IN THE MATTER OF	*	IN THE
SOBCZAK FAMILY, LLC	*	CIRCUIT COURT
FOR JUDICIAL REVIEW OF THE OPINION AND ORDER OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY	*	FOR BALTIMORE COUNTY
Board of Appeals Case No. 04-089-SPHX	*	CASE NO. 03-C-04-010679 AE CASE NO. 03-C-0410903 AE

****

STIPULATION OF DISMISSAL

Sobczak Family, LLC, Petitioner, by and through its attorneys, Robert R. Bowie, Jr., John T. Willis, Michael W. Siri and Bowie & Jensen, LLC, and Honeygo Run Reclamation Center, Inc. , by and through its attorneys John B. Gontrum and Whiteford, Taylor & Preston, LLP hereby STIPULATE AND AGREE to dismiss the appeal which was filed on behalf of Sobczak Family, LLC in the above captioned case.

John B. Gontrum, Esq.
Whiteford, Taylor & Preston
210 W. Pennsylvania Avenue
Towson, Md. 21204

Attorneys for Respondent
Honeygo Run Reclamation Center, Inc.

Robert R. Bowie, Jr.
John T. Willis
Michael W. Siri
Bowie & Jensen, LLC
29 W. Susquehanna Ave., Suite 600
Towson, Maryland 21204-4528

Attorneys for Petitioner
Sobczak Family, LLC

FILED APR 11 2005

PETITION FOR JUDICIAL REVIEW OF: ROCKWELL COLLINS, INC. 400 Collins Road, N.E. Cedar Rapids, IO 52458	*	IN THE
	*	CIRCUIT COURT
	*	FOR
And	*	BALTIMORE COUNTY
SOBCZAK FAMILY, LLC 2206-D Lakeside Boulevard Edgewood, Maryland 21040	*	
	*	
FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY	*	
BOARD OF APPEALS OF BALTIMORE COUNTY	*	
Old Courthouse, Room 49, 400 Washington Avenue,	*	
Towson, Maryland 21204	*	Case Nos.: 03-C-04-10903 And 03-C-04-10679
IN THE MATTER OF THE APPLICATION	*	
OF **HONEYGO RUN RECLAMATION CENTER, INC.**, ET AL., LEGAL OWNERS/	*	
PETITIONERS FOR SPECIAL HEARING ON PROPERTY LOCATED ON THE N & S/S	*	
SILVER SPRING ROAD, W/S OF PHILADELPHIA ROAD (10710	*	
PHILADELPHIA ROAD) 11TH ELECTION DISTRICT, 5TH COUNCILMANIC DISTRICT	*	
Case No.: 04-089-SPHX Before the County	*	
Board Of Appeals of Baltimore County		

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

ORDER

Upon consideration of HONEYGO RECLAMATION CENTER, INC.'s Motion for Consolidation, and any opposition filed thereto, it is this 20 day of JAN, in the year 2005, hereby

FILED JAN - 5 2005

ORDERED that the Motion to Consolidate be GRANTED and the above-referenced matters (case nos.) are consolidated for trial.

Judge, Circuit Court Baltimore County

copies to:

C. William Clarke
Nolan, Plumhoff & Williams, Chartered
Nottingham, Centre
Suite 700
502 Washington Avenue
Towson, Maryland 21204-4528
Attorneys for Rockwell Collins

John T. Willis, Esquire
Bowie & Jensen, LLC
Suite 600
29 West Susquehanna Avenue
Towson, Maryland 21204
Attorneys for the Sobczak Family

John B. Gontrum, Esquire
Whiteford, Taylor & Preston L.L.P.
210 West Pennsylvania Avenue
Towson, MD 21204-4515
(410) 832-2055
Attorneys for Honeygo Run Reclamation Center, Inc.

True Copy Test
SUZANNE MENSH, Clerk
Per _____
Deputy Clerk

IN THE MATTER OF HONEYGO RUN RECLAMATION CENTER, INC. - SOUTHERN EXPANSION	*	IN THE CIRCUIT COURT
10710 Philadelphia Road North and South Side of Silver Spring Road 5th Councilmanic District 11th Election District	*	FOR BALTIMORE COUNTY
	•	CASE NO.: 03-C-04-10679
Honeygo Run Reclamation Center, Inc. Petitioner	*	and 03-C-04-10903

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

RESPONSE TO MOTION TO CONSOLIDATE

Rockwell Collins, Inc., Petitioner, by and through its attorneys, C. William Clark of the Law Offices of Nolan, Plumhoff & Williams, Chartered hereby files this Response to Motion to Consolidate and says as follows:

1. The Petitioner admits the statements contained in Paragraph 1 of the Motion to Consolidate.

2. The Petitioner admits the statements contained in Paragraph 2 of the Motion to Consolidate, and further answers that the Petition for Judicial Review filed by the Sobczak Family, LLC was assigned Case No.: 03-C-04-10903 and the Petition for Judicial Review filed by Rockwell Collins was assigned Case No.: 03-C-04-10679.

3. The Petitioner admits the statements contained in Paragraph 3 of the Motion to Consolidate.

4. The Petitioner admits the statements contained in Paragraph 4 of the Motion to Consolidate.

WHEREFORE, Petitioner, Rockwell Collins, respectfully requests that this Court pass an Order granting the Motion to Consolidate the above cases.

C. William Clark
Nolan, Plumhoff & Williams, Chtd.
Suite 700, Nottingham Centre
502 Washington Avenue
Towson, Maryland 21204-4528
410-823-7800

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of January, 2005, a copy of the foregoing Response to Motion to Consolidate was mailed, first class, postage prepaid to the following:

John B. Gontrum, Esquire
Whiteford, Taylor & Preston, LLP
210 W. Pennsylvania Avenue
Towson, Maryland 21204-4515

C. William Clark

Y:\JENNIFERDATA\WPDOCS\BUD\CWC\ZONING-CLIENTS\Honeygo\respmotiontoconsol.wpd

THOMAS J. RENNER
WILLIAM P. ENGLEHART, JR.
ROBERT L. HANLEY, JR.
ROBERT S. GLUSHAKOW
DOUGLAS L. BURGESS
C. WILLIAM CLARK
CATHERINE A. POTTHAST*
E. BRUCE JONES**
CORNELIA M. KOETTER*

* ALSO ADMITTED IN D.C.
** ALSO ADMITTED IN NEW JERSEY

Law Offices
NOLAN, PLUMHOFF & WILLIAMS
CHARTERED
SUITE 700, NOTTINGHAM CENTRE
502 WASHINGTON AVENUE
TOWSON, MARYLAND 21204-4528
(410) 823-7800
TELEFAX: (410) 296-2765
EMAIL: NPW@NOLANPLUMHOFF.COM
WEB SITE: WWW.NOLANPLUMHOFF.COM

J. EARLE PLUMHOFF
(1940-1988)

NEWTON A. WILLIAMS
(RETIRED 2000)

RALPH E. DEITZ
(1918-1990)

January 10, 2005

VIA HAND DELIVERY
Clerk's Office
Circuit Court for Baltimore County
County Courts Building
401 Bosley Avenue
Towson, MD 21204

Re: Honeygo Run Reclamation Center
Petition for Judicial Review Case Nos. 03-C-01-10679,03-C-04-10903

Dear Sir/Madam:

Enclosed herein please find the Petitioner's Response to Motion to Consolidate.

If you have any questions, please do not hesitate to contact me.

Thank you for your assistance.

Very truly yours,

C. William Clark

CWC/jkc

Enclosure

cc: John B. Gontrum, Esquire
Peter Max Zimmerman, Esquire
County Board of Appeals of Baltimore County
Mr. Thomas Manor

IN THE MATTER OF HONEYGO RUN RECLAMATION CENTER, INC. - SOUTHERN EXPANSION	*	IN THE CIRCUIT COURT
10710 Philadelphia Road North and South Side of Silver Spring Road 5th Councilmanic District 11th Election District	*	FOR BALTIMORE COUNTY
	•	CASE NO.: 03-C-04-10679
Honeygo Run Reclamation Center, Inc. Petitioner	*	and 03-C-04-10903

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

ORDER

Upon consideration of counsel's Stipulation to Extend Time to File Memorandum in Support of Petition for Judicial Review, it is this 30th day of December ORDERED: That the time for Petitioner to file its Memorandum in Support of Petition for Judicial Review be extended until January 10, 2005.

Judge, Circuit Court for Baltimore County

Y:\JENNIFERDATA\WPDOCS\BUD\CWC\ZONING-CLIENTS\Honeygo\ORDER.wpd

LAW OFFICES
NOLAN, PLUMHOFF
& WILLIAMS,
CHARTERED

CIRCUIT COURT FOR BALTIMORE COUNTY
Suzanne Mensh
Clerk of the Circuit Court
County Courts Building
401 Bosley Avenue
P.O. Box 6754
Towson, MD 21285-6754
(410)-887-2601, TTY for Deaf: (800)-735-2258
Maryland Toll Free Number (800) 938-5802

Case Number: 03-C-04-010679

TO: BOARD OF APPEALS OF BALTIMORE COUNTY
400 Washington Ave
Room 49
Baltimore, MD 21204

IN THE MATTER OF HONEYGO RUN RECLAMATION CENTER, INC. - SOUTHERN EXPANSION	*	IN THE CIRCUIT COURT
10710 Philadelphia Road North and South Side of Silver Spring Road 5th Councilmanic District 11th Election District	*	FOR BALTIMORE COUNTY
	•	CASE NO.: 03-C-04-10679
Honeygo Run Reclamation Center, Inc. Petitioner	*	and 03-C-04-10903

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

STIPULATION TO EXTEND TIME TO FILE MEMORANDUM IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

Rockwell Collins, Inc., Petitioner, by and through its attorneys, C. William Clark of the Law Offices of Nolan, Plumhoff & Williams, Chartered and John B. Gontrum of Whiteford Taylor & Preston hereby Stipulate and agree that the time for Petitioner to file its Memorandum in Support of Petition for Judicial Review be extended until January 10, 2005.

John B. Gontrum, Esquire
Whiteford Taylor & Preston
210 W. Pennsylvania Ave.
Towson, MD 21204
(410) 832-2055

Attorneys for Respondent

C. William Clark
Nolan, Plumhoff & Williams, Chtd.
Suite 700, Nottingham Centre
502 Washington Avenue
Towson, Maryland 21204-4528
410-823-7800

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of December, 2004, a copy of the foregoing Stipulation to Extend Time to File Memorandum in Support of Petition for Judicial Review was mailed, first class, postage prepaid to the following:

John B. Gontrum, Esquire
Whiteford, Taylor & Preston, LLP
210 W. Pennsylvania Avenue
Towson, Maryland 21204-4515

C. William Clark

THOMAS J. RENNER
WILLIAM P. ENGLEHART, JR.
ROBERT L. HANLEY, JR.
ROBERT S. GLUSHAKOW
DOUGLAS L. BURGESS
C. WILLIAM CLARK
CATHERINE A. POTTHAST*
E. BRUCE JONES**
CORNELIA M. KOETTER*

* ALSO ADMITTED IN D.C.
** ALSO ADMITTED IN NEW JERSEY

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SUITE 700, NOTTINGHAM CENTRE
502 WASHINGTON AVENUE
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J. EARLE PLUMHOFF
(1940-1988)

NEWTON A. WILLIAMS
(RETIRED 2000)

RALPH E. DEITZ
(1918-1990)

December 29, 2004

VIA HAND DELIVERY
Clerk's Office
Circuit Court for Baltimore County
County Courts Building
401 Bosley Avenue
Towson, MD 21204

Re: Honeygo Run Reclamation Center
Petition for Judicial Review Case Nos. 03-C-04-10903, 03-C-01-10679

Dear Sir/Madam:

Enclosed herein please find a Stipulation to Extend Time to File Memorandum in Support of Petition for Judicial Review.

If you have any questions, please do not hesitate to contact me.

Thank you for your assistance.

Very truly yours,

Jennifer K. Chmielewski

Jennifer K. Chmielewski
Legal Assistant to C. William Clark

JKC/

Enclosure

cc: John B. Gontrum, Esquire
Peter Max Zimmerman, Esquire
County Board of Appeals of Baltimore County
Mr. Thomas Manor

PETITION OF:	*	IN THE
ROCKWELL COLLINS , INC. 400 Collins Road, NE Cedar Rapids, IO 52458	*	CIRCUIT COURT FOR
FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY	*	BALTIMORE COUNTY
IN THE CASE OF : HONEYGO RUN RECLAMATION CENTER, INC., ET AL. Legal Owners/Petitioners for Special Hearing on Property located on the North and South Side of Silver Spring Road 5th Councilmanic District 11th Election District	*	CIVIL ACTION NO.: C-04-10903
Case No.: 04-089-SPHX	*	

RECEIVED
OCT 20 2004
BALTIMORE COUNTY
BOARD OF APPEALS

* * * * * * * * * * *

PETITION FOR JUDICIAL REVIEW

Rockwell Collins, Inc., Protestant,, who participated in the proceedings before the County Board of Appeals of Baltimore County, by C. William Clark, Esquire, Robert L. Hanley, Jr., Esquire and Nolan, Plumhoff & Williams, Chartered, its legal counsel, in accordance with Maryland Rules 7-201 through 7-210, hereby requests judicial review of the September 21, 2004 Decision of the County Board of Appeals of Baltimore County in the above captioned matter, a copy of which is attached hereto as Exhibit A.

C. William Clark

Robert L. Hanley, Jr.
Nolan, Plumhoff & Williams, Chtd.
Suite 700, Nottingham Centre
502 Washington Avenue
Towson, Maryland 21204-4528
410-823-7800
Attorneys for Protestant

cc: John B Gontrum
C. William Clark
Board of Appeals for Balto Co

RECEIVED
2004 OCT 18 P 2:50
CLERK OF THE CIRCUIT COURT
BALTIMORE COUNTY

LAW OFFICES
NOLAN, PLUMHOFF
& WILLIAMS,
CHARTERED

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of October, 2004, a copy of the foregoing Petition for Judicial Review was mailed, first class, postage pre-paid to the following:

John B. Gontrum, Esquire
Whiteford, Taylor & Preston, Llp
Suite 400
210 W. Pennsylvania Avenue
Towson, Maryland 21204

Peter Max Zimmerman, Esquire
People's Counsel for Baltimore County
Room 47, Old Courthouse
400 Washington Avenue
Towson, Maryland 21204

John T. Willis, Esquire
Bowie & Jensen, LLC
Suite 600
29 W. Susquehanna Avenue
Towson, Maryland 21204

County Board of Appeals
of Baltimore County
Room 49, Old Courthouse
400 Washington Avenue
Towson , Maryland 21204

C. William Clark

LAW OFFICES
NOLAN, PLUMHOFF
& WILLIAMS,
CHARTERED

County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
410-887-3180
FAX: 410-887-3182

September 21, 2004

John T. Willis, Esquire
BOWIE & JENSEN, LLC
6th Floor, 29 W. Susquehanna Avenue
Towson, MD 21204

Peter M. Zimmerman, People's Counsel
for Baltimore County
Room 47, Old Courthouse
Towson, MD 21204

RE: *In the Matter of: Honeygo Run Reclamation Center, Inc.* -
Petitioner / Case No. 04-089-SPHX

Dear Mr. Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the County Board of Appeals of Baltimore County in the subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **with a photocopy provided to this office concurrent with filing in Circuit Court. Please note that all subsequent Petitions for Judicial Review filed from this decision should be noted under the same civil action number as the first Petition.**
If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Kathleen C. Bianco /tks

Kathleen C. Bianco
Administrator

Enclosure

c: The Sobczak Family LLC
John B. Gontrum, Esquire
Philip J. Auld /Honeygo Run Reclam Cntr
Donald C. Lentz, P.R. for the
Estate of Carl H. Lentz
Charles F. Volpe and Jane Volpe
Wayne B. Knight /Honeygo Mobile Park
Bruce S. Campbell III /Nottingham Village
David Taylor /Morris & Ritchie Assoc.
Lawrence E. Schmidt /Zoning Commissioner
Pat Keller, Planning Director
Timothy M. Kotroco, Director /PDM

EXHIBIT
tabbies
A

THOMAS J. RENNER
WILLIAM P. ENGLEHART, JR.
ROBERT L. HANLEY, JR.
ROBERT S. GLUSHAKOW
DOUGLAS L. BURGESS
C. WILLIAM CLARK
CATHERINE A. POTTHAST*
E. BRUCE JONES**
CORNELIA M. KOETTER*

* ALSO ADMITTED IN D.C.
** ALSO ADMITTED IN NEW JERSEY

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J. EARLE PLUMHOFF
(1940-1988)

NEWTON A. WILLIAMS
(RETIRED 2000)

RALPH E. DEITZ
(1918-1990)

October 18, 2004

VIA HAND DELIVERY
Clerk's Office
Circuit Court for Baltimore County
County Courts Building
401 Bosley Avenue
Towson, MD 21204

Re: Honeygo Run Reclamation Center

Dear Sir/Madam:

Enclosed herein please find a Petition for Judicial Review to be filed on behalf of the Protestant, Rockwell Collins, Inc. This petition is being filed to appeal the decision of the County Board of Appeals of Baltimore County which was rendered on September 21, 2004.

If you have any questions, please do not hesitate to contact me.

Thank you for your assistance.

