Line Bird River Beach Rd. District 15

Water Supply Private Sewage Disposal Private

COMMENTS ARE AS FOLLOWS:

( ) Prior to approval of a Building Permit for construction, renovation and/or installation of equipment for any existing or proposed food service facility, complete plans and specifications must be submitted to the Plans Review Section, Environmental Support Services, for final review and approval.

( ) Prior to new installation/s of fuel burning equipment, the owner should contact the Division of Air Pollution Control, 494-3775, to obtain requirements for such installation/s before work begins.

( ) A permit to construct from the Division of Air Pollution Control is required for such items as spray paint processes, underground gasoline storage tank/s (5,000 gallons or more) and any other equipment or process which exhausts into the atmosphere.

( ) A permit to construct from the Division of Air Pollution Control is required for any charbroiler operation which has a total cooking surface area of five (5) square feet or more.

( ) Prior to approval of a Building Permit Application for renovations to existing or construction of new health care facilities, complete plans and specifications of the building, food service area and type of equipment to be used for the food service operation must be submitted to the Plans Review and Approval Section, Division of Engineering and Maintenance, State Department of Health and Mental Hygiene for review and approval.

( ) Prior to any new construction or substantial alteration of public swimming pool, wading pool, bathhouse, saunas, whirlpools, hot tubs, water and sewerage facilities or other appurtenances pertaining to health and safety, two (2) copies of plans and specifications must be submitted to the Baltimore County Department of Health for review and approval. For more complete information, contact the Recreational Hygiene Section, Division of Environmental Support Services.

( ) Prior to approval for a nursery school, owner or applicant must comply with all Baltimore County regulations. For more complete information, contact the Division of Maternal and Child Health.

(X) If lubrication work and oil changes are performed at this location, the method providing for the elimination of waste oil must be in accordance with Water Resources Administration requirements.

BS 20 1082 (1)

Zoning Item # 67 Zoning Advisory Committee Meeting of Aug 27, 1985
Page 2

( ) Prior to razing of existing structure/s, petitioner must contact the Division of Water Quality and Waste Management at 494-3768, regarding removal and/or disposal of potentially hazardous materials and solid wastes.

( ) Any abandoned underground storage tanks containing gasoline, waste oil, solvents, etc., must have the contents removed by a licensed hauler and either be removed from the property or properly backfilled. Prior to removal or abandonment, owner must contact the Division of Water Quality and Waste Management at 494-3768.

( ) Soil percolation tests (have been/must be) conducted.
( ) The results are valid until
( ) Soil percolation test results have expired. Petitioner should contact the Division of Environmental Support Services to determine whether additional tests are required.

( ) Where water wells are to be used as a source of water supply, a well meeting the minimum Baltimore County Standards must be drilled.

( ) In accordance with Section 13-117 of the Baltimore County Code, the water well yield test
( ) shall be valid until
( ) is not acceptable and must be retested. This must be accomplished prior to conveyance of property and approval of Building Permit Applications.

( ) Prior to occupancy approval, the potability of the water supply must be verified by collection of bacteriological and chemical water samples.

( ) If submission of plans to the County Review Group is required, a Hydrogeological Study and an Environmental Effects Report must be submitted.

(X) Others Investigations by this Department revealed the presence of hydric soils on the 130 acre site. Non-tidal wetlands are an integral part of the hydrologic system. Given the proposed activity and associated levels of disturbance it is recommended that this Special Exemption not be granted.

Ian J. Forrest, Director
BUREAU OF ENVIRONMENTAL SERVICES

SS 20 1283 (2) E

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO: MR. ARNOLD JABLON, Zoning Commissioner Date: November 6, 1985

FROM: NORMAN E. GERBER, AICP, Director, Office of Planning & Zoning

SUBJECT: Zoning Petition - S.E., Southern Four, Inc., #86-195-X, Item 67

The Baltimore County Office of Planning and Zoning is unable to determine Chesapeake Bay Critical Area compliance until the petitioner provides to this agency the necessary information to enable the staff of the Office of Planning and Zoning to complete a review.

It is recommended that the petitioner contact Paul J. Solomon at 494-3521 in order to determine what type and form of submittal will be necessary.

NEG:PJS:vh

Norman E. Gerber per JGHoswell
Norman E. Gerber, AICP
Director

cy: James G. Hoswell, Planner
Office of the Director

NOV 7 AM

CPS-008

BALTIMORE COUNTY ZONING PLANS ADVISORY COMMITTEE

COUNTY OFFICE BLDG.
111 W. Chesapeake Ave.
Towson, Maryland 21204

000

Chairman

MEMBERS

Bureau of Engineering
Department of Traffic Engineering
State Roads Commission
Bureau of Fire Prevention
Health Department
Project Planning
Building Department
Board of Education
Zoning Administration
Industrial Development

December 12, 1985

Michael F. Marr, Esquire
Robert R. Scarlett, Esquire
Suite 430, 10 North Calvert Street
Baltimore, Maryland 21202

RE: Item No. 67 - Case No. 86-195-X
Petitioner - The Southern Four, Inc.
Special Exception Petition

Dear Sirs:

Enclosed please find additional comments submitted after my original comments of October 21, 1985.

Very truly yours,

James E. Dyer, Jr.
JAMES E. DYER
Chairman
Zoning Plans Advisory Committee

JED:hsc

Enclosure

cc: Mr. Frank Lee
1277 Neighbors Avenue
Baltimore, Md. 21237

BALTIMORE COUNTY
DEPARTMENT OF TRAFFIC ENGINEERING
TOWSON, MARYLAND 21204
494-3550

STEPHEN E. COLLINS
DIRECTOR

December 6, 1985

Mr. Arnold Jablon
Zoning Commissioner
County Office Building
Towson, Maryland 21204

Item No. 67 -ZAC- Meeting of August 27, 1985
Property Owner: Southern Four, Inc.
Location: Ebenezer Rd., 1248.75' E of Bird River Beach Rd.
Existing Zoning: R.C. 2
Proposed Zoning: Special excepture for controlled excavation and removal of sand and related materials

Acres:
District:

Dear Mr. Jablon:

Bird River Beach Road and Ebenezer Road were not constructed for frequent use by large trucks. Use of these roads in their present condition by trucks can be expected to cause damage to the roads.

Should this special exception for controlled excavation be granted, the following conditions are recommended:

1. The existing culvert on Ebenezer Road over White Marsh Run should be upgraded to a 40 ton weight limit.

2. The hours of operation should be restricted to daylight hours only.

Gregory Morris Jones
Gregory Morris Jones

GMJ/bld

WIDENING RUN

86-195

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO: Arnold Jablon, Zoning Commissioner Date: February 6, 1986

FROM: Norman E. Gerber, AICP, Director, Office of Planning and Zoning

SUBJECT: Zoning Petition No. 86-195-X

This office requests that the subject hearing be postponed until or unless the petitioner satisfies the requirements of the Chesapeake Bay Critical Area review.

Norman E. Gerber per JGHoswell
Norman E. Gerber, AICP
Director

NEG:JGH:slm

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

FEB 13 AM

TO: Arnold Jablon, Zoning Commissioner Date: February 6, 1986

FROM: Norman E. Gerber, AICP, Director, Office of Planning and Zoning

SUBJECT: Chesapeake Bay Critical Area Review - The Southern Four, Inc.

The Baltimore County Office of Planning and Zoning cannot review this zoning petition for Critical Area consistency until the necessary information is provided to this agency by the applicant. Please note this office's comment dated 11/6/85, requesting information. Further, the petitioner's representatives met with Mr. Solomon of this office (2/5/86) and the informational needs were detailed. Until or unless the necessary information is received and reviewed, it is requested that the hearing be continued.

Norman E. Gerber
Norman E. Gerber, AICP
Director

NEG:JGH:slm

cc: Phyllis Cole Friedman
Susan Carrell
J.G. Hoswell
Paul Solomon

86-195-X

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

MAR 20 AM

TO: MR. ARNOLD JABLON, Zoning Commissioner Date: March 13, 1986

FROM: NORMAN E. GERBER, AICP, Director of Planning & Zoning

SUBJECT: Critical Area Comments; Southern Four, Inc.
Petition for Special Exception for Sand and Gravel Operation
(86-195-X, Item 67)

Site Description

The site is located in the coastal plain in the eastern area of Baltimore County bordering Ebenezer Road to the south and Bird River Road to the west. It consists of 129 acres and is zoned Resource Conservation 2 or agricultural. Currently, the land consists of old field or meadow, woodland meadow, and woodland. Tidal wetlands exist in the northeast corner of the site. Extensive areas of nontidal wetlands exist along much of the eastern fringe extending into the central portion of the site and throughout most of the site's western section. Except for an area of steep slopes bordering the stream flowing near the northern border of the site, the land contained within the site is level to nearly level.

Project Description

The petitioner proposes to extract 7,200,000 tons of sand and gravel from the site over a 15-year period. As proposed, 60 acres of land will be mined with an additional 15 acres to be utilized for support services such as mineral processing, including washing, stockpiling, and roads. The operation is planned in five phases over the 15 years. The phases consist of operational units or cells of from 8 to 16 acres. Reclamation is planned concurrently with the extractive operations and consists of a series of lakes and the creation of wetland areas. Selected plantings are included in the reclamation plan. Erosion and sedimentation controls are to be established. Disturbed areas are to be staged so as to reduce the degree of exposed land at any one time.

Environmental Impacts

The petitioner states that no adverse environmental impact will result from the proposed extractive operation and that water quality and wildlife habitat will be enhanced. However, no detailed support data or information is provided. The following information is required in order to determine the validity of these claims.

1. Detailed plans for erosion and sedimentation and runoff control.

2. Groundwater profiles before, during, and following the extraction activity.

CPS-008

TO: MR. ARNOLD JABLON March 13, 1986
Page 2

3. Water quality analysis to determine present groundwater and surface water quality. This should include a detailed list of all pollutants to be utilized or stored on site.

4. A detailed plan of plantings or revegetation.

5. A detailed plan showing dimensions of lakes and wetlands being proposed as part of reclamation program.

6. A schedule of operation including reclamation to the degree that can be determined at this time.

7. A survey of the site's wildlife.

8. Noise levels resulting from the use of equipment.

9. Details regarding the on-site processing of materials.

10. Details regarding location and extent of all improvements including buildings, roads, and parking.

11. Soil tests should be taken to determine what, if any, toxics may persist from the Back River sludge previously spread on site.

Chesapeake Bay Critical Area Consistency

No finding can be made at this time regarding whether or not this proposed extractive operation meets the requirement of the Chesapeake Bay Critical Area statute until the information requested above is obtained in suitable form. It is recommended that a meeting with the petitioner and his consultant be scheduled for this purpose.

However, a minimum 300-foot vegetated buffer will be required from all tidal wetlands; a minimum 50-foot buffer will be required from all nontidal wetlands; and a 50-foot vegetated buffer will be required from all wooded areas including wooded edge areas.

County Review Group (CRG) Applicability

Due to lack of specific information, the County is unable to determine if this proposed use requires CRG review and approval. The information requested above, in addition to assisting the Critical Area review, will allow the County to make a finding regarding CRG applicability. If it is determined that CRG review is required, the County will likely require additional information pursuant to CRG review.

NEG:PJS:vh

Norman E. Gerber, AICP

TO: MR. ARNOLD JABLON March 13, 1986
Page 3

cy: Southern Four, Inc.
499 Mountain Hill Road
Perryville, Md. 21903

Michael E. Marr, Attorney-at-Law
10 N. Calvert St., Suite 430
Baltimore, Md. 21202

M. L. Clar, P.E.
ETA Association, Inc.
9051 Baltimore National Pike
Ellicott City, Md. 21043

People's Counsel

Susan S. Carrell, Acting Chief
Current Planning & Development Div.

86-309-A
Case file

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO Mr. Arnold Jablon, Zoning Commissioner
Zoning Administration
Date April 18, 1986

FROM Ian J. Forrest, Director
Bureau of Environmental Services

SUBJECT Waste and Water Quality Management Comments: Southern Four, Inc.
Petition for Special Exception
for Sand and Gravel Mining
(SE #86-195X, Item 67)

In response to a request for comments on the above referenced petition, a review of the project proposal is being conducted by the Health Department's Waste and Water Quality Management Division. From the Health Department's perspective, the protection of wetlands and water quality are two major environmental issues associated with the proposed sand and gravel mining operations.

Major tidal and non-tidal wetland areas were identified by a field assessment of this site conducted by the Health Department. The petitioner should be advised that all mining, support and processing activities should be restricted to upland areas with no disturbance to these identified wetlands.

Specific comments with regard to potential impacts on surface and groundwater quality cannot be made until additional information has been provided by the petitioners consultant.

The petitioner should be advised that all Health Department requirements must be met prior to issuance of a permit to operate.

Ian J. Forrest, Director
Bureau of Environmental Services

IJF/kek

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

RECEIVED SEP 5 1986 ZONING OFFICE

TO Mr. Paul J. Solomon, Head
Environmental Planning Section
Date August 28, 1986

FROM Ian J. Forrest
Southern Four, Inc.

SUBJECT Sand & Gravel Mining Proposal

This project has been under review by this office since March of 1986. On May 5, 1986 we sent to the applicant, Terry Stancill, the attached correspondence requesting a site evaluation to include soil and groundwater and surface water analyses. To date we have received only the same soils analyses that you received. Our decision on a permit for the site will of necessity incorporate review of data from all the categories referenced above.

The soil sample analyses to which you refer are preliminary samples run by the applicant prior to our May 5th correspondence. The levels of cadmium in the samples taken from 0-6" depth exceed what would be acceptable for use on vegetable gardens or other agricultural applications. However, applications of this top soil for other projects such as land reclaimation would be acceptable. Conversation by my staff with the applicant has revealed that they are seeking approval for just such an application elsewhere offsite.

The applicant has postponed initiating the sampling we have requested pending a decision on the zoning exception. When we receive data to evaluate we will advise you accordingly.

Should you have questions regarding this matter in the interim, please contact John H. Hobner at 494-3768.

Ian J. Forrest, Director
BUREAU OF ENVIRONMENTAL SERVICES

IJF:gc

RECEIVED SEP 3 1986

BALTIMORE COUNTY, MARYLAND

RECEIVED SEP 8A 1986

INTER-OFFICE CORRESPONDENCE

ZONING OFFICE

TO Arnold Jablon
Zoning Commissioner
Date September 18, 1986

FROM Norman E. Gerber, AICP, Director
Office of Planning and Zoning

SUBJECT Critical Area Findings: Southern Four, Inc.
Petition for Special Exception for Sand and Gravel Operation
(86-195-X, Item 67)

Site Description

The site is located in the coastal plain in the eastern area of Baltimore County bordering Ebenezer Road to the south and Bird River Road to the west. It consists of 129 acres and is zoned Resource Conservation 2. Currently, the land consists of old field or meadow, woodland meadow, and woodland. Tidal wetlands exist in the northeast corner of the site. Extensive areas of nontidal wetlands exist along much of the eastern fringe extending into the central portion of the site and throughout most of the site's western section. Except for an area of steep slopes bordering the stream flowing near the northern border of the site, the land contained within the site is level to nearly level.

Project Description

The petitioner proposes to extract 7,200,000 tons of sand and gravel from the site over a 15-year period. As proposed, 60 acres of land will be mined with an additional 15 acres to be used for support services such as mineral processing, including washing, stockpiling, and roads. The operation is planned in five phases over the 15 years. The phases consist of operational units or cells of from 8 to 16 acres. Reclamation is planned concurrently with the extractive operations and consists of a series of lakes and the creation of wetland areas. Selected plantings are included in the reclamation plan. Erosion and sedimentation controls are to be established. Disturbed areas are to be staged so as to reduce the amount of exposed land at any one time.

Environmental Impacts

Sand and gravel extractive operations include the potential for adverse impacts including those relating to water quality, vegetation and wildlife. The petitioner in this case has submitted studies entitled Environmental Impact Report and Additional Environmental Impact Data. In addition, a detailed site plan and a letter to Paul Solomon, Baltimore County Environmental Planner, with attached descriptive information (Attachment A) have been submitted. All of these submittals have been made to satisfy the requirements of the Chesapeake Bay Critical Area Protection Program. A review of these Critical Area submittals has led this agency to conclude that as designed, the proposed extraction avoids or minimizes adverse environmental impacts.

CPS-008

Arnold Jablon
September 18, 1986 Page Two

Chesapeake Bay Critical Area Findings

It is the Findings of this agency, in accordance with Section 8-1813 of the Critical Area law, that the proposed development will minimize adverse impacts on water quality and has been designed for appropriate habitat protection, provided that the following minimum requirements are made an enforceable part of the zoning order authorizing the development;

The construction, operation, maintenance and termination of the development must be in accordance with the site plan dated 2/86 with noted revisions and the accompanying explanatory text, including:

a. All tidal wetlands shall be protected by an undisturbed buffer which shall not be less than 300-ft.-wide except at the two places shown on the plan.

b. All existing non-tidal wetlands and wooded areas shall be protected by establishment of a 50-ft.-wide vegetated buffer along the edge of these areas, except that the buffer need not be established along the existing service road or along the interior haul-road as shown on the plan. A 50-ft.-wide buffer must also be established along all parts of the property's perimeter which are not now wooded.

c. The 50-ft. vegetated buffer areas will be planted and maintained as part of a well-conceived, diversified plan for wildlife habitat enhancement. This plan is to be developed and implemented through enrollment in the Maryland Acres for Wildlife program. The buffer plantings will consist of suitable conifers where necessary to reduce or eliminate visual and noise impacts on neighboring properties.

d. The erosion and sediment control plan as indicated on the site plan shall be fully implemented in complete accordance with Baltimore County erosion and sediment control standards and practices. These structures will in turn be converted to shallow marsh ponds when no longer necessary to control sediment. These wetland or marsh ponds shall be designed and constructed based on the State of Maryland Water Resources Administration's standards for wetlands.

e. The fuel storage area shall include an oil/grease trap installed and operated in accordance with the standards of the Maryland Department of Health and Mental Hygiene.

f. All processing water shall be returned to the pit areas by a drainage ditch as shown on the plan.

g. All site improvements, including sanitary facilities and water supplies, shall be developed consistent with all applicable State and County health regulations.

Arnold Jablon
September 18, 1986 Page Three

h. Monitoring, including the collection and analysis of both the soil and groundwater, shall be performed as determined and under the supervision of the Baltimore County Department of Health.

i. All applicable local, state, and federal noise and dust regulations will be fully satisfied.

County Review Group (CRG) Applicability

It has been determined by the Current Planning and Development Division of the Baltimore County Office of Planning and Zoning that CRG review and approval is not required due to the limited nature of the improvements as delineated on the site plan. However, a formal waiver must be applied for by the petitioner.

Norman E. Gerber, AICP
Director

NEG/PJS/sf

Attachments:
1. Environmental Impact Report and
   Additional Environmental Impact Data
2. Detailed site plan and letter
3. Descriptive Information (Attachment A)

cc: Uri P. Avin, AICP
Tim Dugan, AICP
Herbert P. Bangs
James Komatinsky

BALTIMORE COUNTY, MARYLAND

RECEIVED AUG 12 1986 ZONING OFFICE

INTER-OFFICE CORRESPONDENCE

TO IAN J. FORREST, Director
Environmental Services, Health
Date August 7, 1986

FROM PAUL J. SOLOMON, Head
Environmental Planning Sec., OPZ

SUBJECT Southern Four, Inc. —
Sand and Gravel Mining Proposal

The consultant for Southern Four, Engineering Technologies Associates, Inc. provided this agency with information regarding their project. Attached is information regarding heavy metal concentrations on the areas covered with sludge from Back River sewage treatment plant. We would appreciate your agency advising us as to potential health or environmental impacts from these levels if the top soil was removed from the site and used for various purposes including lawns and vegetable gardens. You may also wish to comment on the adequacy of the sampling method.

The applicant is reluctant to provide information regarding ground and surface water. This agency believes that it is essential that groundwater sampling be done in order to establish benchmark readings prior to the beginning of extractive operations.

Looking forward to receiving this information at your earliest convenience, so that we may complete the interim "findings" and the Zoning Commissioner will then be able to schedule the Special Exception hearing. Additionally, Southern Four, Inc. is in the process of applying for a permit to remove the top soil from this site. It would seem to be essential to determine the acceptability of pollutant levels due to sludge application before any permit is granted.

Paul J. Solomon
PAUL J. SOLOMON, Head
Environmental Planning Sec.

PJS:vh

cy: Tim Dugan, Spec. Assistant
to the Director

James E. Dyer
Zoning Supervisor

Jack Berger
Sediment Control Div.
Permits & Licenses

Attachment:
Information, heavy metal
concentrations

CPS-008

GASCOYNE LABORATORIES, INC.
BALTIMORE, MARYLAND 21202

CERTIFICATE OF ANALYSIS

APR 28 1986

Report No. 86-1218

Report to: Stancills, Inc. Report Date 4-23-86

Sample I.D. Soil samples rec'd on 4/15/86

Sample No.	S4-1	S4-2	S4-3	S4-4	S4-5
pH	6.5	5.7	5.3	5.5	5.3
Chromium (Cr)	120	180	150	230	9
Nickel (Ni)	18	22	13	26	< 2
Cadmium (Cd)	< 1	1	1	1	< 1
Zinc (Zn)	140	180	130	320	4
Copper (Cu)	86	120	130	230	4
Mercury (Hg)	0.60	0.77	0.95	0.80	< 0.001
Lead (Pb)	36	47	50	74	< 5

NOTE: The above results are expressed in ppm (mg/kg).

cc: Mr. Michael L. Clar B-4

GASCOYNE LABORATORIES, INC.

GASCOYNE LABORATORIES INC.

BALTIMORE, MARYLAND 21202

SALISBURY (301)543-1051

CERTIFICATE OF ANALYSIS

MAY 16 1986

Report No. 86-1406

Report to: Stancill's, Inc. Report Date 5/7/86

Sample ID. Four soil samples received on 4/30/86

	S4-2A,12"	S4-2B 24"	S4-6 Control 6"	S4-6 Control 12"
pH	5.1	5.3	5.0	4.6
Chromium (Cr)	14	23	15	22
Nickel (Ni)	3	3	2	2
Cadmium (Cd)	< 1	< 1	< 1	< 1
Zinc (Zn)	38	42	17	30
Copper (Cu)	10	11	7	7
Mercury (Hg)	< 0.02	< 0.02	0.03	< 0.02
Lead (Pb)	13	11	10	9

The above results are expressed as mg/kg.

cc: Mr. Michael Clar
Eng. Technology Assoc., Inc.
P.O. Box 816
Ellicott City, MD 21043

GASCOYNE LABORATORIES, INC.

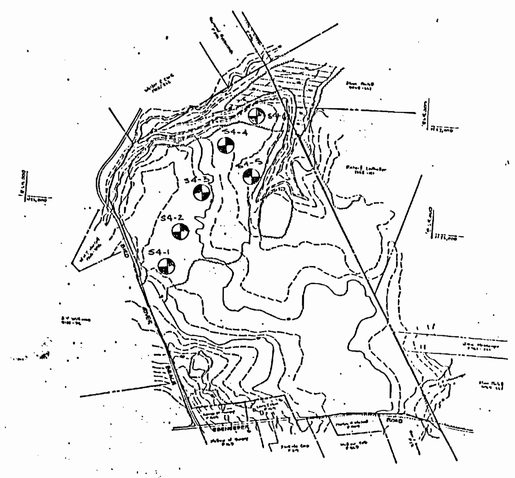


Figure 1
Site Plan

TABLE 1. TYPICAL CONCENTRATIONS AND RANGES OF ELEMENTS IN SOILS [a,b]

Element	Typical Value	Range
O (%)	49	-
Si (%)	33	-
Al (%)	7	25-35[b]
Fe (%)	4	1-3[b]
C (%)	2	0.7-5[b]
Ca (%)	1	0.7-5[b]
K (%)	1	0.04-3[b]
Na (%)	0.7	0.07-7[b]
Mg (%)	0.6	0.06-6[b]
N (%)	0.1	0.02-.25[b]
P (%)	0.08	-
S (%)	0.05	0.003-.09[b]
F (%)	0.02	0.003-.03[b]
Cl (%)	0.01	-
B (%)	0.001	0.0002-.01[b]
I (ppm)	5	-
Mo (ppm)	3	0.02-5
Cd (ppm)	0.06	0.01-7
Co (ppm)	8	1-40
Cu (ppm)	20	2-100
Pb (ppm)	10	2-200
Mn (ppm)	850	100-4000
Ni (ppm)	40	10-1000
Zn (ppm)	50	10-300
As (ppm)	5	1-50
Be (ppm)	1	0.2-10
Cr (ppm)	20	5-1000
Se (ppm)	0.5	0.1-2.0
Hg (ppm)	0.05	0.02-0.2

Bohn, McNeal, and O'Connor, 1979
Overcash and Pal,1979

February 24, 1987

Michael E. Marr, Esquire
Robert B. Scarlett, Esquire
10 N. Calvert Street, Suite 430
Baltimore, Maryland 21202

RE: Petition for Special Exception
Beginning at the Centerline Ebenezer Road,
1248.75' E of the Centerline Bird River Beach Road
15th Election District, 5th Councilmanic District
The Southern Four, Inc. - Petitioner
Case No. 86-195-X

Dear Messrs. Marr and Scarlett:

Please be advised that on February 19, 1987, an appeal of the decision rendered in the above-referenced case was filed by William A. Barkuloo, President, Bird River Civic Association.

You will be notified of the date and time of the appeal hearing when it has been scheduled by the County Board of Appeals (494-3180).

Very truly yours,

ARNOLD JABLON
Zoning Commissioner

AJ:bjs

cc: Ms. Patricia Ecke, Vice President
Harewood Park Community League, Inc.
c/o 12929 Community Road
Baltimore, Maryland 21220

Phyllis Cole Friedman, Esquire
People's Counsel for Baltimore County
Room 223, Old Courthouse
Towson, Maryland 21204

File

County Board of Appeals of Baltimore County
COUNTY OFFICE BUILDING, ROOM 315
111 W. CHESAPEAKE AVENUE
TOWSON, MARYLAND 21204
(301) 887-3180
July 18, 1989

RECEIVED
JUL 20 1989
ZONING OFFICE

Michael P. Tanczyn, Esquire
606 Baltimore Avenue, Suite 106
Towson, Maryland 21204

Re: Case No. 86-195-X
The Southern Four, Inc.

Dear Mr. Tanczyn:

Notice is hereby given, in accordance with the Rules of Procedure of the Court of Appeals of Maryland, that an appeal has been taken to the Circuit Court for Baltimore County from the decision of the County Board of Appeals rendered in the above matter.

Enclosed is a copy of the Certificate of Notice.

Very truly yours,

LindaLee M. Kuszmaul
Legal Secretary

Encl.
cc: Mr. William A. Barkuloo, Pres.
Bird River Civic Association
Ms. Patricia Ecke, Vice President
Harewood Park Community League, Inc.
Phyllis C. Friedman, Esquire
Mr. William Marsden, President
Bengies & Chase Democratic Club
Ms. Janine Mauersberg
Mr. Jerry R. Bloyer
Mr. Jack Gease
Mr. Mark Kahler
Ms. Diane Fielding
Ms. Charlotte Meinhardt
Mrs. Carol Wehner
Mr. David C. Brown
Mr. Charles J. Hiles
P. David Fields
Pat Keller
J. Robert Haines
Ann M. Nastarowicz
James E. Dyer
Docket Clerk - Zoning
Arnold Jablon, County Attorney
Sarah J. Taylor, PhD
Ron Serey, Planner - Ches. Bay CAC
Hon. E. Farrell Maddox
Marilyn Cannon

APPEAL

Petition for Special Exception
Beginning at the Centerline Ebenezer Road
1248.75' E of the Centerline Bird River Beach Road
15th Election District - 5th Councilmanic District
The Southern Four, Inc. - Petitioner
Case No. 86-195-X

Petition for Special Exception

Description of Property

Certificates of Posting

Certificates of Publication

Entry of Appearance of People's Counsel

Zoning Plans Advisory Committee Comments

Correspondence from the Director of Planning & Zoning dated 02/06/86

Letter of Protest from Harewood Park Community League, Inc. dated 02/26/86

Letter of Protest from Mr. & Mrs. Herman D. Pennington (no date)

Letter of Protest from West Twin River Improvement Assoc. dated 02/24/86

Letter of Protest from Raymond and Alice Andrews (no date)

Critical Area Comments, from Norman E. Gerber dated 03/13/86

Waste & Water Quality Mgmt. Comments from Ian J. Forrest dated 04/18/86

Correspondence dated 08/07/86 from Paul Solomon to Ian Forrest

Correspondence dated 08/28/86 from Ian J. Forrest to Paul Solomon

Preliminary Erosion and Sediment Control Plan revised 08/28/86

Additional Critical Area Comments from Norman E. Gerber dated 09/18/86

Petitioner's Exhibits: 1 - Map of Site submitted by Petitioner (Missing from File)

2 - Plat to Accompany Petition revised 10/4/85

3 - Copy of Resume of Michael L. Clar, P.E.

4 - Environmental Impact Report (Revised EIR entitled "Additional Environmental Impact Report" w/attachment)

5 - Requirements for Environmental Effects Reports Baltimore County Dept. of Health

6 - Site Plan of Site dated 02/86 (10 Sheets)

7 - Resume of Timothy A. Ryan, P.E. from Kidde Consultants, Inc.

Protestant's Exhibits: 1 - Letter dated 02/20/86 from Bird River Civic Assoc.

2 - List dated 02/26/86 of names and addresses

3 - Letter dated 02/25/86 from Ebenezer United Methodist Church

4 - Letter from Bird River Beach Community Assoc. (no date)

5 - Letter dated 02/25/86 from Oliver Beach Imp. Assoc.

6 - Letter dated 02/25/86 from Mr. Norma Stinchicum to Harewood Park Community League.

7 - Accident Statistics from Patricia Ecke (Harewood Park Community League)

8 - Letter dated 02/24/86 from Our Lady Queen of Peace School.

9 - Aerial Map (#4-5-82; 178-82; 29-258)

10 - Aerial Map (#72-47; 25-18

Zoning Commissioner's Order dated 11/20/86

Zoning Commissioner's Amended Order dated 11/26/86

Letter from William A. Barkuloo, Bird River Civic Assoc., dated 12/23/86

Zoning Commissioner's Amended Order dated 01/21/87

Notice of Appeal received 02/10/87 from People's Counsel

Notice of Appeal received 2/19/87 from William A. Barkuloo, Bird River Civic Assoc.

Michael E. Marr, Esquire, Attorney for Petitioner
Robert B. Scarlett, Esquire, Attorney for Petitioner
10 N. Calvert Street, Suite 430, Baltimore, Maryland 21202

Phyllis Cole Friedman, Esquire, Appellant
People's Counsel for Baltimore County
Room 223, Old Courthouse, Towson, Maryland 21204

Ms. Patricia Ecke, Vice President
Harewood Park Community League, Inc.
c/o 12929 Community Road, Baltimore, Maryland 21220

Mr. William A. Barkuloo, President
Bird River Civic Association
6612 Blackhead Road, Baltimore, Maryland 21220

Request Notification: Norman E. Gerber, Director of Planning
James Hoswell, Office of Planning & Zoning
Arnold Jablon, Zoning Commissioner
Jean M. H. Jung, Deputy Zoning Commissioner
James E. Dyer, Zoning Supervisor
Margaret E. duBois, Docket Clerk

Board No 1

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO: Baltimore County Board of Appeals DATE: October 24, 1988

FROM: Mr. Robert W. Sheesley

SUBJECT: Zoning Petition for Special Exception 85-195-X
Requested by the Southern Four, Inc.

The applicant, Southern Four, Inc., is petitioning for a special exception to permit control excavation and removal of sand and related materials.

The subject property is located on the northeast corner of Ebenezer Road and Bird River Beach Road. This site is approximately 129 acres and is zoned RC-2. Approximately 60 acres of the entire property is within the Chesapeake Bay Critical Area and is classified as Resource Conservation Area (RCA). However, only 19 acres will be developed in the Chesapeake Bay Critical Area.

This entire property is located within an area that is identified as a mineral resource area. This is in accordance with A Mineral Resource Plan for Baltimore County. This plan is also part of the Baltimore County Chesapeake Bay Critical Area Program.

The Chesapeake Bay Critical Area Criteria defines this proposed land use as "surface mining". "Surface mining means:

1. The breaking of the surface soil in order to extract or remove minerals in the Critical Area;

2. Any activity or process constituting all or part of a process for the extraction or removal of minerals from their original location in the Critical Area; and

3. The extraction of sand, gravel, rock, stone, earth or fill from borrow pits for highway construction purposes or other public facilities."

Surface mining also means:

1. "Operations engaged in processing minerals at the site of extraction;

2. Removal of overburden and mining of limited amounts of any mineral when done for the purpose of prospecting and to the extent necessary to determine the location, quantity or quality of any natural; and

operations in the immediate vicinity of the Petitioner's property. Certainly, the Petitioner does not dispute that the Genstar operation is in differently zoned area. However, the truck traffic generated from Genstar's operation uses Ebeneezer Road. This is evidence of an existing traffic condition within the immediate community. The Protestants cannot really claim this is the bucolic, rural road they would wish.[7]

The Protestants must show that the impact created by the Petitioner's use is new and unique. Truck traffic on Ebeneezer Road is neither.

While the Protestants' primary complaint involved traffic on Ebeneezer Road, at the eleventh hour, the Protestants also argue that the mining operation will have visual and noise impacts which are special and unique. However, the evidence does not support this allegation. There is no evidence that any property owner will see the tower that may be used in this mining operation. Indeed, there is virtually no evidence before this Board regarding a tower. Absent such evidence, it would be rank speculation for the Board to assume any facts about a tower.

Furthermore, there are certain inherent characteristics

[7]. Indeed, Ebeneezer Road is very soon to be visited by a new Theme Park with a Chinese focus. See Article from the February 27, 1989 Evening Sun, a copy of which is attached hereto as Exhibit 1.

of a mining operation that will exist regardless of where the operation is placed in a zone. One of them is a tower. There will also be some noise from trucks and loading equipment. (Like the tower, there is no testimony from anyone with expertise in mining as to the nature and extent of this noise.) The question that this Board has to address is whether operational conditions inherent to this proposed use would have any greater impact on the immediate neighbors than would otherwise occur if the mining operation were located anywhere else within the zone. The Protestants have not offered, and indeed cannot offer, any credible evidence that there is another location within the zone where these operational conditions would have less impact. Applying Schultz, the application for a special exception must be granted.

PETITIONER'S REPLY TO THE PEOPLE'S COUNSEL'S MEMORANDUM

Schultz v. Pritts

Interestingly, but not unexpectantly, People's Counsel is opposing the application.[8] In doing so, Peoples Counsel

[8]. The Petitioner questions whether People's Counsel is exceeding its statutory authority. Like the residents in the immediate area of the Petitioner's property, the Petitioner is a citizen of Baltimore County. People's Counsel has a duty to all citizens, including the Petitioner, to see that the laws of the County are obeyed. In the context of this case, and in particular in the context of the Schultz v. Pritts holding, the Petitioner, and not the community residents, enjoys a presumption of validity as to its proposed use. There is no evidence that County laws have not been met. Indeed, because of the critical shortage of minerals in Baltimore County, People's Counsel has a duty to see that resource deposits are not wasted. People's Counsel seems to have disregarded its charge in taking such a vehement stand against the proposed use.

relies on a particularly confused reading of the Schultz and Holbrook cases.[9] Contrary to People's Counsel's argument, the Court of Appeals in Holbrook did not underline the restrictive character of the special exception but rather reaffirmed once again that a special exception must be granted unless there is substantial evidence of adverse impacts at the location of the proposed use that are above and beyond the impacts that would exist regardless of where the use were located in the zone. In Holbrook, the Court of Special Appeals had concluded there was no substantial evidence of particular adverse impact at the location upon which the Zoning Board could have based its denial of the application and for that reason determined that the Board's denial was arbitrary and capricious. On certiorari, the Court of Appeals did not question or criticize the Court of Special Appeals interpretation of the Schultz case. Rather, if found that the Court of Special Appeals had impermissably overstepped the appropriate scope of judicial review of an administrative decision by substituting its judgment for that

[9]. The Petitioner's attorneys have read the original paragraph of page two of People's Counsel's Memorandum numerous times and still have no idea what People's Counsel is saying. As previously noted, and as indeed People's Counsel observes in his Memorandum (at page three), the holding of Schultz is clear.

of the administrative agency.[10] For that reason and for that reason alone, the Court of Appeals reversed. In all other respects it reaffirmed its prior holding in Schultz regarding the standard to be applied in considering an application for special exception.

No Evidence of Adverse Impacts

In the case at bar, there is no evidence of any particular adverse impact at the location of the proposed use. There is no evidence that the mining operation will be visible by any neighbor. No neighbor testified to that theory. There was no evidence as to the height or visibility of any tower. Furthermore, there is evidence in the record that the site will have a berm around it on which trees will be planted. Photographs introduced into evidence reveal a thick woodline between the project site and the main community on Bird River Beach Road. There is also no evidence that the neighbors would be impacted by noise from the operation. No witness testified as to the kinds of noise that might eminate from the Petitioner's mining operation. There is no evidence that this noise would be greater or

[10]. In Holbrook, the Court of Appeals observed that there was evidence before the Board of particular adverse impacts unique to the location which would not otherwise exist within the zone. For example, the Court of Appeals observed that there was evidence of other locations within the zone where the presence of a mobile home would have no adverse impact on property values. Thus, the Court determined that the Board could have found that the adverse impact created at the location of the mobile home was greater than elsewhere within the zone.

would have a greater impact on any particular neighbor than it would were the operation located somewhere else within the zone. For this Board to assume the degree of impact (or lack thereof) that might result from a mining operation would be speculative and arbitrary.

Finally, there is no evidence that there is any other location within the zone where the Petitioner's proposed use could be located such that the visual, auditory, or other impact typically associated with that use would be less than those inherently associated with such an operation. Such evidence was absolutely essential for the Protestants to overcome the presumption of validity which the Petitioner enjoys.

The Neighborhood

The People's Counsel's argument regarding the definition of neighborhood is also incorrect. In support of its position, Peoples Counsel extracted the following single sentence quote from Judge Cole's opinion in Holbrook:

"As we explained in another zoning context, the neighborhood in any area must be an area which reasonably constitutes the immediate environs of the subject property."

apparent. In Holbrook, the owner of a mobile home wanted an This sentence is not at all at odds with the Petitioner's reading of Schultz. Indeed, when Judge Cole's statement is read in the context of the balance of the Holbrook opinion, The limited scope of the term neighborhood is expansive definition of neighborhood because of the rural

nature of the area. The Court rejected this argument. In Holbrook, the Court concluded that this definition of environment included only the properties immediately contiguous to the subject property. Like Holbrook, the case at bar, involves a rural area. The neighborhood here is that "area which reasonably constitutes the immediate environs of the subject property". Holbrook, 314 Md. App. 219; Clayman v. P.G. County, 266 Md. 409, 418 (1972). Under this definition, the neighborhood is at best the community of Bird River Beach. Any alleged adverse impacts at Windless Run are outside the neighborhood and irrelevant. Within the immediate neighborhood, there is no evidence of any adverse impacts above and beyond those that would result if the proposed use were located anywhere else within the zone. There is no testimony of the diminution of anybody's property values, no evidence of any particular unusual visual or auditory impacts, and no evidence of any particular traffic danger.

The Petitioner's Reputation

Perhaps the most disturbing argument proferred by the People's Counsel is the suggestion that the Petitioner will not abide by the law. But for the doctrines of privilege, such a suggestion borders on libel. That the People's Counsel has even put forth this suggestion is particularly distressing. The matter of prior usage of the property for sludge disposal is irrelevent, notwithstanding the fact that the application for and permission to use the property for

that purpose was done entirely within the law. The People's Counsel's suggestion that the Petitioner has displayed "indifferent environmental sensitivity" is a singularly possessed opinion of the author not borne out by any evidence and should be stricken if not disregarded. Zoning is merely that first of the Petitioner's hurdles. This Board can take notice of the fact that mining operations are subject to stringent regulatory controls on the federal, state, and local levels. Overlaying that body of regulation is the existence of very stringent regulatory authority associated with the Chesapeake Bay critical areas laws in which a significant portion of the subject property is located. The Petitioner must adhere to environmental concerns and has represented just that to the County. The Petitioner has also proferred to the County and to the State that it will return the property to agricultural use within twenty five years. It is bound by this promise. No zoning authority has the responsibility to act as an haruspex in predicting whether an applicant will in the future comply with various regulatory laws governing the use of property. Rather, the Zoning Board's authority is limited to a determination of whether the application meets the standards of existing zoning law. That People's Counsel are urging this Board to step beyond its authority is particularly troublesome.

Conclusion

For all the above reasons, the Petitioner respectfully submits that its application for a special exception should be granted.

Respectfully submitted,

Thomas C. Swiss

Michael E. Marr

Michael E. Marr
MARR, SWISS & WOODS
301 North Charles Street
Suite 900
Baltimore, Maryland 21201
(301) 539-4252

3. Mining operations, if the affected land exceeds one acre or more in area."

<COMAR 14.15.07.01(A)(B) and Balto. Co. Code, Sec. 403.2>.

"Surface mining operations in the Critical Area shall be sited to minimize pollution from sedimentation and siltation, chemical and petrochemical use and spillage, noise and the storage or disposal of wastes, dusts and spoils. The operation shall be conducted to permit the rapid reclamation of the site, including the wash ponds, when the operation has terminated." <Balto. Co. Code, Sec. 403.2(2)>.

Several site constraints on this property are of important concern to the Baltimore County Chesapeake Bay Critical Area Program. Tidal wetlands are important and have been delineated in the field as shown on the Critical Areas Findings Plan. In accordance with COMAR 14.15.07(D)(4) a minimum buffer of 100 feet is required from the mean high water line of tidal waters. The applicant will provide a buffer area from 175' to 300' between the limit of disturbance area and tidal wetlands. This buffer area will be undisturbed and the existing natural vegetation will remain in place.

Non-tidal wetlands are also present on the property and have been field delineated as shown on the Critical Area Findings Plan. The majority of the south and southeastern portion of the property is considered non-tidal wetland. This wetland area will not be disturbed. The north and northeastern portion of the property also encompasses non-tidal wetlands. A buffer area will be established that will be a non-disturbed area from the limit of disturbance line. A minimum 25 foot buffer is provided in accordance with COMAR 14.15.09.02.C and Balto. Co. Code, Sec. 38-22(2), 22-212 and in some areas the buffer exceeds 200 feet.

There are two streams on the property and they are located in the north and northeastern portions of the site. A buffer is provided for each. The findings plan indicates a buffer range from 100 feet to 150 feet of undisturbed area. <COMAR 14.15.07(D)(4)>.

As for protecting the existing forest and developed woodland, development activity will be consistent with the criteria for Limited Development Area (LDA). Any alteration of woodland will comply with the criteria that no more than 20% of forest or woodland may be removed. This woodland will be replaced in the Critical Area on no less than equal area basis. An additional 10% of the forest or woodland may be removed provided that it will be replaced by 1:1.5 acre ratio. This will be done in accordance with a forest establishment plan and

agreement. The applicant may also pay fees in lieu to Baltimore County for forest replacement only. <COMAR 14.15.02.04(3) and Balto. Co. Code, Sec. 22-217(c)>.

Surface mining in the Chesapeake Bay Critical Area is prohibited where highly erodible soils exist. <COMAR 14.15.07 and Balto. Co. Code Sec. 403.2(3)>. Within this property, the pit area is comprised of the following soils with their K value: ShB-K = .25, ShA-K = .28, SlA-K = .28, MkA-K = .37 and WdA-K = .28. Highly erodible soils have a slope greater than 15%, or those with a "K" value greater than .35 and with slopes greater than 5%. The Southern Four Pit Critical Area Findings Plan indicates that the mining will not take place on soils that are classified as highly erodible. Also, this site is not considered a Habitat Protection Area according to the Baltimore County Habitat Protection Plan.

Grading and surface mining activities which are subject to State approval and enforcement under State law and regulations are exempt from the requirements for grading and sediment control plans, but are subject to the following conditions and requirements:

a. Any grading or surface mining activities subject to State approval and enforcement under State law and regulations determined by the Department to be the cause for an erosion or sediment condition detrimental to adjacent properties, public safety or any watercourse will be referred to the Maryland Water Resources Administration for corrective action.

b. The Maryland Water Resources Administration shall provide written notification to Baltimore County regarding the disposition of any grading or surface mining erosion or sediment violations referred to the State for a corrective action.

<Balto. Co. Code, Sec. 38-6(b)(3)a,b>

The Baltimore County Code, Section 403.2(3)(iii) indicates that surface mining operations, including access roads, accessory or related improvements, equipment and storage areas shall not be permitted if the mining activity would prevent the use of the site for agricultural or forestry purposes for more than 25 years. Southern Four, Inc. intends to comply with the law by implementing a aquacultural program within the proposed lakes. It is this Department's understanding of the law and input from Critical Area Commission staff that aquacultural land use is an acceptable post mining land use. It is also this Department's recommendation that this post land use be put into covenants that will be part of the land regardless of ownership.

Therefore, these findings for Southern Four Pit shows that the revised site plan of October 1988 has met the requirements and the following goals of the Chesapeake Bay Critical Area Law:

1. "Minimize adverse impacts on water quality that result from pollutants that are discharged from structures or conveyances or that have runoff from surrounding lands;

2. Conserve fish, wildlife and plant habitat; and

3. Establish land use policies for development in the Chesapeake Bay Critical Area which accommodate growth and also address the fact that even if pollution is controlled, the number, movement, and activities of persons in that area can create adverse environmental impacts."

<COMAR 14.15.10(0)(1)(2)(3)>.

Robert W. Sheesley, Director
Department of Environmental Protection
and Resource Management

RWS:DCF:tjg

Attachment

cc: The Honorable Ronald B. Hickernell

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO David Flowers Date August 8, 1988

FROM Eugene Siewierski

SUBJECT Stancill Sludge Site

The results of analysis of soil and sludge compost samples collected by my staff on the Bird River Beach Road site have been received and evaluated. The results indicate that the concentration of heavy metals, PCB's and lime are well within the standards described under state regulation. As a result this compost is considered acceptable for unlimited distribution to the public, as proposed by the site owner.

EGS:sp

cc: Rocky Powell
Jeffrey Jollie
Peter Zimmerman, Deputy People's Counsel

RECEIVED
AUG 11 1988
DIVISION OF
ENVIRONMENTAL MANAGEMENT

CPS-008

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO: File DATE: October 19, 1988

FROM: Mr. Jeffrey B. Jollie

SUBJECT: Southern Four Sand and Gravel Mining Proposal

I have reviewed the Environmental Impact Report, Addendum B, for the Southern Four, Inc. sand and gravel mining proposal in southeastern Baltizore County. The Addendum was prepared in response to DEPRM concerns regarding wetlands, ground water and surface water. My comments and concerns are relative to ground water.

The initial Environmental Impact Report submitted for Southern Four, Inc. by Engineering Technology Associates, Inc. acknowledged that residential domestic water supplies in the area were drawn from ground water via inidivisual on-site wells. The report, however, did not identify the location of those supplies or the aquifer(s) from which they are drawn. In addition, it did not detail whether ground water flow from the proposed site was in a direction towards or away from those well supplies. A third concern was related to the establishment of baseline water quality and the monitoring of water quality parameters over time. That concern was due in part to prior application of sewage sludge on site.

Addendum B satisfies ground water related concerns. Soils samples conducted by this Department's Waste Management Section indicate that the prior on-site application of sludge presents no environmental hazards. Southern Four, Inc. has identified generalized ground water flow directions for the site and has identified and catalogued adjacent and nearby well supplies. Southern Four, Inc. has also agreed to install an upgradient and downgradient monitoring well. The proposed well sites have been identified and agreed upon by the engineer and this Department. Since the soils testing conducted by the Waste Management Section did not indicate any problems, it is not imperative that the wells be tested prior to the ruling on the special exception.

The only issue not discussed and, as of yet is unresolved, is routine sampling and analysis of the on-site monitoring wells. It is recommended that annual samples be collected by Southern Four, Inc. and analyzed for inorganic metals, volatile priority pollutants, and semi-volatiles. The Department of Environmental Protection and Resource Management would reserve the right to collect split samples and would as a matter of necessity require five working days notice prior to the collection of those samples.

JBJ:tjg

cc: Mr. Robert W. Sheesley
Mr. Paul H. Solomon
Mr. David C. Flowers
Mr. Eugene G. Siewierski
Mr. Rocky O. Powell

County Board of Appeals of Baltimore County
Room 200 Court House
Towson, Maryland 21204
(301) 494-3180

May 20, 1987

Michael P. Tanczyn, Esquire
Suite 106, 606 Baltimore Avenue
Towson, MD 21204

RE: Case No. 86-195-X
The Southern Four

Dear Mr. Tanczyn:

Your request for postponement is timely and your reasons are valid. The Board will therefore grant the requested postponement.

The next two consecutive days available on the docket will be August 18 and 19. Unless the Board is notified within ten days of any conflict with these dates, the Board will set the case for hearing on August 18 and August 19, 1987 and will consider no further requests for postponements except for unusual or dire circumstances.

Sincerely,

William T. Hackett
William T. Hackett, Chairman
County Board of Appeals

WTH:kcw

cc: Michael E. Marr, Esquire
Robert B. Scarlett, Esquire
People's Counsel, Baltimore County
Mr. William Barkuloo

Baltimore County, Maryland
PEOPLE'S COUNSEL
RM. 223, COURT HOUSE
TOWSON, MARYLAND 21204
494-2188

PHYLLIS COLE FRIEDMAN
People's Counsel

PETER MAX ZIMMERMAN
Deputy People's Counsel

May 26, 1987

The Honorable
William T. Hackett, Chairman
County Board of Appeals
Room 200, Court House
Towson, Maryland 21204

RE: Case No. 86-195-X
The Southern Four

Dear Chairman Hackett:

In reference to your recent correspondence, please be advised that the undersigned will be out of state at an American Law Institute Seminar which begins on August 19, 1987, and necessitates travel on August 18th.

We have no desire to delay the proceedings, but respectfully request a rescheduling of this case. We would be willing to meet with counsel and the Board, or have a conference call, to attempt to come up with a possible time either before or after August 18th, and either on separate or consecutive days.

Very truly yours,

Peter Max Zimmerman
Peter Max Zimmerman
Deputy People's Counsel

PMZ:sh

cc: Michael E. Marr, Esquire
Robert B. Scarlett, Esquire
Michael P. Tanczyn, Esquire

RECEIVED
COUNTY BOARD OF APPEALS
'87 MAY 26 A 10 04

County Board of Appeals of Baltimore County
Room 200 Court House
Towson, Maryland 21204
(301) 494-3180

June 9, 1988

Michael E. Marr, Esquire
Thomas C. Swiss, Esquire
MARR & BENNETT
10 N. Calvert Street
Baltimore, MD 21202

Peter Max Zimmerman
Deputy People's Counsel
Room 223, Courthouse
Towson, MD 21204

Michael P. Tanczyn, Esquire
Suite 106, 606 Baltimore Avenue
Towson, MD 21204

Dear Counsel:

RE: Case No. 86-195-X
Southern Four, Inc.

The Board is in receipt of a Motion for Reconsideration by Counsel for the property owner in the above case requesting rescission and/or modification of the Board's Ruling on Motion to Direct Inspection of Property and Production of Documents dated May 17, 1988.

It should be noted that the Ruling of May 17 did not address the admissibility of any evidence which may be obtained during the course of People's Counsel's inspection. Rather, the Ruling provided only that People's Counsel could obtain such samples. If the results of this sampling are offered during the hearing, the Board will entertain any objections and argument regarding admissibility at that time.

Insofar as the Motion for Reconsideration, we will deny same as moot. Our Ruling of May 17 provided that the inspection must be on or before June 7, 1988 so as to prevent any postponement of this case. In that the Motion for Reconsideration was received on June 8, the Board need not consider the Motion as the date for testing has passed.

Very truly yours,

Lawrence F. Schmidt, Acting Chairman
County Board of Appeals
of Baltimore County

LES:kcw

E. FARRELL MADDOX
8TH LEGISLATIVE DISTRICT
BALTIMORE COUNTY
JUDICIARY COMMITTEE

DISTRICT LEGISLATIVE OFFICE
418 EASTERN BOULEVARD
BALTIMORE, MARYLAND 21221
PHONE 391-7800
ANNAPOLIS PHONE 841-3384

HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401-1991

June 13, 1988

Zoning Appeals Board
Mr. William T. Hackett
Chairman
Old Court House
Towson, Maryland 21204

Dear Mr. Hackett and Members:

Regarding the appeal by Southern Four, Inc., No. 86-195-X, asking for permission to mine: I would like to add my support to the community organizations which are opposing Southern Four's appeal.

My reasons for opposition are: (1) The likelihood of adverse effect on the wells in the Bird River Beach Community; (2) The large increase of dump trucks travelling on Ebenezer Road which is already overburdened with Genstar trucks; (3) Traffic will not be lessened by Route 43 because of the two-phase building of this project. The first phase will take Route 43 into The Worldbridge Theme Park with the second phase to Eastern Avenue not scheduled before the 1990's or into the twenty-first century; and (3) Continued development of the Harewood Park, Chase area adding to the already over-impacted Ebenezer Road. All of this adds to the severe burden of the residents who must use Ebenezer Road.

Another point for your consideration is the impact this will have on the Critical Areas by worsening the Bird River contamination of the Genstar Whitemarsh runoff.

For all the reasons cited above, I ask that the appeals board seriously consider denying the zoning petition of Southern Four, Inc. I know that this action will be heartily approved by all the community organizations concerned.

Sincerely,

E. Farrell Maddox

RECEIVED
6-15-88
C.B.A.
10:15 AM

EFM:ah

copies: Oliver Beach, Twin River, Bird River Community,
Bird River Civic and Harewood Park Community Organizations;
Bengies - Chase Democratic Club, Bird River Democratic Club.

County Board of Appeals of Baltimore County
Room 200 Court House
Towson, Maryland 21204
(301) 494-3180

June 30, 1987

Michael E. Marr, Esquire
MARR & BENNETT
Suite 430, 10 N. Calvert Street
Baltimore, MD 21202

RE: Case No. 86-195-X
Southern Four, Inc.

Dear Mr. Marr:

In response to your letter of June 29, 1987, requesting a new date for Case No. 86-195-X, Southern Four, Inc., the Board regrets to inform you that the docket is completely scheduled through September 29, 1987. The Board is agreeable to rescheduling the hearing to agree with your mid-October commitment but cannot schedule any hearing in August since notices for all August dates have been mailed.

If you wish, we will supply you with those dates that are now available after September 29 and await your response in answer to same. Since it is the Board's practice to schedule appeals in the sequence in which they are received, your timely response is requested so that none of these dates are lost.

Very truly yours,

William T. Hackett
William T. Hackett, Chairman
County Board of Appeals

WTH:kcw

cc: Mr. Jerry Stancil
Michael P. Tanczyn, Esquire

MEMORANDUM NOTE -- NOT TO BE CONSIDERED PART OF THE CASE FILE

On Monday, December 7, I received a telephone call from Mr. Terry Stancil asking if there was some way that we could get together and have a talk. I told him I thought that would be unwise and that we should have no conversations regarding his petition until after the final settlement.

W. T. Hackett
William T. Hackett

12/10/87

County Board of Appeals of Baltimore County
~~Room 200 Court House~~ Room 315, County Office Building
Towson, Maryland 21204
(301) 494-3180

August 24, 1988

Thomas C. Swiss, Esquire
MARR & BENNETT
Suite 430
10 N. Calvert Street
Baltimore, MD 21202

RE: Southern Four, Inc.
Case No. 86-195-X

Dear Mr. Swiss:

I am in receipt of your letters of July 27, July 28, and August 11, 1988 regarding DEPRM investigation of this matter.

I am appreciative of the novelty of this program and am convinced that their report and input will be worth any minor delay which may be caused in the hearing of this case by its production. I am therefore inclined to grant your request that the matter be continued for a period not to exceed sixty (60) days from August 11, 1988 for DEPRM to complete their investigation. However, I note that none of your letters were copied to Mr. Tanczyn nor People's Counsel. Therefore, I am enclosing copies of each to all concerned counsel to allow them the opportunity to provide any input as to this issue which they may deem necessary.

Very truly yours,

Lawrence E. Schmidt, Acting Chairman
County Board of Appeals

cc: Michael P. Tanczyn, Esquire
People's Counsel for Baltimore County
Robert W. Sheesley

Baltimore County
Department of Environmental Protection
& Resource Management
County Courts Building
401 Bosley Avenue
Towson, Maryland 21204
494-3733

Robert W. Sheesley
Director

August 25, 1988

Dennis F. Rasmussen
County Executive

Mr. Jerry Stancil
Southern Four Incorporated
499 Mountain Hill Road
Perryville, Maryland 21903

Dear Mr. Stancil:

In response to our meeting of July 23, 1988, I have reviewed the need for on site groundwater monitoring wells for the proposed Southern Four Sand and Gravel Mining operation located at the Northeast corner of the Bird River Beach and Ebenezer Roads. It has been determined that groundwater monitoring is required, at least initially. Two wells should be constructed on site, one in an upgradient location, the second in a downgradient location. The wells will be sampled and analyzed by the Waste Management Section of this Department. You, or your consultant are welcome to collect split samples if you desire.

The wells should be constructed according to State of Maryland COMAR Regulations 10.17.13.02 J, attached is a copy for your review. It is recommended that your consultent identify two potential wells sites and submit to this office a plan showing these locations. It is suggested that the wells be installed and sampled prior to the special exception hearing, however, that is not a requirement prior to approval. Samples collected by this Department will be analyzed for nitrates, PCBs, and heavy metals.