Very truly yours,

C. William Clark

CWC/jkc

Enclosure

cc: John B. Gontrum, Esquire
Peter Max Zimmerman, Esquire
John T. Willis, Esquire
County Board of Appeals of Baltimore County

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY

PETITION OF	*	
SOBCZAK FAMILY, LLC 2206-D LAKESIDE BOULEVARD EDGEWOOD, MARYLAND 21040	*	
FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY	*	CIVIL
IN THE CASE OF	*	ACTION
HONEYGO RUN RECLAMATION CENTER, INC., ET AL – LEGAL OWNERS/PETITIONERS FOR SPECIAL HEARING ON PROPERTY LOCATED ON THE N & S/S SILVER SPRING ROAD, W/S OF PHILADELPHIA ROAD (10710 PHILADELPHIA ROAD) 11TH ELECTION DISTRICT, 5TH COUNCILMANIC DISTRICT	*	NO. _____
CASE NO.: 04-089-SPHX	*	

* * * * * * *

PETITION FOR JUDICIAL REVIEW

1. Pursuant to Rules 7-201 through Rule 7-210 of the Maryland Rules of Procedure, Section 604 of the Charter for Baltimore County, Maryland, and Section 501 *et seq.* of the Baltimore County Zoning Regulations, the Petitioner, Sobczak Family, LLC, hereby files this Petition for Judicial Review.

2. This Petition for Judicial Review is from the Decision of the County Board of Appeals of Baltimore County in Case No.: 04-089-SPHX.

3. The Petitioner, Sobczak Family, LLC, was a party to the proceeding before the County Board of Appeals for Baltimore County.

RECEIVED
OCT 12 2004
BALTIMORE COUNTY
BOARD OF APPEALS

John T. Willis, Esquire
Bowie & Jensen, LLC
29 W. Susquehanna Ave., Suite 600
Towson, Maryland 21204
(410) 583-2400

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12 day of October, 2004, a copy of the aforesaid Petition for Judicial Review was mailed, postage-prepaid, to John B. Gontrum, Esq., Whiteford, Taylor & Preston, LLP, 210 W. Pennsylvania Avenue, Suite 400, Towson, Maryland 21204, Attorney for Petitioner(s); to Peter Max Zimmerman, People's Counsel for Baltimore County, Room 47, Old Courthouse, 400 Washington Avenue, Towson, Maryland 21204; to C. William Clark and Robert L. Hanley, Jr., Nolan, Plumhoff & Williams, Chartered, 502 Washington Avenue, Suite 700, Towson, Maryland 21204, Attorney for Protestant, Rockwell Collins; and delivered to the County Board of Appeals of Baltimore County, 400 Washington Avenue, Room 49, Towson, Maryland 21204.

John T. Willis

John T. Willis, Esq.
Bowie and Jensen, LLC
Attorney for Petitioner,
Sobczak Family, LLC

IN THE MATTER OF	*	BEFORE THE
THE APPLICATION OF		
HONEYGO RUN RECLAMATION CENTER,	*	COUNTY BOARD OF APPEALS
INC., ET AL -LEGAL OWNERS /		
PETITIONERS FOR SPECIAL HEARING ON	*	OF
PROPERTY LOCATED ON THE N & S/S		
SILVER SPRING ROAD, W/S OF	*	BALTIMORE COUNTY
PHILADELPHIA ROAD		
(10710 PHILADELPHIA ROAD)	*	Case No. 04-089-SPHX
11TH ELECTION DISTRICT		
5TH COUNCILMANIC DISTRICT	*	

* * * * * * * * *

OPINION

This matter is before the Board on an appeal from a decision of the Zoning Commissioner dated January 5, 2004 in which the Commissioner granted a Petition for Special Exception pursuant to § 248.4A of the *Baltimore County Zoning Regulations* (BCZR) for an "excavation, controlled" and a "rubble landfill" facility in a M.L.R. zone and granting a Petition for Special Hearing pursuant to § 412.3 of the BCZR as it references § 412 under the 1987 regulations seeking approval of the following:

1. An amendment to the previously approved site plan and Order issued in Case No. 94-87-SPHXA for a landfill expansion and the relocation of accessory uses;
2. A special exception for an "excavation, controlled" in conjunction with a special exception for a "rubble landfill" on the same site;
3. A determination that the special exceptions as part of the expansion of the existing operations have no time limit for utilization, or alternatively, a 5-year period for utilization of the special exception;
4. The modification or elimination of restrictions 3, 4, and 6 of the Order issued in Case No. 94-87-SPHXA;
5. The continuation of the existing variance from §§ 409.8A.2 and 409.8A.6 of the *Baltimore County Zoning Regulations* to permit a crushed concrete surface for the

internal haul road and parking areas in lieu of the required durable and dustless surface and to permit same without the required permanent striping for off-street parking facilities; and

6. The termination of the special exception granted in Case No. 3902-RX for a trailer court.

A hearing was held before the Board on July 14, 2004 and July 21, 2004. The Petitioners, the owners of the subject property, Donald C. Lentz, personal representative of the Estate of Carl H. Lentz; Charles F. Volpe and Jane Volpe; the Honeygo Mobile Park, by Wayne B. Knight, Owner; Nottingham Dodge, Inc., by Bruce S. Campbell III, Senior Vice President; and Baltimore County, Maryland, a body politic, by Dr. Anthony G. Marchione, Administrative Officer, and the Contract Purchasers, Honeygo Run Reclamation Center, Inc., by Philip J. Auld, Area President, were represented by John B. Gontrum, Esquire, WHITEFORD, TAYLOR & PRESTON, L.L.P.

The Protestants, Sobczak Family, L.L.C., were represented by John T. Willis, Esquire, and BOWIE & JENSEN, LLC, and Protestant Rockwell Collins was presented by C. William Clark, Esquire, NOLAN, PLUMHOFF & WILLIAMS, CHTD.

Both sides participated fully and submitted Briefs in support of their positions. A public deliberation was held on August 25, 2004.

Background

The Honeygo Run Reclamation Center, Inc., previously received approval for a special exception to operate a rubble landfill by decision of the Zoning Commissioner for Baltimore County in Case No. 94-87-SPHXA on December 13, 1993. Subsequent to receiving that approval for the requested special exception, related variances, and development plan, a permit was issued by the Maryland Department of the Environment on January 8, 1997 for the operation of a rubble landfill on the north side of Silver Spring Road.

The rubble landfill occupies 38.3 acres on the 68-acre tract of ground that was previously the site of a sand and gravel excavating operation that dated back to the 1920s. The tract is bounded on the north by the stream known as Honeygo Run, on the south by Silver Spring Road and residential properties, on the east by Philadelphia Road, and on the west by Interstate 95. The landfill was granted a permit by the Maryland Department of the Environment on January 8, 1997 and began landfill operations on March 29, 1999. Petitioner is the owner of three parcels and the contract purchaser of seven additional parcels of land on which it seeks to establish a rubble landfill utilizing 41.1 acres of the 49.8 acres as rubble disposal area. The properties proposed to be used as a rubble landfill were previously used as residential dwellings and a trailer park or are undeveloped land in the M.L.R. zoning classification. The portion of the property containing a former mobile home park was rezoned to M.L.R. from D.R. 3.5 in the 2000 Comprehensive Zoning Map Process, thereby permitting a rubble landfill on the site by special exception.

The Petitioner proposes to construct on the additional properties by excavation and fill a large landfill. The completed landfill will cover 41.1 acres of land and is being designed to contain 5.6 million cubic yards of rubble landfill material. The proposal is to excavate to depths ranging from 20 to 70 feet below existing grade on the various parcels of property. The finished rubble landfill is proposed to have grades ranging from 20 to 110 feet above the elevation of the existing land.

The County amended its Solid Waste Management Plan by Resolution 18-03 to include the proposed expansion of the existing facility. In addition, Baltimore County enacted Bill No. 58-04 clarifying prior amendments to § 412 of the *Baltimore County Zoning Regulations*. Bill 58-04 permits the expansion of existing rubble landfills with approved development plans under regulations in effect as of the date of the original approval. It appears that this particular expansion was the subject of discussion in consideration of the Bill by the County Council, and

the Council approved the Bill with its grandfathering provisions with full knowledge of its impact on the site while this appeal was pending before the Board of Appeals.

The existing facility required both a special exception for controlled grading and for a rubble landfill. Seven to eight hundred thousand cubic yards of material have been excavated. In addition, the existing facility required a special hearing for recycling of concrete and wood chipping as accessory uses to the landfill. As a result of the recycling operations, only 50 to 60 percent of the material brought into the site has been placed in the landfill. It was originally planned to occupy 50 to 60 acres on a 70-acre site. Surveys reduced the size of the site to 68 acres and the use of a liner and adherence to the State regulations reduced the size of the landfill to 39 acres. The landfill opened in 1999 and is expected to be completely filled in the Fall of 2005.

Petitioners presented David Taylor, employed by Morris & Ritchie Associates, who was the landscape architect and project manager overseeing the preparation of the Plan for the new landfill. Mr. Taylor was accepted by the Board as an expert in landscape architecture and is familiar with the *Baltimore County Zoning Regulations*. Taylor testified that the proposed expansion of the existing landfill and grading operations will occur on an assemblage of properties consisting of 48 acres. The landfill area will occupy approximately 40 acres and the existing recycling operation will be moved from its present location to the rear of the property near I-95. The entrance to the site and inspection station will remain in the same location. Silver Spring Road will be closed just past the Sobczak property and would only be used by emergency vehicles if necessary to access the property. No access is proposed to the site on a right-of-way through the Sobczak property.

Mr. Taylor stated that all the properties in the proposed assemblage are zoned M.L.R. Several of the properties are being used as residences. Also included in the site is a former mobile home park. The mobile home park was zoned D.R. 3.5 until the 2000 Comprehensive

Zoning Maps at which time the property was changed to the M.L.R. zone which does not permit mobile home parks. The mobile home park was closed in 2003. Petitioner submitted several exhibits showing the plans for the proposed expansion and Mr. Taylor indicated that the closest point from the start of the landfill to the subject Sobczak property was approximately 173 feet. Taylor also indicated that the new landfill would have two cells with various elevations. The maximum elevation of the landfill will probably be approximately 202 feet above ground. He estimated this would be approximately 470 feet from the Sobczak property line. The landfill would be graded at approximately a 4 percent slope and the sides would slope in a ratio of 3 to 1, would have a shelf, and then go up again approximately 3 to 1 feet until they reach the top of the landfill area. Mr. Taylor stated that after the expanded landfill was completed and capped off, it would be used as a park. The road around the landfill would convert to a trail and there would be various loop systems and trails for hiking and biking to the top of the park. It would cost approximately $1 million to develop the park, and it would take approximately 10 years to fill in the landfill. A 100-foot buffer line around the landfill and a berm 15 feet to 18 feet in height with vegetation on top of it would be built to shield the surrounding properties from the landfill.

Mr. Taylor testified with respect to the requirements under § 502.1 of the BCZR.

A. He did not feel that the landfill would be detrimental to the health, safety or general welfare of the locality involved because of the berms and screening required, as well as the fact that the operations of the landfill had been in accordance with the County and Maryland State regulations and no violations have been recorded against the landfill.

B. He felt that there would not be any congestion in road, streets, or alleys therein because the landfill has been operating without any problems from truck traffic and traffic going in and out of the site, and it would continue to use the same entrance and exits as previously used.

C. He did not think that there was a potential hazard from fire, panic or other danger since the operation has been safely operated during the past 4 years and would continue to operate in the same manner.

D. He did not feel that the landfill would tend to neither overcrowd the land nor cause undue concentration of population, particularly since the mobile home park would be closed.

E. He did not feel that it would interfere with adequate provisions for schools, parks, water, sewerage, transportation or other public requirements, conveniences or improvements due to the fact that there would be an additional park after the landfill was capped off, and there was no sanitary use, waste was trucked off, and there was no public sewer or water to the site.

F. He did not feel that it would interfere with adequate light and air because ultimately a park would be created when the landfill is capped.

G. In addition, he did not feel it was inconsistent with the purposes of the property's zoning classification or inconsistent with the spirit and intent of the zoning regulations since a landfill was allowed by special exception in an M.L.R. zone.

H. He did not feel it would be inconsistent with the impermeable surface and vegetative retention provisions of the zoning regulations, again since the landfill would be converted to a parkland with vegetation, and the buffer area around the site, as well as the berms to be constructed, would offer protection to the neighboring properties.

I. He also felt that it would not be detrimental to the environmental and natural resources of the site and vicinity, including forest, streams, wetlands, aquifers,

and floodplains in an R.C. 2, R.C. 4, R.C. 5 or R.C. 7 zone, since the entire zone was M.L.R.

Mr. Taylor also stated that the County had abandoned the land and did not wish to have it transferred to them upon completion of the park. Further, Mr. Taylor indicated that it was necessary to amend the site plan in Case No. 94-87-SPHXA for the landfill expansion in order for material to be excavated and to recycle material. He also said that the second special exception for controlled excavation in conjunction with a special exception for a rubble landfill was necessary for the expansion of the present landfill. He felt that it was necessary also to have an expansion of the permits for the special exception for unlimited or 5 years at the least because of the requirements of Baltimore County in obtaining permits, etc., for the landfill, and asked for the modification of the three conditions in the Order in Case No. 94-87-SPHXA. These conditions are:

#3 - That the property be turned over to the County after completion of the landfill. The County has made it clear that it does not desire to obtain the property upon completion of the landfill.

#4 – Restore the Honeygo stream. Mr. Taylor stated that the stream restoration was not desired by the County at this point since the County had put in a sewer. He did not feel that it would be necessary to take any action with respect to the stream unless the County required it.

#6 – The elimination of the requirement to pay the salary of an inspector. Mr. Taylor testified that the neighborhood community group that inspects the site on a periodic basis, at least quarterly, has not asked for an inspector to be appointed. The group intends to continue and he sees no need for the continuation of the requirement for an inspector.

He also asked for a continuation of the variance from a paved road to a concrete roadway as is currently in place. The road will move in accordance with the excavation and filling operations of the landfill. Taylor stated that it would be most difficult and impractical to pave it

and then remove the paving when the operations would require it, then repave it again. The method now in operation, watering roadways with the company water truck, has been sufficient to keep the dust down. He felt that the berm and vegetation would protect any neighboring properties from any dust that might be generated. He asked that the special hearing be allowed to remove the special exception from the mobile home park, which has been abandoned and closed since 2003.

Mr. Edward M. Dexter, Administrator of the Solid Waste Plan for Department of the Environment for the State of Maryland, testified that the State has regulations with respect to rubble landfills. He said that no law enforcement actions had been taken against the operator of the Honeygo landfill since its operation. One problem with fly ash being accepted by Honeygo was corrected on the spot and did not require any citation to the landfill.

The Petitioner also presented William Monk, a principal of Morris & Ritchie Associates, who was accepted as an expert in land planning. Mr. Monk testified that the M.L.R. zone provides designated areas for manufacturing light activities. He identified various M.L.R. zones in Baltimore County in an exhibit presented to the Board. The various zones were shown on the west side of Towson; a portion on Security Boulevard; an office park off of Liberty Road; a portion of land on the north side of I-83 north of the Marriott Inn; and an area in Rosedale. It was Mr. Monk's opinion that the proposed landfill would have no more impact on the Sobczak property than it would on any other property in the M.L.R. zone. Mr. Monk also felt that when the proposed use was completed the park would actually provide a visual relief from the sea of parking and buildings that typically is found in a designated growth area.

Petitioners also provided Dr. Ramesh Venkatakrisnan, a geologist with Golden and Associates. Dr. Venkatakrisnan stated that he had done three-dimensional illustrations to show the line of sights and visual impact analysis of the landfill. He presented an exhibit that provided

a line of sight analysis based on existing topography, contending that the buffers around the landfill would preclude a view of the landfill.

On being recalled in rebuttal, Mr. Taylor testified that 100-foot wide buffer area would permit a berm of such height and vegetation on top of it that it would provide substantial screening to the Sobczak property. He indicated that the Petitioner would agree to have the landscape architect from Baltimore County review the screening, and that the Board could require that in its Order. In addition, Mr. Taylor testified that a bond or letter of credit would be issued to Baltimore County that would insure that the Petitioner or Baltimore County would have to erect the park as had been proposed by the Petitioner.

Petitioner also presented George Frizzell, an expert in real estate appraisal, who indicated that the Knight property to the north of the landfill was under contract to the Keelty Company to erect apartments, townhomes, and condominiums in that area. He stated that it was his understanding that the homes were going to start at $250,000 for the cheapest unit. He had reviewed the real estate listings for the Sobczak property and had also conducted real estate evaluations for the existing landfill and for the contract purchaser of adjacent property. He believed that the value of the Sobczak property, which Sobczak's broker had rated as a Class B industrial building, depended far more on the income stream from the lease and potential issues with the tenant than from any impact of the landfill.

Protestants presented Mr. Sobczak of the Sobczak Family, LLC. This is a property management company who owns the property next to the landfill. Mr. Sobczak stated that he purchased the property in White Marsh in order to be in an upscale neighborhood. He purchased the building for possible expansion and had a road constructed to access the industrial park. Mr. Sobczak stated that his business was not presently in the building. He stated that he had to look for additional space for his operations so he now leases the property to Rockwell Collins, a

manufacturer of electronic equipment. The building is a clean, bright building which has a manufacturing floor as well as offices. The windows are sealed.