Very truly yours,

Jeffrey B. Jollie
Geohydrologist

JBJ:sp

Enclosure

cc: Paul Solomon
Rocky Powell
Eugene G. Siewierski
David Flowers

RECEIVED
AUG 00 1988
ENVIRON'L
ENVIRONMENTAL MANAGEMENT

County Board of Appeals of Baltimore County
COUNTY OFFICE BUILDING
111 W. CHESAPEAKE AVENUE
TOWSON, MARYLAND 21204
(301) 494-3180

October 19, 1988

Thomas C. Swiss, Esquire
MARR & BENNETT
Suite 430
10 N. Calvert Street
Baltimore, MD 21202

RE: Southern Four, Inc.
Case No. 86-195-X

Dear Mr. Swiss:

This is to acknowledge your letter of October 11, 1988. I assume that your letter contains a typographical error as to the date to which this Board has agreed to extend for the DEPRM to submit its report. My recollection of our telephone conversation was that the extension would be granted to Monday, October 24. Unless my recollection of this matter is in error, I trust that the Board will receive that report within that deadline.

Very truly yours,

Lawrence E. Schmidt
Acting Chairman

LES:kcw

cc: Michael P. Tanczyn, Esquire
Peter Max Zimmerman, Esquire
Mr. David C. Flowers

Baltimore County
Department of Environmental Protection
& Resource Management
County Courts Building
401 Bosley Avenue
Towson, Maryland 21204
494-3733

Robert W. Sheesley
Director

October 24, 1988

Dennis F. Rasmussen
County Executive

Mr. Lawrence E. Schmidt, Acting Chairman
Baltimore County Board of Appeals

RE: Southern Four, Inc.
Case No. 86-195-X

Dear Mr. Schmidt:

Enclosed please find the Critical Area Findings for the Southern Four, Inc. mining proposal.

In addition, please find several letters, prepared by this Department, addressing groundwater concerns and the results of soil analysis that we would like the Board to consider when rendering its decision.

If you have any questions, please do not hesitate to contact me at 494-3980.

Sincerely,

David C. Flowers
Program Coordinator
Chesapeake Bay Critical Area Program

DCF:KLC:tjg

Enclosures

RECEIVED
10/24/88
2:10 PM
C.B.A.

P-549 205 443
RECEIPT FOR CERTIFIED MAIL
No Insurance Coverage Provided
Do Not Use for International Mail

Dr S Taylor Exec Dir	
Crit Area Comm -Natl Resrcs	
580 Taylor Ave, D4	
Tawes State Office Bldg	
Annapolis, MD 21401	
Postage	.65
Certified Fee	.85
Special Delivery Fee	—
Restricted Delivery Fee	—
Return Receipt Fee	.90
TOTAL Postage and Fees	—
Postmark or Date	1.40

OCT 28 1988
ANNAPOLIS, MD

PS Form 3811, July 1983 447-845

DOMESTIC RETURN RECEIPT

1. Article Addressed to: Dr S Taylor Exec Dir Crit Area Comm -Natl Res Office Building, D4 Tawes State Annapolis, MD 21401	4a. Article Number P 549 205 443
	4b. Service Type: ☐ Registered ☐ Insured ☐ Certified ☐ COD ☐ Express Mail
	7. Date of Delivery: OCT 28 1988
	8. Addressee's Address (ONLY if requested and fee paid)

5. Received By: (Print Name) Michael Sellis
6. Signature — Addressee / Authorized agent
DATE DELIVERED
Date, Agent's Signature

County Board of Appeals of Baltimore County
COUNTY OFFICE BUILDING
111 W. CHESAPEAKE AVENUE
TOWSON, MARYLAND 21204
(301) 494-3180

October 26, 1988

Dr. Sarah Taylor, Executive Director
Critical Area Commission
580 Taylor Avenue
Department of Natural Resources
D4, Tawes State Office Building
Annapolis, MD 21401

RE: Case No. 86-195-X
Southern Four, Inc.

Dear Dr. Taylor:

Kindly be advised that this Board is presently entertaining a Petition for Special Hearing filed by Southern Four, Inc., for development of its site in eastern Baltimore County as a controlled excavation operation. In connection with the hearing of this case, the recommendations of the Department of Environmental Protection and Resource Management (DEPRM) as to this development were solicited by the Board. Those recommendations have now been received.

Pursuant to Section 500.14(C) of the Baltimore County Zoning Regulations, I enclose herewith the following: (1) the recommendations and exhibits prepared by DEPRM; (2) notice of the hearing dates assigned for this matter before the Board of January 3 and January 4, 1989; and (3) a copy of the Petition for Special Hearing, evidencing the property owner's request.

Also pursuant to B.C.Z.R. 500.14(C), kindly acknowledge receipt of these documents by written notice to this Board. A copy of your notice of receipt should also be forwarded to the applicant, Southern Four, Inc.

Finally, please note that I am forwarding copies of this correspondence with attachments to all interested parties. It would be appreciated if all parties would consult their calendars and acknowledge the assigned hearing dates. Further, if it is estimated that additional hearing dates will be necessary, they should be promptly requested so that they may be assigned before the Board's docket is filled.

Very truly yours,

Lawrence E. Schmidt, Acting Chairman
County Board of Appeals

cc: Thomas C. Swiss, Esquire
Michael E. Marr, Esquire
Michael P. Tanczyn, Esquire
People's Counsel for Baltimore County

County Board of Appeals of Baltimore County
COUNTY OFFICE BUILDING
111 W. CHESAPEAKE AVENUE
TOWSON, MARYLAND 21204
(301) 494-3180

CERTIFIED MAIL -
RETURN RECEIPT REQUESTED

October 26, 1988

Dr. Sarah Taylor, Executive Director
Critical Area Commission
580 Taylor Avenue
Department of Natural Resources
D4, Tawes State Office Building
Annapolis, MD 21401

RE: Case No. 86-195-X
Southern Four, Inc.

Dear Dr. Taylor:

Kindly be advised that this Board is presently entertaining a Petition for Special Hearing filed by Southern Four, Inc., for development of its site in eastern Baltimore County as a controlled excavation operation. In connection with the hearing of this case, the recommendations of the Department of Environmental Protection and Resource Management (DEPRM) as to this development were solicited by the Board. Those recommendations have now been received.

Pursuant to Section 500.14(C) of the Baltimore County Zoning Regulations, I enclose herewith the following: (1) the recommendations and exhibits prepared by DEPRM; (2) notice of the hearing dates assigned for this matter before the Board of January 3 and January 4, 1989; and (3) a copy of the Petition for Special Hearing, evidencing the property owner's request.

Also pursuant to B.C.Z.R. 500.14(C), kindly acknowledge receipt of these documents by written notice to this Board. A copy of your notice of receipt should also be forwarded to the applicant, Southern Four, Inc.

Finally, please note that I am forwarding copies of this correspondence with attachments to all interested parties. It would be appreciated if all parties would consult their calendars and acknowledge the assigned hearing dates. Further, if it is estimated that additional hearing dates will be necessary, they should be promptly requested so that they may be assigned before the Board's docket is filled.

Very truly yours,

Lawrence E. Schmidt, Acting Chairman
County Board of Appeals

cc: Thomas C. Swiss, Esquire
Michael E. Marr, Esquire
Michael P. Tanczyn, Esquire
People's Counsel for Baltimore County
Dave Flowers

County Board of Appeals of Baltimore County
Room 315, County Office Building
Towson, Maryland 21204
(301) 494-3180

July 28, 1988

Robert W. Sheesley, Director
Department of Environmental Protection
& Resource Management
County Courts Building
401 Bosley Avenue
Towson, MD 21204

RE: Southern Four, Inc.
Case No. 86-195-X
Petition for Special Exception

Dear Mr. Sheesley:

The Board of Appeals is in receipt of your letter of July 22, 1988 which requests a thirty-day extension for the preparation of Critical Area Recommendations with regard to the subject case.

The Board will grant your request for an additional thirty days in order to provide for the collection and review of data and the final preparation of your recommendations.

Very truly yours,

Lawrence E. Schmidt, Acting Chairman
County Board of Appeals

kcw

cc: Michael E. Marr, Esquire
Michael P. Tanczyn, Esquire
Peter Max Zimmerman, Esquire
Mrs. Janice B. Outen
Mr. David C. Flowers

Baltimore County
Department of Environmental Protection
& Resources Management
County Courts Building
401 Bosley Avenue
Towson, Maryland 21204
494-3733

Robert W. Sheesley
Director

Dennis F. Rasmussen
County Executive

July 22, 1988

Mr. Lawrence Schmidt, Acting Chairman
County Board of Appeals for Baltimore County
Room 200, Court House
Towson, Maryland 21204

RE: Southern Four, Inc.
Case No. 86-195-X
Petition for Special Exception

Dear Mr. Scheidt:

This is in response to your letter dated June 29, 1988 formally requesting Critical Area Recommendations for the Board of Appeals in the matter of the Petition for Special Exception filed by the Southern Four, Inc. In order to adequately address the issues involved and in view of Bill No. 32-88, Section 500.14 of the Baltimore County Zoning Regulations, the Department of Environmental Protection and Resource Management kindly requests a thirty day extension in the preparation of Critical Area Recommendations.

An additional thirty days would provide the Southern Four, Inc. time to collect and prepare data required by Critical Area Law and allow adequate time for review.

Please contact Mr. David Flowers at 494-3980 should you have any questions, and I look forward to receiving your response as soon as possible.

Very truly yours,

Robert W. Sheesley
Director

RWS:tjg

cc: Mrs. Janice B. Outen
Mr. David C. Flowers

RECEIVED
7/24/88
C.A.C.
2:45 pm
K.

P-549 230 049
RECEIPT FOR CERTIFIED MAIL
NO INSURANCE COVERAGE PROVIDED
NOT FOR INTERNATIONAL MAIL
(See Reverse)

Sent to: Robert W. Sheesley, Dir.
DEPRM -4th Fl. Courts Bldg.
Street and P.O. Box No. 401 Bosley Ave.
P.O. State and ZIP Code Towson, MD 21204

Postage	$.240
Certified Fee	.85
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom and Date Delivered	.90
Return Receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	$1.75
Postmark or Date	

PS Form 3800, June 1985

County Board of Appeals of Baltimore County
Room 200 Court House
Towson, Maryland 21204
(301) 494-3180

June 29, 1988

CERTIFIED MAIL -
Return Receipt Requested

Mr. Robert W. Sheesley, Director
Department of Environmental Protection
& Resource Management
Fourth Floor, New Courts Building
401 Bosley Avenue
Towson, MD 21204

RE: The Southern Four, Inc.
Case No. 86-195-X
Petition for Special Exception

Dear Mr. Sheesley:

This is to follow up this office's telephone conversation with Mr. Dave Flowers regarding the above-referenced special exception.

As was explained to Mr. Flowers, the Board of Appeals is presently considering the Petition for Special Exception filed by The Southern Four, Inc., for a controlled excavation operation. This special exception was granted, with restrictions, on November 26, 1986. Additionally, the property lies within the Chesapeake Bay critical area demarcation.

In view of the enactment of Bill No. 32-88 which created Section 500.14 of the Baltimore County Zoning Regulations, the Board has stayed this case to obtain recommendations from your office. Please consider this letter as a formal request for these recommendations. Kindly note that all recommendations and questions should be referred to this Board, and not the office of the Zoning Commissioner.

I enclose herewith a copy of the Petition for Special Exception and a copy of the Environmental Impact Report prepared by The Southern Four and entered as evidence in this case.

Please contact me should you have any questions, and I look forward to receiving your recommendations within thirty (30) days as required by 500.14.

Very truly yours,

Lawrence E. Schmidt, Acting Chairman
County Board of Appeals

LES:kcw
Encls.

cc: Michael E. Marr, Esquire
Thomas C. Swiss, Esquire
Michael P. Tanczyn, Esquire
Phyllis Cole Friedman, Esquire

PART VI

POSTAL CUSTOMER: In response to your inquiry regarding the article described below, the following information is furnished:

☒ THE ARTICLE WAS RECEIVED BY THE ADDRESSEE on July 1, 1988

☐ WE WERE UNABLE TO LOCATE THE ARTICLE. IF LATER FOUND YOU WILL BE ADVISED. THIS INFORMATION HAS BEEN REFERRED TO THE POSTAL INSPECTION SERVICE FOR REVIEW AND IF ADDITIONAL INFORMATION IS NEEDED, YOU WILL BE CONTACTED.

☐ WE DID NOT LOCATE THE ARTICLE AND THE ADDRESSEE FAILED TO REPLY TO OUR INQUIRY. YOU MAY WISH TO CONTACT THE ADDRESSEE, REQUESTING COOPERATION IN THIS MATTER.

DATE OF REPLY	CONTACT	POSTMASTER
AUG 11 1988	CRIMS INQUIRY SECTION ROOM 383-MAIN POST OFFICE 900 E. FAYETTE STREET BALTIMORE, MARYLAND 21233-9652	

PS Form 1510 July 1977

PART II-C

U. S. POSTAL SERVICE
MAIL NONDELIVERY REPORT

1. COMPLAINT DATE: 7-2-88
2. OFFICE ACCEPTING COMPLAINT (CITY AND STATE): Balto. Md.

3. ARTICLE WAS MAILED BY
A. NAME: Sou...
B. RETURN ADDRESS AS ON ARTICLE MAILED: 1114 A...
C. CITY: ... D. STATE: ... E. ZIP CODE: ...
F. DAY TELEPHONE NUMBER (Include Area Code): 494-3...

4. ARTICLE WAS ADDRESSED TO
A. NAME: Robert ... Sheesley
B. ADDRESS OR ARTICLE: Dept. of ...
C. CITY: ... D. STATE: ... E. ZIP CODE: ...
F. DAY TELEPHONE NUMBER (Include Area Code): ...

5. ARTICLE MAILED
A. DATE: MONTH 6, DAY 3, YEAR 88
B. HOUR: ☐ AM ☐ PM

6. ARTICLE WAS SENT
☐ 1ST CLASS ☐ PARCEL POST ☐ OTHER (Specify)

7. TYPE OF MAIL
☒ LETTER ☐ PARCEL ☐ OTHER (Specify)

8A. SPECIAL SERVICES
☐ SPECIAL HANDLING ☐ SPECIAL DELIVERY ☒ CERTIFIED NO. P 549 230 049

8B. CANADIAN MAIL ONLY
☐ INSURED NO. ☐ REGISTERED NO.

9. PLACE OF MAILING
☐ MAIN POST OFFICE
☒ STATION OR BRANCH
☐ COLLECTION BOX
☐ RESIDENCE OR BUSINESS
CITY AND STATE: Balto. Md.
NAME AND/OR ADDRESS OF LOCATION CHECKED: Towson
ZIP CODE OF POST OFFICE CHECKED: 21204

10. CONTENTS OF ARTICLE (Describe in detail: size, color, brand name, serial No., check no., and amount or other identifying data.)
Letter

11. VALUE: $ 0

PS Form 1510 July 1977 — MS PART 3

JUDGE SOLOMON LISS
CHAIRMAN

STATE OF MARYLAND
CHESAPEAKE BAY CRITICAL AREAS COMMISSION
DEPARTMENT OF NATURAL RESOURCES
TAWES STATE OFFICE BUILDING, D-4
ANNAPOLIS, MARYLAND 21401
974-2418 or 974-2426

SARAH J. TAYLOR, PhD
EXECUTIVE DIRECTOR

COMMISSIONERS

Thomas Osborne, Anne Arundel Co.
James E. Gutman, Anne Arundel Co.
Ronald Karasic, Baltimore City
Albert W. Zahniser, Calvert Co.
Thomas Jarvis, Caroline Co.
Kathryn D. Langner, Cecil Co.
Samuel Y. Bowling, Charles Co.
G. Steele Phillips, Dorchester Co.
Victor K. Butanis, Harford Co.
Wallace D. Miller, Kent Co.
Parris Glendening, Prince George's Co.
Robert R. Price, Jr., Queen Anne's Co.
J. Frank Raley, Jr., St. Mary's Co.
Ronald D. Adkins, Somerset Co.
Shepard Krech, Jr., Talbot Co.
Samuel E. Turner, Sr., Talbot Co.
William J. Bostian, Wicomico Co.
Russell Blake, Worcester Co.

CABINET MEMBERS

Wayne A. Cawley, Jr., Agriculture
J. Randall Evans, Employment and Economic Development
Martin Walsh, Jr., Environment
Ardath Cade, Housing and Community Development
Torrey Brown, Natural Resources
Constance Lieber, Planning

November 18, 1988

Mr. Lawrence E. Schmidt
Acting Chairman
County Board of Appeals
County Office Building
111 W Chesapeake Avenue
Towson, Maryland 21204

Re: Special Exception Case No. 86-195-X
Southern Four, Inc.

Dear Mr. Schmidt:

This letter is to acknowledge receipt of notice of the above referenced project. The Critical Area Commission staff will review the project and will contact you if more information is needed. Any comments will be sent directly to you.

Sincerely,

Ren Serey
Planner

RS/jjd

cc: Robert Carlett, Esq.
David Flowers

RECEIVED
11/21/88
re: 30 cm
C.A.C.
K.

TT/ for Deaf-Annapolis-974-2609 D.C. Metro-508-0450

DEPARTMENT OF NATURAL RESOURCES
CHESAPEAKE BAY CRITICAL AREAS COMMISSION
TAWES STATE OFFICE BUILDING, D-4
ANNAPOLIS, MARYLAND 21401

ANNAPOLIS MD JAN 19 89 4:30 PM
U.S. POSTAGE
$.21
0752400

Mr. Lawrence E Schmidt
Acting Chairman
County Board of Appeals
County cffice Building
111 W Chesapeake Avenue
Towson, Maryland 21204

Baltimore County
Department of Environmental Protection
& Resource Management
County Courts Building
401 Bosley Avenue
Towson, Maryland 21204
(301) 887-3733

Robert W. Sheesley
Director

RECEIVED
COUNTY BOARD OF APPEALS
89 JAN 25 PM 2:37

January 20, 1989

Dennis F. Rasmussen
County Executive

Mr. Lawrence Schmidt, Acting Chairman
Baltimore County Board of Appeals
Room 311 County Office Building
Towson, Maryland 21204

Dear Mr. Schmidt:

This letter is prepared in response to a request from Mr. Michael Tanczyn and is a follow-up to my testimony regarding the Southern Four Sand and Gravel Mining proposal. As stated in my testimony on January 3, 1988, the Department of Environmental Protection and Resource Management did, in fact, collect background water quality data from some domestic wells adjacent to the proposed mining site. A total of four samples were collected, one was collected from the stream just east of the property, the other three were collected from the following residences:

1. Mr. Robert Ledbetter
   736 Earl's Beach Road

2. Mrs. William Hackett
   830 Bird River Beach Road

3. Mr. James Beavdet
   940 Bird River Beach Road

The samples were analyzed for heavy metals and volatile organics. The samples were not analyzed for turbidity since, at the time of sampling, DEPRM was concerned with the prior use of the Southern Four property for sewage sludge disposal. The results of the sampling effort indicate that all parameters were below USEPA established drinking water criteria.

At the time of the hearing, I took note of the complaints regarding turbidity associated with wells bordering the nearby Genstar operation. While I have not been able to substantiate those claims, I have discussed the matter with Mr. Eugene G. Siewierski, Supervisor of the DEPRM Waste Management Section. He is amenable to additional baseline sampling in the area and is now making plans for sampling that will include the turbidity parameter. If you have any questions or comments regarding those plans, you can contact Mr. Siewierski at 887-3745.

Mr. Lawrence Schmidt
January 20, 1989
Page 2

Since there are no domestic well supplies immediately downgradient from the proposed site, there should be no turbidity problems for adjacent homeowners. If there are, the baseline water quality samples will become quite important.

Mr. Tanczyn informed me that as the hearing progressed, there were differences of opinion with regard to the issue of "Hydrologic self-containment". In a strict, hydrogeologic interpretation the proposed excavations will be in hydraulic communication with the streams on-site. The ground water that will occupy those excavations during and after the mining operation is not stagnate. It will move with water in the aquifer to discharge points in the stream. Prior to discharge, however, it must pass through the unconsoloidated aquifer material and wetlands where filtration will occur.

If you have any questions or comments, please do not hesitate to call me at 887-3980.

Very truly yours,

Jeffrey B. Jollie
Geohydrologist

JBJ:tjg

cc: Mr. Robert W. Sheesley
Mr. Donald C. Outen
Mr. David Filbert
Mr. Eugene G. Siewierski
Mr. David C. Flowers
Mr. Rocky O. Powell
Mr. Michael Tanczyn

County Board of Appeals of Baltimore County
COUNTY OFFICE BUILDING, ROOM 315
111 W. CHESAPEAKE AVENUE
TOWSON, MARYLAND 21204
(301) 887-3180

January 31, 1989

Michael E. Marr, Esquire
Thomas C. Swiss, Esquire
MARR & BENNETT
10 N. Calvert Street
Baltimore, MD 21202

Peter Max Zimmerman
Deputy People's Counsel
for Baltimore County
Room 304, County Office Building
Towson, MD 21204

Michael P. Tanczyn, Esquire
Suite 106, 606 Baltimore Avenue
Towson, MD 21204

Dear Counsel:

RE: Case No. 86-195-X
Southern Four, Inc.

This is to follow up the Board's letter of January 24, 1989. On January 25, 1989, the Board received a copy of a letter dated January 20, 1989, from Jeffrey B. Jollie, Geohydrologist with Baltimore County's Department of Environmental Protection & Resource Management. This copy was provided by Mr. Tanczyn. Apparently, the original letter directed to the Board has been lost in the mail in that it has not yet been received. The Board further notes that Mr. Jollie's letter was not copied to Mr. Zimmerman or Mr. Marr. I am therefore taking the liberty of enclosing the same herewith. Under the circumstances, the Board feels compelled to disregard its original timetable and will therefore allow any party to request further hearings as to this letter and its contents. All such requests must be received in writing by the Board by February 7, 1989. If the Board does not receive any requests, it will add Mr. Jollie's letter to the record of the case.

The Board also notes Mr. Tanczyn's letter of January 24, 1989, to Mr. Marr requesting the additional studies which were to be provided within 15 days. The Board looks for prompt resolution of that issue so that Counsel's memorandums can be submitted timely. Pursuant to instructions given on the final hearing day, those memorandums were to be submitted 45 days from January 4, 1989 (February 20, 1989) with reply memorandums due 15 days thereafter.

Very truly yours,

Lawrence E. Schmidt, Acting Chairman
County Board of Appeals
of Baltimore County

LES:kcw

Encl.

County Board of Appeals of Baltimore County
COUNTY OFFICE BUILDING, ROOM 315
111 W. CHESAPEAKE AVENUE
TOWSON, MARYLAND 21204
(301) 887-3180

January 24, 1989

Michael E. Marr, Esquire
Thomas C. Swiss, Esquire
MARR & BENNETT
10 N. Calvert Street
Baltimore, MD 21202

Peter Max Zimmerman
Deputy People's Counsel
for Baltimore County
Room 304, County Office Building
Towson, MD 21204

Michael P. Tanczyn, Esquire
Suite 106, 606 Baltimore Avenue
Towson, MD 21204

Dear Counsel:

RE: Case No. 86-195-X
Southern Four, Inc.

As you each recall, the Board ruled at the conclusion of the above-referenced hearing that it would be open to receive correspondence clarifying the testimony of Jeffrey Jollie. The Board provided that such correspondence was due within ten days from the date of the Board's last hearing on January 4, 1989. The Board further allowed that requests for additional hearing would be entertained upon receipt of Mr. Jollie's correspondence.

In that greater than two weeks have expired since the Board's last hearing and there has been no communication received from Mr. Jollie, the Board is satisfied that the record of this case is complete. The Board will therefore await memorandums from the parties.

Very truly yours,

Lawrence E. Schmidt, Acting Chairman
County Board of Appeals
of Baltimore County

LES:kcw

Law Offices
Michael P. Tanczyn, P.A.
Suite 106, 606 Baltimore Avenue
Towson, Maryland 21204
(301) 296-8823
(301) 296-8824

RECEIVED
COUNTY BOARD OF APPEALS
89 JAN 25 PM 2:07

January 24, 1989

Michael E. Marr, Esq.
10 North Calvert Street, Suite 430
Baltimore, MD 21202

Re Southern Four, Inc.
Case No. 86-195-X

Dear Mr. Marr

At the conclusion of this hearing on January 4, 1989 you promised to submit the studies of the biologists hired to do the soils analysis as well as the habitat survey in accordance with the Board's direction. As I was to receive it by January 15th and it is overdue, I would appreciate receiving it from you very soon.

I reserve the right to request an extension of time for submitting memoranda if that is necessary and perhaps continuation of the hearing if this information is not submitted. I hope that is not necessary.

Very truly yours,

Michael P. Tanczyn

MPT/ed

cc Baltimore County Board of Appeals
Baltimore County People's Counsel
Mr. William Barkuloo
Mr. Elmer E. Yingling

COPY

County Board of Appeals of Baltimore County
COUNTY OFFICE BUILDING, ROOM 315
111 W. CHESAPEAKE AVENUE
TOWSON, MARYLAND 21204
(301) 887-3180

June 19, 1989

Michael P. Tanczyn, Esquire
Suite 106, 606 Baltimore Avenue
Towson, MD 21204

RE: Case No. 86-195-X
The Southern Four, Inc.

Dear Mr. Tanczyn:

Enclosed is a copy of the final Opinion and Order issued this date by the County Board of Appeals regarding the subject matter.

Sincerely,

Kathleen C. Weidenhammer
Administrative Secretary

Encl.

cc: Mr. William A. Barkuloo
Michael E. Marr, Esquire
Thomas C. Swiss, Esquire
The Southern Four, Inc.
Ms. Patricia Ecke
Mr. William Cosden
Ms. Janine Mauersberg
Mr. Jerry R. Bloyer
Mr. Jack Gease
Mr. Mark Kahler
Ms. Charlotte Rheinhardt
Mr. David C. Brown
Ms. Diane Fielding
Mrs. Carol Wehner
Mr. Charles J. Hajek
Phyllis Cole Friedman, Esquire
P. David Fields
Pat Keller
J. Robert Haines
Ann M. Nastarowicz
James E. Dyer
Docket Clerk -Zoning
Arnold Jablon, County Attorney
Sarah J. Taylor, PhD
Ren Serey, Planner -Chesapeake Bay CAC
Hon. E. Farrell Maddox
Marilee Cameron

County Board of Appeals of Baltimore County
COUNTY OFFICE BUILDING, ROOM 315
111 W. CHESAPEAKE AVENUE
TOWSON, MARYLAND 21204
(301) 887-3180
July 18, 1989

Michael P. Tanczyn, Esquire
606 Baltimore Avenue, Suite 106
Towson, Maryland 21204

Re: Case No. 86-195-X
The Southern Four, Inc.

Dear Mr. Tanczyn:

Notice is hereby given, in accordance with the Rules of Procedure of the Court of Appeals of Maryland, that an appeal has been taken to the Circuit Court for Baltimore County from the decision of the County Board of Appeals rendered in the above matter.

Enclosed is a copy of the Certificate of Notice.

Very truly yours,

LindaLee M. Kuszmaul
Legal Secretary

Encl.

cc: Mr. William A. Barkuloo, Pres.
Bird River Civic Association
Ms. Patricia Ecke, Vice President
Harewood Park Community League, Inc.
Phyllis C. Friedman, Esquire
Mr. William Cosden, President
Bengies & Chase Democratic Club
Ms. Janine Mauersberg
Mr. Jerry R. Bloyer
Mr. Jack Gease
Mr. Mark Kahler
Ms. Diane Fielding
Ms. Charlotte Rheinhardt
Mrs. Carol Jenner
Mr. David C. Brown
Mr. Charles J. Hajek
P. David Fields
Pat Keller
J. Robert Haines
Ann M. Nastarowicz
James E. Dyer
Docket Clerk - Zoning
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Hon. E. Farrell Maddox
Marilee Cameron

County Board of Appeals of Baltimore County
COUNTY OFFICE BUILDING, ROOM 315
111 W. CHESAPEAKE AVENUE
TOWSON, MARYLAND 21204
(301) 887-3180

July 18, 1989

Michael E. Marr, Esquire
Thomas C. Swiss, Esquire
Marr, Swiss & Woods
301 N. Charles Street, Suite 900
Baltimore, Maryland 21201

Re: Case No. 86-195-X
The Southern Four, Inc.

Dear Mr. Swiss:

In accordance with Rule B-7(a) of the Rules of Procedure of the Court of Appeals of Maryland, the County Board of Appeals is required to submit the record of proceedings of the appeal which you have taken to the Circuit Court for Baltimore County in the above-entitled matter within thirty days.

The cost of the transcript of the record must be paid by you. In addition, the cost incurred for certified copies of other documents necessary for the completion of the record must also be at your expense.

The cost of the transcript, plus any other documents, must be paid in time to transmit the same to the Circuit Court not later than thirty days from the date of any petition you file in Court, in accordance with Rule B-7(a).

Enclosed is a copy of the Certificate of Notice which has been filed in the Circuit Court.

Very truly yours,

LindaLee M. Kuszmaul
LindaLee M. Kuszmaul
Legal Secretary

Encl.
cc: The Southern Four, Inc.

Baltimore County, Maryland
PEOPLE'S COUNSEL
ROOM 304, COUNTY OFFICE BUILDING
111 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND 21204
887-2188

PHYLLIS COLE FRIEDMAN
People's Counsel

PETER MAX ZIMMERMAN
Deputy People's Counsel

September 20, 1990

The Honorable
John Grason Turnbull, II, Judge
Circuit Court for Baltimore County
Courts Building
401 Bosley Avenue
Towson, Maryland 21204

RE: Southern Four v. Bird River Community Assn., et al.
Ckt. Ct. No. 70/109/89CG2509

Dear Judge Turnbull:

When it appeared, on September 19, 1990, that you were not in possession of the County Board of Appeals record, including the transcript and exhibits, the hearing was discontinued with the consent of all parties, to be rescheduled.