At the time that he purchased the property, Sobczak was aware of the Honeygo landfill and he did not object to the current operation. However, when he became aware of the expansion, he was quite alarmed. He did not see how his tenant could operate next to a landfill. He thought that there would be noise and dust, and the visual effect would adversely affect the employees of his tenant. The back area behind the office building is used by employees for picnics and he is worried about the downflow of dust from the landfill. He was also quite concerned about the marketability of the property with it being located next to the landfill.

Protestants also presented Raymond Miller, a neighbor who lives on Philadelphia Road. Mr. Miller was aware of the expansion of the landfill and was concerned that dust would accumulate on his property.

Protestants also presented Robert Biller, Director of Marketing for Rockwell Collins, the tenant in the Sobczak building. Mr. Biller was concerned that the operation of the landfill would create dirt and noise which would filter over to the company's property. He stated that the employees leave their car windows open in the summer time and was concerned that the dust from the landfill would get into their cars and cover their cars. In addition, he was concerned with the dirt and dust getting into the manufacturing area and hindering the products which they were producing at the plant. He conceded that the windows in the building did not open and that, if the berm was constructed on the north side of the property so that they could not see the landfill, that might help.

Protestants also presented Alfred W. Barry, a land planning consultant and accepted by the Board as an expert land planner with familiarity of Baltimore County's zoning regulations. Barry felt that the Master Plan for the Perry Hall-White Marsh Growth Area was clear as to what should happen in the area. He felt that the construction of the landfill was inconsistent with the

Master Plan for this area and the zoning ordinances for the M.L.R. zone. Barry felt that the construction of the landfill was not in accordance with the requirements of § 502.1 of the BCZR. He felt that it would be detrimental to the health, safety and welfare of the general population. He stated that the Master Plan calls for growth in the White Marsh area and that the landfill was inconsistent with the goal of extended Route 43. He also felt that the landfill would overcrowd the land when you considered the size of the rubble landfill which he felt would be 10 times the size of the building that could be placed on the property. He felt that it would exceed the criteria. He felt that it would not provide adequate light and air because of the dump trucks and dust that would be created by them coming in and out of the landfill. He also felt it was inconsistent with the zoning classification of the M.L.R. zone. He believed this site was unique and that the placing of a landfill in the area would remove much of the M.L..R. zoned property from the County inventory.

Decision

The application of § 412 of the BCZR.

Section 412 of the BCZR was rewritten in Council Bill No. 97-1987 to recognize issues with rubble landfills. Council Bill No. 97-1987 called for a landfill to sit back 100 feet from the property line. It also stated that the Zoning Commissioner had the right to determine appropriate screening. However, it did not mandate screening or any particular buffer area.

In 1997 prior to the opening of the instant landfill, but after its approval by the County, the County adopted Bill No. 28-1997. That bill called for a minimum landfill site of 50 acres. It also called for new landfills to have a 500-foot wide edge, including a 300-foot buffer area and a transition area of 200 feet into which fill could be placed at a rise of 1 foot for every 6.67 feet. Additional standards also had to be met. Adopted with the bill, however, was language grandfathering existing landfills and additions to them.

BCZR § 412.3 states:

> Any landfill or expansion thereof for which a development plan was approved prior to the effective date of Bill No. 28-1997 shall comply with the landfill requirements in effect at the time of the original approval.

The Council may have felt that this language permitted expansion of the current landfill by Honeygo. However, the grandfather language of § 412.3 appeared to give rise to some confusion after the Zoning Commissioner's decision in the instant case. Apparently, the County Council then passed Bill No. 58-2004 which was adopted "for the purpose of clarifying the application of Bill No. 28-1997 upon previously approved landfills and providing for a buffer area that shall be landscaped or screened and generally related to landfills." Provided that § 412.3 should be amended to read as follows: "Any landfill for which a development plan was approved, pursuant to Bill 1-1992 as amended, prior to the effective date of Bill No. 28-1997 shall comply with the landfill requirements in effect at the time of the original approval. The zoning regulations in effect at the time of the approval of the development plan for the original landfill shall apply to any subsequent expansion, refinement or material amendment to the development plan for the landfill. Landscaping or screening shall be provided within the 100-foot wide buffer area as may be required by the Director of Permits and Development Management."

It seems clear to the Board that in enacting this legislation the County Council contemplated the expansion of the present landfill by Honeygo and that the expansion of the landfill is just that, an expansion and not a new landfill subject to the new requirements of § 412 which provides for a buffer area of 500 feet paralleling the boundaries of the site.

Protestants state that 58-04 is unconstitutional under Maryland law, citing the Maryland Constitution which states, "the General Assembly shall pass no special law, for any case, for which provision has been made, by an existing general law." This Board has consistently taken the position that it is not the duty or obligation of this Board, nor does the Board have the authority, to rule on the constitutionality of any laws passed by the Council or the State of

Maryland. Constitutionality is to be ruled on by the courts, and not administrative agencies of the County.

Protestants also argue that the proposed landfill is not exempt from § 412 as enacted by Bill 28-1997. There is a development plan for the original landfill but no development plan for the expansion of the existing landfill prior to the effective date of Bill No. 28-1997. This issue is related to the question concerning the constitutionality of Bill No. 58-04. As stated above, the Board will not rule on the constitutional issue.

Protestants also contend that the Petitioner did not comply with the restrictions set forth in the Zoning Commissioner's decision in Case N o. 94-87-SPHXA. Specifically, the Zoning Commissioner approved the Development Plan subject to restrictions including the transfer of the land to Baltimore County "upon full utilization of the fill, restoration of Honeygo Run, and payment of the salary and necessary related expenses for an independent inspector to periodically monitor the operation of the landfill." Protestants also contend that the Petitioner agreed to limit rubble to only local customers. They contend that evidence submitted in the documents produced in the instant case and the testimony of the Petitioner's witnesses indicates that none of the restrictions above were followed.

As part of this hearing, Petitioners seek the modification of the restrictions set forth in the Zoning Commissioner's decision of December 17, 1993. With respect to eliminating Restriction #3, that the property be transferred to Baltimore County upon the completion and capping of the landfill for use by the Department of Recreation & Parks at no cost to Baltimore County, there was testimony that the County no longer wishes to have the land transferred to the County. Therefore, there is no need for the transfer and retention of the restriction requiring the transfer.

With respect to the restriction regarding the restoration of the Honeygo Run stream, the Zoning Commissioner stated that the restoration should be completed within 5 years from the date of the issuance of final permits authorizing the rubble fill operation. At this point, though,

the Petitioner is under no current obligation to restore the stream. In addition, during the period of time the landfill has been operating, the County has constructed a main sewer line in Honeygo Run to serve the Honeygo area of Perry Hall. The restoration of the Honeygo Run stream is not being required by the Department of Environmental Protection & Resource Management, and the Board will delete that restriction from the requirements of the Zoning Commissioner's decision.

With respect to the requirement of hiring and paying the expenses of an independent inspector, the Zoning Commissioner states in his decision, "The identity and specific duties of this individual shall be determined by the community advisory committee, which the Petitioner shall maintain and keep in place throughout the life of the fill." Petitioners, in their special hearing, have requested that this be removed from the decision of the Zoning Commissioner since the committee has been maintained throughout the operation of the landfill and has never requested that an inspector be employed. The committee meets quarterly and goes over the landfill with respect to any issues which might arise in the operation of the landfill. In addition, the Department of the Environment for the State of Maryland makes periodic inspections of the landfill, and the operators have added additional inspection equipment to insure that material that is not appropriate for the landfill not be deposited in the landfill. The Board sees no reason to continue this restriction and will also lift that restriction.

Finally, the Zoning Commissioner did not place geographical limits as to the customers who were allowed to deposit rubble in the landfill, even though it was mentioned in the body of his decision. The Petitioner files yearly reports with the County and the State concerning the amounts of rubble going into the landfill and the area from which the rubble comes. No one has objected to the rubble which may be coming from out of state, even though it is clearly marked on the reports filed by the Petitioner. The Board does not feel that this is a basis for denying the special exception in this matter.

Protestants also contend that the expansion of the landfill is inconsistent with the Master Plan of the County and would overcrowd the land.

The County Charter and the Code repeatedly indicate that the Master Plan serves as a guide for the development of the County and is not a condition for it. In *Nottingham Village v. Baltimore County*, 266 Md. 339, 292 A.2d 680 (1972), the Court found no requirement that the zoning plan conform to the Master Plan. In addition, Petitioner's expert, William Monk, indicated that the end use of this site as recreational open space had to be considered as a relief from the "urban fabric" of the area. He felt this would be consistent with the Master Plan and would provide a "visual relief from the parking and buildings that is typically found in designated growth areas."

Finally, the Protestants contend that the expansion of the landfill does not meet the requirements of § 502.1 of the BCZR. In evaluating this issue, the Board credits the testimony of Petitioner's witnesses, Charles Taylor and William Monk. The evidence indicates that:

(a) The expansion of the landfill will not be detrimental to the health, safety and general welfare of the locality involved. There will be a berm erected around the buffer area of the landfill and vegetation will be placed at the top of the berm in accordance with the requirements of the Baltimore County architect. In addition, the Petitioner has agreed to pave a portion of the road directly in back of the Sobczak property, at the discretion of Baltimore County and the County's Landscape Architect, based upon the success and construction of the buffer berm and screening.

(b) The expansion of the landfill will not tend to create congestion on roads, streets or alleys therein. The landfill has been operating for several years without any problems of this nature, and intends to continue to operate with the same access and egress. There is no indication that future operations will create any congestion.

(c) The expansion will not create a potential hazard for fire, panic, or other danger. The landfill's record with respect to safety is exemplary and there have been no problems so far with respect to fires, etc. It is not anticipated that the future operation will create such a hazard.

(d) There does not appear to be any overcrowding of the land or undue concentration of population with respect to a landfill. The trailer home park, which is currently in the proposed area to be used for the expansion, will be removed. The ultimate objective is to create a park with hiking and bike trails.

(e) There will be no interference with adequate provisions for schools, parks, water, sewerage, transportation or other public requirements, conveniences or improvements. In fact, the landfill, when it is completed, will create a large park area for the use of citizens living in the area.

(f) The landfill will not interfere with adequate light and air. While it will create a large mound of fill in the center of the landfill, it does not appear that this will hinder the light and air of any of the property owners in the area.

(g) The landfill will not be inconsistent with the purposes of the property's zoning classifications nor inconsistent with the spirit and intent of the zoning regulations. A landfill may be constructed in an M.L.R. zone by special exception, and it does not appear to be inconsistent with the zoning regulations.

(h) It is not inconsistent with the impervious surface and vegetation retention provisions of the zoning regulations. Once again, upon completion, the landfill will be covered and made into a parkland with various types of wildflowers and vegetation, as well as riding and hiking trails.

(i) It will not be detrimental to the environmental and natural resources of the site and vicinity, including forests, streams, wetlands, aquifers, and floodplains in an R.C. 2, R.C. 4, R.C.

5 or R.C. 7 zone. The zone in question is an M.L.R. zone, and there is no indication that the landfill will affect any of the natural resources of the site.

Finally, the Board finds that the construction of the landfill meets the requirements of *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981). The Court stated, "We now hold 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 shown that the Petitioner's use proposed at the 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."

The Court of Special Appeals in *Days Cove Reclamation Co. v. Queen Anne's County*, 146 Md.App. 469, 486-487, stated, "Applicant argues correctly in our view that the *Schultz* requirement is not satisfied simply by identifying some unique characteristic of the neighborhood. In order for a unique characteristic of the neighborhood to support the denial of the conditional use, it is necessary that the ordinary adverse conditions of the conditional use be greater at the location in question because of the unique characteristics of that location's neighborhood than would be the case if the use were located elsewhere in the zone."

William Monk was clear in his testimony that other M.L.R. zoned properties in the County would not be acceptable for a rubble landfill. The present property is bounded on the north by Honeygo Stream, on the south by Silver Spring Road and residential properties, which will be sold to the Petitioner, on the east by Philadelphia Road, and on the west side by Interstate 95. The existing rubble landfill has been operating there for several years. It is clear that all of the neighbors will be protected by the berm to be constructed in the 100-foot buffer area around the landfill. Other sites in the M.L.R. zones cited by Mr. Monk in his testimony, such as the Hunt Valley site, the Security Boulevard site, and the Rosedale site are not appropriate for a

landfill of this nature. It seems quite apparent that this is the least objectionable site of all the M.L.R. properties in the County for the location of the landfill.

The Board also finds that an amendment to the previously approved site plan and Order issued in Case No. 94-87-SPHXA for a landfill expansion and the relocation of accessory uses should be granted. A special exception for an "excavation, controlled" in conjunction with a special exception for a "rubble landfill" on the same site should also be granted.

The Board will grant the expansion of the time limit for the utilization of the special exception. There will be no time limit for utilization or alternatively a 5-year period for utilization of the special exception. As previously stated, the Board will modify and eliminate the conditions in 3, 4 and 6 in Case No. 94-087-SPHXA. In addition, the Board will continue the existing variance from BCZR §§ 409.8A.2 and 409.8A.6 to allow crushed concrete surface for the internal haul road and parking areas in lieu of the required durable and dustless surface, and to permit the same without the required permanent striping for off-street parking facilities.

The Board is not convinced that this variance is needed. However, out of an abundance of caution, it will continue the variance. The Board considers the property in question unique, since it is the largest piece of property in the area and will be connected to the current landfill. It will require excavation of dirt and filling of the area once the cells of the landfill are filled. The roadway will go down into the landfill at certain points and will then be relocated to allow for the filling operations. Without the movement of the road, there is no grading or landfilling. It is impractical to pave the road, take up the paving as the road changes, and repave again as the elevations of the road change. This is a unique characteristic of the property, which would allow for the continuation of the granting of the variance. In continuing the variance for the unpaved road, the Board notes that the company cannot violate the Clean Air Act, and any excessive dust could be the subject of a charge with the Environmental Protection Agency to remedy the situation. In addition, the Petitioner has agreed to pave a portion of the hard road directly in back

of the Sobczak property, depending upon the success and construction of the buffer berm and screening. The Board will make this part of its Order.

Finally, the Board will terminate the special exception granted in Case No. 3902-RX for a trailer court. The property has been rezoned to M.L.R., which does not allow for the construction of a trailer court in the zone, and the court has been abandoned and has not operated since 2003.

ORDER

THEREFORE, IT IS THIS 21st day of September, 2004 by the County Board of Appeals of Baltimore County

ORDERED that the Petition for Special Hearing to approve a special exception pursuant to § 248.4A of the *Baltimore County Zoning Regulations* (BCZR) for an "excavation, controlled" and a "rubble landfill" facility in an M.L.R. zone be and is hereby **GRANTED**; and it is further

ORDERED that the Petition for Special Hearing, pursuant to § 412.3 of the BCZR as it references § 412 under the 1987 regulations requesting approval of the following:

1. An amendment to the previously approved site plan and Order issued in Case No. 94-87-SPHXA for a landfill expansion and the relocation of accessory uses;
2. A special exception for an "excavation, controlled" in conjunction with a special exception for a "rubble landfill" on the same site;
3. A determination that the special exceptions as part of the expansion of the existing operations have no time limit for utilization, or alternatively a 5-year period for utilization of the special exceptions;
4. The modification or elimination of restrictions 3, 4 and 6 of the Order issued in Case No 94-87-SPHXA;

5. The continuation of the existing variance from §§ 409.8A.2 and 409.8A.6 of the *Baltimore County Zoning* Regulations (BCZR) to permit a crushed concrete surface for the internal haul road and parking areas in lieu of the required durable and dustless surface and to permit same without the required permanent striping for off-street parking facilities; and
6. A termination of the special exception granted in Case No. 3902-RX for a trailer court

be and are hereby **GRANTED**; and it is further

ORDERED that the Petitioner be required to construct a berm around the property with plantings on the top to be approved by the Landscape Architect of Baltimore County. In the event the Landscape Architect should determine that the buffer berm and screening do not successfully control the dust at the point of the Sobczak property, the Architect may require the Petitioner to pave a portion of the access road directly in back of the Sobczak property in order to attempt to control any dust in the area.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

Lawrence S. Wescott, Chairman

Donald I. Mohler III

John P. Quinn

County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE
TOWSON, MARYLAND 21204
410-887-3180
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September 21, 2004

John T. Willis, Esquire
BOWIE & JENSEN, LLC
6th Floor, 29 W. Susquehanna Avenue
Towson, MD 21204

Peter M. Zimmerman, People's Counsel
for Baltimore County
Room 47, Old Courthouse
Towson, MD 21204

RE: *In the Matter of: Honeygo Run Reclamation Center, Inc.* -
Petitioner / Case No. 04-089-SPHX

Dear Mr. Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the County Board of Appeals of Baltimore County in the subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **with a photocopy provided to this office concurrent with filing in Circuit Court. Please note that all subsequent Petitions for Judicial Review filed from this decision should be noted under the same civil action number as the first Petition.**
If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Kathleen C. Bianco /tks

Kathleen C. Bianco
Administrator

Enclosure

c: The Sobczak Family LLC
John B. Gontrum, Esquire
Philip J. Auld /Honeygo Run Reclam Cntr
Donald C. Lentz, P.R. for the
Estate of Carl H. Lentz
Charles F. Volpe and Jane Volpe
Wayne B. Knight /Honeygo Mobile Park
Bruce S. Campbell III /Nottingham Village
David Taylor /Morris & Ritchie Assoc.
Lawrence E. Schmidt /Zoning Commissioner
Pat Keller, Planning Director
Timothy M. Kotroco, Director /PDM

IN THE MATTER OF HONEYGO RUN RECLAMATION CENTER, INC. - SOUTHERN EXPANSION	*	BEFORE THE
	*	BALTIMORE COUNTY
10710 Philadelphia Road North and South Side of Silver Spring Road	*	BOARD OF APPEALS
5th Councilmanic District 11th Election District	*	Case No. 04-089-SPHX
	*	
Honeygo Run Reclamation Center, Inc. Petitioner	*	

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

RECEIVED
AUG 17 2004
BALTIMORE COUNTY
BOARD OF APPEALS

PROTESTANT, ROCKWELL COLLINS, INC.'S MEMORANDUM

Rockwell Collins, Inc., Protestant, by and through their attorneys, C. William Clark, and Robert L. Hanley, Jr. of the Law Offices of Nolan, Plumhoff & Williams, Chartered adopts as its memorandum the Memorandum filed by the Respondent, Sobszak Family, LLC, in the above-captioned case.

C. William Clark
Robert L. Hanley, Jr.
Nolan, Plumhoff & Williams, Chtd.
Suite 700, Nottingham Centre
502 Washington Avenue
Towson, Maryland 21204-4528
410-823-7800
Attorneys for Protestant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of August, 2004, a copy of the foregoing Protestant Rockwell Collins, Inc.'s Memorandum was mailed, first class, postage prepaid to the following:

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Whiteford, Taylor & Preston, LLP
210 W. Pennsylvania Avenue
Towson, Maryland 21204-4515

John T. Willis, Esquire
Bowie & Jensen, LLC
29 W. Susquehanna Avenue
Towson, Maryland 21201

C. William Clark

LAW OFFICES
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& WILLIAMS,
CHARTERED

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ROBERT S. GLUSHAKOW
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CATHERINE A. POTTHAST*
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J. EARLE PLUMHOFF
(1940-1988)

NEWTON A. WILLIAMS
(RETIRED 2000)

RALPH E. DEITZ
(1918-1990)

August 17, 2004

VIA HAND DELIVERY
Baltimore County Board of Appeals
Attn: Kathy Bianco
Old Courthouse
Room 49
400 Washington Ave.
Towson, Maryland 21204

Re: In the Matter of Honeygo Reclamation Center
Case No.: 04-089-SPHX

Dear Ms. Bianco :

Enclosed herein please find the Protestant's Memorandum to be filed in the above captioned case.

If you have any questions, please do not hesitate to contact me.

Thank you for your cooperation.

Very truly yours,

C. William Clark

CWC/jkc

Enclosure

cc: John Gontrum, Esquire
John T. Willis, Esquire

IN THE MATTER OF HONEYGO RUN RECLAMATION CENTER, INC. - SOUTHERN EXPANSION	*	BEFORE THE COUNTY BOARD OF APPEALS
10710 Philadelphia Road North and South Side of Silver Spring Road 5 th Councilmanic District 11th Election District	*	FOR BALTIMORE COUNTY
	*	CASE NO. 04-089-SPHX
Honeygo Run Reclamation Center, Inc. Petitioner		

MEMORANDUM OF PETITIONER

John B. Gontrum
Whiteford, Taylor & Preston, LLP
210 W. Pennsylvania Avenue
Towson, Maryland 21204
410-832-2055
Attorney for Petitioner

IN THE MATTER OF HONEYGO RUN RECLAMATION CENTER, INC. - SOUTHERN EXPANSION	*	BEFORE THE COUNTY BOARD OF APPEALS
10710 Philadelphia Road North and South Side of Silver Spring Road 5th Councilmanic District 11th Election District	*	FOR BALTIMORE COUNTY
	*	CASE NO. 04-089-SPHX
Honeygo Run Reclamation Center, Inc. Petitioner		

MEMORANDUM OF PETITIONER

SUMMARY

Honeygo Run Reclamation Center, Inc. has operated an efficient and unobtrusive recycling center and rubble landfill at its current 68 acre site on the northeast side of Philadelphia and Silver Spring Roads for over 5 years. There is absolutely no objection to the presence of the existing facility, and there were no complaints about the operation of the existing facility. The proposed facility has also met with no organized community opposition and will be a continuation of the existing operation.

The suitability of this site for an expansion of the existing uses has been considered and affirmed many times. A portion of the property containing a former mobile home park was rezoned to M.L.R. from D.R. 3.5 in the 2000 comprehensive zoning map process, thereby permitting a rubble landfill on the site by special exception. The county amended its Solid Waste Management Plan by Resolution 18-03 to include the proposed expansion of the existing facility. Finally, Baltimore County enacted Bill 58-04 (Attachment "A") clarifying prior amendments to Section 412 of the

Baltimore County Zoning Regulations (hereinafter cited as the "BCZR"). Bill 58-04 permits the expansion of existing rubble landfills with approved development plans under regulations in effect as of the date of the original approval. This particular expansion was a subject of discussion in consideration of the Bill by the County Council, and the Council approved the Bill with its grandfathering provisions with full knowledge of its impact on the site while this appeal was pending before this Board of Appeals.

The Petitioners presented testimony of the suitability of the site for the desired uses. The site has access to major roadways, yet it will have very limited visibility. The site does not impinge on any residential neighborhood, and in fact, developers are seeking to rezone adjacent property to the project, in clear view of the project, to residential zoning to build high end, quality units. The site lacks public sewer service so that other usage would be limited. Every county agency including economic development has supported the development and has found it consistent with the zone's requirements.

The Protestants only presented limited evidence addressing issues under Section 502.1. There was no evidence that the proposed use at this location would have any unique effects upon the locality beyond that which might otherwise be expected of a rubble landfill and recycling operation. Such evidence is required in order to defeat a special exception request. Mere evidence that the landfill might have a deleterious impact on the value adjoining properties is not enough. Days Cove Reclamation Company v. Queen Anne's County, 146 Md. App. 469, 807 A.2d 156 (2002); Mossburg

v. Montgomery County, 107 Md. App. 1, 666 A. 2d 1253 (1995) (Attachments "B" and "C"). The proposed expansion to the existing fill with the proposed landscape buffer will have a negligible impact on Protestants' properties.

STATEMENT OF THE CASE

Petitioner Honeygo Run Reclamation Center, Inc. filed a petition seeking a special exception pursuant to BCZR Section 248.4A for an "excavation, controlled" in a M.L.R. zone and seeking a special exception pursuant to BCZR Section 248.4A for a rubble landfill in a M.L.R. zone. In addition, Special Hearing relief was sought as follows:

(1) To amend the site plan and order in Zoning Case No. 94-87-SPHXA for a landfill expansion and to permit relocation of accessory uses.

(2) To permit a special exception for an "excavation controlled" in conjunction with a special exception for a "rubble landfill" on the same site.

(3) To determine that the special exceptions as part of the expansion of the existing operations have no time limit for utilization, or alternatively, a five (5) year period for utilization of the special exceptions.

(4) To modify or eliminate the following conditions in the Order in Case No. 94-87-SPHXA: Conditions 3, 4 and 6. (Attachment "D")

(5) To continue the existing variance from BCZR Sections 409.8A.2 and 409.8A.6 to allow a crushed concrete surface for the internal haul road and parking areas in lieu of the required durable and dustless surface and to permit same without the required permanent striping for off street parking facilities.

(6) To terminate the special exception granted in Case No. 3902-RX for a trailer court.

STATEMENT OF FACTS

The zoning petitions propose an expansion of the existing rubble landfill and a continuation of the recycling operations. In the 1992 Baltimore County Solid Waste Management Plan (pages v-6, v-12-13) the Honeygo Run Reclamation Facility was proposed as a rubble landfill (Prot. Ex. 1). The existing facility and associated uses were approved by the zoning commissioner/hearing officer in his order dated December 17, 1993 (Attachment D). The existing facility required both a special exception for controlled grading and for a rubble landfill. Seven to eight hundred thousand cubic yards of material have been excavated (I T. 208). In addition, the existing facility required a special hearing for recycling of concrete and wood chipping as accessory uses to the landfill. As a result of the recycling operations only fifty to sixty percent of the material brought onto the site has been placed in the landfill (I T. 204).

As the Solid Waste Management Plan indicates, the landfill originally was planned to occupy 50-60 acres on a 70 acre site. Surveys reduced the size of the site to 68 acres, and the use of a liner and adherence to the state regulations reduced the size of the landfill to 39 acres (I TR. 38)[1]. The landfill opened in 1999 and is expected to be completely filled in the fall of 2005 (I T. 203).

[1] The testimony of July 14th is contained in volume I of the transcripts and is cited as "I T": the testimony of July 21st is contained in volume 2 of the transcripts and is cited as "II T."

Protestant Sobczak Family LLC (hereinafter referred to as "Sobczak") purchased its property in 1995, and a building was constructed in 1996 with full knowledge of the proposed landfill and its location relative to the Sobczak property. The existing landfilled area itself is 170' from the Sobczak property line.[2] Mr. Sobczak testified that when he built the building he intended in the future to expand his building even closer to the existing landfill (II T. 49-50). He testified repeatedly as did the other Protestants that he had no objections to the current landfill or to its operations (II T. 17-18, 56, 80, 109-110). Neither he nor the tenant of his building felt that the existing landfill operations impacted their business. Indeed, the tenant leased its space and increased its space within the Sobczak building with the existing landfill and the existing concrete crushing and recycling operation in place across Silver Spring Road from the Sobczak site (II T. 104-107; Pet. Ex. 5).

The proposed expansion of the existing landfill and grading operations will occur on an assemblage of properties consisting of 48 acres. The landfill area will occupy approximately 40 acres (I T. 57). The existing recycling operation will be moved from its present location to the rear of the property near I-95. The entrance to the site and inspection station will remain in the same location. Silver Spring Road will be closed just past the Sobczak property and would only be used by emergency vehicles, if necessary, to access the property. No access is proposed to the site on the right of way through the Sobczak property (Pet. Ex. 5).

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[2] This calculation is based on applying a scale to Petitioner's Exhibit 5 from the Sobczak property line at 1"=100'.

All of the properties in the proposed assemblage are zoned M.L.R. Several of the properties were and/or are being used as residences. Also included is the site of a former mobile home park. The mobile home park was zoned D.R. 3.5 until the 2000 comprehensive zoning maps. At that time the zoning on the property changed from the D.R. 3.5 zone, which permits mobile home parks, to the M.L.R zone, which does not permit mobile home parks. The mobile home park was closed in 2003.

In 2002 the Petitioner proposed an amendment to the Baltimore County Solid Waste Management Plan to permit the proposed expansion. Extensive notice of the proposal was given, and a public hearing was conducted. County Council Resolution 18-03 then adopted the Honeygo Run expansion as proposed for the area described in this hearing request (Pet. Ex. 2; Prot. Ex. 1).

Stephen Lippy, the chief of the solid waste bureau in the Department of Public Works, stated the purpose of the county's solid waste plan is "to evaluate the needs of the county and whether there is [sic] sufficient solid waste collection disposal processing facilities within the county to handle the needs of the county" (I T. 80). The county's solid waste management plan is actually a planning document that is mandated by state law. Section 9-503 of the Environment Article of the Annotated Code of Maryland states:

> "(a) Requirement. – Each county shall have a county plan or a plan with adjoining counties that:
>
> (1) Is approved by the Department;
>
> (2) Covers at least the 10-year period next following adoption by the county governing body; and
>
> (3) Deals with:
>
> (i) Water supply systems;

(ii) Sewerage systems;
(iii) Solid waste disposal systems;
(iv) **Solid waste acceptance facilities**; and
(v) The systematic collection and disposal of solid waste, including litter."

The Code further states that an amendment or revision to the county plan shall be adopted "if (1) The governing body considers a revision or amendment necessary; or (2) the Department requires a revision or amendment." Annotated Code of Maryland, Environment, § 9-503(c). A public hearing with published notice is required prior to adoption of the plan.

The proposed landfill area will be located further from the Sobczak property than the existing landfill area or about 175 feet at its closest point (I T. 35). There will be a landscaped buffer surrounding the proposed landfill area, and an additional area in back of the Sobczak property will be devoted to storm water management and support facilities. The landfill will rise at a 3:1 slope to a maximum elevation of 202 feet. The highest point of the landfill will be over 470' from the Sobczak property line or about 620' from the building (I T. 42-43). As the landfill is constructed, dirt removed by excavation will be used in providing cover for the rubble and will eventually be used on the cap and sides of the fill. The sides are stabilized as the fill is constructed with grasses. Eventually, when the fill is completed, it will be fully landscaped into a park setting (Pet Ex. 3D; I T. 47-51). This final park development will be secured by a letter of credit or bond (II T. 249-250).

Construction and operation of a landfill is subject to extensive state regulation. In addition, permits to operate the recycling equipment also must be obtained from the

State. Consequently, the facility is regularly monitored for compliance with state air pollution regulations (COMAR Title 26.11) and noise regulations (COMAR Title 26.02). The Petitioner has never been issued a violation citation (I T. 98-99). Furthermore, there is nothing in the record to indicate that the proposed expansion will operate in violation of the state laws and regulations.

Mr. Sobczak testified as to his investment in his property and in the building. He did not indicate, however, that his building was significantly different than other office buildings. The building is different from a typical warehouse in that it is fully air-conditioned and is essentially a "sealed" building with non-operable windows (II T. at 125).

Protestants have raised several issues with respect to the impact of the proposed expansion. Mr. Sobczak stated: "My biggest concerns are overall marketability of our building to tenants, and, also, our current tenant, and being able to sustain and renew their lease" (II T. 19). In addition, he enumerated concerns with the visual look, noise, dumping and dirt (II T. 21-22, 34). Since the existing facility is as close or closer the Protestants' properties as the proposed expansion of the facility, and since the Protestants testified that there is no objectionable impact from the existing facility, there is no reason to believe that the construction and operation of the expansion will have a greater impact than the existing facility on the neighboring properties.

Mr. Biller, who spoke on behalf of the tenant of the Sobczak building, testified that he was not familiar with the site plans for the proposed expansion (II T. at 127) and had not known of the proposal. Based on representations from Mr. Sobczak and his

participation in the hearing he said, "I am very concerned about the appearance, the dirt factor, and the noise as well" (II T. 91). His concerns appeared not be so much for the impact on the interior of the building as for the impact on employees in the parking area (II T. 126). He stated: "If they can't see it, if they are not bothered by the noise, and if they are not bothered by the dirt, then, I am happy, I suppose" (II T. 109).

Mr. Biller also indicated that the lease renewal has multiple considerations and is more complex than a decision based on the landfill expansion (II T. 103). There are plans to expand the employee base from a current staff of 165 to 350, and he was not aware of the capacity of the existing septic system to handle this expansion (II T. 102).

Raymond Miller's primary concern was the visual impact on the value of his property (II T. 70). Mr. Miller's property has drainage problems, and he said that his septic system is not functioning properly. He was concerned about drainage from the landfill, but has no issues with the runoff (II T. 76). He also testified that when he bought his property in 2000 he felt that the landfill would be completed in 2005 and that he was not prepared for an expansion of the landfill. At the time of purchase, however, he had no reason to believe that the landfill would not be continuing in operation for a lengthy period of time, for no calculations as to capacity had occurred to dispute the projection that the landfill would be open ten years after opening.

Mr. Miller's property is located at the corner of Silver Spring Road and Philadelphia Road and is zoned M.L.R. He bought his house with the current landfill up and operating in close proximity to his house. The existing rubble landfill site is located about 120' from his property line and his dwelling is located about 385' from the

existing fill area. His dwelling will be located about 670' from the expanded area of the landfill and about 980' from its highest point (Pet. Ex. 5 per scale).

Alfred Barry was admitted as Protestants' expert in land planning with familiarity with the Baltimore County Zoning Regulations and the Baltimore County Code (II T. 139). He raised several issues. He believed that the use was not consistent with the Master Plan. He felt that the Plan called for a "... prestigious kind of development and an industrial office research park associated with a landscape campus theme" for the site (II T. 151-152). Mr. Barry opined that the plan also was not consistent with the M.L.R. zoning "...because it is not economic development in the sense that I would interpret the M.L.R. zone to call for" (II T. 155). He did admit, however, that the county council had not seen fit to remove the rubble landfill use from the uses permitted by special exception in the M.L.R. zone (II T. 168),

Mr. Barry also addressed issues raised by Section 502.1 of the BCZR. He felt that special exceptions' inconsistency with the Master Plan was such that the landfill would not be in the general welfare (II T. 156-157). He also testified that the landfill expansion would overcrowd the land based on the floor area ratio permitted for buildings in the M.L.R. zone of .6 in that the land fill, if considered a building, would be over ten times the permitted floor area ratio (II T. 15-159). He was concerned that possible dust from the landfill could interfere with provisions for adequate light and air (II T. 159-160). His comments to the spirit and intent of the zone were covered by his remarks on the M.L.R. zone (II T. 161-162).

Finally, Mr. Barry offered his opinion that the state and county were spending a lot of money on Route 43 and that it was "inconceivable that the County would propose something that would take this degree of land from the M.L.R. inventory" (II T. 166). He believed that the use of the site for a rubble fill here would have a greater impact at this location because of the removal of the land from the M.L.R. inventory (II T. 165).

Mr. Barry argued further that the Solid Waste Management Plan was inconsistent with the Master Plan (II T. 177), that the position of the Department of Economic Development supporting the proposed use in this case was "absurd" (II T. 183), and that the Planning Office was incorrectly applying its own Master Plan (II T. 184-185).