I then checked the file of the County Board of Appeals office. That office has retained a copy of the receipt from the Circuit Court dated October 13, 1989, which verifies that the Circuit Court did in fact receive the administrative file, including transcript and exhibits. The Legal Secretary to the County Board of Appeals on that date also forwarded an itemized listing of the voluminous proceedings. Copies of the receipt and the record of proceedings are enclosed.

Based on this information, it is logical to conclude that the bulk of the record has either been retained by the Circuit Court Clerk's office, in a location separate from the Circuit Court pleading file, or perhaps was forwarded to Judge A. Owen Hennegan, to whom the case was assigned prior to his retirement.

If I can be of any further assistance in locating the record, I will be glad to do so. However, I trust that the Circuit Court staff will be able to locate the materials and place them before you for your review of this administrative appeal on the record.

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- 2 -

The Honorable
John Grason Turnbull, II, Judge
Circuit Court for Baltimore County

September 20, 1990

We look forward to your notifying us in due course of a convenient time for the rescheduling of oral argument.

Very truly yours,

Peter Max Zimmerman
Peter Max Zimmerman
Deputy People's Counsel

Enclosure

cc: Suzanne Mensh, Clerk
Circuit Court for Baltimore County

Michael E. Marr, Esquire

Michael P. Tanczyn, Esquire

LindaLee M. Kuszmaul, Legal Secretary
County Board of Appeals of Baltimore County

PMZ:sh

CASE NO. 89-CG-2509
The Southern Four, Inc.
v. Bird River Civic Assoc.

RECEIVED FROM THE COUNTY BOARD OF APPEALS EXHIBITS, BOARD'S RECORD EXTRACT & TRANSCRIPT FILED IN THE ABOVE-ENTITLED CASE, AND ZONING COMMISSIONER'S FILE & EXHIBITS.

Suzanne Mensh
Clerk's Office

Date: 10/13/89

IN THE MATTER OF THE APPLICATION OF THE SOUTHERN FOUR, INC. FOR A SPECIAL EXCEPTION ON PROPERTY BEGINNING AT THE CENTERLINE OF EBENEZER ROAD, 1248.75' EAST OF THE CENTERLINE OF BIRD RIVER BEACH ROAD 15TH ELECTION DISTRICT 5TH COUNCILMANIC DISTRICT THE SOUTHERN FOUR, INC., PLAINTIFF
ZONING FILE #86-195-X

IN THE CIRCUIT COURT
FOR BALTIMORE COUNTY
CG Doc. No. 70
Folio No. 109
File No. 89-CG-2509

PROCEEDINGS BEFORE THE ZONING COMMISSIONER AND THE BOARD OF APPEALS OF BALTIMORE COUNTY

TO THE HONORABLE, THE JUDGE OF SAID COURT:

And now come Lawrence E. Schmidt, Harry E. Buchheister, Jr. and Henry H. Lewis, constituting the County Board of Appeals of Baltimore County, and in answer to the Order for Appeal directed against them in this case, herewith return the record of proceedings had in the above-entitled matter, consisting of the following certified copies or original papers on file in the office of the Zoning Commissioner of Baltimore County:

No. 86-195-X

October 18, 1985	Certificate of Posting of property - file.
October 21	Comments of Baltimore County Zoning Plans Advisory Committee - file.
October 24	Publication in newspapers- file.
November 7	Additional Zoning Plans Advisory Committee Comments - file.
December 12	Additional Zoning Plans Advisory Committee Comments - file.
January 21, 1986	Petition of The Southern Four, Inc. for Special Exception for controlled excavation and removal of sand and related materials.
February 6	Publication in newspaper - file.
February, 1986	Certificate of Posting of property - file.
February 26	Hearing held on Petition by the Zoning Commissioner.
November 20	Order of the Zoning Commissioner that the Petition for Special Exception for controlled excavation and removal of sand and related materials be GRANTED with restrictions.
November 26	Amended Order of the Zoning Commissioner.
January 23, 1987	Amended Order of the Zoning Commissioner.

THE SOUTHERN FOUR, INC. — 86-195-X

Beginning at the c/l of Ebenezer Rd., 1248.75' E of the c/l of Bird River Beach Rd. — 15th Election District, 5th Councilmanic District

SE -Controlled excavation and removal of sand and related materials.

January 21, 1986	Petition of The Southern Four, Inc. for Special Exception for controlled excavation and removal of sand and related materials.
November 20	Order of the Zoning Commissioner that the Petition for Special Exception for controlled excavation and removal of sand and related materials be GRANTED with restrictions.
November 26	Amended Order of the Zoning Commissioner.
January 23, 1987	Amended Order of the Zoning Commissioner.
February 10	Notice of Appeal received from People's Counsel for Baltimore County.
February 19	Notice of Appeal received from William Barkuloo, President, Bird River Civic Association.
November 4	Hearing on appeal before the Board of Appeals.
March 3, 1988	Continued Hearing before the Board.
June 21	Continued Hearing before the Board.
January 3, 1989	Continued Hearing before the Board.
January 4	Completed Hearing before the Board.
June 19	Opinion and Order of the Board ordering that the Petition for Special Exception be DENIED.
July 17	Order for Appeal by The Southern Four, Inc., Petitioner filed in the CCt, BCo by Michael E. Marr, Esquire and Thomas C. Swiss, Esquire.
July 18	Certificate of Notice sent.
October 13, 1989	Transcript of testimony filed; Record of Proceedings filed.
August 13, 1991	Order of the CCt,BCo AFFIRMING Board of Appeals (J. Wm. Hinkel).
September 11	Notice of Appeal to Court of Special Appeals filed by Michael Marr, Esquire on behalf of Southern Four, Inc.
March 11, 1992	Appeal dismissed by C. of S. A. pursuant to Appellant's default of Md. Rule 9-502 (Brief not filed).

2/26/86 86-195-X The Southern Four 10:00
+ Michael E. Marr, Esq
Robert H. Swaim, Esq
on behalf of Bird River Civic Assoc + William Barkuloo, 6604 Steel Head Rd 21220
+ Patricia Ecke, 6960 Hammond Ave 21220

Terry Stansill - Spec Exc Esq - operation & processing of sand & gravel -

(1) map of site as Pet's Exh 1

north of site on Ebenezer Rd, a ghost - Bird River Beach Rd on east - immediately to north is Bird Riv - [illegible] RC 2 - operation sand & gravel operations within RC 2 zone entered upon site - extracted sand & gravel & processing on site - after extraction will create lakes, which will support wildlife - mostly gravel for State Dept of Nat Resources, which inspects & removes will compliance of State regs - community must comply to State regulated plan & inspections about 4 times yr - has a business all of Eds - has located in Cecil Cnty - family owned & operated - will use commercially - gravel, processed materials sold, processed on site - N of Ebenezer Rd will access & egress N of Ebenezer - as operated, result in gullies & other hazards which will cause injury of Ebenezer - existing facility south of site owned by Gunter - A V Williams exits to other side of Bird River Beach Rd, onto the facility - materials removed by dump trucks - Pet will not own trucks but use private owner-operated trucks - if not sufficient available, then would either buy or lease own trucks - some would use tractor-trailers - hope to have max of 50 truckloads leaving site per day, 100 trips per day

10 wheeler, 3 axle

cross X - coming & going - A V Williams lease as DEQ, and do not clean plant on site - would also expand existing facility to - 178 acres - buffer of about 150' between proposed mining & use - gray lines which these exits to recreation & trees - State would prohibit development in this area - access off of Bird River but no truck will use - they have own trucks & bought stable & removed by rail - will maintain existing buffer between gray lines & processing plant & use special equipment to limit noise of processing - [illegible] truck management plan w/ State - 1, 200, 000 tons of material on site presently & 15-20 years of use - reclamation controlled by State, w/ bond posted

w/ State - a 1989 or 1990, Cnt ckt Pet to stop operations & civil - write case, remand county reinstated & no unlawful gravel case -

Richard Ecke, Civ Engr, Chairman, civil & survey engineer - Engineering Recreational Assoc, Inc - 50' buffer between mining operations & hydrologic - could not identify any significant impact on environment - opinion that proposed use not create any unusual or undue problems than any other in the RC 2 zone -

§ 7-6A-02 Bird Reserves Act -

- mining & de-watering of gravel, sand allowed if 3 year, 4b a depth of 40' to 60' - bonded @ $1415 + 4b to comply on environmental issues on site, but not off site traffic - 30-35 acres w/in contained area - no separate impact - pushing 20 acres be disb -

Timothy Byer - Public Accountant - traffic engineer - spoken w/ site & examined roadways - 100 trips per day should not be problem - did capacity analysis @ access point - Bird River because of road capacity - Bird is regarded a lower level of acceptability - w/ respect to access point Bird Riv - total # of analyses was based on 40 trips per hr - could have 40 trips per hr - 7 day + will be total Bird A - 7 am - 6 PM on Fri 7/21 - westerly flat - Pet's goal @ other end of Ebenezer closed during summer, could import export during summer - operation during 7 AM - 5 PM - could live w/ opinion for proposed access on Ebenezer - Ebenezer 15 to 16' wide - w/ proper design & clearance need not cross each other - have a stop enter exit - could enter from one Ecke Ave & need not have trucks come from Pet 40 - about 1 mile for gray access to Ecke Ave, & must fix that wide unpaved recently -

7:00 - 10:00 peak hour

Stansill - will be developed -

Byer - would during most of day - don't need complete traffic analysis

Every year here, about 800 trips of the - still H ave if
consider so in + out of bus for site -

Rasbulos - my Xs drilled in 1972 + in 1974 - many shallow wells
+ some drilled wells - concerned about contamination of H2O -
no pictures in case of bus H2O - also testified about effect
on wetlands rather than on well H2O of neighboring communities -
roads + bridge cannot handle size of trucks servicing site -
problem of noise - concerned about drainage into river -
believes that there will be negative impact + possible pollution
of bird bird - interconnection of bird River Beach Rd +
Rockhill very important -

Eckle -

Rev Clark Carr - pastor of Edgewater Baptist Church - opposition to
sand + gravel - traffic by trucks dangerous -

Frank Gorman - lives in area since 1952, a watercolor of Edgewater +
Eastern Ave Bridge before State took during summer create
traffic back-up - during summer of 1985, are moving @ 7:30
average 15 trucks - no comparison between traffic count in Feb
+ during summer -

Alice Andrews - lives school bus for 9 years - Edgewater Elementary + narrow
of school bus + of truck - both can't pass one another
@ same time -

Henry Hershfield - represents Bird River Beach Comm Assoc - volunteer of
"Save Our Streams" - monitors Gunpowder site -

Raymond Kline - Aliceanna Beach Improvement Assoc - traffic problems -
not traffic count but road itself cannot take
type of trucks -

Eckle - VP of Harwood Improvement Assoc worried about water which they are fighting to clean up -

Clark - no way to expect to drill their + existing wells - whatever they might

Think any of info need both coming from agricultural use,
rather than from industrial use - large settlement control ponds on
site + will have weather gauges + every 15 years + Code
Transition team to come on monthly - on site staff + not
in Clerk's office -

Harry Schlicke - Road will negotiate suggested by morning Sun Comm -

Clear will beg Bill's Exh. 1 (big map)

BALTIMORE COUNTY
OFFICE OF PLANNING & ZONING
TOWSON, MARYLAND 21204
494-3353

ARNOLD JABLON
ZONING COMMISSIONER

JEAN M. H. JUNG
DEPUTY ZONING COMMISSIONER

December 30, 1986

Michael E. Marr, Esquire
Suite 430, 10 N. Calvert Street
Baltimore, Maryland 21202

Dear Mr. Marr,

Enclosed you will find the Protestants comments on Case #86-195-X as provided for in the Amended Order on the case dated Nov. 26, 1986.

If you wish to respond to these comments, feel free to do so.

Sincerely,

Arnold Jablon

Arnold Jablon

AJ/sz

Mr. Arnold Jablon
Zoning Commissioner Baltimore County

December 23, 1986 - Case #86-195X
Response to Amended Order

Protestants' Comments on Case No. 86-195-X as provided for in Amended Order this case dated November 26, 1986

As noted a brief history of petitioners activities on this site with emphasis on possible health effects on area.

1) April 17, 1972 and June 8, 1972 S.E. request for controlled excavation 72-244-X heard and denied by Zoning Commissioner on 11/6/72.

2) Appealed to Board of Appeals on 4/30/73 -- petitioner did not appear -- Zoning Commissioner decision affirmed.

3) August 12, 1974 S.E. for controlled excavation #75-18-X heard and denied by Zoning Commissioner on 11/25/74.

4) Appealed to Board of Appeals -heard 2 days August 26, 1975 and December 9, 1975 and Zoning Commissioner decision affirmed on March 3, 1976.

5) Appealed to Circuit Court March 25, 1976, case # 5889; Board of Appeals reversed and S.E. granted with restrictions.

6) Appealed to Court of Special Appeals and Circuit Court decision reversed and Zoning Commissioner and Board of Appeals affirmed June 25, 1979.

7) Appealed to Court of Appeals who declined to hear this case.

8) Top soil stripped from farm land area in 1978-1980 and same sold to Egypt Farms.

9) Area timber sold and removed in approximately 1975.

10) Mining operation started based on receipt of a state permit in summer of 1979.

11) Injunction issued by Circuit Court to cease mining operation.

12) State permit to allow excavation and removal of enough material to create a 20-acre fish pond received, and mining and hauling operation begun.

13) Circuit Court August 1980 affirmed a permanent injunction against the removal of any material from the site until all proper zoning to do so is acquired.

14) Permit for disposal of Back River sludge issued. This sludge spread on farm area June and July 1981 at the rate of 50 tons/acre, heavy metal sludge.

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ZONING OFFICE

Page 2

15) Area previously timbered, semi-cleared fall 1981 and all slash and rubble pushed into huge pits. Sludge permit for this area applied for.

16) Sludge disposal permit issued and sludge spread on this semi-cleared area at the rate of 15 tons/acre in the summer of 1982.

This brief history is for your information and all contained herein is public information. The neighborhoods health and welfare concerns are manifest in this history. No regard was ever evidenced for the run-off from the top soil sale into the river, no regard for the possible effects from the sludge disposal as to possible effects on the wells of over 100 nearby homes and almost total removal of all the forest that was to sound and dust buffer the nearby homes from the proposed mining operation. The protestants especially note the recommendation by Ian Forrest, Director of Environmental Services, dated August 27, 1985 that this S.E. be denied. In the Board of Appeals order in case #75-18-X dated March 3, 1976, page 4, Mr. James Humphreyville, petitioners' geologist, testified that the proposed operation would destroy Mr. Hackett's well. The protestants would especially note the number of wells in much closer proximity to the proposed operation and certainly question the danger to all these wells from this proposal. Mr. Humphreyville's complete testimony is contained in the transcript presented the upper courts and is on pages 107 through 142 and is available for presentation. Mere logic would seem to indicate that if a very large in area excavation was mined to a depth far exceeding the depth of many nearby wells and septic systems the potential for this liquid, either water or sewerage, to flow by the rule of less resistance to this excavation is extremely likely and the fear of this is paramount in all area residents' minds.

This site is within the Chesapeake Bay Critical Area. It contains both tidal wet lands and non-tidal wet lands. A study of the topography of this site shows a max elevation of +40' down to sea level through a shallow depression that draws into the non-tidal wet lands and into the Bird River. The proposal to protect this 130-acre site from any run-off problems for this extensive mining operation through the use of natural vegetation buffers is certainly suspect. These buffers may suffice for the initial operations but to expect them to completely perform for some 15+ years during a massive mining operation is just not reasonable. Any rain water or water produced by mining must eventually find its way into the river.

Page 3

The protestants would like to call attention to the large sums of money already spent by Baltimore County in attempts to dredge the river of existing sediment without any success. We would also note the existence of Gunpowder Park, a beautiful park just about 1 mile downstream of this proposed operation and cite the potential danger to its well-being if the mining operation is allowed. Once these vegetative buffers as proposed become sediment clogged, as they surely will, all sediment run-off goes directly into the river and all the basic fears that occasioned the Critical Area studies and legislation will become realities. The topography of the site with its constant slope toward the river can leave no other long-term results.

Thank you for your consideration of this response to petitioners' allegations. If any direct testimony or evidence is desired by you, we will be happy to produce same at any hearing you may desire to schedule.

In conclusion, we would like to especially draw your attention to the final comments provided by Mr. Ian Forrest in his report to you concerning the Zoning Advisory Committee comments from their August 27, 1985 meeting. Mr. Forrest cited very specific reasons for the committee's decision to recommend denial of the Special Exception. Nowhere in the Southern Four's Environmental Effects Reports or their Environmental Impact Statement are these specific reasons for the committee's decision addressed. Thank you for your consideration of our response in this matter.

Yours truly,

BIRD RIVER CIVIC ASSOCIATION
William A. Barkuloo, President

Wild Rockhold Rd
21220

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DEC 29 1986
ZONING OFFICE

Law Offices
Michael P. Tanczyn, P.A.
Suite 106, 606 Baltimore Avenue
Towson, Maryland 21204
(301) 296-8823
(301) 296-8824

May 7, 1987

Baltimore County Board of Appeals
Court House
Towson, MD 21204

Re:Case No. 86-195-X

Gentlemen:

Please enter the appearance of the undersigned as attorney for the Protestants, Bird River Civic Association, William Barkuloo, Elmer E. Yingling and Patricia Ecke.

I understand that this matter has been scheduled for hearing on July 28 and 29, 1987. I have a conflict in that I will be attending annual training with the Maryland Army National Guard out of state from July 15 through August 1, 1987. Due to that and to the complexity of this case, I would respectfully request that this matter be conferenced for rescheduling at a later hearing date.

Your cooperation with this request is appreciated.

Very truly yours,

Michael P. Tanczyn

MPT/ed

cc: Michael E. Marr, Esq.
Robert B. Scarlett, Esq.
Baltimore County People's Counsel
Mr. William Barkuloo
Mr. Elmer E. Yingling
Ms. Patricia Ecke

COUNTY BOARD OF APPEALS
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Law Offices
Michael P. Tanczyn, P.A.
Suite 106, 606 Baltimore Avenue
Towson, Maryland 21204
(301) 296-8823 (301) 296-8824
FAX (301) 296-8827

January 22, 1990

Baltimore County Circuit Court
County Courts Building
401 Bosley Avenue
Towson, MD 21204

Re The Southern Four, Inc.
Case Number 89-CG-2509

Gentlemen

Enclosed herewith please find Memorandum of Appellees/Protestants, Bird River Civic Association, William Barkuloo, Elmer Yingling and Patricia Ecke in the above matter.

Very truly yours,

Michael P. Tanczyn

MPT/ed
Enclosure

cc Thomas C. Swiss, Esq. and Michael E. Marr, Esq.
Baltimore County People's Counsel
Mr. William Barkuloo
Mr. Elmer Yingling

90 JAN 23 A 11:12

12/05/85

11/26/85 TO ED

ED Reid 11/27/85

MARR & BENNETT
ATTORNEYS AT LAW
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
SUITE 430
10 NORTH CALVERT STREET
BALTIMORE, MD. 21202
TELEPHONE
(301) 539-4250
4994181 BALTLAW

MICHAEL E. MARR, P.C.*
RICHARD D. BENNETT, P.C.*
ROBERT B. SCARLETT*
MARTHE B. REED

OF COUNSEL
JOSEPH F. CUNNINGHAM
WASHINGTON OFFICE
5039 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20008

*ALSO ADMITTED IN D.C.

December 18, 1985

11/12/85 Hearing — Postponed —

Baltimore County Office of
Planning and Zoning
County Office Building
Towson, Maryland 21204

RE: Petition for Special Exemption
in the center of Ebenezer Road
Case No. 86-195-X, Item #67
Southern Four, Petitioner

Gentlemen:

Please place the above-captioned Petition for Special Exemption in for a hearing as soon as possible.

Thank you for your attention to this matter.

Very truly yours,

Robert B. Scarlett

RBS/gs
cc: Phyllis Cole Friedman, Esquire
People's Counsel for Baltimore County
Peter Max Zimmerman, Esquire
Deputy People's Counsel

MARR & BENNETT
ATTORNEYS AT LAW
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
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MICHAEL E. MARR, P.C.*
RICHARD D. BENNETT, P.C.*
ROBERT B. SCARLETT*
PHILIP H. LOHREY, JR.
DONNA M. LARKIN

OF COUNSEL
JOSEPH F. CUNNINGHAM
WASHINGTON OFFICE
5039 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20008

*ALSO ADMITTED IN D.C.

June 29, 1987

Ms. Kathi Weidenhammer
County Board of Appeals of Baltimore County
Rom 200 Court House
Towson, Maryland 21204

Re: Southern Four Inc.
Case No. 86-195-X

Dear Ms. Weidenhammer:

In response to your Notice of Postponement dated June lst in the above-captioned case, please be advised that the undersigned is unable to attend the Hearing on the scheduled dates because of a conflict with a pre-set jury trial entitled MDIF et al. v. Rowen, Case No. 86CG2196/28/16 scheduled September 2, 1987, which is expected to last until Mid-October. Accordingly, I would request that this Hearing be rescheduled for some time in August.

Very truly yours,

MARR & BENNETT

Michael E. Marr

MEM:lam
cc: Mr. Jerry Stancil

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COUNTY BOARD OF APPEALS
'87 JUN 30 P 2:21

MARR & BENNETT
ATTORNEYS AT LAW
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
SUITE 430
10 NORTH CALVERT STREET
BALTIMORE, MD. 21202
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RICHARD D. BENNETT, P.C.*
MICHAEL E. MARR, P.C.*
THOMAS C. SWISS, P.C.
ROBERT B. SCARLETT, P.C.*
PHILIP H. LOHREY, JR.
DONNA M. LARKIN

OF COUNSEL
JOSEPH F. CUNNINGHAM
WASHINGTON OFFICE
5039 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20008

*ALSO ADMITTED IN D.C.

May 25, 1988

Peter Max Zimmerman, Esquire
Deputy People's Counsel
Baltimore County, Maryland
Room 223 Court House
Towson, Maryland 21204

RE: Southern Four, Inc., Petitioner
Zoning Case No: 86-195-X

Dear Peter:

I am enclosing a copy of a letter dated May 20, 1988 that I received from William E. Chicca, Administrator of the Technical Services Program of the Department of the Environment. As you can see from this letter, the State does not believe any adverse health or environmental impacts would result from the disturbance or removal of the soil to which sludge was applied in 1981 and 1982. We had hoped to have this letter prior to the ruling by the Board of Appeals on your Motion to allow inspection and sampling of the property. We consider the need for such a study to be irrelevant of any matter at issue in this case. Unfortunately, Mr. Chicca did not respond prior to the Board's ruling. As a result, the County apparently will be testing this property. While we do not believe the testing process itself will prove anything, and the results of that process could very well be inadmissible, we have no objection to the County conducting reasonable tests provided that neither your office nor the County will seek to delay the disposition of this zoning case pending results of the County's testing process. Furthermore, we feel that testing for constituent elements in the soil should be limited to those elements for which the Back River treatment facility itself tested prior to delivery of the materials to Southern Four's property. We believe it is unfair and burdensome for the County to overlay additional constituent element testing into this matter when the sludge treatment facility itself did not feel other elements were present or of any concern.

Please note from Mr. Chicca's letter that Southern Four can now, if it chooses, plant crops in the soil to which the sludge was

Rec'd 5/31/88 C.B.A. 9:30 am L.

Peter Max Zimmerman, Esquire
May 25, 1988
Page 2

applied. Give that circumstance, we question whether or not the Health Department's intercession and questioning of the safety of this soil is really a matter which is relevant or one with which it should be involved.

Very truly yours,

MARR & BENNETT

Thomas C. Swiss

TCS/B.3:sh
cc: Michael P. Tanczyn, Esquire
Arnold Jablon, County Attorney
Kathleen C. Weidenhammer
Lawrence E. Schmidt, Esquire

MARR & BENNETT
ATTORNEYS AT LAW
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
SUITE 430
10 NORTH CALVERT STREET
BALTIMORE, MD. 21202
TELEPHONE
(301) 539-4250
4994181 BALTLAW

RICHARD D. BENNETT, P.C.*
MICHAEL E. MARR, P.C.*
THOMAS C. SWISS, P.C.
ROBERT B. SCARLETT, P.C.*
PHILIP H. LOHREY, JR.
DONNA M. LARKIN

OF COUNSEL
JOSEPH F. CUNNINGHAM
WASHINGTON OFFICE
5039 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20008

*ALSO ADMITTED IN D.C.

July 27, 1988

Board of Appeals
of Baltimore County
Room 200
Court House
Towson, Maryland 21204

ATTN: Lawrence E. Schmidt,
Acting Chairman

RE: Southern Four, Inc.
Case No: 86-195-X (Item 67)

Dear Mr. Schmidt:

Our client has been in touch with the DEPRM of Baltimore County with regard to the above matter. We have been advised by persons in the DEPRM that that agency will require an additional thirty days to submit its report pursuant to County law. Our client has no problem with a short extension of time to permit the DEPRM to fulfill its function. If the Board has a problem with this circumstance, please advise.

Very truly yours,

MARR & BENNETT

Thomas C. Swiss

TCS/D.2:sh
cc: Mr. Jerry Stancill

RECEIVED
8/01/88
C.B.A.
11:42am
K

MARR & BENNETT
ATTORNEYS AT LAW
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
SUITE 430
10 NORTH CALVERT STREET
BALTIMORE, MD. 21202
TELEPHONE
(301) 539-4250
4994181 BALTLAW

RICHARD D. BENNETT, P.C.*
MICHAEL E. MARR, P.C.*
THOMAS C. SWISS, P.C.
ROBERT B. SCARLETT, P.C.*
PHILIP H. LOHREY, JR.
DONNA M. LARKIN

OF COUNSEL
JOSEPH F. CUNNINGHAM
WASHINGTON OFFICE
5039 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20008

*ALSO ADMITTED IN D.C.

July 28, 1988

Chairman
Board of Appeals
Baltimore County
Office of Planning and Zoning
401 Bosley Avenue
Towson, Maryland 21204

RE: Southern Four, Inc.
Zoning Appeal 86-195-X

Dear Mr. Schmidt:

On July 22, 1988, our client and its consultants met with representatives of the Baltimore County Department of Environmental Protection and Resource Management. It is our understanding that the Baltimore County Department of Environmental Protection and Resource Management will request a thirty-day extension of the comment period. Southern Four expects to be able to address all of the issues raised by that agency's personnel within that time frame with one exception.

It was the opinion of David Flowers, as expressed in our meeting, that consistency with the Critical Areas Act would have to be finalized before the Board's decision could be made on the request for the special exception. This would include certification of his findings by the Critical Areas Commission. It was also his opinion that this process involves the development of a plan in compliance with the Critical Areas requirements of the State of Maryland and Baltimore County. This procedure, involving three levels of review and determination, could not be completed in thirty days.

Very truly yours,

MARR & BENNETT

Thomas C. Swiss

TCS/D.34:sh

RECEIVED
8/01/88
C.B.A.
9:00 am

MARR & BENNETT
ATTORNEYS AT LAW
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
SUITE 430
10 NORTH CALVERT STREET
BALTIMORE, MD. 21202
TELEPHONE
(301) 539-4250
4994181 BALTLAW

RICHARD D. BENNETT, P.C.*
MICHAEL E. MARR, P.C.*
THOMAS C. SWISS, P.C.
ROBERT B. SCARLETT, P.C.*
PHILIP H. LOHREY, JR.
DONNA M. LARKIN

OF COUNSEL
JOSEPH F. CUNNINGHAM
WASHINGTON OFFICE
5039 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20008

*ALSO ADMITTED IN D.C.

August 11, 1988

Board of Appeals
of Baltimore County
Room 200
Court House
Towson, Maryland 21204

ATTN: Lawrence E. Schmidt,
Acting Chairman

RE: Southern Four, Inc.
Case No: 86-195-X

Dear Mr. Schmidt:

Our client continues to work with the DEPRM of Baltimore County with regard to the above matter. Because this is such a new program, there are no guidelines or procedures yet in place to follow with regard to the reporting responsibilities under County law. Obviously, our client would like the DEPRM to submit its report at the earliest possible date. However, it appears from conversations with David Flowers that the DEPRM needs additional time to submit its report. We have been advised that Mr. Flowers believes the DEPRM can submit its report within sixty days, and perhaps less. Again, our client has no problem in consenting to such an extension, particularly in light of the newness of this reporting requirement and the complication of the project being addressed.

If the Board has a problem with further extension, please advise.

Very truly yours,

MARR & BENNETT

Thomas C. Swiss

TCS/E.37:sh
cc: Jerry Stancill
David C. Flowers

RECEIVED
8-12-88
C.B.A.
11:15

MARR & BENNETT
ATTORNEYS AT LAW
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
SUITE 430
10 NORTH CALVERT STREET
BALTIMORE, MD. 21202
TELEPHONE
(301) 539-4250
4994181 BALTLAW

RICHARD D. BENNETT, P.C.*
MICHAEL E. MARR, P.C.*
THOMAS C. SWISS, P.C.
ROBERT B. SCARLETT, P.C.*
PHILIP H. LOHREY, JR.
DONNA M. LARKIN

OF COUNSEL
JOSEPH F. CUNNINGHAM
WASHINGTON OFFICE
5039 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20008

*ALSO ADMITTED IN D.C.