Petitioner also offered several expert witnesses to address the issues in Section 502.1. Mr. William Monk, an expert land planner, described the other M.L.R. zoned properties of substantial size in Baltimore County that could accommodate a rubble landfill. Mr. Monk's experience was such that he could virtually identify the location and use of every M.L.R. property that counsels for both Petitioner and Protestant suggested. He testified that the proposed uses could generate a significantly greater impact on the localities involved at these other sites than at the subject site due to traffic issues through residential streets and visibility from adjacent commercial properties (I T. 160-163, 165-166). In Mr. Monk's opinion this is one of the best locations for a rubble landfill in the M.L.R. zone based on: size of the parcel to accommodate proposed expansion, configuration of the parcel, and location relative to commercial motorways (I T. 165-166). The opportunity and requirement of screening in the landscape buffer is

an important factor in judging the impact of the site on adjacent properties. With respect to the Protestants' property he stated:

> "If you look at the orientation of the building, the land use activities on this site, coupled with the buffer that is being proposed or required by law, with the vegetation that will have to be planted on it consistent with the Baltimore County landscape manual and any approved plan that would have to be submitted subsequent to the development plan, the impact, in my opinion, would be negligible" (I T. 162-163, 171).

In response to a question in cross-examination Mr. Monk also pointed out that the end-use of the site as a recreational open space had to be considered as a relief from the "urban fabric" of the area. He said, " I think that the petitioner's proposed use when its completed after build out will actually provide a visual relief from the sea of parking and buildings that typically is found in designated growth areas where they're trying to concentrate everything in a more compacted area. " (I T. 184-185)

Petitioner also offered David Taylor, an expert landscape architect, who described the buffering of the adjacent property that could occur. He believed that a combination of berm and landscaping would effectively screen any visual impact of the landfill from the Sobczak property (II T. 247-249).[3] No testimony was offered that this could not be done. The berm and landscaping would also have the effect of blocking any potential dust from the property (II T. 248).

Mr. Taylor's testimony was based on his own expertise and position as a project manager for Morris & Ritchie Associates, Incorporated, which prepared the site plan.

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[3] The Petitioner offered to landscape and create berms in the buffer area between the proposed landfill and the Sobczak property along the length of the Sobczak property with the purpose of obscuring the view of the landfill operation from the date of commencement of operations to the satisfaction of the

His testimony also built upon the information provided by Dr. Ramesh Venkatakrisnan, who provided photographs of existing conditions from surrounding properties and computer projections on the views from those sites with the landfill fully built (Pet Ex. 12). Also, as part of Petitioner's Exhibit 12 Dr. Venkatakrisnan provided a line of sight analysis based on existing topography (Pet. Ex. 14). The topography is consistent with that shown on Petitioner's Exhibit 5, Sheets D-3 and D-6. The existing buffers in the state highway rights of way will preclude a view of the landfill from the north and west.

Petitioner also offered Mr. George Frizzell, an expert acknowledged by all parties in real estate appraisal, who had reviewed real estate listings for the Sobczak property, and who had conducted real estate evaluations for the existing landfill and for contract purchasers of adjacent property. Mr. Frizzell drew on his background knowledge of this facility and location as well as other similar facilities to state that the expansion would have little impact on the surrounding industrial properties (II T. 265-267). He noted that the area from which the site would be most visible as indicated in the photographs was proposed for rezoning to accommodate a high end residential development (II T. 266-267). He believed that the value of the Sobczak property, which Sobczak's broker had rated as a Class B Industrial building, depended far more on the income stream from the lease and potential issues with the tenant than from any impact of the landfill (II T. 265, 269).

Baltimore County landscape architect and the Department of Permits and Development Management as a proposed condition to a special exception approval.

There were no adverse comments to the proposed zoning requests filed by any county agency. The zoning requests are supported by the Economic Development Office (Pet. Ex. 6).

DISCUSSION

1. APPLICATION OF SPECIAL EXCEPTION STANDARDS

There are two cases that are particularly on point with respect to the special exception arguments raised at the hearings: Days Cove Reclamation Company v. Queen Anne's County, 146 Md. App. 469, 807 A.2d 156 (2002) and Mossburg v. Montgomery County, 107 Md. App. 1, 666 A. 2d 1253 (1995) (Attachments "B" and "C"). In Days Cove at issue was a Queen Anne's County zoning decision denying permission to construct a rubble landfill. The Court of Special Appeals reversed the decision and approved the landfill. The Court addressed several issues that are pertinent to special exceptions uses such as landfills and to the evidence that is necessary to defeat a special exception request.

The Queen Anne's County regulations called for a landfill setback of 100 feet from the boundaries of the property on which it is located. The zoning code also contained a standard similar to Section 502.1, but with some important differences. The Queen Anne's County Zoning Code §13-1-131(b)(3) states: "The proposed use at the proposed location may not result in a substantial or undue adverse impact **on adjacent property**, the character of the neighborhood, traffic conditions, parking, public improvements, public sites or rights-of-way, or other matters affecting the public health, safety, and general welfare." [emphasis added] Days Cove Reclamation

Company v. Queen Anne's County, 146 Md. App. 469, 476, 807 A. 2d 156, 160 (2002). The Board found that the landfill mound would have an undue adverse impact. In addition, it found that that through human error potential negative impacts could occur and that there would be a cumulative impact from the existence of another fill in the area and diminished property values would result from these conditions. *Id.*, at 483-484, 807 A. 2d at 164.

In overturning the Board's findings the court stated: "... the scattershot approach of the Board's decision did not distinguish between adverse impacts **that are common to rubble landfills** and those that the **Board found unique to the Site.**" *Id.* at 485, 807 A. 2d at 165 [emphasis added]. The court went on to state that the height of the landfill above the ground was to be expected since "Contemporary landfills no longer fill a hole to the level of the ground surrounding the hole. At the Site, the elevated landfill will be less offensive, visually, than ordinarily would be the case because high voltage electricity lines, supported by metal towers, traverse the Site." *Id.* at 485, 807 A. 2d at 165. Like the landfill in Days Cove this site has features which will tend to minimize the effect of the height of the landfill. The topography of the site is such that the property will be buffered by existing trees in the public right of way and in the landscape buffer areas so as to minimize the view.

Human frailty reasons also were rejected. The court stated: "There is no basis for concluding that the independent checker or [owner's] employees engaged to work at the Site will be less reliable than if they were engaged to work at a landfill located elsewhere." *Id.* at 485, 807 A. 2d at 165.

Finally, the court rejected the significance of the finding of fact that real estate values would be impacted. The court stated:

> The appellees' real estate expert demonstrated that residential property located adjacent to a landfill is less valuable than property that is not.... The appellees' expert, however, presented no evidence that property values would be more adversely affected by a landfill at the Site than would the value of properties adjacent to or in the vicinity of a landfill elsewhere in the zone..." *Id.* at 485-486, 807 A.2d at 165.

Consequently, the Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319 (1981), test could not be satisfied simply by a showing that there would be adverse impacts to the locality. *Id.* at 486.

The Days Cove Court reviewed Schultz as follows:

"In Schultz, the Court of Appeals explained that conditional uses result from the **legislative determination that the use is "compatible** with the permitted uses in a use district, but that the beneficial purposes [that conditional] uses serve do not outweigh their possible adverse effect." Schultz v. Pritts, 291 Md. 22, 432 A. 2d 1319, 1331 (1981). The adverse effect referred to is "at the particular location proposed and is "above and beyond that ordinarily associated with" the particular conditional use. *Id.* at 22, 432 A. 2d at 1330." Days Cove Reclamation Company v. Queen Anne's County, 146 Md. App.469 at 474, 807 A. 2d 156, 159 (2002) [emphasis added].

The court then went on to rebut findings that there would be adverse impacts by the leachate on groundwater and that thermal pollution would affect fish and drinking water by stating:

> "Applicant argues, correctly in our view, that the Schultz requirement is not satisfied simply by identifying some unique characteristic of the neighborhood. In order for a unique characteristic of the neighborhood to support the denial of a conditional use it is necessary that the ordinary adverse effects of the conditional use be greater at the location in question, because of the unique characteristics of that location's neighborhood, than would be the case if the use were located elsewhere in the zone." *Id.* at 486-487, 807 A. 2d at 166.

The court also rejected the testimony of Richard Klein, the Protestants' expert, quoting extensively from other cases that "an expert's opinion is of no greater probative value than the soundness of his reasons given therefore will warrant..." *Id.* at 488, 807 A. 2d at 167.

The Court rejected the cumulative impact finding of the Board that having two landfills in a community would substantially devalue the nearby residential properties as unsupported by evidence. The Court distinguished Brandywine Enters., Inc. v. County Council for Prince George's County, 117 Md. App. 525, 700 A. 2d 1216, *cert. denied*, 347 Md. 253, 700 A. 2d 1214 (1997) and Moseman v. County Council of Prince George's County, 99 Md. App. 258, 636 A. 2d 499, *cert. denied*, 335 Md. 229, 643 A.2d 383 (1994). *Id.* at 506, 807 A. 2d at 177.

In Mossburg v. Montgomery County, 107 Md. App. 1, 666 A. 2d 1253 (1995) (Attached hereto as Attachment C), the Petitioner sought to put a solid waste transfer station in the one zone in the county that permitted the use by special exception. The Court noted that the zone had a very limited inventory of land, and the land available had been intensively developed. The Board of Appeals had denied the special exception based on its perception of the impact of the transfer station in the particular location desired on traffic and environment. The Court of Special Appeals reversed and ordered that the Board grant the special exception after finding that the Board's finding of adverse impact was not sufficient based on the law of special exceptions.

The Court first discussed "(1) how provisions for special exceptions are created in zoning codes, (2) the policy statements made by the creation of those provisions, (3)

the inherent permissive nature of such exceptions, and (4) the proper focus to be utilized in determining whether a proposed special exception satisfies the conditions of the statute." *Id.* at 5, 666 A. 2d at 1256). The Court recognized first that zoning itself is an interference with a property owner's constitutional rights and that the placement or exclusion of a use within a zone is a policy decision made by a legislative body. The Court then stated:

> Thus, we conclude, as this Court and the Court of Appeals often have, that a special exception/conditional use in a zoning ordinance often recognizes that **the legislative body of a representative government has made a policy decision** for all of the inhabitants of the particular governmental jurisdiction, and **that the exception or use is desirable and necessary** in its zoning planning provided certain standards are met. Id. at 6-8, 666 A. 2d at 1256-1257 [emphasis added].

The Court then noted:

> In special exception cases, therefore, general compatibility is not normally a proper issue for the agency to consider. That issue has already been addressed and legislatively resolved. Moreover, it is not whether a use permitted by way of a special exception will have adverse effects (adverse effects are implied in the first instance by making such uses conditional uses or special exceptions rather than permitted uses), it is whether the adverse effects in a particular location would be grater than the adverse effects ordinarily associated with a particular use that is to be considered by the agency.
>
> Id. at 8-9, 666 A. 2d at 1257.

The issue before the Board should not, therefore, focus on whether the use is compatible or whether the use has adverse impacts. "Once an applicant presents sufficient evidence establishing that his proposed use meets the requirements of the statute, even including that it has attached to it some inherent adverse impact, an otherwise silent record does not establish that impact, however severe at a given

location, is greater at that location than elsewhere." *Id.* at 9, 666 A. 2d at 1257. *See also* Deen v. Baltimore Gas & Elec. Co., 240 Md. 317, 214 A. 2d 146 (1965).

The Mossburg Court summarized its review of the special exception law by quoting from a Baltimore County zoning case People's Counsel v. Mangione, 85 Md. App. 738, 747-748, 584 A 2d 1318 (1991):

> "The term "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." Cadem v. Nanna, 243 Md. 536, 543, 221 A. 2d 703 (1966). *It is a part of a comprehensive zoning plan, sharing the presumption that it is in the interest of the general welfare* and is, therefore valid. It is a use that has been legislatively predetermined to be conditionally compatible with the uses permitted as of right in a particular zone.... In sum, special exception is a "valid zoning mechanism that ... the legislative body has determined can, prima facie, properly be allowed in a specified use district, absent any fact or circumstance in a particular case which would change this presumptive finding."

Mossburg v. Montgomery County, 107 Md. App. 1 at 11, 666 A. 2d 1253 at 1259 (1995).

Mossburg also noted that the Protestants seemingly wanted the courts to change a zoning ordinance permitting the requested use by special exception. The Court stated:

"Zoning *policy* is generally better, and more appropriately addressed, in legislative forums, rather than quasi-judicial or judicial forums. Normally, general objections to legislative initiatives are better addressed legislatively." (*Id.* at 29-30, 666 A. 2d at 1267).

In this Honeygo Run application there has been no showing that this use at this location will produce any impact outside of the range that one would normally expect from a rubble landfill. Traffic and environmental issues were not even raised. There has been no showing whatsoever that the use will in any way not meet county

standards. A review of the standards enunciated by BCZR Section 502.1 indicates that all of the standards have been addressed.

Protestants have emphasized one adverse impact, loss of economic value, to a particular piece of property, which is not even part of the enumerated list in Section 502.1. Loss of economic value is specifically cited in the Montgomery County Code, 59-G-1.21 (a)(5) quoted in Mossburg v. Montgomery County, 107 Md. App. 1, 20, 666 A. 2d 1253, 1263 (1995). It also is a specific requirement issue in Queen Anne's County Zoning Code, Section 13-1-131 (b) (3) quoted in Days Cove Reclamation Co. v. Queen Anne's County, 46 Md. App. 469, 476, 807 A. 2d 160 (2002).

In Prince George's County, where two rubble landfill special exceptions were denied, there are specific code provisions in the Prince Georges County Code, Section 27-317(a) that state that a special exception use may be approved if: "(3) The proposed use will not substantially impair the integrity of any validly approved Master Plan or functional Master Plan, or, in the absence of a Master Plan or Functional Master Plan, the General Plan; ... (5) The proposed use will not be detrimental to the use or development **of adjacent properties** or the general neighborhood... ." This Section was quoted in Brandywine Enterprises, Inc. v. County Council for Prince George's County, 117 Md. App. 525, 700 A. 2d 1216 (1997) and in Moseman v. County Council for Prince George's County, 99 Md. App. 258, 636 A. 2d 499 (1994) [emphasis added]. Such language is not contained in the zoning regulations of this county. There is no reference to the Master Plan in BCZR Section 502.1, and nowhere is there reference to economic impact on specific adjacent properties. The county has had ample opportunity to add

an economic impact argument into the law but has refrained from doing so. The Board should not judicially adopt an amendment to the law that the county has not legislated.

Not only were the legal conditions for a special exception in Brandywine Enterprises, Inc. v. County Council for Prince George's County, 117 Md. App. 525, 700 A. 2d 1216 (1997) and in Moseman v. County Council for Prince George's County, 99 Md. App. 258, 636 A. 2d 499 (1994) substantially different from those in Baltimore County but also the facts presented at the evidentiary hearings were very different.

In Brandywine the use was only permitted in the zone as a temporary use but the use for which permission was sought would have a life of 22 years. Also, the Prince George's County Code specifically required a showing of need for the landfill, and the need for capacity in the future was highly speculative. *Id.* at 539, 700 A. 2d 1222-1223.

In addition, the cumulative impact of the proposed fill and an adjacent closed fill was such that four single family houses would be surrounded on three sides by 100 foot high rubble mounds. The Court stated that this could have lead to a finding of adverse impact on the adjacent residential properties. Id at 538, 700 A. 2d at 1222. The tract involved in the landfills was 450 acres or roughly 4.5 times the size of the proposed landfill and expansion. Finally, the only access to the residential properties was over an access used exclusively by the landfills. *Id.* at 537-538, 700 A. 2d at 1222. The Court likened the residential properties to a hole in a doughnut. *Id.* at 538, 700 A. 2d at 1222.

In this case unlike Brandywine there is no "temporary" special exception. The special exception use, however, proposed here will be much shorter in duration than 22 years. Legislatively, the County Council has determined that there is a "need", and that

issue is not left to the fact-finding body. Most important, the impact on the locality is of nowhere the extent as the impact of the additional landfill in Brandywine. This is no 450 acre site surrounding residential properties on three sides. In this case the landfill lies to the rear of properties on Philadelphia Road. It hardly surrounds the properties, and the properties all enjoy excellent access. At no time did anyone suggest that the access to the surrounding properties was at any point hindered by the landfill. The Protestants' properties do not represent any hole in a doughnut.

Finally, in Brandywine it was suggested that the landfill at the end of use would create "an industrial landscape." *Id.* at 538, 700 A. 2d 1222. That is far different from the landscape suggested in this case. Not only was there no criticism of the final plan for the property, the questioning instead went to guaranteeing that the plan would be built as presented.[4]

In Moseman v. County Council of Prince George's County, 99 Md. App. 258, 636 A. 2d 499 (1994), the proposed landfill site was "surrounded by undeveloped land, "scenic" property, historic sites, a rubble fill, a surface mining operation, and single family homes utilizing well and septic systems." *Id.* at 261, 636 A. 2d 500. In Moseman the rubble fill was to operate in addition to another fill across a road, and under the zoning ordinances in Prince George's County it was found that this would have a unique impact on the rural nature of the surrounding houses. Access to the site was

[4] Brandywine also dealt with the issue of contract zoning, for it was felt by Protestants that the condition of operating a part of the landfill following the closing of another part constituted contract zoning. *Id.* at 536, 700 A. 2d 1221. The Court disposed of the argument by pointing out that there was no contract to rezone property in that the County did not extract a condition or promise from the developer in exchange

along a narrow country road on which trucks already ran to the existing landfill. There were also environmental concerns raised by experts. *Id.* at 266, 636 A. 2d 503. The Court in reviewing the fact-fining body found the issues fairly debatable.

Honeygo Run enjoys excellent access to its site, and no environmental issues were raised by Protestants. This site is not operating separately from another site but successively to it. There was absolutely no showing by expert testimony or otherwise that there would be a unique effect on the locality involved more severe than at other locations where the use is permitted. Even if the impact on the value of individual properties is read into BCZR Section 502.1[5], there was no showing that the impact on land value would be more severe at this location than at other locations where rubble landfills are permitted by special exception. No expert testified on the valuation of Protestants' property interests other than Mr. Frizzell, who testified that it would basically have no impact on the locality involved (II T. 264 - 273), and the proposed construction of new residential housing in full view of the landfill would support that opinion.

2. CONFLICT WITH MASTER PLAN AND SPIRIT AND INTENT OF THE M.L.R. ZONE

Even though there is no provision in Section 502.1 of the BCZR that raises the issue of a zoning special exception conflict with a Master Plan as exists in the Prince

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for zoning. Reasonable conditions may be placed on property without such conditions being contract zoning. Id. at 536-537, 700 A. 2d 1221.

[5] The "general welfare" provision of BCZR section 502.1 refers to "the general welfare of the locality involved" and does not refer to specific property values. It also should be noted that standards such as "health, safety and general welfare" are contained in most of the local ordinances, some of which have an additional specific paragraph referencing economic impact on specific properties.

George's County Code, the Protestants have argued that such a provision should be read into the Code. There is no basis for this argument.

The Baltimore County Charter, Section 523 is entitled "the master plan and zoning maps." Section 523 states:

> "(a) *Definition and implantation of the master plan.* The master plan shall be a composite of mapped and written proposals setting forth comprehensive objectives, policies and standards **to serve as a guide for the development** of the county. Upon receipt of the master plan from the office of planning and zoning, the county council shall accept or modify and then adopt it by resolution."
>
> (b) *Definition and implementation of the zoning maps.* The zoning maps shall show the boundaries of the proposed districts, divisions and **zones into which the county is to be divided consistent with the master plan**. Upon receipt of the zoning map from the office of planning and zoning, the county council shall accept or modify and then adopt it by legislative act." [emphasis added]

The County Code further echoes the theme that the master plan is a guide for development and not a condition for it. Section 26-82 of the Baltimore County Code (hereinafter cited as the "BCC")[6] contains the scope of the master plan proposals and includes new zoning maps and regulations within the permitted scope. BCC §26-82(a)(2). It is presumed that the zoning regulations are adopted in pursuance of the master plan. BCC §26-116. The Baltimore County Zoning Regulations state:

> "For the purpose of promoting the health, security, comfort, convenience, prosperity, orderly development and other aspects of the general welfare of the community, zones are intended to provide broad regulation of the use and manner of use of land, in accordance with comprehensive plans." BCZR §100.1A.1

[6] It is recognized that the Baltimore County Code has been reorganized and that Title 32 has in large part replaced Title 26. Unfortunately, published editions of the Code have not yet been made available so the older references to the bound version of the Code have been used.

Zoning maps and the regulations of a particular zone are adopted in accordance with comprehensive plans. The master plan and its documents are guides, not zones. In City of Annapolis v. Waterman, 357 Md. 484, 745 A.2d 1000 (1999), the Court noted the distinctions between the concept of zoning, which is concerned with land use, and of planning, which is broader in its application. Planning most closely is aligned with development regulation, and attempts protect the community from imperfect development, for it attempts to look at factors beyond land use. The Court quoted from Coffey v. Maryland-National Capital Park & Planning Commission, 293 Md. 24, 30, 441 A. 2d 1041, 1044 (1982): "While planning and zoning complement each other and serve certain common objectives, each represents a separate municipal function and neither is a mere rubber-stamp for the other. City of Annapolis v. Waterman, 357 Md. 484 at 495n.4, 745 A. 2d 1000 (1999).

The case law has generally followed the premise that the master plan is simply a guide. In Nottingham Village v. Baltimore County, 266 Md. 339, 292 A. 2d 680 (1972), for example, the court found no requirement that the zoning plan conform to a master plan. Indeed, the county code states that conformance with the development regulations and standards as set forth in the code "shall be deemed" to be conformance with the master plan and other stated policies and objectives of the development regulations. BCC § 26-167(b).

The Baltimore County Master Plan 2010, adopted in 2000, explicitly states its role as a guide and states: "The plan is intended to serve as a reference document which the County Council may use when exercising its authority to establish land use policy

through the adoption of zoning maps and zoning ordinances." Baltimore County Master Plan at 3. The plan itself is a combination of several plans, particularly as it relates to the subject site.

Contrary to the opinion of Protestants' expert the proposed special exception requests by Petitioner are not inconsistent to the master plans covering the subject site. The Master Plan 2010 states that the site is part of the "Perry Hall-White Marsh Growth Area". The subject property in this plan is identified for "Industrial" use. Master Plan 2010 at 192. Using the scale in the plan it is located almost one mile from the designated town center area. *Id.* at 184. The plan identifies the Philadelphia Road Corridor Study, adopted in 1992, and the Eastern Baltimore County Revitalization Strategy, adopted in 1996, as included documents. The common goals of all of the plans for the area are to strengthen the industrial development of the area and to make the area generally a site for "well-paying employment opportunities". Eastern Baltimore County Revitalization Strategy, at 30.[7]

The plans all echo the theme that infrastructure improvements will be needed to support the desired growth of industry and jobs. As the Solid Waste Management Plan indicates, such infrastructure includes facilities for the reception of construction debris.

[7] The Philadelphia Road Corridor Study did call for amendments to the M.L.R. zone to lessen potential impacts of industrial development on adjacent residential properties (Philadelphia Road Corridor Study at 36), but no amendments were ever adopted.

The proof of this need is contained in the testimony of Monte Kamp, who testified that the contractors building the extension to Route 43 are among the largest customers of the existing landfill (I T. at 205-209). Even Protestant's expert Al Barry testified that rubble landfills are necessary by-products of the development industry (II T. 191). The current Master Plan 2010 on pages 99, 104-105 also gives specific recognition to the need for solid waste handling and disposal to increase recycling and to extend the useful life of the Eastern Sanitary Landfill Solid Waste Management Facility.

None of the plans condemn the existing operations at the Honeygo Run site. The Philadelphia Road Corridor Study was adopted shortly before the adoption of the County Solid Waste Management Plan in 1991, which included the existing landfill site. No conflict apparently was perceived at that time. By the time of the adoption of the 1996 Eastern Baltimore County Revitalization Strategy the landfill had received local zoning and development approval. There was no rezoning proposed to counter the approval of the use. Finally, in the current Baltimore County Master Plan 2010, adopted in 2002, the ultimate use of the existing landfill is noted as a park and recreation area on page 192 of the Plan. This specifically adopts the long term and eventual use of the project for recreation use as part of the Plan. Eventual use of landfill facilities for recreation is noted by the Plan on page 106, and it is presumably compatible with the industrial uses and zone.

The existing development was first proposed in 1991. Since that time there have been two plans adopted for the area and the adoption of comprehensive zoning maps in 1992, 1996, 2000, and 2004. Not one of the plans offered, or any of the zoning map

changes have removed the ability to develop the property as proposed. The only change to the zoning on the parcels was in 2000, which extended the M.L.R. zoning to a parcel included in the proposal. In the current 2004 zoning maps there is a proposal to change a portion of the Sobczak property, which fronts on Philadelphia Road from residential zoning to M.L. and a request to change the S.E. zoning on the properties across Honeygo Run from the existing landfill to residential zoning. These proposals all were initiated after the County Council had adopted the amendment to the Solid Waste Management Plan for the expansion of the facility and neither proposal appears incompatible with the requested special exceptions.

There also was no conflict with the master plan noted at any time in the opinion of the Zoning Commissioner in his 51 page opinion in Cases No. XI - 611 and 94-87-SPHA, which approved the original landfill (Attachment "D"). In that case Protestants and community groups raised much the same objections as the present case. See Zoning Commissioner's Opinion at 30—31, 33-34. Interestingly, none of those Protestants are Protestants in this case. Much of the protest in that case involved the proposed recreation venue as being inconsistent with the industrialized use. Mr. Schmidt's comments in that case are pertinent: "At first blush, a landfill operation and park are at opposite ends of the zoning use spectrum. However, upon further consideration, both provide important services and satisfy public needs. The services provided by a landfill operation are needed. Once the operation is completed, the conversion of the property to another useful purpose is appropriate." Zoning Commissioner's Opinion at 33-34.

Mr. Monk's opinion given as an expert land planner that the landfill served as a useful and important accessory to the construction of the industrial employment center is important. For as Mr. Schmidt noted in the earlier case, the disposal of the waste from the construction is a part of the construction and industrial process. In addition, the park will provide a good amenity to the industrialized area (I T. at 184 - 185).

The M.L.R. zone was designed, in part, to serve as a transition between industrial and residential uses. In this context the transition from industrial landfill use to a park setting as proposed is significant, for it complies with the spirit and intent of the M.L.R. zone. In addition, the uses allowed are to permit and facilitate industrial employment centers. BCZR, §247. The uses that are permitted within the M.L.R. zone are presumed to accomplish its purposes. Mossberg v. Montgomery County, 107 Md. App. 1, at 7-8, 666 A. 2d 1253 at 1256-1257 (1995).

The M.L.R. zone has no ranking of uses that prefers some special exception uses over others. It does not contain wording similar to the R.C. 2 zone, which states a preferred use over all other permitted uses. BCZR § 1A01.2A. The special exception uses have remained fairly consistent since 1991, and arguably there are uses listed as special exceptions that can have an equal or greater impact on adjacent communities as the proposed use. BCZR § 248. Sanitary landfills first appeared with the M.L.R. zone in 1961 (County Council Bill 56, 1961). At that time there was no separate classification for a rubble or construction and demolition debris fill. County Council Bill No. 97-1987 first adopted a definition for a rubble landfill, and added it to the use allowed by special exception in the M.L.R. zone.

The scarcity of land now already developed in the M.L.R. zone on large tracts is not germane to the consideration of a special exception. In Mossburg v. Montgomery County, 107 Md. App. 1, 666 A. 2d 1253 (1995), the Court noted that the proposed waste transfer station was allowed in only one zone, which had very limited acreage available. *Id.* at 5, 666 A. 2d at 1255. The Court found that by allowing such use as a special exception that the legislative body expressly permitted such uses as a policy decision in the zone. *Id.* at 7-8, 666 A. 2d at 1256-1257. The quantity of land available was in effect a non-issue, and the Court found that the County had made a policy decision to locate the transfer station at the subject location based on the zoning regulations it had adopted. The Court found that the impacts of the specific operation were also contemplated. *Id.* at 25, 27, 666 A. 2d at 1265-1266. That same finding can be made in this case by the actions of the County Council in its adoption of the amendment to the Solid Waste Management Plan and by its adoption of the clarifying legislation in Council Bill No. 58-04.

For all of the reasons enunciated by Mr. Monk and echoed in the letter from the Director of Economic Development (Pet. Ex. 6) and approved by the Office of Planning in its advisory comment, the rubble fill expansion and recycling efforts at this location meet the spirit and intent of the M.L.R. zone. They will serve the new construction of Route 43 and the new developments well. They will provide a needed adjunct for the development to occur, and subsequently the recreational amenity will provide a good resource to the residential and development communities. If a primary focus of the M.L.R. is to provide that transition area to residential uses, then it is significant that no

community group feels that this use in this location will in any way deviate from that purpose. We only have an industrial user concerned about the impact of value to his property, and that impact is at best speculative.

Protestants also have raised the issue that the proximity and height of the landfill to the property is contrary to the spirit and intent of the M.L.R. zone. In this respect it must be noted that the M.L.R. zone permits buildings up to 60 feet in height anywhere from 30 to 50 feet from the property line depending on the orientation of the buildings. A 100 foot high building may be constructed within 100 feet of the property line. It is true that the floor area ratio for such a building may reduce its size on the property, but theoretically over half of the property's 48 acres could be covered by a building with asphalt covering the balance. It is not inconceivable that a building virtually covering the entire rear property line of the Sobczak property 60 feet high could be located 30 feet from the Sobczak property line and going up to 100 feet within 70 feet by right, without zoning approvals. The import of this is not to show that the landfill is preferable or comparable to a building. The point is that the proximity or height of a landfill or a building to a property line is not an issue in the M.L.R. zone contrary to the spirit and intent of the zone.

3. IMPACT OF SECTION 412 OF THE BCZR

Section 412 of the BCZR was rewritten in County Council Bill No. 97, 1987 to recognize issues with rubble landfills (See Attachment E). Council Bill No. 97 called for a landfill to sit back 100 feet from a property line. It also stated that the zoning

commissioner had the right to determine appropriate screening. It, however, did not mandate screening or any particular "buffer area".

In 1997 prior to the opening of the existing landfill but after its approval by the county, the county adopted Bill No. 28-1997. That bill called for a minimum landfill site of 50 acres (BCZR § 412.4B). It also called for new landfills to have a 500 foot wide edge including a 300 foot buffer area and a transition area of 200 feet into which fill could be placed at a rise of 1 foot for every 6.667 feet (BCZR §412.4C.1-2). Additional standards also had to be met. Adopted in the Bill, however, was language grandfathering existing landfills and additions to them.

BCZR Section 412.3 stated: "Any landfill or expansion thereof for which a development plan was approved prior to the effective date of Bill No. 28-1997 shall comply with the landfill requirements in effect at the time of the original approval." This language was deemed by the county council when it adopted the Solid Waste Management Plan Amendment in 2003 to permit the proposed landfill expansion in its proposed configuration. An expansion which conformed to the 500 foot edge area would not have had the volume proposed nor the area shown on the map attached as part of the Solid Waste Management Plan amendment. The grandfathering language in BCZR Section 412.3 was also felt to be applicable to an expansion by Protestants who argued that the language did not apply because of the size and configuration of the proposed fill and not due to the expansion itself. Indeed, no one raised the issue of the grammar of Section 412.3 until after the Zoning Commissioner's opinion in this case.

County Council Bill 58-04 (Attachment A) was adopted, "For the purpose of clarifying the application of Bill 28-1997 upon previously approved landfills; and providing for a buffer area that shall be landscaped or screened; and generally related to landfills" (Pet. Ex. 9). Its expressed intention was to permit existing landfills to expand under the standards of the initial approval with the one condition that landscaping in the setback area had to be approved by the Director of Permits and Development Management. There can be no question that the 100 foot setback applies under the plain meaning of the Bill and under its declared purpose.

One issue which could be argued is that a landfill expansion with a 100 foot setback and slopes as proposed under state regulations will have a different impact and more severe impact on adjacent properties than a new landfill which has the 500 foot edge on a 50 acre parcel. It is clear that if a new landfill was proposed for the site, it could not be built under the 1987 legislation. It is being constructed on less than the required acreage, and the setbacks would render it virtually worthless.

No testimony was presented, however, suggesting that this landfill expansion occurring where it does will have a more deleterious impact on the locality involved than a new landfill elsewhere. Indeed, if only the M.L.R. zone is to be considered, given the location of the other large M.L.R. tracts of land, redevelopment of those other parcels into a landfill could still have far greater impacts on adjoining residential and commercial communities than the existing location. Trucks would still have to access the landfills, and the visibility of the site would still be problematic. One can just envision a landfill where the hotel park now is located at I-83 and Shawan Road to

realize that the setbacks would be meaningless at that location to alter visibility. Office towers that exceed 10 stories in height would still look down at the landfilling operations. The same argument may be made for a landfill at the Shawan and York Road location. Accessing the Highlands Industrial Park on York Road, either by way of Belfast or by Shawan Roads from I-83, raises issues that make those made by Protestants here pale in comparison.

None of these issues were addressed by Protestants. The testimony that Protestants offered is that this site could best be used in their judgment for some other use that would not impact the existing industrial site as much as the landfill. The testimony simply does not address the legal issues presented by the special exception. This use in this location was presumed to be acceptable under a policy decision by the county council. Mossburg v. Montgomery County, 107 Md. App. 1, 666 A. 2d 1253 (1995). A comparison to other permitted uses is not permissible either to accept or reject the special exception presented.

Would no landfill expansion or a smaller expansion have a less impact on the Protestants' properties? The answer is a resounding maybe. The only testimony from Protestants is speculation. There is no proof that the proposed expansion will have any impact on the Protestants' use or enjoyment of their property. More important, that is not the legal standard articulated by Schultz v. Pritts and its progeny. Protestants have

not offered any factual basis supporting any claim that this expansion as proposed at this location is worse than a new landfill elsewhere.[8]

The County Council also has indicated by their approval of Bill 58-03 that expansions of existing landfills that otherwise meet special exception tests is a preferable policy to new landfills. This policy determination may have any number of rational bases that are relevant. A smaller expansion than a new landfill may have less of an impact on an adjacent community than a new landfill because the roads have been shown to be adequate, because issues with environmental factors and buffers have been addressed, etc. In any event, this enactment by the County Council is another clear indication that the use of the M.L.R. zone and of the properties involved in this matter is not a conflict with their perception of the zoning or master plans for the area.