October 11, 1988

Lawrence E. Schmidt,
Acting Chairman
County Board of Appeals
Room 315, County Office Building
Towson, Maryland 21204

RE: Southern Four, Inc.
Case No. 86-195-X

Dear Mr. Schmidt:

Confirming our converstaion of October 10, 1988, I had a conversation with David Flowers of the DEPRM regarding a report that agency is to submit pursuant to County law. I understand from Mr. Flowers that his report is virtually complete subject to some additional input in the way of plans for my client. My client is in the process of providing that information. Accordingly, it would appear that the report from the DEPRM can be submitted within the next two weeks. For that reason, and pursuant to our discussion, I understand that you once again will extend the date for the DEPRM to submit its report until Monday, October 24, 1988. Thank you for your patience.

Very truly yours,

MARR & BENNETT

Thomas C. Swiss

TCS/P.18:sh
cc: Michael P. Tanczyn, Esquire
Peter Max Zimmerman, Esquire
Mr. David C. Flowers

RECEIVED
10/11/88
C.B.A.
10:23 am
L.

MARR, SWISS & WOODS
ATTORNEYS AT LAW
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
SUITE 900
301 NORTH CHARLES STREET
BALTIMORE, MD. 21201
TELEPHONE
(301) 539-4250
FAX NO. (301) 539-8014

MICHAEL E. MARR, P. C.*
THOMAS C. SWISS, P. C.
RICHARD C.S. WOODS, P. C.

*ALSO ADMITTED IN D.C.

OF COUNSEL
JOSEPH F. CUNNINGHAM

WASHINGTON OFFICE
5039 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20008

July 17, 1989

HAND DELIVERED

Board of Appeals
of Baltimore County
County Office Bldg., Room 315
111 West Chesapeake Avenue
Towson, Maryland 21204

Attention: Laurence Schmidt

Re: Southern Four, Inc.
Case No.: 86-195-X

Dear Mr. Schmidt:

In compliance with Rule B-2 of the Maryland Rules of Procedure, I am delivering herewith a copy of the Certificate of Compliance and Order for Appeal which I am filing today with the Circuit Court of Baltimore County.

Very truly yours,

MARR, SWISS & WOODS

By: Thomas C. Swiss

cc: J. Stancill
TCS/3C.63/rl

RECEIVED
COUNTY BOARD OF APPEALS
89 JUL 17 PM 3:10

MARR, SWISS & WOODS
ATTORNEYS AT LAW
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
SUITE 900
301 NORTH CHARLES STREET
BALTIMORE, MD. 21201
TELEPHONE
(301) 539-4250
FAX NO. (301) 539-8014

MICHAEL E. MARR, P. C.*
THOMAS C. SWISS, P. C.
RICHARD C.S. WOODS, P. C.

*ALSO ADMITTED IN D.C.

OF COUNSEL
JOSEPH F. CUNNINGHAM

WASHINGTON OFFICE
5039 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20008

July 31, 1989

The County Board of Appeals
of Baltimore County
County Office Building
Room 315
111 West Chesapeake Avenue
Towson, Maryland 21204
Attention: Linda Lee Kuszmaul

Re: Case No. 86-195-X
Southern Four, Inc.

Dear Linda Lee:

In accordance with your letter of July 18, 1989, I understood that the Court Reporter would be in touch with us to estimate the cost of the transcript. To date, I have not heard from her. I would much appreciate your advising me of her name and telephone number so that I could work directly with her.

Thank you for your anticipated cooperation.

Very truly yours,

MARR, SWISS & WOODS

Thomas C. Swiss

TCS/4C.5/rl

200
180
255

RECEIVED
COUNTY BOARD OF APPEALS
89 AUG -2 AM 10:12

SWISS & WOODS
ATTORNEYS AT LAW
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
SUITE 900
301 NORTH CHARLES STREET
BALTIMORE, MD. 21201
TELEPHONE
(301) 539-4280
FAX NO. (301) 539-8014

THOMAS C. SWISS, P. C.
RICHARD C.S. WOODS, P. C.

March 6, 1990

Clerk's Office
Circuit Court for Baltimore County
Courthouse
Towson, Maryland 21204

Re: Appeal of Southern Four, Inc.
Case No. 89-CG 250G

Dear Clerk:

Please file the enclosed Reply Memorandum of Southern Four, Inc. in the above-referenced case.

Very truly yours,

SWISS & WOODS

Thomas C. Swiss

TCS/lmg/6C.62
Enclosure
cc: Michael E. Marr, Esquire
Mr. Terry Stancill
Michael B. Tanczyn, Esquire
Peter Max Zimmerman, Esquire

Engineering Technologies Associates, Inc.
Engineers, Surveyors, Construction Managers. (301) 461-9920

9061 Baltimore National Pike
Ellicott City, MD 21043

August 25, 1986

Mr. Paul Solomon
Office of Comprehensive Planning
Courts Building
401 Bosley Avenue
Towson, Maryland 21204

Re: Southern Four Inc.

Dear Mr. Solomon:

I have incorporated the changes which we discussed at our meeting on July 29, 1986, and during our telephone conversation on August 19, 1986. These changes which are reflected on the revised Site Plan are summarized in Attachment A.

In addition, we are submitting a revised copy of the report titled, "Additional Environmental Impact Data." This report was prepared in response to your comments dated March 13, 1986, and serves to supplement the Environmental Impact Report which was submitted to your office in February, 1986.

If you have any questions or comments related to any aspect of this submittal, please let me know.

Very truly yours,

Michael L. Clar, P.E.

MLC/jfe
5307.40

Enclosures

SOUTHERN FOUR, INC.

ATTACHMENT A

1. Service Road

The previous site plan showed a 150-foot right-of-way for the existing service road but did not specify the actual road width. The plan has been revised to show a 20-foot wide road width. This service road will be designed so as not to impede surface water flow or impact the hydric soils. A uniformly-sized crushed stone base such as is used in porous paving applications will be used for this purpose. In addition, where required, culverts will be used to maintain natural flow conditions.

2. Conversion of Sediment Traps and Ponds to Stormwater Management Facilities

When the existing sediment pond is no longer required for erosion and sediment control (estimated to be at the completion of Phase I of the mining operations), the sediment pond will be converted to a wetland marsh.

Also, when the drainage areas to sediment traps #2 and #3 have been stabilized, the traps will be converted to stormwater management ponds. There will be shallow marsh ponds with extended detention.

3. Fuel Storage Area

The fuel storage area will be surrounded by a diversion ditch which will drain to an oil/grease trap.

4. Return Water from Processing Plant to Pit

The treated wash water from the processing plant operations will be returned to the pit area using a drainage ditch as shown on the attached plan. The Phase I and Phase II areas of mining have been redefined to keep the length of the drainage ditch to a minimum.

5. Hydric Soils (Fallsington Series)

A small projecting section of the Fallsington Series had been incorporated in the mining area. This section has been again added to the plan as wetlands area. It should be noted, however, that the return water drainage ditch and the internal haulroads are proposed to cut through this area.

SOUTHERN FOUR, INC.

ATTACHMENT A
(Continued)

6. Vegetative Buffer

The plant materials list did not include any pine species. A mix of Scotch and Austrian pine has been added to the list. These pine species will be used primarily to vegetate the berm proposed along Bird River Beach Road and in the buffer zone which runs parallel to the property line behind the proposed mineral stockpiles.

Common Name	Scientific Name	Remarks
Scotch Pine	Pinus sylvestris	Good for Christmas trees if managed properly. Can be planted on all slopes and tolerates PH of 4.0 to 7.5
Austrian Pine	Pinus nigra	Can be planted on all slopes; should be planted in bands or blocks.

7. Acres for Wildlife

A brochure of the Maryland Acres for Wildlife program is attached. This program which is administered by the Maryland Forest, Park, and Wildlife Service is an advisory program which requires the Owner's cooperation.

Carl 3-7 10:35
Lee Pearlman -
2450
Re Chase Area
Strip Mining
Sixteen Eastern Eastern Ave.
Karen
Joan Hensler 391-1900
Home in area 7154

Carl 10:15
3-19
Lee
2450
in Dennis's office
Karen
335-2236

Harewood Park
Community League, Inc.

February 26, 1986

As representatives of the Harewood Park Community League, Inc., we strongly oppose the approval of Case #86-195X for the controlled evacuation and removal of sand, etc. on approximately 144 acres on Ebenezer Road by Bird River Beach Road.

Respectfully,

Gerard D. Sachs
President

Patricia A. Ecke
Vice President

Harewood Park Community League, Inc.
c/o 12929 Community Road
Baltimore, Maryland 21220

Feb. 25, 1986

To Whom it may Concern,

I am a resident in District 15 Voters registration no 751935 and have lived at 416 Earls Rd. for 37 yrs. I am concerned about our Community and our environment.

Over the last 10 years I have watched and felt the effects of Heavy traffic it seems everyone uses Ebenezer Rd as a short cut from Pulaski Hwy. to Eastern Ave. And not many observe the speed limit including the sand trucks, and since Gunpowder State Park opened the traffic is very heavy on weekends too If you want to go anywhere on Sunday morning you have to leave at least an hour early because of traffic and the locals don't take care of it.

Sand and Dirt - Sometimes the Air is so thick with dust, sand and dirt that you can't open yr doors or windows much less go outside. I advise Calling Mr Hutter in Air Pollution at least once a

24 February 1986

To whom it may concern:

The members of the West Twin River Improvment Association authorize Patricia Ecke of the Harewood Improvment Association to speak on our behalf concerning Hearing # 86195X. We have a membership of approximately 150 members. We are located east of the Harewood Community and use the same road (Harewood Road) to exit onto Ebenezer Road, so our concerns would be the same as the Harewood Community.

Thank You

Robert Coyne - Pres.
Michael W. Herz VP
George T. Jenkins, Sec.
Stu C. Zock - Bd of Dir.

Raymond and Alice Andrews
12929 Princeton Road
Baltimore, Maryland 21220

Voters Card #177990
Gunpowder Post 10067
VFW Hall

Commissioners Baltimore County
111 W. Chesapeake Avenue Room 106
Towson, Maryland 21204

To Whom It May Concern:

We have been residents of Harewood Park for 29 years. During our 27th year of residency we lived at 6900 Harewood Park Drive. Before we sold our home and made our decision to stay in Harewood Park, we checked on the property in the surrounding area that was zoned farm land (including the property in question on Ebenezer Road) and was assured from Towson that the property would NOT be used for ANY kind of business activities or construction other than residential building. Based on this information, we rebuilt in Harewood Park. During these years, we have watched the development of this and surrounding communities very closely. Most changes made were for the better; however, some were for the worse. In speaking for the better, the installation of the water and sewage in approximately 1972, and for the worse, the pollution of the Bird River due to Campbells construction processes.

I was a Baltimore County Bus Driver for 9½ years. My route encompassed Bird River, Earls Beach, Harewood Park, and Twin River areas. During these years, I have had many traffic experiences and would like to mention a few. For example, I was at the intersection of Ebenezer Road and Earls Beach Road picking up a student. That part of Ebenezer Road curves sharply and limits visibility. During the stop, a cement truck came around the blinding turn, saw me, and was unable to stop. He swirved into the other lane, went around me, and almost hit my bus and a car approaching from the other direction. All was O.K. except for a few un-nerved adults and children. Things of this nature are common everyday occurances on Ebenezer Road and are due in part to these mammoth vehicles using this road so frequently.

Eastbound, morning traffic on Ebenezer Road is faced with another problem, nature's blinding sun. This condition requires skillful negotiation of turns, reduced speeds, and other defensive driving techniques, virtues not normally associated with quota laden truck drivers.

We, as peaceful, lawabiding residents of this area have Ebenezer Road ONLY to enter and exit to and from our homes. We have enough problems coping with Genstar's present traffic volume through our community. Their turcks drop dirt on the road which worsens conditions during rain storms. Stones and debris lofted from under their trucks chip paint and crack windshields of inocent vehicles following behind them. The road is being torn up by these heavy trucks. Ebenezer road had a face lift this winter, which was badly needed. Evidence of the trucks' damage can be seen at the 3 year old bridge crossing Eastern Avenue. It is already caving in from use of these Heavy trucks. Additionally, we are burdened with summer traffic to and from Gunpowder State Park.

I resent the fact that our tax money is being spent to repair truck damage to Ebenezer Road while our community roads have not been paved in 30 years.

I sincerely hope you take our concerns seriously. Put yourself in our shoes long enough to see the results of allowing the property in question to be used as proposed.

Sincerely yours,

Raymond T. Andrews — Raymond T. Andrews

Alice A. Andrews — Alice A. Andrews

TOWSON REPORTING COMPANY, INC.
406 W. Pennsylvania Avenue
Towson, Maryland 21204
(301) 828-4149
Court and General Reporting

ORIGINAL (1)

IN THE MATTER OF * BEFORE THE
SOUTHERN FOUR, INC. * COUNTY BOARD OF APPEALS
* OF BALTIMORE COUNTY
Case No. 86-195-X * November 4, 1987

* * * * * 89CB2509

The above-entitled matter came on for hearing before the County Board of Appeals of Baltimore County at the Courthouse, Towson, Maryland 21204 at 10 a.m., November 4, 1987.

* * * * *

BOARD MEMBERS:
LAWRENCE E. SCHMIDT, CHairman
HENRY LEWIS
HARRY E. BUCHHEISTER

APPEARANCES:
MICHAEL E. MARR, Esquire
THOMAS C. SWISS, Esquire
On behalf of Petitoner/Appellant
MICHAEL P. TANCZYN, Esquire,
On behalf of Protestants
PETER MAX ZIMMERMAN, Esquire
People's Counsel

Reported by:
C.E. Peatt

BOARD OF APPEALS

ORIGINAL (2)

IN THE MATTER OF * BEFORE THE
SOUTHERN FOUR, INC. * COUNTY BOARD OF APPEALS
* OF BALTIMORE COUNTY
Case No. 86-195-X * March 8, 1989

* * * * *

The above-entitled matter came on for hearing before the County Board of Appeals of Baltimore County at the County Office Building, Towson, Maryland 21204 at 10 a.m., March 8, 1989.

* * * * *

BOARD MEMBERS:
LAWRENCE E. SCHMIDT, Chairman
HARRY E. BUCHHEISTER, JR.
HENRY LEWIS

APPEARANCES:
MICHAEL E. MARR, Esquire
THOMAS C. SWISS, Esquire
On behalf of Petitioner/Appellant
MICHAEL P. TANCZYN, Esquire
On behalf of Protestants
PETER MAX ZIMMERMAN, Esquire
People's Counsel

Reported by:
C.E. Peatt

BOARD OF APPEALS

ORIGINAL (3)

IN THE MATTER OF * BEFORE THE
SOUTHERN FOUR, INC. * COUNTY BOARD OF APPEALS
* OF BALTIMORE COUNTY
Case No. 86-195-X * June 21, 1989

* * * * *

The above-entitled matter came on for hearing before the County Board of Appeals of Baltimore County at the County Office Building, Towson, Maryland 21204 at 10 a.m., June 21, 1989.

* * * * *

BOARD MEMBERS:
LAWRENCE E. SCHMIDT, Chairman
HARRY E. BUCHHEISTER, JR.
HENRY LEWIS

APPEARANCES:
MICHAEL E. MARR, Esquire
THOMAS C. SWISS, Esquire
On behalf of Petitioner/Appellant
MICHAEL P. TANCZYN, Esquire
On behalf of Protestants
PETER MAX ZIMMERMAN, Esquire
People's Counsel

Reported by:
C.E. Peatt

BOARD OF APPEALS

ORIGINAL (4)

IN THE MATTER OF * BEFORE THE
SOUTHERN FOUR, INC. * COUNTY BOARD OF APPEALS
* OF BALTIMORE COUNTY
Case No. 86-195-X * January 3 1989

* * * * *

The above-entitled matter came on for hearing before the County Board of Appeals of Baltimore County at the County Office Building, Towson, Maryland 21204 at 10 a.m., January 3, 1989.

* * * * *

BOARD MEMBERS:
LAWRENCE E. SCHMIDT, Chairman
HENRY LEWIS
HARRY E. BUCHHEISTER, JR.

APPEARANCES:
MICHAEL E. MARR, Esquire
THOMAS C. SWISS, Esquire
On behalf of Petitoner/Appellant
MICHAEL P. TANCZYN, Esquire,
On behalf of Protestants
PETER MAX ZIMMERMAN, Esquire
People's Counsel

Reported by:
C.E. Peatt

BOARD OF APPEALS

(5)

COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY
COUNTY OFFICE BUILDING
111 W. Chesapeake Avenue
Towson, Maryland, 21204

In re: Southern Four, Inc, : January 3, 1989
: : : :

BOARD MEMBERS:
Lawrence E. Schmidt, Chairman
Harry E. Buchheister
Henry H. Lewis

APPEARANCES:
THOMAS C. SWISS, Esq. and
MICHAEL E. MARR, Esq.,
In behalf of the Petitioner
MICHAEL P. TANCZYN, Esq.,
In behalf of the Defendant
PETER MAX ZIMMERMAN, Esq. People's Counsel

Reported by:
Jane Hiens

BERNARD DANKER ASSOCIATES 666-8877

TOWSON REPORTING COMPANY, INC.
Court and General Reporting
406 W. Pennsylvania Avenue
Towson, Maryland 21204
(301) 825-4149

ORIGINAL (5)

IN THE MATTER OF * BEFORE THE
SOUTHERN FOUR, INC. * COUNTY BOARD OF APPEALS
* OF BALTIMORE COUNTY
Case No. 86-195-X * January 4, 1989

* * * * *

The above-entitled matter came on for hearing before the County Board of Appeals of Baltimore County at the County Office Building, Towson, Maryland 21204 at 10 a.m., January 4, 1989.

* * * * *

BOARD MEMBERS:
LAWRENCE E. SCHMIDT, Chairman
HENRY LEWIS
HARRY E. BUCHHEISTER, JR.

APPEARANCES:
MICHAEL E. MARR, Esquire
On behalf of Petitoner/Appellant
MICHAEL P. TANCZYN, Esquire,
On behalf of Protestants
PETER MAX ZIMMERMAN, Esquire
People's Counsel

Reported by:
C.E. Peatt

BOARD OF APPEALS

ENVIRONMENTAL IMPACT REPORT

SAND AND GRAVEL MINING PROPOSAL
SE #85-195-X, Item 67

ENGINEERING TECHNOLOGIES ASSOCIATES, INC.
9051 BALTIMORE NATIONAL PIKE
ELLICOTT CITY, MD. 21043
(301) 461-9920

RECEIVED
BALTIMORE COUNTY
FEB 26 1989
OFFICE OF PLANNING
AND ZONING

SOUTHERN FOUR, INC.
SAND AND GRAVEL MINING PROPOSAL
SE #85-195-X, Item 67

ADDITIONAL ENVIRONMENTAL IMPACT DATA

ENGINEERING TECHNOLOGIES ASSOCIATES, INC.
9051 BALTIMORE NATIONAL PIKE
ELLICOTT CITY, MD. 21043
(301) 461-9920

Pet No 3
Pg of opp.

ENVIRONMENTAL IMPACT REPORT

SAND AND GRAVEL MINING PROPOSAL
SE #85-195-X, Item 67

ENGINEERING TECHNOLOGIES ASSOCIATES, INC.
9051 BALTIMORE NATIONAL PIKE
ELLICOTT CITY, MD. 21043
(301) 461-9920

PETITIONER'S EXHIBIT 4

ENVIRONMENTAL IMPACT REPORT

SAND AND GRAVEL MINING PROPOSAL
SE #85-195-X, Item 67

ENGINEERING TECHNOLOGIES ASSOCIATES, INC.
9051 BALTIMORE NATIONAL PIKE
ELLICOTT CITY, MD. 21043
Open Cities

MICHAEL L. CLAR, P.E.

PETITIONER'S EXHIBIT 3

EDUCATION:

B.S.: Civil Engineering, 1971, University of Maryland
Graduate Studies in Environmental and Water Resources Engineering, 1972 - 1973, University of Maryland
M.S.: Mining Engineering, 1978, The Pennsylvania State University

AREAS OF EXPERIENCE:

Land Development Engineering
Stormwater Management and Flood Studies
Solid and Hazardous Waste Disposal
Dredging and Shoreline Stabilization
Urban Lakes Management and Restoration
Mining Engineering: Coal, Quarries, Sand and Gravel, Clay
Mine Land Reclamation
Technical and Economic Regulatory Analysis

PROFESSIONAL EXPERIENCE:

1983 to Present — ENGINEERING TECHNOLOGIES ASSOCIATES, INC., Ellicott City, Maryland

Mr. Clar is one of the two principals of this firm which provides engineering, construction management, and surveying services to industry and government. The major technical areas of work include: (1) hydrologic and hydraulic studies; (2) land development engineering; (3) mining engineering, reclamation, and permitting; (4) land disposal of solid and toxic wastes; (5) shore erosion protection and dredging; and (6) urban lakes restoration and management. Some representative projects in which Mr. Clar is involved include:

- Evaluation and revision of the State of Maryland's Standards and Specifications for Erosion and Sediment Control.
- Preparation of a "model" stormwater management plan including stream channel rehabilitation and water quality management for the proposed University of Maryland Science and Technology Center, Bowie, Maryland.

REQUIREMENTS FOR ENVIRONMENTAL EFFECTS REPORTS
BALTIMORE COUNTY DEPARTMENT OF HEALTH
BUREAU OF ENVIRONMENTAL SERVICES

A. GENERAL INFORMATION
Site Name: Southern Four Pit
Address: Intersection of Ebeneezer and Bird River Beach Roads
Location: Baltimore County
Description of Proposed Development: General surface mining excavation for sand, gravel, clay, select and common fill.
Size of Development (Acres): 129.38 total acres; disturbed 75 acres.
Proposed Number of Lots: None
Owner/Developer: Southern Four, Inc. Phone: 575-6916
Address: 499 Mountain Hill Road, Perryville, Maryland 21903
Engineer/Consultant: Engineering Technologies Associates, Inc. Phone: (301) 461-9920
Address: 9051 Baltimore National Pike, Ellicott City, Maryland 21043
Baltimore County Water & Sewer Plan Designation: W_____ S_____

B. WASTEWATER DISPOSAL
Proposed Method of Sewage Disposal:
( ) Public sewerage system
(X) Individual sewage disposal (septic system)
( ) Other (specify)_____
Is there an existing or proposed National Pollutant Discharge Elimination System (NPDES) Permit for this site?
( ) Existing ( ) Proposed (X) Not Applicable
Permit Number:_____
Attach a copy of the NPDES Permit or Application.

C. WATER SUPPLY
( ) Metropolitan District ( ) Small Community (X) Individual Wells

PETITIONER'S EXHIBIT 5

KIDDE CONSULTANTS, INC.
Subsidiary of Kidde, Inc.

PETITIONER'S EXHIBIT 7

TIMOTHY A. RYAN, PE

EDUCATION — Master of Science in Engineering - 1979, University of Connecticut; Bachelor of Science in Engineering - 1977, University of Connecticut; Candidate for Ph.D. in Civil Engineering - 1985, University of Maryland

REGISTRATION — Professional Engineer - MD, PA

PROFESSIONAL AFFILIATIONS — American Society of Civil Engineers; Institute of Transportation Engineers

EXPERIENCE — Mr. Ryan is an Associate and Project Manager in Kidde Consultants' Transportation Division. He has served as Project Engineer for several traffic control signal design projects, for the Anne Arundel County, Maryland Hazardous Location Study, and for various transportation impact statements prepared for private developers. In addition, Mr. Ryan was closely involved with preparation of the Great Seneca Highway Environmental Impact Statement for the Montgomery County, Maryland Department of Transportation.

Mr. Ryan's responsibilities for signal design include signal layout, plan preparation, specifications, and estimates. The Anne Arundel Hazardous Location Study involved analysis of existing conditions followed by a report recommending improvements to ameliorate the dangerous conditions. Transportation impact statements detail the effects of proposed development upon adjacent street networks.

Before joining Kidde, Mr. Ryan worked as a transportation engineer for a Connecticut firm. As a graduate assistant at the University of Connecticut, he worked on the following projects: developing queuing analysis procedures for the Connecticut Department of Transportation; compiling a simplified users' guide to the Network Simulation (NETSIM) Computer Package to be used by both the University of Connecticut and the Connecticut State Department of Transportation; and research to determine the relative effectiveness of elements within Transportation System Management.

Certificate of Service

I HEREBY CERTIFY that on this 8 day of March, 1989, I caused a copy of the foregoing Memorandum to be mailed first class, postage prepaid to Lawrence E. Schmidt, Esquire, County Office Bldg., Room 315, 111 West Chesapeake Avenue, Towson, Maryland 21204; Peter Max Zimmerman, Esquire, County Office Bldg., Room 304, 111 West Chesapeake Avenue, Towson, Maryland 21204; and Michael P. Tanczyn, Esquire, 606 Baltimore Avenue, Suite 106, Towson, Maryland 21204.

Thomas C. Swiss

TCS/1F.19

Baltimore County, Maryland
PEOPLE'S COUNSEL
ROOM 304, COUNTY OFFICE BUILDING
111 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND 21204
494-2188

PHYLLIS COLE FRIEDMAN
People's Counsel

PETER MAX ZIMMERMAN
Deputy People's Counsel

March 23, 1989

The Honorable
Lawrence E. Schmidt
Acting Chairman
Baltimore County Board of Appeals
Room 318, County Office Building
111 W. Chesapeake Avenue
Towson, Maryland 21204

RE: Southern Four, Inc.,
Petitioner, Zoning Case
No. 86-195-X

Dear Chairman Schmidt:

People's Counsel takes issue with the remarks of Petitioner's attorneys contained on pp. 15-16 of Amended Petitioner's Memorandum in Reply to the Memoranda of Protestants and People's Counsel. So the Board can see the inappropriateness of the remarks made, we juxtapose People's Counsel's Memorandum argument with Petitioner's Reply.

What People's Counsel said, at page 5, was:

"V. The Environment

Despite the more detailed environmental studies and relatively favorable critical areas review, some disturbing questions linger. The reports presented prior to critical area review were incomplete and inaccurate. The later reports still leave gaps.

There was no sludge analysis (until) insisted upon through litigation. There was likewise no well monitoring in the neighborhood until demanded. The matter of monitoring wells on site is still in a state of confusion. The original wetlands delineation suffered from major errors and is a good reminder of the

fallibility of attractive environmental presentations.

To all of this must be overlain the evidence of indifferent environmental sensitivity in the past operations. There was the stripping of topsoil and deposit of sludge of then unknown content. There was debris from trucks. Even without the evidence of zoning enforcement action on this site in the early 1980s, the record does not inspire confidence.

Evidence of a pattern of poor operation is probative of the character of future operations. Plans are meaningless in the absence of proper implementation. Indeed, without execution, the grandest proposals lead to the sorest disappointments and most bitter recriminations."

All of which was borne out by the evidence.

What Petitioner, at page 15-16, said People's Counsel said was:

"The Petitioner's Reputation

Perhaps the most disturbing argument proferred by the People's Counsel is the suggestion that the Petitioner will not abide by the law. But for the doctrines of privilege, such a suggestion borders on libel. That the People's Counsel has even put forth this suggestion is particularly distressing. The matter of prior usage of the property for sludge disposal is irrelevent, notwithstanding the fact that the application for and permission to use the property for that purpose was done entirely within the law. The People's Counsel's suggestion that the Petitioner has displayed 'indifferent environmental sensitivity' is a singularly possessed opinion of the author not borne out by any evidence and should be stricken if not disregarded. Zoning is merely that first of the Petitioner's hurdles. This Board can take notice of the fact that mining operations are subject to stringent regulatory controls on the federal, state, and local levels. Overlaying that body of regulation is the existence of a very stringent regulatory

authority associated with the Chesapeake Bay critical areas laws in which a significant portion of the subject property is located. The Petitioner must adhore to environmental concerns and has represented just that to the County. The Petitioner has also proferred to the County and to the State that it will return the property to agricultural use within twenty five years. It is bound by this promise. No zoning authority has the responsibility to act as an haruspex in predicting whether an applicant will in the future comply with various regulatory laws governing the use of property. Rather, the Zoning Board's authority is limited to a determination of whether the application meets the standards of existing zoning law. That People's Counsel are urging this Board to step beyond its authority is particularly troublesome."

People's Counsel takes serious exception to the unfair, uncalled for and inaccurate twisting of argument submitted by People's Counsel in good faith.

Very truly yours,

Phyllis Cole Friedman
People's Counsel for Baltimore County

Peter Max Zimmerman
Deputy People's Counsel

cc: Michael E. Marr, Esquire
Thomas C. Swiss, Esquire
Michael P. Tanczyn, Esquire

PCF/PMZ:sh

The Period During Which The Property Will Be Mined

The Protestants argue that the application must be denied because the evidence regarding length of time over nwhich the property will be mined was vague and inconsistent. This argument is factually incorrect. It is clear from applicable County law governing the critical areas that the Petitioner can only mine that portion of the property in the critical areas[5*] for a maximum of 25 years before returning it to agricultural use, and that the Petitioner's plan was approved subject to this qualification.

Traffic

The Protestants' argument that the Petitioner's use will result in adverse impacts on traffic patterns in the area is also misplaced. While the Petitioner was not required to show any change in the traffic patterns in the area (since its burden was only to show that its use would not create a particular adverse impact at the site of the property over and above any impact that would be created if the use were

5*. Terry Stancill estimated that it would take between 30 and 35 years to extract the minerals from the site. His testimony was given before the critical areas laws went into effect. Some of the mineral deposits on the Petitioner's property are outside of the critical area and may be extracted beyond the 25 year limitation, depending on numerous economic and business factors that will have to be evaluated at that time.

located anywhere else in the zone), it did introduce evidence to show that the its use would not add significant traffic to the existing road system, much less at the project site. Terry Stancill testified that most of the trucks that would frequent the Petitioner's facility would otherwise frequent the facilities of Genstar or A.V. Williams. He further testified that the trucks were already on Ebeneezer Road, regardless of whether the Petitioner ever conducts mining operations on the subject property. Furthermore, using the figures to which Mr. Stancill and Mr. Ryan testified, an average of only four to seven full truckloads per hour will exit the Petitioner's facility onto Ebeneezer Road. Mr. Ryan testified that in his opinion, the Petitioner's proposed use, would have virtually no impact on the whole road system, (much less at the project site). The Protestants offered no cogent rebuttal evidence to counter this opinion. With regard to the road system, it is uncontraverted that the trucks will not be using Bird River Beach Road, the access road to the Protestants' communities.

As to Windless Run, the Board should first note that this very short bridge is far outside the neighborhood where the Petitioner's property lies. For this reason alone, any alleged dangerous condition existing at Windless Run is irrelevant to this dispute (See Schultz v. Pritts, infra). Futhermore, The Protestants presented no real evidence that the bridge over Windless Run is misaligned or dangerous. The Protestants offer no credible evidence of a history of

tower that may be used in this mining operation. Indeed, there is virtually no evidence before this Board regarding a tower. Absent such evidence, it would be rank speculation for the Board to assume any facts about a tower. Furthermore, there are certain inherent characteristics of a mining operation that will exist regardless of where the operation is placed in a zone. One of them is a tower or some mechanism to elevate minerals for loading onto trucks.[7*] There will also be some noise from trucks and loading equipment. (Like the tower, there is no testimony from anyone with expertise in mining as to the nature and extent of this noise.) The question that this Board has to address is whether operational conditions inherent to this proposed use would have any greater impact on the immediate neighbors than would otherwise occur if the mining operation were located anywhere else within the zone. The Protestants have not offered, and indeed cannot offer, any credible evidence that there is another location within the zone where these operational conditions would have less impact. Applying Schultz, the application for a special exception must be granted.

7*. The only evidence of a tower came from the Respondents who offered photographs of Genstar's nearby facility on which there is a tower. The Respondents apparently presume (and wish this Board to presume) that the Petitioner will erect a similar structure. There is no evidence in the record that the Petitioner will do so and it would be sheer speculation for this Board to presume such facts.

the use were located in the zone. In Holbrook, the Court of Special Appeals had concluded there was no substantial evidence of particular adverse impact at the location upon which the Zoning Board could have based its denial of the application and for that reason determined that the Board's denial was arbitrary and capricious. On certiorari, the Court of Appeals did not question or criticize the Court of Special Appeals interpretation of the Schultz case. Rather, it found that the Court of Special Appeals had impermissably overstepped the appropriate scope of judicial review of an decision by substituting its judgment for that of the administrative agency.[10] For that reason and for that reason alone, the Court of Appeals reversed. In all other respects it reaffirmed its prior holding in Schultz regarding the standard to be applied in considering an application for special exception.

No Evidence of Adverse Impacts

In the case at bar, there is no evidence of any particular adverse impact at the location of the proposed use. There is no evidence that the mining operation will be visible by any neighbor. No neighbor testified to that theory. There was no evidence as to the height or visibility of any tower other than Genstar's. Furthermore, there is evidence in the record that the site will have a berm around it on which trees will be planted. Photographs introduced into evidence reveal a thick woodline between the project site and the main community on Bird River Beach Road. There

Bird River Civic Association

Baltimore County • Maryland

February 20, 1986

Mr. Arnold Jablon
Zoning Commissioner
Baltimore County
Towson, Maryland 21204

Dear Sir:

At a special meeting held by the Bird River Civic Association on February 19, 1986, it was unanimously decided to oppose the requested special exception #86-195X to permit the removal of sand and other related materials from the property owned by the Southern Four Corp.

At the same meeting Mr. William Barkuloo was authorized by the membership to testify and present the Association's stand on this matter.

Respectfully submitted,

BIRD RIVER CIVIC ASSOCIATION

William Barkuloo, President

Raymond Reiner, Vice-President

Harry Schleicher, Treasurer

Anne M. Hackett, Secretary

/amh

PROTESTANT'S EXHIBIT 5

2/26/86

1	Patricia R Sachs	12929 Community Rd Balto 21220 335-5799
2	Steven D Sachs	12929 Community Rd Balto 21220 335-5799
3	Alice A Andrew	12929 Princeton Rd. Balto 21220 335-6575
4	Rev Clark D. Carr	6601 Ebenezer Rd. Balto. 21220 335-7172
5	George G. Willinger	6832 Leslie Rd Balto 21220 335-1837
6	Mary L. Bacon	6828 Leslie Rd. 21220 335-1097
7	Brigid A. Willinger	6832 Leslie Rd Balto 21220 335-1837
8	Lyle A Zack	13204 Birdale Ave Balto. 21220
9	Raymond M. Reiner	7410 Greenbank Rd. Balto. 21220
10	William A. Seaby	6632 Blackhead Rd. Balto. 21220
11	Helen A. Seaby	6632 Blackhead Rd Balto. 21220 335-6750
12	Patricia A. Sullivan	6536 Black Head Rd. Balto. Md. 21220
13	James B Sullivan	6536 Black Head Rd Balto Md 21220
14	Elmer F. Yingling	6533 Blackhead Rd Balto Md 21220
15	Francis John Cogan, Esq.	711 Cunning Cir, Balto Md 21220 828-7105
16	Frederick W. Pendolor	6613 Pheasant Road Baltimore 21220
17	Anne M. Hackett	830 Bird River Beach Rd Chase 21027
18	Jane Barkuloo	6612 Blackhead Rd Balto. 21220
19	Janet Thompson	6614 Blackhead Rd Balto, 21220
20	Eugene Hicks	6736 Mallard Rd Balto 21220
21	Jean Hicks	6736 Mallard Rd Balto 21220
22	Bernard Sordelet	6544 Blackhead Road 21220
23	Sandra J. Stromberger	6512 Blackhead Rd. Balto. Md 21220
24	Henry Stromberger	6512 Blackhead Rd Balt. Md 21220

Ebenezer United Methodist Church

6601 Ebenezer Road
Baltimore, Maryland 21220

Clark D. Carr
Paster
Church 335-2172

February 25, 1986

We the members of Ebenezer United Methodist Church (a constinuency of over 300 persons) do hereby give consent to the Reverend Clark D. Carr to represent our sentiments to the oposition of the Stancil Corporation's request for a 'special exemption for mining' in the vicinity of Ebenezer & Bird River Beach Roads.

David G. Mundy
Acting Chairman of
the Administative Board

Edith Long
Secretary of the
Administrative Board

PROTESTANT'S EXHIBIT 3

The Bird River Beach Community Association opposes the application for special exception (86 195X) which is to be heard by the zoning board on Wednesday, February 26, 1986 and has asked me to speak on their behalf.

Henry Stromberger
Henry Stromberger

President

Henry Stromberger
Henry Stromberger

Vice President

Elmer Yingling
Elmer Yingling

PROTESTANT'S EXHIBIT 4

OLIVER BEACH IMPROVEMENT ASSN. INC.

13203 SUSQUEHANNA RD.

BALTIMORE, MARYLAND 21220

Mailing Address:

Chase P.O. Box 57
Chase, Maryland 21027

February 25, 1986

Baltimore County Zoning Commissioner
Towson, Maryland 21204

Dear Commissioner:

This is to certify that Raymond Reiner will officially represent the Oliver Beach Improvement Assn., Inc. at the Special Exemption Zoning hearing, Case #86-195-X, requested for the Stancil property.

The association represents the Oliver Beach community of about four hundred families and has a membership of one hundred thirty members.

Yours truly,

Charles W. Bridge
Charles Bridge, President

Raymond Reiner
Raymond Reiner, Financial Secretary

PROTESTANT'S EXHIBIT 5

PROTESTANT'S EXHIBIT

February 25, 1986

To: Harewood Park Community League
Attention: Mrs. Pat Ecke.

Dear Mrs. Ecke,

This letter is written to support my opposition to allow mining of the Stancil property on Bird River Beach Road. I have a full time job as a rural mail carrier and am unable to attend the meeting in person. However, I must advise you how I feel. I have lived in Harewood Park for 13½ years. I have seen a quiet, uncomplicated community become bothered by spoiled drainage, an unusual and unnecessary large number of truck traffic which severely damaged Ebenezer road between Route 40 and the State Park. I feel a mining project being allowed to happen in this area would damage irreparably our part of the Bird River and would cause undue traffic of a commercial nature an inconvenience and a traffic safety hazard to the Harewood Park Community. I am employed at the Perry Hall Post Office and must travel Ebenezer Road at least five days. We in this community have fought hard and strong to keep our homes safe and our community an attractive comfortable place to raise our families. Of course we would like to continue in this manner.

Sincerely, Miss Norma Strickland

Our Lady Queen of Peace School
10001 Bird River Road
Baltimore, Maryland 21220

February 24, 1986

To Whom It May Concern:

This is to certify that Our Lady Queen of Peace School and Home-School Association serves the needs of the families of 216 school age children. Mrs. Brigid Willinger is representing our Home-School Association and our opposition to the zoning exception that would lead to increased truck traffic on Bird River and Ebenezer Roads.

Sincerely,

Sister Helen Frederick
Sister Helen Frederick
Principal

Mrs. Patricia Pine
Mrs. Patricia Pine
President of Our Lady Queen
of Peace Home-School Association

SHF:vdd

PROTESTANT'S EXHIBIT 8

is still on track

By Larry Carson
Evening Sun Staff

Though it's been nine quiet months since New York developer Isaac L. Gitter made a splash with his plans to build a huge Chinese culture theme park and trade center in Middle River, preparation for the project are continuing, out of the limelight.

An assortment of technical planners and lawyers representing his China-USA company have been working quietly to design a conceptual plan for the project, to clear legal zoning regulations to accommodate it, to further the agreement for the 1,500 acres of land in the deal and to chart the environmentally sensitive sections of land involved.

According to Gitter and local sources with knowledge of the project, the critical time will come this spring, when the developer hopes to submit a plan to the County Review Group, which reviews the technical aspects of development plans in Baltimore County.

By spring, Gitter must also produce substantial cash and reveal financing plans for the land purchase agreement. Gitter estimated the project cost last spring at about $500 million. The Chinese government is to be a 40 percent partner in the venture.

In addition, state highway officials expect this spring to complete studies on the alignment, size and cost of the long planned extension of White Marsh Boulevard to the land Gitter hopes to develop. The road is said to be needed because it would provide the only major access to the land and a link to nearby Interstate 95.

"We're very optimistic" about the plan, county administrative officer Frank C. Robey said, although he acknowledged that "numerous" problems have yet to be overcome.

Among the most time-consuming of those problems will be the revision of county zoning regulations to accommodate the project, county attorney Arnold Jablon said. No zoning change is required, but current county law regulating land zoned for manufacturing must be amended to include such specific use Gitter plans for the park.

Entitled "Worldmirage Centre," Gitter's plan calls for 170 acres to be developed first as a Chinese theme park, featuring replicas of famous buildings and events such as the Forbidden City and the Great Wall of China. A separate retail center will also feature Asian-produced goods, a trade center and a hotel-office-condominium and a million-square-foot industrial park.

Jablon said the plan will have to go through the county's land-use process, and there's a 180-acre tract to be the acreage of them, to prevent people who own similar land from using the zoning or assessment parts or buyer [illegible] on manufacturing land.

The process for amending a zoning category requires public hearings at both the Planning Board and County Council levels, but no action by each of those bodies. Because public hearings require notice of at least 30 days, the process will take at least nine months, Jablon said. So far, [illegible]'s lawyers have already been through eight of the proposed 17 needed hearings, and still are not finished.



Reached at his home in Big Indian, N.Y., Gitter said he knew he had completed a survey of the land, and the mapping of wetlands and environmentally sensitive areas. As a result of the surveys, the planned theme park will be located on the northern section of the tract, he said.

The developer said he hopes to have a conceptual plan to present to the County Review Group by late April. The County Review Group is a technical review board composed of see public works and one planning official. All preliminary plans must be approved by the group [illegible] Gitter has been [illegible] development.

"It's pretty unspectacular stuff," Gitter said, referring to the technical, preparatory work.

Gitter, according to sources, has a June 1 deadline for placing substantial funds in an escrow account to show good faith toward the purchase of the land, and must also present financing plans at that time. More money must be deposited by Oct. 1, and the actual sale of the land is to occur Dec. 31, when Gitter said he hopes to begin actual construction.

John B. Howard, the attorney representing the A. V. Williams trust, owners of most of the 1,500 acres in question, said that Gitter has fulfilled his contractual obligations so far, but would not reveal any specifics.

The land is located between Eastern Boulevard and Pulaski Highway and between Ebenezer Road on the northeast and Morton Boulevard on the southwest, directly across from Martin State Airport.

County officials hope that if the project is actually built, it will provide a major economic boost to troubled eastern Baltimore County, hurt by the closing or retrenchment of many heavy industries. Officials hope the center provides up to 4,500 needed jobs and enough economic momentum to promote new upscale developments in the area.

Club updating memorial

The Fathers Club of Mount Saint Joseph High School needs help in updating the Memorial Gym Plaque honoring alumni who were killed in the Korean and Viet Nam wars. If you know of someone whose name should be included, call 644-5300, Ext. 27.

A.J. from EFS

S. ERIC DINENNA, Zoning Commissioner of Baltimore County, et al.	*	IN THE
Plaintiffs	*	CIRCUIT COURT
v.	*	FOR
STANCILLS' CONTRACTING CORPORATION and SOUTHERN FOUR, INC.	*	BALTIMORE COUNTY
	*	IN EQUITY
	*	CASE NO. 92557/115/48
Defendants	*	

****

ORDER

The above-captioned case having come on for a hearing, testimony having been taken and arguments of Counsel having been heard, it is this 8th day of August, 1980, by the Circuit Court for Baltimore County,

ORDERED, ADJUDGED and DECREED:

a. That the Respondents, and each of them, their successors and assigns, be and they are hereby permanently enjoined from using the property described in these proceedings for the excavation of sand, gravel or other related materials in violation of the Zoning Regulations of Baltimore County, without a special exception granted by the Zoning Commissioner of Baltimore County.

James S. Pike
JUDGE
8/6/80

Approved as to form and content:

Peter Parker, Esq.
Attorney for Defendants

Approved as to form and content:

Thomas J. Bollinger
Assistant County Solicitor

Leonard S. Jacobson
County Solicitor
Attorneys for Plaintiffs

FILED AUG 8 '80 (43 88 SW 588

CASE NO. 89-CG-2509
The Southern Four, Inc.
v. Bird River Civic Assoc.

RECEIVED FROM THE COUNTY BOARD OF APPEALS EXHIBITS, BOARD'S RECORD EXTRACT & TRANSCRIPT FILED IN THE ABOVE-ENTITLED CASE, AND ZONING COMMISSIONER'S FILE & EXHIBITS.

Suzanne Mensh
Clerk's Office

Date: 10/13/89

CIRCUIT COURT FOR HARFORD COUNTY

CHARLES G. HOB, III
Clerk of the Circuit Court
Courthouse
Bel Air, Maryland 21014

SOUTHERN FOUR, INC., et al. — Case Number 12769/22/345
Plaintiffs

Vs. (X) Civil ( ) Criminal

LEONARD P. BERGER
Defendant

STATE OF MARYLAND, HARFORD COUNTY TO WIT:

SUBPOENA

To (Name, Address and County): James E. Dyer, Zoning Supervisor
Office of Zoning & Planning, Room 113
County Office Building
Towson, MD 21204

YOU ARE HEREBY COMMANDED TO: ( ) Personally appear; ( ) Produce documents and or objects only; (X) Personally appear and produce documents or objects; at Towson Reporting Company,
(Place where attendance is required)
406 W. Pennsylvania Avenue, Towson, MD 21204
on Tuesday the 5th day of April, 19 88 at 9:00 a.m. xxxx.

YOU ARE COMMANDED TO produce the following documents or objects: Any and all documents in his possession in any way pertaining to applications made by the Plaintiffs for distributions of "treated sewage sludge" on its property at Bird River Beach Road and Ebenezer Road in Baltimore County.

Subpoena requested by (X) Plaintiff; ( ) Defendant; and any questions should be referred to:
539-4250
Michael E. Marr, Esquire, 10 N. Calvert St., Baltimore, MD 21202 (301) 539-4250
(Name of Party or Attorney, Address and Telephone Number)

Date Issued 2-26-88 — Charles G. Hob III — CLERK

NOTICE
(1) YOU ARE LIABLE TO BODY ATTACHMENT AND FINE FOR FAILURE TO OBEY THIS SUBPOENA.
(2) This subpoena shall remain in effect until you are granted leave to depart by the Court or by an officer acting on behalf of the Court.
(3) If this subpoena is for attendance at a deposition and the party served is an organization, notice is hereby given that the organization must designate a person to testify pursuant to Rule 2-412(d).

SHERIFF'S RETURN

( ) Served and copy delivered on date indicated below.
( ) Unserved, by reason of _____

Date: _____ Fee: $_____ SHERIFF

ORIGINAL AND TWO COPIES NEEDED FOR EACH WITNESS

CC: 4-81 + 2-82 Zones + Zoning on rec'd + plats

SOUTHERN FOUR, INC., et al. * IN THE
Plaintiffs * CIRCUIT COURT
v. * FOR
LEONARD P. BERGER, * HARFORD COUNTY
Defendant * Case No: 12769/22/345

* * * * * * * * * * * * *

NOTICE OF DEPOSITION

You are hereby notified that the Plaintiffs, Southern Four, Inc, et al., pursuant to Maryland Rules, 2-412 through 2-415, will take the deposition, upon oral examination, of the following named person(s) on the date and time indicated below, before a Notary Public of the State of Maryland, or any other duly qualified Notary Public who may be selected to act in his place, at the offices of Towson Reporting Company, 406 W. Pennsylvania Avenue, Towson, Maryland 21204:

Name: James E. Dyer
Zoning Supervisor
Office of Zoning & Planning
Room 113
County Office Building
Towson, Maryland 21204

Date: April 5, 1988

Time: 9:00 a.m.

Michael E. Marr

MARR & BENNETT
ATTORNEYS AT LAW
SUITE 430
10 NORTH CALVERT STREET
BALTIMORE, MD 21202
(301) 539-4250

Michael E. Marr
MARR & BENNETT
10 N. Calvert Street
Suite 430
Baltimore, Maryland 21202
(301) 539-4250

Attorneys for Defendant

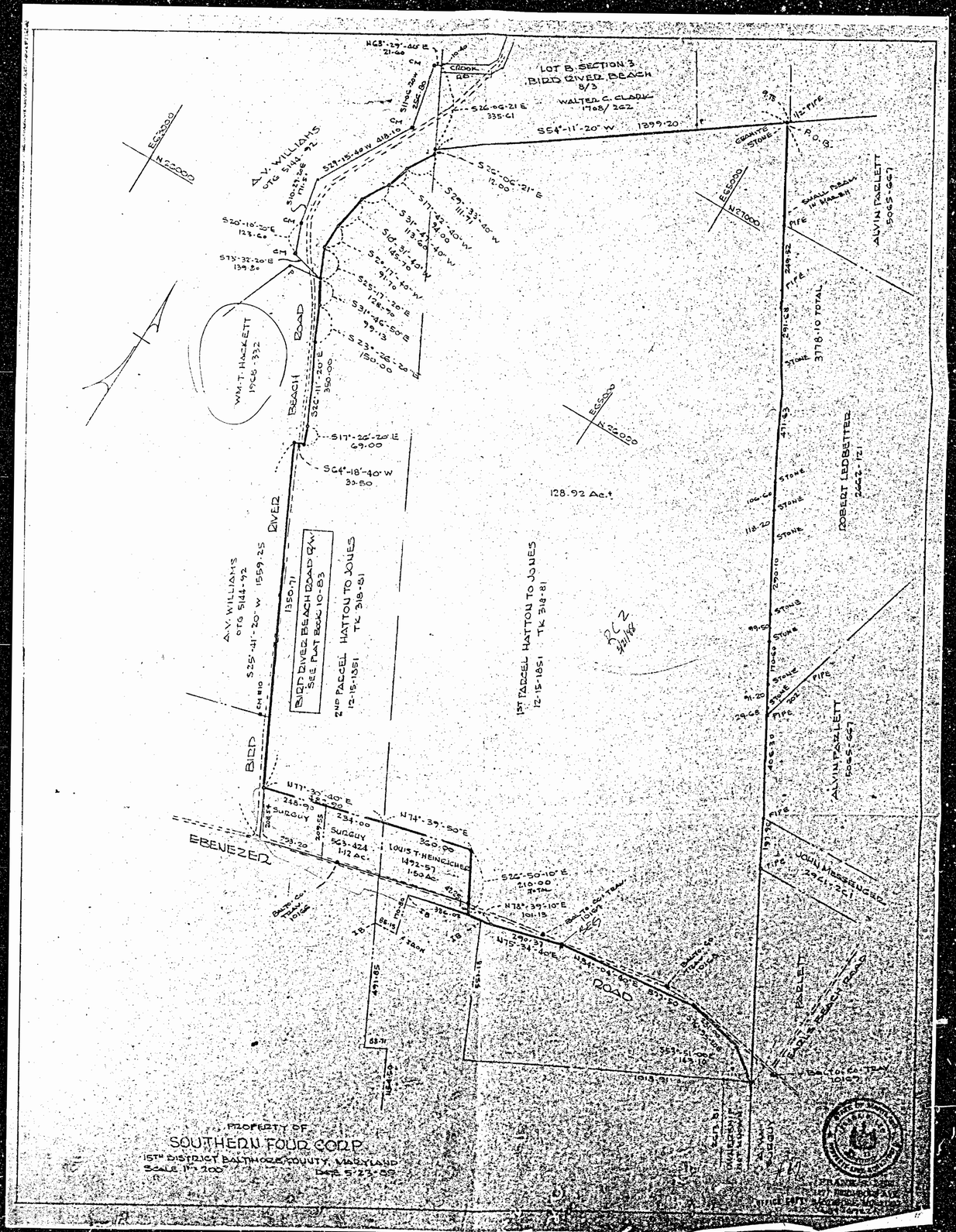
CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 26th day of February, 1988, a copy of the aforegoing Notice of Deposition was mailed first class, postage prepaid, to James G. Beach, III, Esquire, Assistant County Attorney, Office of Law, Courthouse, Towson, and Charles M. Kerr, Esquire, Archibald R. Montgomery, IV., Esquire, Venable, Baetjer and Howard, 1800 Mercantile Bank and Trust Building, Baltimore, Maryland 21201.

Michael E. Marr
Michael E. Marr

MEM/L-pldg:1.30

MARR & BENNETT
ATTORNEYS AT LAW
SUITE 430
10 NORTH CALVERT STREET
BALTIMORE, MD 21202
(301) 539-4250



LOT B SECTION 3
BIRD RIVER BEACH
B/3
WALTER C. CLARK
1708/ 262

N63°-29'-40" E
21.60

CREEK

S54°-11'-20" W 1399.20

S26°-06'-21" E
335.21

S31°-15'-40" W 448.10

S26°-06'-21" E
12.00

S29°-33'-40" W
111.71

S17°-26'-40" W
94.00

S31° 40'
113.00

S40°-51'-40" W
145.70

S2°-17'-40" W
91.70

S25°-17'-20" E
128.90

S31°-46'-50" E
99.13

S23°-28'-20" E
150.00

S17°-26'-20" E
69.00

S64°-18'-40" W
30.50

S26°-11'-20" E
350.00

N74°-39'-30" E
300.00

S22°-50'-10" E
210.00
TO TAN

N78°-39'-10" E
101.13

BALTO. CO. TRAV.
101.68

N84°-04'-40" E
511.50

S53°-51'-00" E
143.10

BALTO. CO. TRAV.
101.69

N15°-34'-40" E
279.31

N71°-30'-40" E
682.00

S25°-41'-20" W 1559.25

1350.71

S64°-18'-40" W
30.50

S17°-26'-20" E
69.00

S26°-11'-20" E
350.00

N74°-39'-30" E
300.00

S22°-50'-10" E
210.00
TO TAN

N78°-39'-10" E
101.13

BALTO. CO. TRAV.
101.68

N84°-04'-40" E
511.50

S53°-51'-00" E
143.10

BALTO. CO. TRAV.
101.69

N15°-34'-40" E
279.31

N71°-30'-40" E
682.00

1248.75

N 28°-51'-30" W

1018.91

S 25°-41'-20" W 1559.25

1350.71

W.M.T. HACKETT
1968 - 332

A.V. WILLIAMS
OTG 5144-92

BIRD RIVER BEACH R/W
SEE PLAT BOOK 10-83

2ND PARCEL HATTON TO JONES
12-15-1351
TK 318-81

1ST PARCEL HATTON TO JONES
12-15-1851
TK 318-81

ROBERT LEDBETTER
2662 - 121

ALVIN PARLETT
5065-667

JOHN MESSENGER
2921 - 261

LOUIS T. HEINECKE
1492-57
1.50 Ac.

SUGGUY
563-424
1.12 Ac.

128.92 Ac.±

3178.10 TOTAL

BIRD RIVER BEACH ROAD

EBENEZER ROAD

PARLETT BEACH ROAD

SMALL AREA IN MARSH

FIRE

STONE

PIPE

CH BND

GRANITE STONE

E 65000
N 26000

N 27000

N 25000

U77°-30'-40" E
682.00

N74°-39'-30"E
300.00

S22°-50'-10" E
210.00
TO TAN

N78°-39'-10" E
101.13

BALTO. CO. TRAV.
101.68

N84°-04'-40" E
511.50

S53°-51'-00" E
143.10

BALTO. CO. TRAV.
101.69

N15°-34'-40" E
279.31

N71°-30'-40" E
682.00

1018.91

N 28°-51'-30" W

1248.75

4 SIGNS

PROPERTY OF
SOUTHERN FOUR CORP.
15TH DISTRICT BALTIMORE COUNTY MARYLAND
Scale 1" = 200'

FRANK S. LEE
1271 NEIGHBORS AVE.
BALTIMORE, MD. 21237
687-6762

10/16/85

ZONING CASE #87

EXISTING ZONING - RC 2

86-195-X (11-2-85)

REVISED PLANS

NOTE - EXCAVATION AREA WILL EXTEND TO WITHIN 10 FEET OF PROPERTY LINES

± INTERSECTIONS

BEGINNING

PLAT FOR SPECIAL EXCEPTION FOR CONTROLLED EXCAVATION FOR

SOUTHERN FOUR CORP.