4. A LANDFILL IS NOT A STRUCTURE OR A BUILDING AS USED IN THE BALTIMORE COUNTY ZONING REGULATIONS

A "rubble landfill" is specifically defined in the Baltimore County Zoning Regulations. Section 101 of the BCZR states: "Rubble landfill means a system of rubble disposal or land reclamation for public or private use for which a permit has been issued if required." The definition of the landfill as a "system of disposal" is carried over to the definition of "Sanitary Landfill". These definitions should be contrasted with the definition of a "Riding Stable", which is on the same page which is defined as a

[8] It should be noted that at its closest point to the Sobczak property the proposed landfill will be over 170 feet from the property line, which closely approximates the distance required under Bill 28, 1997. Landscaping in the buffer area will eliminate any issue of height differential.

"building." The zoning definitions define processes, buildings and structures depending on the nature of the use.

Protestant Sobczak's expert carefully refrained from opining that the proposed landfill expansion was a building. He only testified what the floor area ratio would be "if" it were a building. Nothing in the zoning regulations restricts the size of a landfill. The size depends on the depth as well as the height of the disposal area. It is just useless to apply a floor area ratio to a landfill as to any other non-building use. It can not be done.

As the cases have remarked in reviewing proposed rubble landfills, the use is basically a mound of refuse covered by dirt. It is not a building with walls and a roof. The BCZR Section 101 also has definitions covering "floor area" and "floor area ratio", and a review of those definitions makes it clear how inappropriate the application of height tents and floor area ratios are to the proposed use.

A landfill is not a building; it is a system for the disposal of waste. Even the most inventive argument on what a landfill might be considered becomes very contrived when the zoning regulation definitions are considered and when common sense is applied to the proposal. It may be noted in this context that not one case approving or denying a rubble landfill has considered a landfill anything but a system for refuse disposal. *See e.g.*, Days Cove Reclamation Company v. Queen Anne's County, 146 Md. App.469 at 474, 807 A. 2d 156, 159 (2002); Brandywine Enterprises, Inc. v. County Council for Prince George's County, 117 Md. App. 525, 700 A. 2d 1216 (1997); Moseman v. County Council of Prince George's County, 99 Md. App. 258, 636 A. 2d 499 (1994).

5. SPECIAL HEARING REQUEST

The Petitioner has filed six (6) requests for special hearing relief. They are:

1. To amend the site plan and order in zoning Case No. 94-87-SPHXA for a landfill expansion and to permit relocation of accessory uses.
2. To permit a special exception for an "excavation controlled" in conjunction with a special exception for a "rubble landfill" on the same site.
3. To determine that the special exceptions as part of the expansion of the existing operations have no time limit for utilization, or alternatively, a five (5) year period for utilization of the special exceptions.
4. To modify or eliminate the following conditions in the Order in Case No. 94-87-SPHXA: Conditions 3, 4 and 6.
5. To continue the existing variance from BCZR Sections 409.8A.2 and 409.8A.6 to allow a crushed concrete surface for the internal haul road and parking areas in lieu of the required durable and dustless surface and to permit same without the required permanent striping for off street parking facilities.
6. To terminate the special exception granted in Case No. 3902-RX for a trailer court.

The first request to amend the special hearing order and plan in the preceding zoning case goes to the heart of the special exception requests. It is necessary to tie the expansion into the existing excavation area and landfill area. If the special exceptions are granted, this request also should be granted.

The second request is basically to permit two special exception uses on the site at the same time. This request was filed at the request of the zoning bureau in the Department of Permits and Development Management and basically allows two special exceptions to be considered together rather than separately on the same property. Clearly, the ground has to be excavated before it can be filled. This request simply permits the two uses to operate in conjunction rather than be considered separately. There was no stated opposition to this request. [9]

The third request also was not opposed. It is not clear what must be done to "vest" an expansion of an existing use. A special exception is deemed "void" if it is not utilized within two years of its approval. BCZR § 502.3. In the application for the initial use a request was made and granted to permit utilization to occur within five years in lieu of two years based on the extensive nature of the state regulatory process which follows local zoning approval. The testimony of Mr. Dexter was instructive on this point. He stated the five steps of state review and indicated that three years is an average time to go through the process (I T. 96). After that process there is an additional county process (BCC Section 32-79 et seq.) where performance bonds may be required. It would not be unusual to take five years to complete the process and begin construction. For these reasons an extension of time from the usual two year period is requested.

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[9] Although the special exception for "rubble landfill" clearly includes the necessary excavation, the Petitioner applied for both special exceptions as an accommodation to the zoning bureau and in an abundance of caution.

The fourth request is for a modification of conditions in the 1993 zoning order. Based on the evidence presented Commissioner Schmidt had no difficulty in amending his previous order, and the Protestants offered no evidence or testimony indicating that this request should not be granted. Condition (3) required that the property be turned over to the county for a park. The county has indicated that they do not wish the potential liability that comes from owning a landfill, lined or unlined, rubble or sanitary. Consequently, the county does not wish to "own" the land but has indicated in the filed comments that are part of this file that the land's utilization as a park is appropriate. The Petitioner is required to bond the construction and maintenance of the park facility as presented. The sole issue is the requirement that the land be transferred to the county and the county's reluctance to own it.

Condition (4) to restore the Honeygo Run stream is not being required by the Department of Environmental Protection and Resource Management. It was not contemplated that the landfill would take so long to construct and operate. In the meantime the county has constructed a main sewer line in Honeygo Run to serve the Honeygo area of Perry Hall. That work required considerable work in the stream and flood plain. Protestants have indicated in argument that the Petitioner has failed in its obligation to restore the stream. In point of fact there is no current obligation for Petitioner to do so until the landfill has been operating for five (5) full years, which has not yet occurred. There is no comment now requiring this work from any source despite the fact that Petitioner has raised the issue. To require work that is not needed, nor wanted according to the plans submitted, makes no sense.

Condition (6) to pay the salary and necessary expenses of an inspector appointed by the Community Advisory Committee also was not requested by any party or agency. When the Order of the Zoning Commissioner was issued in 1993, Petitioner was arguing against lining the rubble fill. It was thought that a protection against leachate contamination would be an independent checker of the waste stream. That checker was to be named by the advisory committee. The advisory committee, despite its presence during and following the initial zoning hearing, has never recommended that an independent checker be named. The existing operation consequently is in compliance with the condition. After the liner was adopted for the landfill and after cameras and checking was established at the entrance, the additional checker became meaningless. The strong reputation of the operators of the existing facility among both the regulators and the community give proof that this condition is not necessary. There is no opposition to its removal.

Special hearing request (5) has been characterized as a variance, and it is really a request to continue an existing variance on the haul road and roads leading to the fill operation. It is not even clear that a variance was necessary in the first instance, or that a special hearing is necessary now, for the roads involved are far more temporary than the landfill use. It can be argued that the roadways are an inherent part of the special exceptions for the controlled grading and landfilling operations, for without their movement there is no grading or landfilling. As testimony indicated, it makes little sense to pave and pave over and take up paving as the elevation of the roads change based on the excavation and placement of the fill. The haul road is the only road that is

destined to become a permanent path around the fill, and it will have the least movement, but it will move up and down.

The haul road and interior access roadways are a unique system. Most travelways are stationary. These travelways are not. All but the haul road will vanish as the landfill is completed. Paving them makes no sense and does create a true practical difficulty. The object is to remove the dirt down the bottom of the excavation and then fill it up. The roadways which are established into the face of the excavation and later the fill will change. It can not be contemplated that they will be paved, for the landfill could not then be excavated and filled.

The landfill has large water trucks on hand which regularly wet down the pathways. There certainly is dust from time to time within the landfill, but there was no evidence that dust from the existing landfill covers the cars and trucks on the Sobczak property or any other property. The existing haul road is no further from the Protestant's property than the haul road proposed for the expansion. Surely, if dust problems now existed there would have been testimony or photos showing the dust attributed to the facility. Consequently, a dust problem on adjacent properties can not be presumed. Furthermore, such a dust problem would constitute a violation of the air quality standards to which the landfill is required to adhere. The award of this special hearing request can not be deemed to be a license to violate state law. The Petitioner will be required as it is now to adhere to the ambient air quality regulations, and there was no testimony that the award of this request will cause a violation of state law.

The Petitioner, however, is willing to make to agree to a condition, which it would accept on the special exception to pave **a portion** of the haul road despite the fact it will create a practical difficulty. On the portion of the haul road directly in back of the Sobczak property in that area where the haul road is within 300 feet of the Sobczak Building, the Petitioner is willing to pave the haul road. Paving this portion makes little sense based on the testimony, but in the spirit of co-operation this can be done. The landfill itself will block any issues presented by the roadways on the other sides of the fill. Petitioner recommends that this condition be imposed at the discretion of Baltimore County's landscape architect and/or the Director of Permits and Development Management based on the success and construction of the buffer berm and screen, which should remove dust considerations.

Special Hearing request (6) to remove the special exception for the mobile home park is a simple housekeeping request. The mobile home park has been terminated as a use and is vacant. The property has been rezoned. The issue is simply one of having the special exception remain when the landfill and controlled grading special exceptions are in place on the same property.

7. OTHER REGULATORY PROCESSES.

Mr. Decker's testimony made it clear that the county zoning hearing process is but one step of several that must be undertaken in order to approve the Petitioner's proposal for use of the site. Maryland has adopted laws requiring applications and permits before any person may install or materially extend a refuse disposal system. Annotated Code of Maryland, Environment § 9-204(d). Security in the form of bonds or

other appropriate securities must be posted with the State prior to operation. Environment § 9-211 (a). Failure to comply with the state regulations may result in the suspension or revocation of the permit or its non-renewal. Environment §9-212.1.

In addition, the county has its own development review process, and there is a final review process pursuant to the Baltimore County Code, Title 32, in order to ensure that all appropriate permits have been obtained and that bonding for the landfill obligations has been put in place. As a result of these processes there is constant monitoring of the facility required by both state and county regulations.

The state is required to monitor the facility for compliance with its operations permit, for noise and for dust. Environment §9-252(b); COMAR 26.04.07.18K. Regular noise monitoring studies are required by the landfill under occupational health and safety regulations. COMAR 26.02.03. Material entering the fill is also checked in unannounced inspections, and self-reporting of issues is required. COMAR 26.04.07.18. All of these inspections are in addition to and supplemental to Baltimore County's Code Enforcement inspections.

The recycling operations also have to obtain separate state permits as a processing facility for concrete recycling (COMAR 26.04.07.23) and for wood waste recycling (COMAR 26.04.09). Again, there are regulations in the COMAR titles that require clean and non-objectionable operations. COMAR 26.04.07.23 D; 26.04.09.07G.

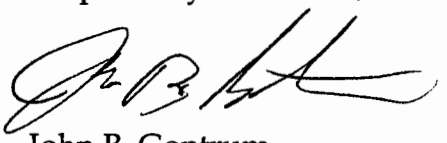
The purpose of this regulatory scheme is to ensure the proper operation of these facilities and their lack of adverse impact on the surrounding properties. It can not be presumed that the proposed facility will operate in violation of the regulations set forth

for its operation. It must be presumed that the facility will abide by the regulations and thereby minimize any adverse impact on the locality. The success of the existing facility and its approval by its neighbors and by the regulatory authorities indicate that when operated properly the rubble landfill with the variances for paving in place and recycling operations in this location will not adversely impact its neighbors.

CONCLUSION

In conclusion, Petitioner respectfully requests the granting of the special exceptions for the controlled grading and rubble landfill uses and for the six special hearing requests. Petitioner has offered testimony and exhibits indicating that the conditions of Section 502.1 have been met, and Protestants have not met their obligations under the case law or zoning regulations to show that this location will have a greater impact on the locality involved than other locations where the use is permitted.

Respectfully submitted,



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Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of August, 2004, a copy of the foregoing Memorandum of Petitioner was hand delivered to:

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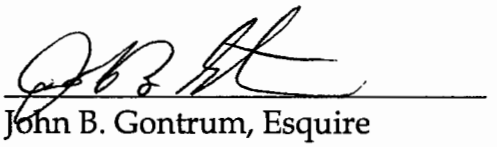


John B. Gontrum, Esquire

314104

EXHIBIT
A

COUNTY COUNCIL OF BALTIMORE COUNTY, MARYLAND
Legislative Session 2004, Legislative Day No. 9

Bill No. 58-04

Mr. Vincent J. Gardina, Councilman

By the County Council, May 3, 2004

A BILL
ENTITLED

AN ACT concerning

Landfills

FOR the purpose of clarifying the application of Bill 28-1997 upon previously approved landfills; and providing for a buffer area that shall be landscaped or screened; and generally relating to landfills.

BY repealing and re-enacting, with amendments

Section 412.3
Baltimore County Zoning Regulations, as amended

SECTION 1. BE IT ENACTED BY THE COUNTY COUNCIL OF BALTIMORE COUNTY, MARYLAND, that Section 412.3 of the Baltimore County Zoning Regulations, as amended, be and it is hereby repealed and re-enacted, with amendments, to read as follows:

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.
[Brackets] indicate matter stricken from existing law.
~~Strike-out~~ indicates matter stricken from bill.
Underlining indicates amendments to bill.

Section 412

Sanitary Landfills and Rubble Landfills

412.3 Any landfill [or expansion thereof] for which a development plan was approved, PURSUANT TO BILL 1-1992, AS AMENDED, prior to the effective date of Bill No. 28-1997 shall comply with the landfill requirements in effect at the time of the original approval. THE ZONING REGULATIONS IN EFFECT AT THE TIME OF THE APPROVAL OF THE DEVELOPMENT PLAN FOR THE ORIGINAL LANDFILL SHALL APPLY TO ANY SUBSEQUENT EXPANSION, REFINEMENT OR MATERIAL AMENDMENT TO THE DEVELOPMENT PLAN FOR THE LANDFILL. LANDSCAPING OR SCREENING SHALL BE PROVIDED WITHIN THE ONE HUNDRED FOOT WIDE BUFFER AREA AS MAY BE REQUIRED BY THE DIRECTOR OF PERMITS AND DEVELOPMENT MANAGEMENT.

SECTION 2. AND BE IT FURTHER ENACTED, that this Act, having been approved by the affirmative vote of five members of the County Council, shall take effect on June 11, 2004.

b05804.bil

Citation/Title
146 Md.App. 469, 807 A.2d 156, Days Cove Reclamation Co. v. Queen Anne's County, (Md.App. 2002)

*469 146 Md.App. 469

807 A.2d 156

Court of Special Appeals of Maryland.

DAYS COVE RECLAMATION COMPANY et al.,
v.
QUEEN ANNE'S COUNTY, Maryland.
No. 1572, Sept. Term, 2001.
Sept. 10, 2002.

Property owner and reclamation company that sought to develop and operate rubble landfill brought against county for declaratory judgment that new zoning ordinance and proposed revision of county's solid waste management plan were improper. The Circuit Court, Baltimore City, Joseph H.H. Kaplan, J., granted injunction against the ordinance. County appealed and property owner and company cross-appealed. The Court of Special Appeals, Davis, J., 122 Md.App. 505, 713 A.2d 351, affirmed in part and remanded. On remand, the county board denied application. Owner and company sought review. The Circuit Court, Queen Anne's County, John W. Sause, Jr., J., remanded the case. Owner and company appealed. The Court of Special Appeals, Rodowsky, J., held that: (1) consultant's expert opinion failed to support findings that the landfill would adversely affect trout stream and lake; (2) the county board lacked authority to regulate the type of waste to be accepted, the risk of leachate, and the risk of pollutants commingling with groundwater or surface water; (3) the board had authority to decide whether surface runoff or stormwater maintenance basin discharge would cause thermal pollution; and (4) evidence failed to establish a uniquely adverse effect from a closed landfill and residential solid waste convenience center nearby.

Reversed and remanded.

West Headnotes

[1] Zoning and Planning 489
414 ----
414IX Variances or Exceptions
414IX(A) In General
414k489 Grounds for Grant or Denial in General.
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 facts and circumstances 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.

[2] Administrative Law and Procedure ⚿683
15A ----
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak681 Further Review
15Ak683 Scope.
The Court of Special Appeals evaluates the decision of the administrative agency, not the decision of the lower court.

[3] Administrative Law and Procedure ⚿760
15A ----
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak754 Discretion of Administrative Agency
15Ak760 Wisdom, Judgment or Opinion.
The Court of Special Appeals does not substitute its judgment for the expertise of those persons who constitute the administrative agency.

[4] Administrative Law and Procedure ⚿791
15A ----
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak784 Fact Questions
15Ak791 Substantial Evidence.

[See headnote text below]

[4] Administrative Law and Procedure ⚿796
15A ----
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak796 Law Questions in General.
Court of Special Appeals has the task of determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions and if the administrative decision is premised upon an erroneous conclusion of law.

[5] Administrative Law and Procedure ⚿790
15A ----
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak784 Fact Questions
15Ak790 Rational Basis for Conclusions.
The Court of Special Appeals will only disturb the decision of an administrative agency with regard to questions of fact, if a reasoning mind reasonably could not have reached the factual conclusion the agency reached.

[6] Administrative Law and Procedure ⚿788

15A ----
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak784 Fact Questions
15Ak788 Determination Supported by Evidence in General.

[See headnote text below]

[6] Administrative Law and Procedure 789
15A ----
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak784 Fact Questions
15Ak789 Inferences or Conclusions from Evidence in General.
A reviewing court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record.