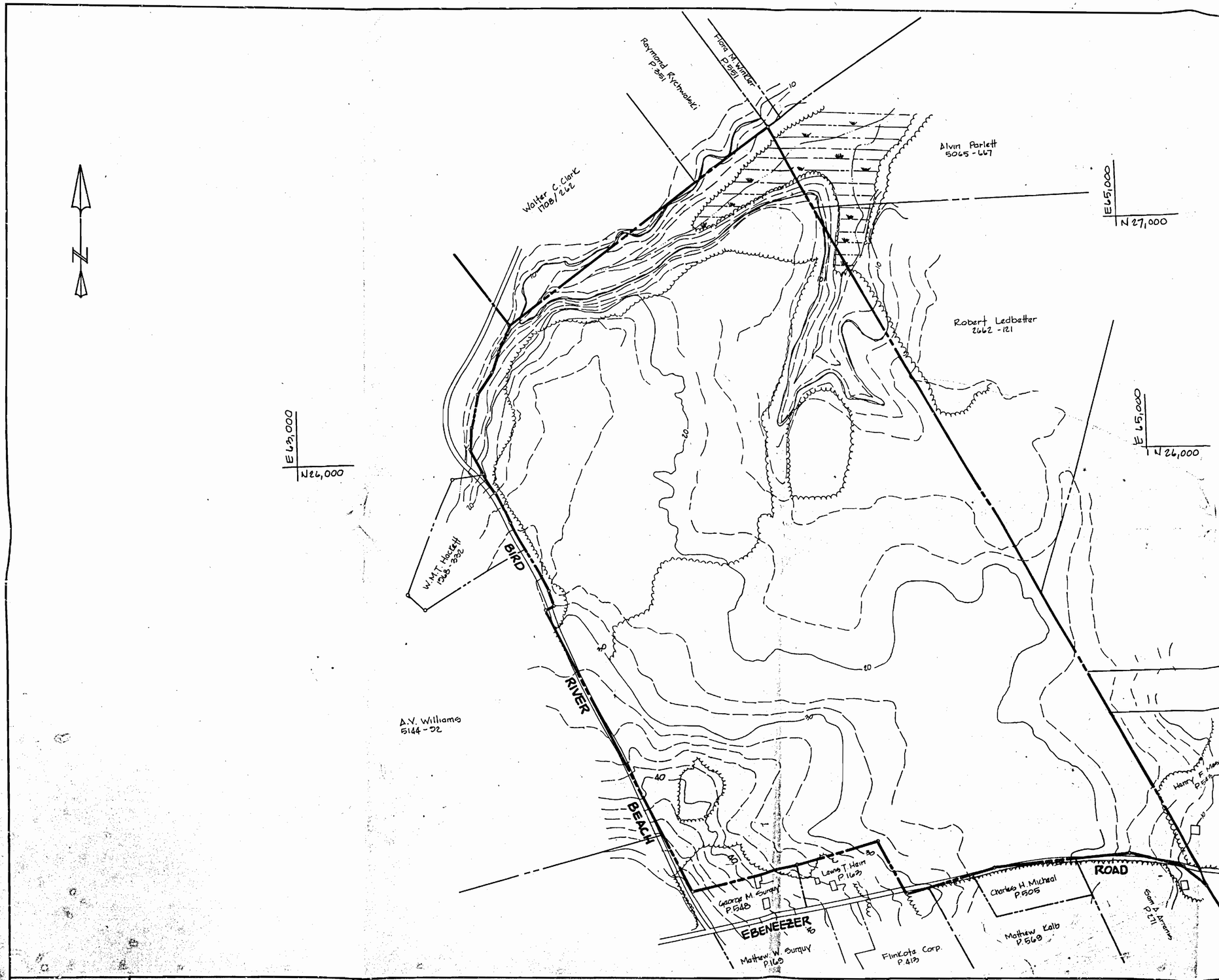
15TH DISTRICT BALTIMORE COUNTY MARYLAND

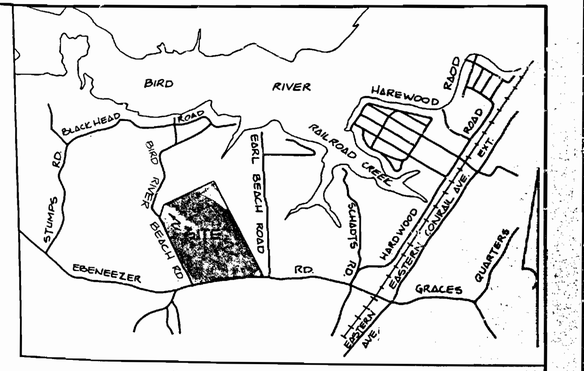
Scale 1" = 200'

Date 5-23-85

Revised 10-4-85

OFFICE COPY





LOCATION MAP

SCALE: 1" = 2000'

PETITIONER'S EXHIBIT 6

DESIGNED	M.L.C.	2/86 DATE
DRAWN	J.E.F.	2/86 DATE
CHECKED	M.L.C.	2/86 DATE
PROVED		DATE

REVISIONS		
DATE	BY	DESCRIPTION

ENGINEERING TECHNOLOGIES ASSOCIATES, INC.

ENGINEERS, SURVEYORS, CONSTRUCTION MANAGERS

9051 BALTIMORE NATIONAL PIKE
ELLICOTT CITY, MD. 21043
(301) 461-9920

OWNER / DEVELOPER

SOUTHERN FOUR INC.
422 MOUNTAIN HILL RD
PERRYVILLE, MD. 21903
(301) 575-6916

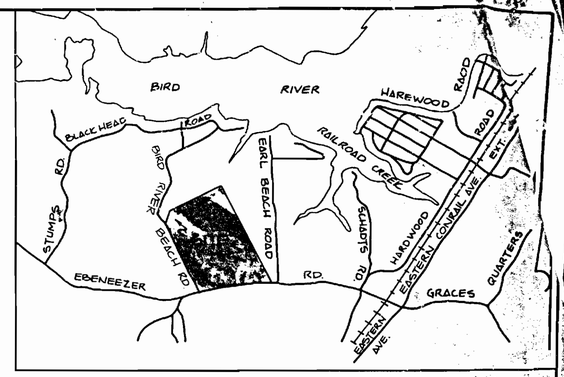
SITE PLAN

SOUTHERN FOUR PIT

15th ELECTION DIST. BALTIMORE, MARYLAND

SCALE: 1"=200'	CONTRACT NO.	DATE:	SHEET: 1 of 12

Petitioner's 6



LOCATION MAP

SCALE: 1" = 1000'



LEGEND

Baltimore County Hydric Soils

Alluvial Land	Av
Baila Series	BaA, BaB
Dunning Series	Du
Elkton Series	Em, En
Fallsington Series	Fa, Fs
Hatboro Series	Hb
Lenoir Series	LlB, LmB, LmC, LmC3
Leonardtown Series	Lr
Melvin Series	Mn, Mo
Othello Series	Ot
Pocomoke Series	Po
Swamp	Sw
Tidal Marsh	Tm
Watchung Series	WaA, WaB, WcB

Hydric Soils

Areas with slopes of 25% or greater — Less than 1% of total site area

100' Stream Setback

Ridge Line

Runoff Flow Direction

Approximate 100-year Floodplain

Tree Cover

EXISTING LAND USE

DESIGNED	M.Y.	10/16 DATE
DRAWN		DATE
CHECKED		DATE
APPROVED		DATE

REVISIONS		
DATE	BY	DESCRIPTION

ENGINEERING TECHNOLOGIES ASSOCIATES, INC.

ENGINEERS, SURVEYORS, CONSTRUCTION MANAGERS.

8051 BALTIMORE NATIONAL PIKE
ELLICOTT CITY, MD. 21043
(301) 461-9920

OWNER / DEVELOPER

SOUTHERN FOUR INC.,
499 MOUNTAIN HILL RD.
PERRYVILLE, MD. 21903
(301) 575-6916

SOUTHERN FOUR TRACT

REQUEST FOR ZONING CHANGE SUBMITTAL

15th ELECTION DIST. BALTIMORE, MARYLAND

SCALE: 1"=200'	CONTRACT NO.	DATE: 10/23/87	SHEET

Petitioner's 7

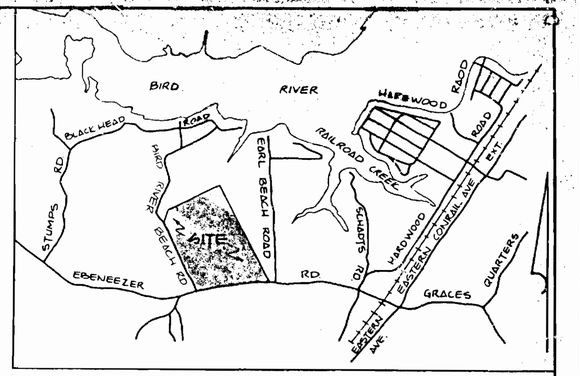
PROPOSED MINING OPERATION

SEDIMENT TRAP # 1
TOTAL DRAINAGE AREA = 9.64 Ac
TOTAL DISTURBED AREA = 9.64 Ac
TRAP VOLUME REQUIRED = 646 C.Y
TRAP SIZE = ½ (160 x 80) x 3'
= 711 C.Y.

EXISTING SEDIMENT BASIN (SEE NOTE #1)
TOTAL DRAINAGE AREA = 36.21 Ac
TOTAL DISTURBED AREA = 36.21 Ac
BASIN VOLUME REQUIRED = 2,426 C.Y.
BASIN SIZE = 170' x 85' x 4.7'
= 2,515 C.Y.

SEDIMENT TRAP # 2 (SEE NOTE #2)
TOTAL DRAINAGE AREA = 1.9 Ac
TOTAL DISTURBED AREA = 1.9 Ac
TRAP VOLUME REQUIRED = 127 C.Y
TRAP SIZE = 30'x40'x3'
= 133 C.Y

SEDIMENT TRAP # 3 (SEE NOTE #2)
TOTAL DRAINAGE AREA = 2.6 Ac
TOTAL DISTURBED AREA = 2.6 Ac
TRAP VOLUME REQUIRED = 174 C.Y
TRAP SIZE = 40'x45'x3'
= 200 C.Y



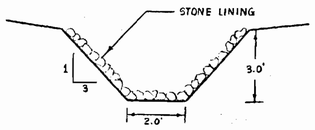
LOCATION MAP
SCALE: 1" = 2000'

NOTES
(1). WHEN THE EXISTING SEDIMENT BASIN IS NO LONGER REQUIRED FOR EROSION AND SEDIMENT CONTROL (AT COMPLETION OF PHASE - I OF MINING) THE SEDIMENT POND WILL BE CONVERTED TO A WETLAND MARSH.

(2). WHEN THE DRAINAGE AREAS TO SEDIMENT TRAPS # 2 AND #3 HAVE BEEN STABILIZED, THE TRAPS WILL BE CONVERTED TO STORMWATER MANAGEMENT PONDS. THESE WILL BE SHALLOW MARSH PONDS WITH EXTENDED DETENTION.

(3). THE FUEL STORAGE AREA WILL BE SURROUNDED BY A DIVERSION DITCH WHICH WILL DRAIN TO AN OIL/GREASE TRAP.

(4). THE SERVICE ROAD WILL BE DESIGNED SO AS NOT TO IMPEDE SURFACE WATER FLOW OR IMPACT THE HYDRIC SOILS, A UNIFORMLY SIZED CRUSHED STONE BASE SUCH AS IS USED IN POROUS PAVING APPLICATIONS WILL BE USED FOR THIS PURPOSE. WHERE REQUIRED, CULVERTS WILL ALSO BE USED TO MAINTAIN NATURAL FLOW CONDITIONS.



TYPICAL SECTION
DRAINAGE DITCH FROM MINERAL PROCESSING AREA TO PIT

LEGEND
- NON - TIDAL WETLAND
- UPLAND FOREST
- TIDAL WETLAND
- PHASE LINE
- DIVERSION SWALE
- DIVERSION DIKE

PRELIMINARY EROSION AND SEDIMENT CONTROL PLAN.

DESIGNED	K.A.P.	2/86
DRAWN	K.A.P.	2/86
CHECKED	M.L.C.	2/86
APPROVED		

REVISIONS

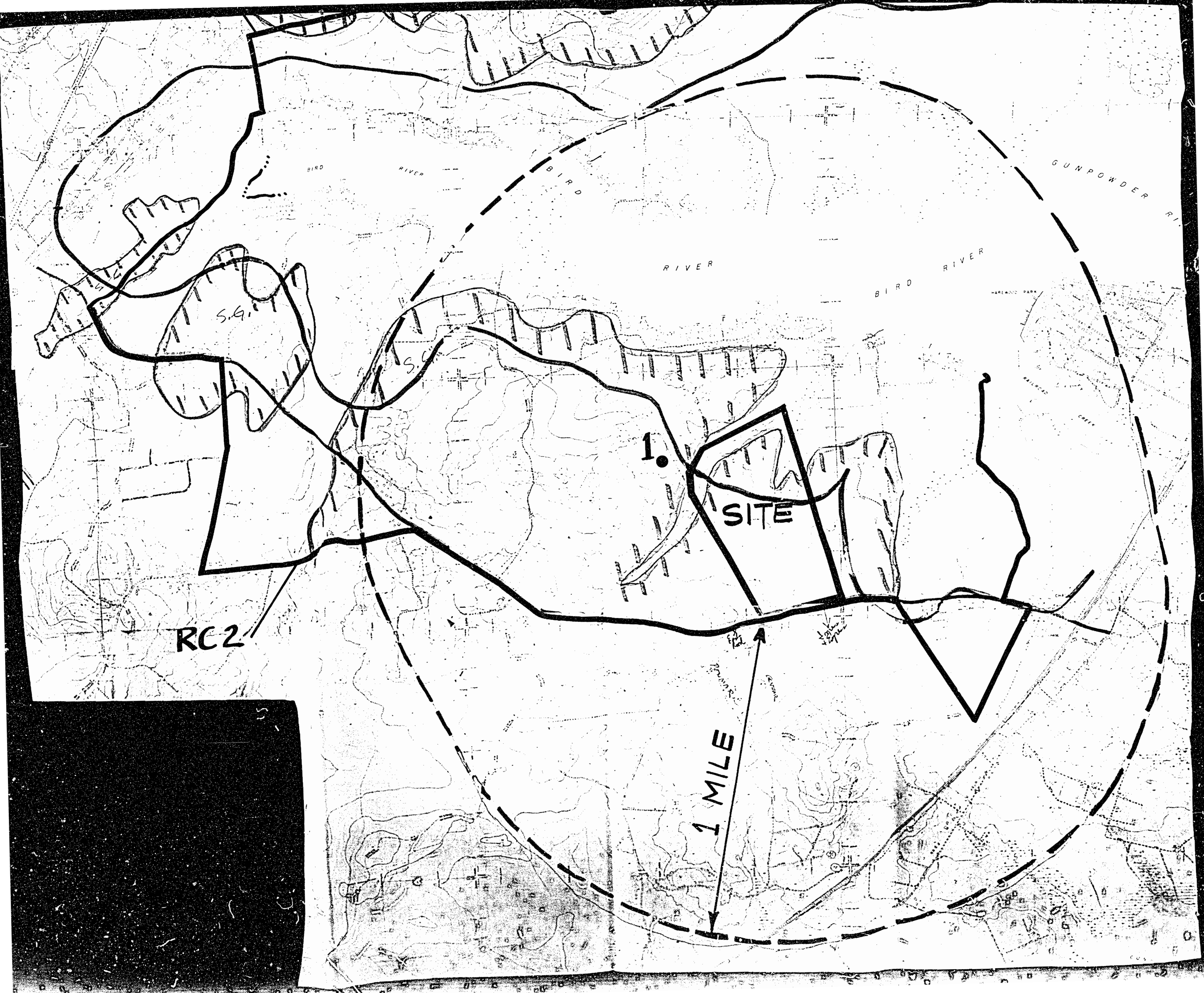
DATE	BY	DESCRIPTION

ENGINEERING TECHNOLOGIES ASSOCIATES, INC.
ENGINEERS, SURVEYORS, CONSTRUCTION MANAGERS
9081 BALTIMORE NATIONAL PIKE
ELLICOTT CITY, MD. 21043
(301) 461-9020

OWNER / DEVELOPER
SOUTHERN FOUR, INC.
499 MOUNTAIN HILL RD
PERRYVILLE, MD. 21903
(301) 575-6916

SITE PLAN
SOUTHERN FOUR PIT
15TH ELECTION DIST. BALTIMORE, MARYLAND
SCALE 1"=100' | CONTRACT NO | DATE | SHEET 1 of 10

86-195-X
Southern Four
PETITIONER'S 7


BIRD
RIVER
BIRD
RIVER
BIRD
RIVER
GUNPOWDER
S.G.
S.C.
1.
SITE
RC2
1 MILE

#86-195-X
Southern Four

RC2

Telecommunications
11-4-87
CBG Cpy.

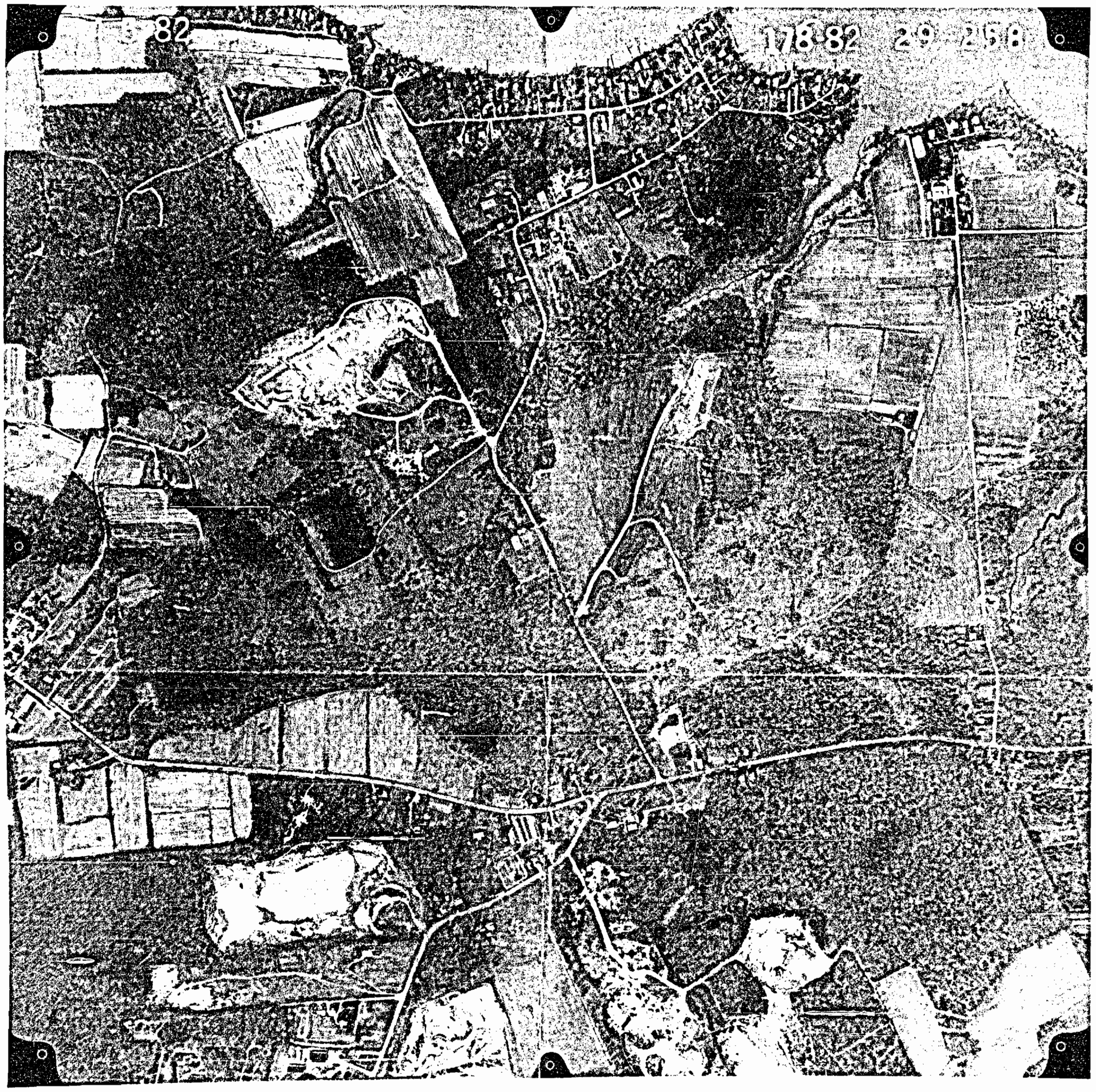
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6

4

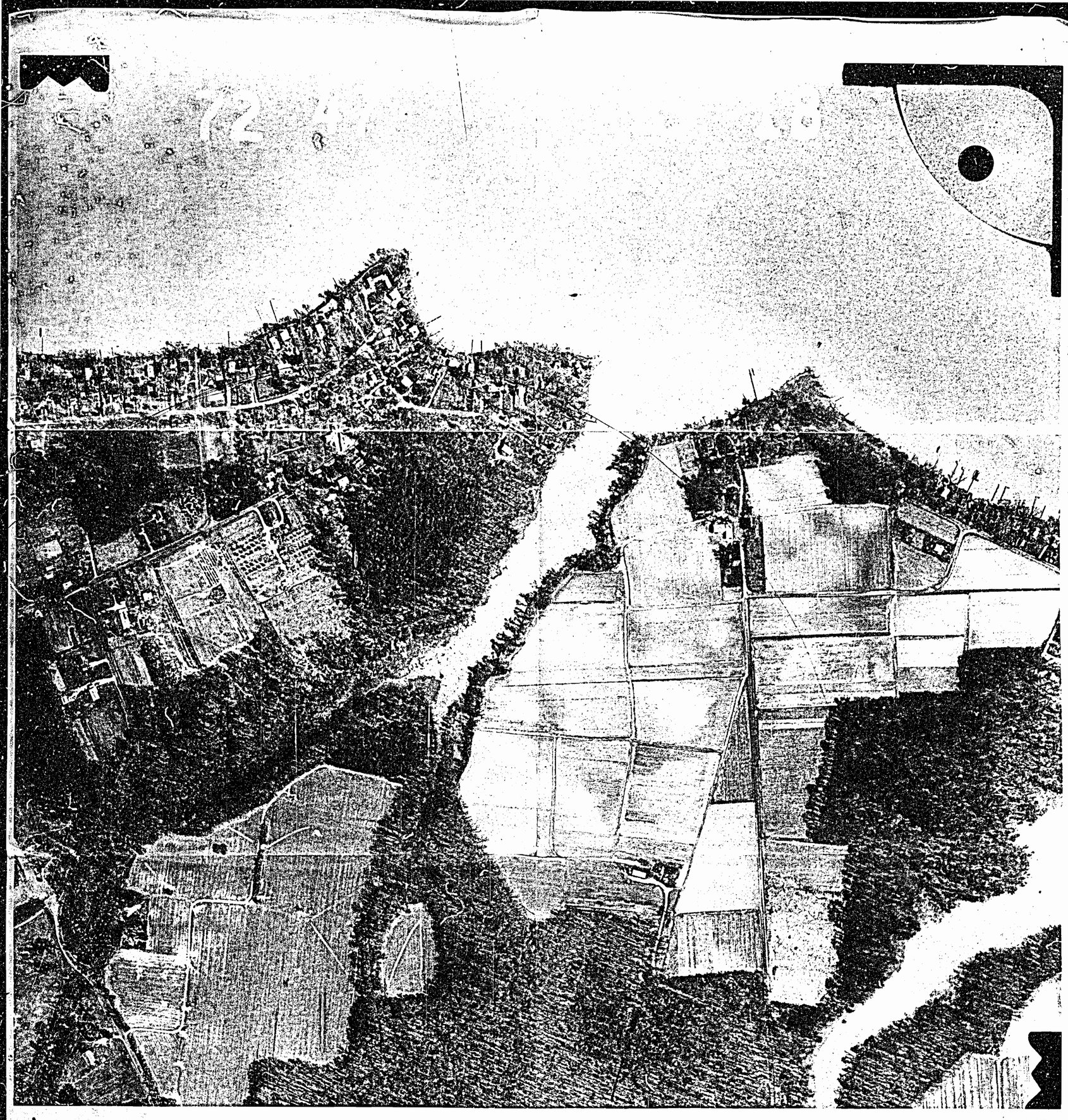
3

RC2



AERIAL DATA REDUCTION ASSOCIATES, INC.
27-16

Pat's Eph 9



25-18 NE

Scot Elk 10

Certificate of Service

I HEREBY CERTIFY that on this 9 day of March, 1989, I caused a copy of the foregoing Memorandum to be mailed first class, postage prepaid to Lawrence E. Schmidt, Esquire, County Office Bldg., Room 315, 111 West Chesapeake Avenue, Towson, Maryland 21204; Peter Max Zimmerman, Esquire, County Office Bldg., Room 304, 111 West Chesapeake Avenue, Towson, Maryland 21204; and Michael P. Tanczyn, Esquire, 606 Baltimore Avenue, Suite 106, Towson, Maryland 21204.

Thomas C. Swiss

TCS/lP.19

2-24-89

IN THE MATTER OF THE APPLICATION OF SOUTHERN FOUR, INC. FOR SPECIAL EXCEPTION FOR CONTROLLED EXCAVATION AND REMOVAL OF SAND AND RELATED MATERIALS Beginning at the C/L of Ebenezer Road, 1248.75' E of C/L of Bird River Beach Road, 15th District	*	BEFORE THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY Zoning Case No. 86-195-X

* * * * * * * * * * * * * *

PROTESTANTS' POST-HEARING MEMORANDUM

NOW COMES, Bird River Community Association, et al, Protestants, by its attorney, Michael P. Tanczyn, Esq., and respectfully submits the following Post-Hearing Memorandum in opposition to the Special Exception for controlled excavation or removal of sand and related materials and for reasons states

FACTS

The Southern Four, Inc., Petitioner, seeks a Special Exception under Section 502.1 of the Baltimore County Zoning Regulations for its 128 acre, more or less, parcel, zoned RC-2 and RC-20, in the 5th Councilmanic District, 15th Election District, of Baltimore County.

After the Petitioner's Motion for the Board to recuse itself was denied the Petitioner presented a number of witnesses to support its position.

This parcel is the same parcel which twice previously unsuccessfully was the subject of Petitions for Special Exception

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for a self-same controlled excavation for removal of sand and related materials in the Petition of Ida Surguy, denied by the Zoning Commissioner for Baltimore County November 6, 1972, and again denied on Petition of the Estate of Ida Surguy on November 25, 1974, and on appeal denied again by the County Board of Appeals, which was the subject of the Petitioner's appeal in the matter of William A. Barkuloo et al vs Stancill Contracting Company, Case No. 383 in the Court of Special Appeals September Term, 1978. The Court of Special Appeals' Decision reversed the Circuit Court for Baltimore County which had overruled or reversed the Board of Appeals denial of the Petitioner's request, thereby reinstating the Board's denial of the Petitioner's request. Writ of Certiorari requested by the Petitioner was denied by the Court of Appeals in that case on March 7, 1979.

The 128 acre parcel is bounded by Ebenezer Road on the South, Bird River Beach Road on the West, by the continuation of properties adjoining Bird River Beach Road on the curve to the North, as well as tributaries of the Bird River, and by farms and residences to the East.

The then Zoning Commissioner for Baltimore County rendered several Orders, on November 20, 1986 granting the Special Exception with five restrictions, which Order was amended November 26, 1986 and finally January 23, 1987 reconfirming the original Decision of the Zoning Commissioner of November 20, 1986. The Protestants who participated before the Zoning Commissioner level

timely appealed the Orders of the Zoning Commissioner to this Board.

One of the stockholders and principals in Southern Four, Inc., Mr. Terry Stancill, testified for the Petitioner that, according to the Petitioner's calculations, there were 7.2 million tons of sand on deposit in the 128 acre tract which he estimated would take 30 to 35 years to extract. He projected peak truck loads at that extraction rate to be 75 truck loads per day with non-salable materials to be separately trucked and dumped off-site. He described the types of trucks which would be drawn to such an activity as small, medium and large dump truck with the range being 12 to 14 tons for the small trucks and 23 to 24 tons for the large trucks. He testified that, in his experience in the business, 5% of the trucking would be arranged and 95% would be unscheduled customer trucks and that the depth of the excavation at this location would be 50 feet maximum. He testified as to requirements for site inspections by the State and other agencies and that since January of 1976 other facilities he was familiar with had been frequently inspected at Otter Point in Aberdeen. He acknowledged that the major supplier in the area for sand and gravel was located in an MH zone which permits this use by right, and he projected that ingress and egress from the site would be by way of Ebenezer Road and that customers would either bring trucks or they would arrange for delivery by truck to customers. He estimated 50 truck loads per day on average, two axle or three

axle, if they captured half the existing business. He projected operating hours of 7 a.m. to 5 p.m. He also said that there would be a 15 acre requirement for access roads, and a processing tower and a small shop on the site, and that approximately 60 acres of the 128 acres would be mined.

He acknowledged on cross-examination that the Southern Four, Inc. or Stancill Contracting Company had been the subject of litigation which resulted in Orders enjoining them from dumping sludge on the site without a permit and prohibiting them from removing topsoil from the site more than they had already done without a permit from the time of the Injunctive Order forward.

The Petitioner's chief witness on the environment was Michael Clar who testified on several occasions. In his earlier testimony, Mr. Clar identified the area of wetlands on the site and generally described the scope of the activities proposed by the Petitioner for the site, stated his opinion that it would not pose a threat to either the environment or to the neighborhood from an environmental impact or in terms of polution or any danger to the water supplies of the neighbors.

Timothy Ryan testified for the Petitioner with regard to traffic as an expert witness and testified that he had been retained by Southern Four, Inc. in early 1986, that his staff did traffic counts on Ebenezer Road shortly before the first day of hearing when Mr. Stancill and Mr. Clar testified. He testified that there had been a fatal accident one year ago and that the

ingress and egress from the site would be by way of Ebenezer Road, that he is familiar with the operations at Genstar and had been told by Mr. Clar or by the owners what they proposed to do at the site and it was on that description that he based his report. It was his opinion that the traffic numbers his staff collected in the previous November and based on the site distance which he calculated was 1,000 feet to the West and 650 feet to the East, that the figures were acceptable for higher than 35 mile per hour traffic and that it was safer to exit the site from Ebenezer Road than from Bird River Beach Road. He did not believe that this operation would have a negative impact on traffic in the community. Prior to his testimony on June 21, 1988 he had last been to the site on June 20, 1988. He testified that his observers had observed traffic at the site from November 2, 1987 from 7 a.m. to 6 p.m. and that between 7 a.m. and 8 a.m. there were fewer than 600 vehicles traveling in the vicinity of the entrance to Petitioner's site.

Petitioner's fourth witness was Bernard Page who testified that he had been an appraiser in Baltimore County since 1967 and that he did appraisals in Baltimore, Cecil and Harford Counties. He is familiar with Middleborough. He had reviewed the property, looked at the neighborhood and testified in 1980 or 1981 concerning this property, that he did not feel that the Petitioner's use would violate the provisions of Section 502.1.

On cross-examination Mr. Page admitted that he had been

the appraiser hired for MDIF in the Advance Mobilehome case, that his estimate of the value of the mobile home park was $1,200,000.00 to $1,400,000.00, and that the property sold, shortly after he gave his testimony in May of 1987, in September of 1987 for $2,425,000.00.

At the conclusion of the Petitioner's case in chief a Motion to Dismiss was made by the Protestants and the Board entered an interim Order denying the Motion to Dismiss but requiring critical area findings to be obtained pursuant to Bill 32-88 passed by the Baltimore County Council and staying the matter until that information was obtained.

On continuation of the hearing on January 3, 1989 the Petitioner recalled Michael Clar, who introduced two packets concerning the reports prepared to satisfy the critical areas legislation findings and admitted in that hearing, on cross-examination, that the wetlands were configured differently than as shown on the original plat, that he had not located the wetlands either for the original plat nor on the new plat but that that was done by others at his request, and that the other individuals had similarly done a habitat survey at the Petitioner's site for endangered species at the same time they relocated the wetlands. Mr. Clar further testified that based on the reduced excavation area the time for extraction of the 4 million plus tons of sand now to be extracted would take something less than 25 years. In his report Mr. Clar talks about the adaptation of the site for

aquaculture which he described as a fish hatchery in the 60 foot plus deep lake created by the excavation.

At the rehearing January 4, 1989 the Petitioner presented a new proposal as far as the area to be mined and the area in which the processing would take place, moving the processing plant from the generally eastern-central portion of this property to the western-central portion of the property adjacent to Bird River Beach Road, and had changed the area of the excavation.

The Protestants adduced evidence by not only the prior environmental problems at the site but also the proof that the self-same petition had been denied by three separate previous decisions and established generally through their testimony that the conditions which existed at the time the Petition was previously denied still existed in terms of the misalignment of the road at Windlass Run and the narrow, curving, hilly nature of Ebenezer Road from the major arteries of Route 40 and Eastern Avenue to the Petitioner's site which caused a continuing hazard to neighbors and residents of this area in the five enumerated communities whose only means of egress from their communities was by way of Ebenezer Road since they were bounded by the Bird River or its tributaries on the North and Ebenezer Road was the first feeder street coming out of their communities which led to Eastern Avenue or to Route 40.

Testimony was adduced as to the problems created when

the Amtrak train crash occurred and portions of their community were rendered inaccessable in an attempt to manage the traffic during the crisis. Fears were expressed by residents of long standing that emergency equipment and ambulance equipment would be unable to reach their community streets if accidents occurred on Ebenezer Road, which they feared was much more likely if the Petitioner's request was granted and additional truck traffic was introduced into the area.

They produced a video tape concerning representative traffic at Windlass Run to supplement their own traffic counts done by the residents which established that the traffic in the area began to increase in volume at times earlier than those at which the Petitioner's experts began their traffic counts; namely, 7 a.m., and that there was a substantial problem with traffic passing at Windlass Run in a dangerous manner due to the misalignment of the road and the fact that there is one lane in each direction with no shoulder on either side of the road and that at Windlass Run the traveled portion of the road measures approximately 17 feet for both lanes of traffic.

Residents testified that, on a regular basis, there are mirrors on cars and trucks knocked off by vehicles attempting to pass each other on that narrow area. They further testified as to serious traffic accidents and fatalities directly adjacent to the Petitioner's proposed site entrance caused by the fact that eastbound traffic on Ebenezer Road at that location is trapped by

a high bank on the right side of the road in the vicinity of the Petitioner's proposed point of egress leaving no escape for drivers approaching that site to go to the right, which was the scene of a flagman being run down and dying on September 23, 1987 pursuant to Baltimore County Police Department Report No. 4616214, Protestants' Exhibit 11.

Residents also testified concerning the Petitioner's property as viewed by numerous aerial photography to show its proximity to the Bird River, which feeds into the Chesapeake Bay, and to show the portion of the Petitioner's property which is roughly 60% within the critical areas as delineated by Baltimore County and the State Critical Areas Commission.

Numerous neighbors testified as to problems they have had with both hand dug and drilled wells, particularly those neighbors and the Church which was located in the vicinity of the Genstar operation which experienced suddenly sand in their well systems when Genstar began to actively mine in the vicinity of between 1,000 and 1,500 feet of their homes.

Many residents testified that, because of their previous experience with Southern Four, Inc. and the Stancills in particular they did not believe they were trustworthy, based on the previous litigation which was required to enjoin them from dumping sludge on their site or removing topsoil or trees from the site without permits.

At the conclusion of the hearing, the Board of Appeals

set as timelines that Mr. Clar would provide the Petitioner with information concerning the work of the experts who located the wetlands and who conducted the habitat survey. Attached is a copy of the letter received by the Protestants from Petitioner's counsel from Mr. Clar dated January 13, 1989 to Mr. Michael Marr from Mr. Michael Clar in response to that request. The Board will note that in the second full paragraph Mr. Clar maintains in this letter, contrary to his sworn testimony on January 3, 1989, that no habitat survey was conducted by the experts.

Finally, the traffic counts recorded by the area residents showed far more traffic on the site than that on which the Petitioners' expert Mr. Ryan developed or on which his opinion was based. Further, the counts recorded by the residents are corroborated in part by Baltimore County traffic figures submitted as a later exhibit.

The neighbors all testified as to the adverse impact on their properties the processing tower as well as the open excavated area, which by Mr. Stancill's unsupplemented testimony would exist between 30 to 35 years, would have on their neighborhood and on their individual properties in particular.

Finally, it was noteworthy that Mr. Clar, in his last day of testimony, admitted that he had not read Bills 32-88 through 35-88 of the Baltimore County Council establishing the critical areas.

THE LAW

In this case in which the Petitioner seeks a grant of a Special Exception for a controlled excavation in lands 60% of which are determined to be critical areas, ordinances are clearly applicable to this case; specifically, Bills 32-88 through 35-88 and 41-88, involving not only controlled excavations in particular but critical areas. It has been held that a Special Exception refers to a grant by a zoning administrative body pursuant to existing provisions of zoning law and subject to certain guides and standards of special use permitted under provisions of existing zoning law. Turner vs Hammond, 270 Md 41, 310 A 2d 543 (1973).

Further, that law of this case includes the critical areas legislation is the proposition of O'Donnell vs Bassler, 289 Md 501, that the law in effect at the time a case is decided will be the law applied to a specific case absent an applicable exception which applies to the Petitioner. Yorkdale Court vs Powell, 237 Md 121; Miller vs Forty West Builders, 62 Md App 320.

Further, pursuant to Bill 32-88, Section 103.5(c), provides that non-residential developments located in Chesapeake Bay Critical Areas are subject to zoning regulations in effect at the time a right is to be exercised unless the lot or parcel is within a recorded or approved plat or plan of a land subdivision approved by the County before December 1, 1985. (Bill 32-88, Page 15, Line 16).

It is further proposed for surface mining operations under Bill 32-88 that they "must comply with the habitat protection area and buffer regulations specified in Sections 22-215 and 22-213 in the Baltimore County Code" (Bill 32-88, Page 4, Line 23); "shall not be permitted if the mining activity would prevent the use of the site for agricultural or forestry purposes for more than 25 years" (Bill 32-88, Page 5, Line 1); must upon completion of the mining operation "return the property to a condition capable of sustaining agricultural or forest use or to another use permitted by these zoning regulations" (Bill 32-88, Page 5, Line 4); "shall incorporate a multi-purpose berm or buffer to protect neighboring residential sites from the polutants specified in the policy section of this subsection" (Bill 32-88, Page 5, Line 7).

Further, "wash plants, including ponds, spoil piles and associated equipment, must be hydrologically self-contained unless it can be conclusively proven to the approving authority (Emphasis supplied) that there will be no risk of water quality degradation" (Bill 32-88, Page 5, Line 10).

Appendix E of the Rules of Practice and Procedures of the Zoning Commissioner of Baltimore County specify under Rule 2 the requirements for Petitions and preliminary review. Rule 2.B.5. provides that surveyor's plat on an engineering scale must include the zoning of each such parcel and of adjacent properties.

During the pendency of the Petitioner's Special

Exception request, the Baltimore County Council rezoned a portion of the Petitioner's property RC-20, leaving a portion of the Petitioner's property RC-2 and denying the Petitioner's request for MH zoning in the quadrennial zoning maps approved October 13, 1988 by the County Council for this district.

The Petitioner as a moving party having the burden to meet the Zoning Commissioner's requirements as to forms and plats has never updated its site plan to show the current zoning for either the Petitioner's property nor the adjacent properties as a result of the County Council's actions in October of 1988 as affirmed by the signature of the County Executive effective December 9, 1988; however, this is only the tip of the iceberg when considering the Petitioner's substantive failings in either producing information or complying with the requirements of the law in meeting its burden concerning this Special Exception.

The highlighted portions of Bill 32-88 are designed to carry out the legislative intent to treat on a comprehensive basis the preservation and rejuvenation of the Chesapeake Bay and its tributaries in conjunction with a state activity pursuant to Maryland Annotated Code, Natural Resources Article, Section 8-1801 et seq, dealing with the Chesapeake Bay and its rejuvenation.

The Petitioner has taken no steps to survey the habitat protection area within the critical areas on its lands as noted in the letter of Mr. Clar of January 13, 1989 to Mr. Marr attached to this Memorandum and, contrary to Mr. Clar's testimony at the

hearing that a habitat survey had been conducted with the finding that no endangered species were involved, it appears that the Petitioner took no such action, relying on the opinion of a County official that there were no endangered species in the area. That does not comport with the requirements of the law which mandate that the Petitioner do a habitat survey on its lands to determine if there are endangered species which Mr. Clar testified had been done in conjunction with the experts being out at the site to relocate the wetlands prior to the January 3, 1989 hearing.

The Board has only Mr. Clar's opinion (and he did not purport to have operated a sand and gravel business heretofore) that the 4,000,000 plus tons of sand to be extracted from the site could be done in less than 25 years. The Petitioner's other testimony on that point was from Mr. Terry Stancill whose estimate was 25 to 30 years would be required to remove the sand and gravel.

Bill 34-88 passed by the Baltimore County Council and signed by the Baltimore County Executive added Sections 38-19 through 38-26 to the Department of the Environmental Protection and Resource Management and in Section 38-20 specifically defined habitat protection areas.

Bill 35-88 titled "Development Regulations in the Chesapeake Bay Critical Area" provided in Section 22-206 that an applicant proposing development in the critical area prepare a critical area findings plan, including at a minimum the

information contained in Section 22-206(b) (Pages 24 through 26 of the Bill), including current zoning of the subject property and surrounding properties and including the location of any residential transition areas, which information has not to this time been provided by the Petitioner in this case. Therefore, the Petitioner has not met his minimum burden of providing necessary information as required by the statutes and any grant of approval for a Special Exception would be premature under the law and error to grant any such approval.

With regard to the fact that this is Petitioner's third application for the same use at the same site, the law is clear that when an application has been once rejected a new application may not be granted absent a showing of change since the earlier denial. Randolph Hills, Inc. vs Whitley, 249 Md 78, 238 A 2d 257 (1968); and Polinger vs Briefs, 244 Md 538, 224 A 2d 460 (1966). It is clear that the same conditions which led the Board of Appeals and Zoning Commissioner to earlier deny the Petitioner's request still exist in terms of the inappropriateness of Petitioner's proposed use at this site on a closed arterial road system utilizing Ebenezer Road as the primary and only means of egress from the Petitioner's site to the major arterials nearby of Eastern Avenue and Route 40.

The Petitioner has shown no change in the traffic and, in fact, the traffic figures propounded by the Protestants indicate that the area has greater traffic today than it had at

the time the previous petitions were denied despite the fact that there have been no improvements made to the length of Ebenezer Road or at Windlass Run, save the improvement of the bridge at White Marsh Run. The Petitioner has failed to address that burden at all.

With regard to the frequently quoted case of Schultz vs Pritts, 291 Md 1, 432 A 2d 1319, and the case of County Commissioners for Cecil County vs Holbrook, 70 Md App 207 (1987), the Petitioners have consistently misinterpreted Schultz vs Pritts during the hearing. The Petitioner argued during the hearing that the location of other sand and gravel operations in the neighborhood meant that their application must be approved. The law concerning non-conforming uses is settled and the uses in the area for sand and gravel operations were either on land where the process was being done as a non-conforming use or on land zoned MH, Manufacturing Heavy, such as the Genstar operation to the South of Ebenezer Road where such use is permitted of right and, in particular, has gone on in excess of four decades already in the case of Genstar. The Petitioner equated the immediate neighborhood as the zone whereas a proper interpretation of Schultz vs Pritts would require an analysis of its effect on the neighborhood at this location as opposed or contrasted with its operation at anywhere else within the RC-2 zone to determine whether or not there is anything unique about the effect of the Petitioner's proposed operation at this site on the neighbors or

the neighborhood which would offend Section 502.1 of the Baltimore County Zoning Regulations.

It is clear that traffic impact is a sufficient basis to deny an application for a Special Exception, Gowl vs Atlantic Richfield Company, 27 Md App 410, 341 A 2d 832 (1975). Further, the testimony in this case including the video tape exhibited the continued traffic hazard caused by use of heavy vehicles on Ebenezer Road and eloquently illustrated that further harm and danger would be visited on the community by the increased traffic proposed by the Petitioner's operation, notwithstanding their claims that the traffic would not increase due to their proposed operations. The fatalities recorded on Ebenezer Road, including adjacent to the Petitioner's proposed site entrance for the Petitioner's property with the embankment, represents a continuing and unchanged circumstance which cries out for a fourth denial of the Petitioner's request.

Further, the effect of the processing tower, noisy equipment and truck traffic on the neighborhood indicate particular adverse impact under the holding of County Commissioners for Cecil County vs Holbrook (Supra).

The testimony by the Protestants who had lived in this neighborhood for many decades indicated that they had built their homes to be close to the water in a rural and pastoral area and by their testimony no-one could visit them nor could they utilize their property without being effected by the processing tower,

noise and trucks inherent in the Petitioner's operation.

The conditions which an applicant for a Special Exception must meet go to policy considerations to be determined by the Zoning Board in deciding whether the exception whould be granted. Town of Sommerset vs Montgomery County Board of Appeals, 245 Md 52, 225 A 2d 294 (1966).

The burden of the applicant in this case would be to show that the grant of an exception would be in harmony with the general plan and would not have an adverse effect on health or safety and would not be detrimental to adjacent properties in the general neighborhood. Richmond Corp. vs Board of County Commissioners for Prince George's County, 254 Md 244, 255 A 2d 391 (1969) and Schultz vs Pritts (Supra).

On the evidence presented the Board, the Petitioner has failed to meet its burden and the Protestants have clearly shown that continued traffic safety problems, a failure to indicate a change in conditions from the time of the time of the previous denials, and the failure of the Petitioner to even attempt to meet its burden under the critical areas legislation suggests the appropriate result would be a denial of the Petition for Special Exception.

Respectfully Submitted,

MICHAEL P. TANCZYN, ESQ.
Attorney for the Protestants
Suite 106, 606 Baltimore Avenue
Towson, Maryland, 21204
Telephone (301) 296-8823

I HEREBY CERTIFY that, on this 2nd day of February, 1989, a copy of the foregoing Protestants' Post-Hearing Memorandum was mailed, postage prepaid, to Michael E. Marr, Esq. and Thomas C. Swiss, Esq., Marr, Swiss & Woods, 301 North Charles Street, Suite 900, Baltimore, Maryland, 21201; to Lawrence E. Schmidt, Esq., County Office Building, 111 West Chesapeake Avenue, Room 315, Towson, Maryland, 21204; and to Peter Max Zimmerman, Esq., Deputy People's Counsel, County Office Building, 111 West Chesapeake Avenue, Room 304, Towson, Maryland, 21204.

MICHAEL P. TANCZYN, ESQ.

Engineering Technologies Associates, Inc.

Engineers • Planners • Surveyors

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Ellicott City, MD 21043

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Washington Area (301) 621-4690

January 13, 1989

Mr. Michael Marr
Marr & Bennett
301 N. Charles Street
Suite 900
Baltimore, Maryland 21201

Re: Southern Four, Inc., Special Exception

Dear Mr. Marr,

I am enclosing a copy of the field biologists notes related to the Southern Four property for your review and submittal to the Baltimore County Hearing Board.

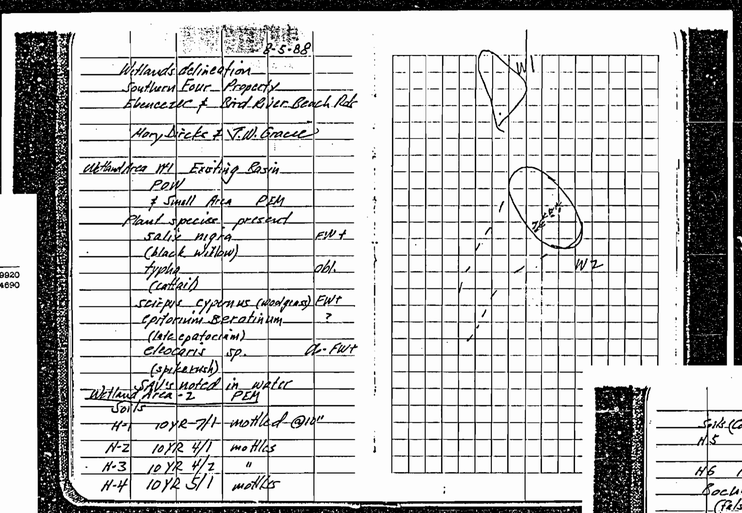
With respect to rare and endangered species I have been informed by my staff, Mr. Donald Koch of ETA and Mr. James Gracie that they met with Ms. Jill Swearinger of the Baltimore County Department of Environment of Resource Management to discuss what additional work if any would be required related to this issue. Ms. Swearinger indicated that she would review the County and State data for that property as well as determine what additional work would be required. Upon completion of her activities, including a site field evaluation, she indicated to ETA that she was satisfied that there are no known rare or endangered species at the site and that no additional work would be required.

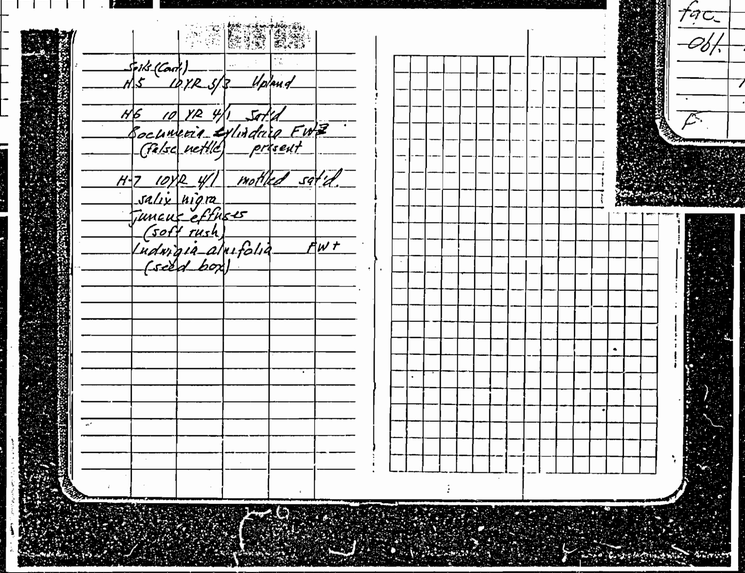
I trust that this information will satisfy the issues that arose during my testimony. If you need any additional information please let me know.

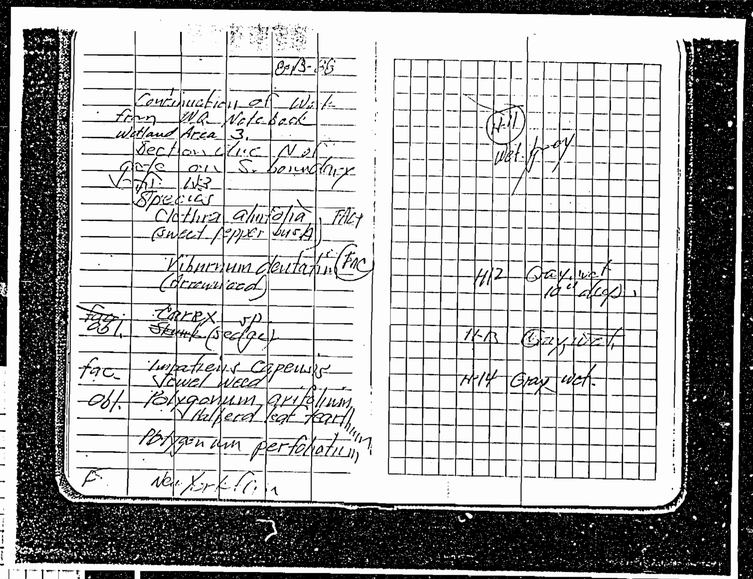
Very truly yours,

Michael L. Clar, P.E.

MLC/ds





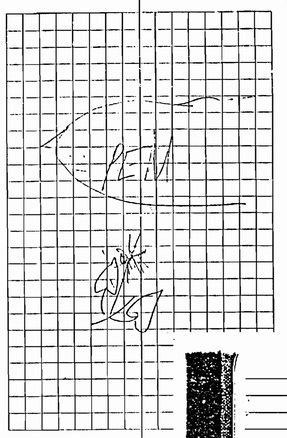


Plant species

FACW+ Rubus allegheniensis (Common blackberry)

OBL Acer rubrum, Liquidambar styraciflua, Ilex opaca

Boehmeria cylindrica



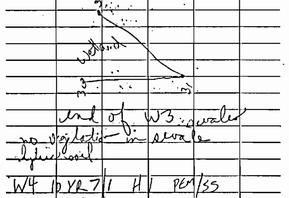
8-19-88

Wetlands Delineation — 10:00am

Southern Four

Dicks & Gracie

27 of property



End of W3: wooded

no vegetation in areas

W4 10YR 7/1 H1 per/ss

H5 10YR 5/1 mottled

W3 sedge

Calamagrostis canadensis
Eupatorium perfoliatum
Boehmeria cylindrica

Osmunda cinnamomea
Polygonum sp.

W4 H2 10YR 5/1 Mottled
Solidago gracilis
early goldenrod
Smooth aster, basal rosette

Scirpus cyperinus
Juncus effusus
Ludwigia sp.

8-14-88

Wetlands delineation

Southern Four Property

Dicks & Gracie

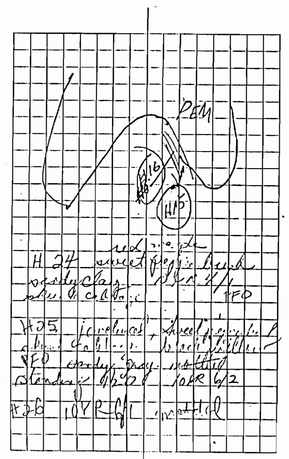
Wetland Area W-3 Cont.

H15 Grey Mot.
H16 Grey Mott.
H17 10YR 4/1 or 4/2 Mottled

H18 Upland boundary
H19 DYAS2 Mottled
Vaccinium corymbosum FACW+ (common highbush blueberry)

Zizania aquatica OBL (wild rice)
Smilax rotundifolia
common greenbrier

H20 DK 10YR
H21 H
H22 "
H23 H Grey mottled



H 24 wetland boundary: Acer rubrum, Liquidambar styraciflua, Ilex opaca, Clethra alnifolia, Viburnum dentatum, Rubus allegheniensis

H25 10YR 6/2 mottled

H26 10YR 6/2 mottled

8-20-88

Large meadow running from sta 0 on 320

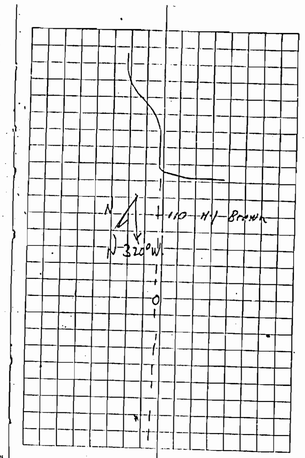
Late thoroughwort
Eupatorium serotinum
Verbena
White vervain

175' Scirpus cyperinus
wool grass
10 YR 6/1 mottled

300' Woolgrass
10 YR 5/2 Mottled
10 YR 4/1 "
Carex
Juncus
Vaccinium
Dead tree

402 ft
446 Rosa
Rosa sylvatica

Soft rush
Woolgrass
Setaria faberii, foxtail, "



Ludwigia alternifolia

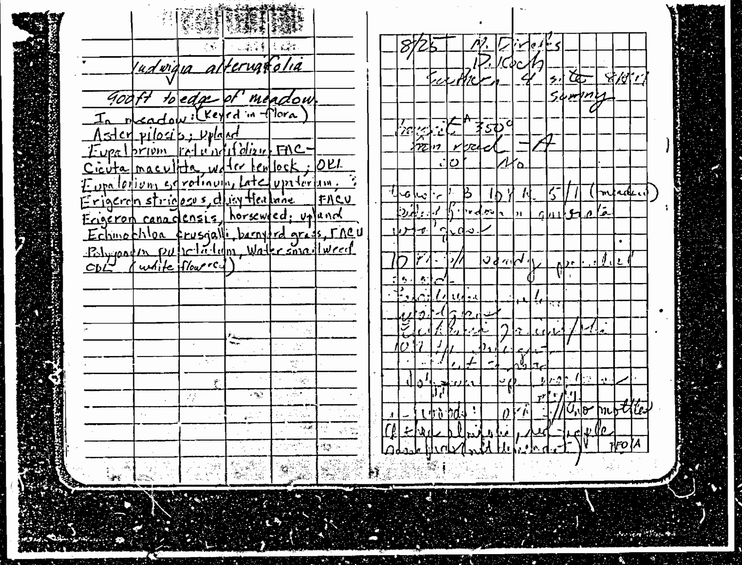
South to edge of meadow

In meadow (Keyed in Flora)
Aster pilosus; Upland
Eupatorium rotundifolium, FAC-
Cicuta maculata, water hemlock; OBL
Eupatorium serotinum, late eupatorium,
Erigeron strigosus, daisy fleabane FACU
Eupatorium canadensis, horsetweed; upland
Echinochloa crusgalli, barnyard grass, FACW
Polygonum punctatum, Water smartweed OBL (white flowered)

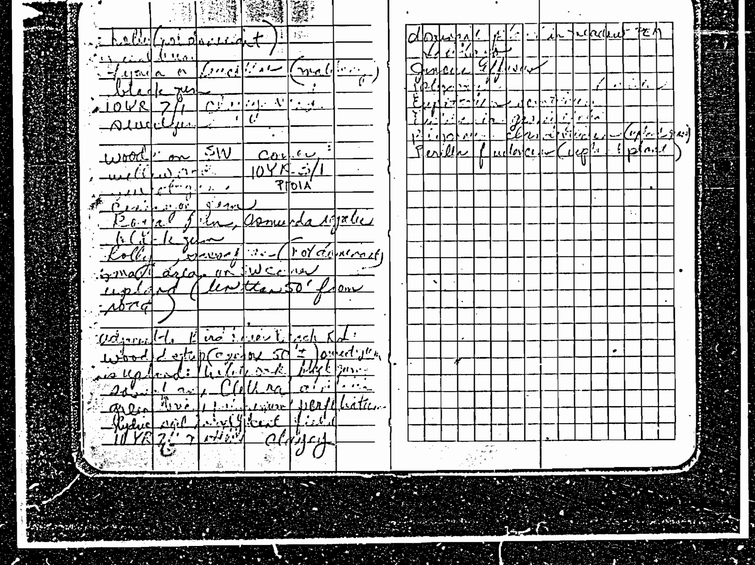
8/25 12 Dicots
12 Cocks
Feather 4 3:00 8/26/88
sweeping

Temp 350°
Wind NW
10 mph

Flow B 10YR 5/1 (meadow)
Small grasses = Gramineae
Typha
10 YR 4/1 Upland grasses
Typha
10 YR 5/2 mottled
Typha



Holly (Ilex opaca)
Typha
Ilex opaca (male)
bleeds sap
10YR 7/1
Ludwigia
Wood on SW corner
10YR 5/1
Typha
Typha
Acer rubrum, Osmunda cinnamomea
Cattail
Rolls
Typha (not common)
Small dykes in wetland
upland (less than 50' from stake)
Viburnum
Ilex Viburnum Rubus
Wood debris (covering 50% of ground)
in upland
Rubus
Clethra
area
Ilex
Typha
Rubus allegheniensis
Typha
10 YR 7/1 mottled
Typha



Osmunda cinnamomea
Viburnum
Typha
Ilex opaca
Typha
Rubus allegheniensis
Typha
Boehmeria cylindrica (Typha)

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 383

September Term, 1978

#75-18-X

27

PEOPLE'S COUNSEL EXHIBIT

WILLIAM A. BARKULOO, et al.

V.

STANCILL CONTRACTING COMPANY

Davidson
Couch
MacDaniel,
JJ.

Per Curiam

Rec'd 12/28/78
11 am

Filed: December 26, 1978

MICROFILMED