[7] Zoning and Planning 489
414 ----
414IX Variances or Exceptions
414IX(A) In General
414k489 Grounds for Grant or Denial in General.
In order for a unique characteristic of the neighborhood to support the denial of a conditional use, the ordinary adverse effects of the conditional use must be greater at the location in question, because of the unique characteristics of that location's neighborhood, than would be the case if the use were located elsewhere in the zone; simply identifying some unique characteristic of the neighborhood does not satisfy the *Schultz* requirement to show that the particular use proposed at the particular location proposed would have adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.

[8] Zoning and Planning 539
414 ----
414IX Variances or Exceptions
414IX(B) Proceedings and Determination
414k537 Weight and Sufficiency of Evidence
414k539 Particular Uses.
Consultant's expert opinion in opposition to conditional use permit failed to support findings by county board of appeals that rubble landfill in agricultural zone would adversely affect trout stream and lake; consultant relied on data from unlined landfills to support conclusions about leachate of metals and made assumptions about catastrophic failure of liners, and material portions of the reasons underlying his opinion on thermal pollution were factually inaccurate, speculative, or both.

[9] Evidence 570
157 ----

157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k569 Testimony of Experts
157k570 In General.

(Formerly 157k555.2)
An expert's opinion is of no greater probative value than the soundness of his reasons given therefor will warrant.

[10] Evidence ⚷555.2
157 ----
157XII Opinion Evidence
157XII(D) Examination of Experts
157k555 Facts Forming Basis of Opinion
157k555.2 Necessity and Sufficiency.
An expert opinion derives its probative force from the facts on which it is predicated, and these must be legally sufficient to sustain the opinion of the expert.

[11] Environmental Law ⚷352
149E ----
149EVIII Waste Disposal and Management
149Ek349 Concurrent and Conflicting Statutes or Regulations
149Ek352 State Preemption of Local Laws and Actions.

[See headnote text below]

[11] Zoning and Planning ⚷14
414 ----
414I In General
414k14 Concurrent and Conflicting Regulations.
State statutes governing ***469** rubble landfills preempt local regulation, except to the extent specifically provided to the contrary. Code, Environment, § § 9-204 to 9-229.

[12] Zoning and Planning ⚷384.1
414 ----
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 In General.
A local zoning role in landfill siting is not intended to encompass all aspects of what might be considered to be environmental protection. Code, Environment, § 9-210(3) (1999).

[13] Zoning and Planning ⚷384.1
414 ----
414VIII Permits, Certificates and Approvals

146 Md.App. 469, 807 A.2d 156, Days Cove Reclamation Co. v. Queen Anne's County, (Md.App. 2002)

414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 In General.
The traditional zoning and land use decisions which are to be made by local government do not include determining what is necessary in order to protect the environment from the pollutants that are generated specifically by a rubble landfill. Code, Environment, § 9-210(3) (1999).

[14] Zoning and Planning 384.1
414 ----
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 In General.
Regulation of the type of waste to be accepted at rubble landfill in agricultural zone was not a matter of local zoning, but involved the enforcement of any state permit by the Department of Environment. Code, Environment, § 9-210(3) (1999).

[15] Zoning and Planning 14
414 ----
414I In General
414k14 Concurrent and Conflicting Regulations.

[See headnote text below]

[15] Zoning and Planning 384.1
414 ----
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 In General.
The risk of leachate from rubble landfill entering groundwater in aquifer use for drinking water was to be evaluated exclusively by the Department of Environment during the permit process and was not a matter of local zoning. Code, Environment, § 9-210(3) (1999).

[16] Zoning and Planning 14
414 ----
414I In General
414k14 Concurrent and Conflicting Regulations.
The risk that pollutants in leachate, such as metals, would be commingled wi groundwater or surface water and produce adverse effects away from the site of proposed rubble landfill was for the Department of Environment's exclusive evaluation in the permit process and was not a matter of local zoning. Code, Environment, § 9-210(3) (1999).

[17] Zoning and Planning 14

414 ----
414I In General
414k14 Concurrent and Conflicting Regulations.
The reference in a county zoning code to protection of environmentally sensitive areas as a consideration for denying a conditional use for a rubble landfill was preempted by state statute to the extent that that provision could be applied to the risk of an escape of rubble landfill leachate from containment. Code, Environment, § 9-210(3) (1999).

[18] Environmental Law 352
149E ----
149EVIII Waste Disposal and Management
149Ek349 Concurrent and Conflicting Statutes or Regulations
149Ek352 State Preemption of Local Laws and Actions.

[See headnote text below]

[18] Environmental Law 357
149E ----
149EVIII Waste Disposal and Management
149Ek356 Landfills and Disposal Sites
149Ek357 In General.
The Department of Environment's power to evaluate the potential for horizontal movement of pollutants and to prevent the migration of pollutants out of the landfill to the adjacent surface water refers to pollutants which landfills generate, but does not to include forms of pollution that are common to many types of land uses. COMAR 26.04.07.16(C), 26.24.07.15.A(9).

[19] Zoning and Planning 353.1
414 ----
414VII Administration in General
414k353 Powers, Duties, and Liabilities
414k353.1 In General.
Local zoning authorities have the power to decide whether surface runoff or stormwater maintenance basin discharge will cause thermal pollution. COMAR 26.04.07.16(C), 26.24.07.15.A(9); Code, Environment, § 9-210(3) (1999).

[20] Zoning and Planning 539
414 ----
414IX Variances or Exceptions
414IX(B) Proceedings and Determination
414k537 Weight and Sufficiency of Evidence
414k539 Particular Uses.
Evidence failed to establish that a closed landfill and residential solid waste convenience center in conjunction with the site of a proposed rubble landfill would create a uniquely adverse effect and justify denial of special exception for the rubble landfill as a conditional use.

146 Md.App. 469, 807 A.2d 156, Days Cove Reclamation Co. v. Queen Anne's County, (Md.App. 2002)

[21] Zoning and Planning 384.1
414 ----
414VIII Permits, Certificates and Approvals
414VIII(A) In General
414k384 Nature of Particular Structures or Uses
414k384.1 In General.
A conditional use permit applicant's proposed additional condition of electronic warning signs during the hours of school bus operation so mitigated the risk to children that truck traffic could not be considered an adverse traffic impact of the proposed rubble landfill.

[807 A.2d 158] ***474** Warren K. Rich (Mark F. Gabler and Rich and Henderson, P.C., on the brief), Annapolis, for appellants.

Patrick E. Thompson (Foster, Braden, Thompson & Palmer, LLP, on the brief), Stevensville, and J. Carroll Holzer (Holzer & Lee, on the brief), Towson, for appellees.

Argued before JAMES R. EYLER, BARBERA and LAWRENCE F. RODOWSKY (retired, specially assigned), JJ.

RODOWSKY, Judge.

This appeal arises out of the denial by the Queen Anne's County Board of Appeals (the Board) of a conditional use (special exception) for a rubble landfill. (FN1) The [807 A.2d 159] aggrieved applicant submits that there was a want of substantial evidence to support the Board's action. Underlying this contention are two factually-interrelated legal issues--whether the denial is sustainable under the analysis required by *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981), and whether the Board encroached into areas preempted by State regulation.

[1] In *Schultz*, the Court of Appeals explained that conditional uses result from the legislative determination that the use is "compatible with the permitted uses in a use district, but that the beneficial purposes [that conditional] uses serve do not outweigh their possible adverse effect." *Id.* at 21, 432 A.2d at 1330. The adverse effect referred to is "at the particular location proposed" and is "above and beyond that ordinarily associated with" the particular conditional use. *Id.* at 22, 432 A.2d at 1330. Thus, the Court held 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 ***475** adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone."

Id. at 22-23, 432 A.2d at 1331. The conditional use provisions of a county

zoning code must be read with the holding of *Schultz* engrafted upon them. *See Mossburg v. Montgomery County*, 107 Md.App. 1, 21, 666 A.2d 1253, 1263 (1995), *cert. denied*, 341 Md. 649, 672 A.2d 623 (1996).

Days Cove Reclamation Company (DCRCo), one of the appellants, seeks to operate the landfill in an agricultural use zone on property owned by the other appellant, Springview, Inc. We shall refer to the appellants jointly as "Applicant." After hearings were conducted on three separate dates in order to accommodate the many protestants, the Board denied Applicant's request by a vote of two to one.

Applicant sought judicial review in the Circuit Court for Queen Anne's County. The circuit court concluded that some of the reasons given by the Board to support denial of the special exception were based on determinations which the State alone could make. The court further concluded that the "Board did not specifically identify those adverse impacts" which justified rejection of the proposed use under the rule of *Schultz*. Because the court could affirm only for reasons stated by the Board, see *United Steelworkers v. Bethlehem Steel Corp.*, 298 Md. 665, 679, 472 A.2d 62, 69 (1984), the court remanded the matter to the Board.

Applicant appeals from that judgment. The appellees are Queen Anne's County (the County) and persons from the vicinity who oppose the project (the Protestants). There is no cross-appeal by the appellees from the order of remand.

I. Legal Background

Extraction and disposal industrial uses, including a rubble landfill, are permitted in the County as conditional uses in the Agricultural, Countyside, Suburban Industrial and Light Industrial Highway Service zones. Queen Anne's County Code § 18-1-025 (1996). A rubble landfill may not be located ***476** within 500 feet of a residential zone, and it must set back 100 feet from the boundaries of the property on which the landfill is located. County Code § 18-1-132(d)(7)(v).

The County Zoning Code imposes general use standards for conditional uses of any type. Pertinent here is that found in § 13-1-131(b)(3), reading as follows:

> [807 A.2d 160] "The proposed use at the proposed location may not result in a substantial or undue adverse effect on adjacent property, the character of the neighborhood, traffic conditions, parking, public improvements, public sites or rights-of-way, or other matters affecting the public health, safety, and general welfare."

In addition, Maryland Code (1982, 1996 Repl.Vol.), § 9-503(a) of the Environment Article (Envir) requires each Maryland county, acting individually or in conjunction with adjoining counties, to adopt a plan dealing with, *inter alia*,

solid waste acceptance facilities. A sanitary landfill "whose primary purpose is to dispose of, treat, or process solid waste" is a type of solid waste acceptance facility. Envir § 9-501(n). The county plan is "a comprehensive plan for adequately providing throughout the county" facilities, including solid waste acceptance facilities. Envir § 9-501(d). County plans are to be reviewed at least once every three years. Envir § 9-503(b). The Maryland Department of Environment (MDE) may require the governing body of a county to adopt, after public hearing, and submit to MDE a revision or amendment to its county plan. Envir § 9-503(c) and (d). When a county submits its proposed county plan, or revision thereof, to MDE, MDE may approve or disapprove in whole or in part or "[m]odify or take other appropriate action on the proposal." Envir § 9-507(a).

The County has a Solid Waste Management Plan. It was amended at Applicant's request in December 1994 to include, as a proposed rubble landfill, the property that is the subject of these proceedings (the Site). The amendment recited that "[t]he facility will not be allowed to accept any material until it ***477** receives all state, local and other required permits and approvals."

In June 1996 DCRCo applied to MDE for a permit to operate a rubble landfill at the Site. See *County Comm'rs of Queen Anne's County v. Days Cove Reclamation Co.*, 122 Md.App. 505, 713 A.2d 351 (1998) (*DCRCo I*). It appears that DCRCo's application for a State permit is presently at the stage of MDE's review process that is described in Envir (2001 Supp.), § 9-210(a)(3) and (b), namely, MDE has ceased processing DCRCo's application awaiting the determination of the County as to whether the proposal "[m]eets all applicable county zoning and land use requirements[.]" (FN2)

[807 A.2d 161] In November 1996 a proposed ordinance was introduced before the County Commissioners that would have amended the County's Solid Waste Management Plan, reversed the action taken in December 1994, and deleted the Site as a potential rubble landfill. *DCRCo I*, 122 Md.App. at 514, 713 A.2d at 355. DCRCo obtained an injunction against the ***478** proposed ordinance, and this Court affirmed. Based on *Holmes v. Maryland Reclamation Assocs., Inc.*, 90 Md.App. 120, 600 A.2d 864, *cert. granted,* 327 Md. 55, 607 A.2d 564,*and cert. dismissed,* 328 Md. 229, 614 A.2d 78 (1992), this Court held that "the County may not now amend the Plan to exclude the facility because of some negative reaction from community representatives. The facility's fate is the province of the MDE." *DCRCo I*, 122 Md.App. at 525, 713 A.2d at 361.

Thereafter, by Ordinance No. 99-04, effective June 18, 1999, the County amended § 18-1-132(d) of its Zoning Code, dealing with additional standards for extraction and disposal businesses, including rubble landfills, as conditional uses. All references to geology, groundwater movements, and aquifer information were deleted. See former § 18-1-132(d)(3)(ii)1, 3, 4, and (iii)(4)(i)2. Also deleted from the Zoning Code were requirements that the proposed plan of operation of the Site describe the "types of liners or other barriers to prevent movement through the soils," and the "types of leachates generated and method of managing these materials." Former § 18-1-132(d)(3)(iii)2D and E.

146 Md.App. 469, 807 A.2d 156, Days Cove Reclamation Co. v. Queen Anne's County, (Md.App. 2002)

The 1999 amendment also limited to data "related to storm water management" a former requirement that a plan of a proposed rubble landfill include basic data concerning soils and geology. § 18-1-132(d)(4)(i)1. Also added to the Zoning Code in 1999 was the requirement that "[s]ubmittals should demonstrate that the landfills or rubble fill will not adversely affect wetlands, floodplains, or other environmentally sensitive areas." § 18-1-132(d)(7)(vi) 6. The Board quoted this provision in its written opinion in this case.

II. Factual Background

The Site is located in an agricultural zone in the northern part of the County, a little over one mile south of Millington and over three miles north of Sudlersville. A sand and gravel pit operation, formerly conducted at the Site, has been discontinued. The Site consists of fifty-eight acres of unimproved land, lying on the southeasterly side of Glanding Road, south of its acute angle intersection with Peters Corner Road. The ***479** Site is bounded on its northeasterly side by Peters Corner Road and along its eastern boundary by railroad tracks of the Penn Central line. That right-of-way is now owned by the State of Maryland. To the south of the Site is a 143 acre farm, the frontage of which extends along the north side of Hackett Corner Road from a southern extension of the Site's eastern property line to Glanding Road.

In the northwest corner of that farm is a relatively small, separately titled parcel, zoned agricultural. It faces on the easterly side of Glanding Road and its northern boundary abuts the southwestern corner of the Site. DCRCo plans to locate a stormwater management pond in that corner. The small parcel is the home of Allen Boyles and his family. It is the closest residence to the Site. A line of trees twenty-five to fifty-five feet tall separates the Boyles's property from the Site.

On the northwesterly side of Glanding Road are three properties, owned, from south to north, by the County, by a rod and gun club, and by an electric utility. The County property was the site of a sanitary landfill which has been closed [807 A.2d 162] and capped for a number of years. In their report on the Site the County's Department of Planning and Zoning and Department of Public Works state that the County property is currently used as a "residential solid waste convenience center." (FN3) On the electric utility property is a large transfer station.

Traversing the Site in north-south and east-west directions are two power line transmission corridor easements, the former 300 feet wide and the latter 150 feet wide. In the corridors high voltage electric power lines are suspended from metal towers containing one to three cross-arms each.

The rear or west side of the County's Glanding Road property abuts a former millpond known as Unicorn Lake. At the nearest point the lake lies approximately 200 feet from ***480** that portion of the County land that is the closed landfill, and the lake lies about 1,000 feet from the Site. The lake was formed by damming

Unicorn Branch, a stream which flows from south to north. At the north end of the lake, near the dam, is a fish hatchery operated by the Department of Natural Resources (DNR). "Unicorn Millpond," *i.e.*, Unicorn Lake, is designated by MDE as a nontidal wetland of special State concern. COMAR 26.23.06.01Q(12).

DCRCo's design for the Site utilizes twenty-six out of the fifty-eight acres for disposal cells. Three cells are planned for twenty-one acres lying to the west of the electrical power transmission lines right-of-way, and a five acre cell is planned to the east of that right-of-way. Stormwater management structures complying with MDE soil conservation requirements and the County Code are to be built into the project. Containment of surface water will also be effected by a berm forty feet wide and five feet high on which trees will be planted and which will extend 3700 feet along the Glanding Road and Peters Corner Road perimeters of the landfill. Stormwater collection and management is separated from leachate collection and management. (FN4)

Each cell will contain a leachate collection system. The leachate drains by gravity to a sump area in the double lined bottom of the cell. The leachate then flows by gravity or is pumped to a storage facility, either a lined basin or a storage tank, from which it is transferred to tanker trucks for transport to a licensed waste water treatment plant.

Deep below the Site is the Aquia aquifer, the drinking water source for a large area. A vertical cross-section of a cell after it has been filled and closed would reveal the following levels, ascending from the subterranean to above ground:

1. The Aquia aquifer, an area of deep groundwater;

***481** 2. The Calvert formation, a twenty-foot thick clay aquiclude;

3. The Columbia aquifer, an area of high groundwater;

4. A level of buffer soil extending three feet above the highest groundwater level recorded within the prior year;

5. A geosynthetic clay liner;

6. A sixty millimeter thick geomembrane liner. (Layers 5 and 6 form the double lining of the bottom of a cell.);

7. A layer of gravel of a minimum depth of two feet, *see* COMAR [807 A.2d 163] 26.04.07.16C(5) , through which the leachate drains to the bottom of the cell for collection;

8. The rubble waste, in a series of levels, or "lifts," each not exceeding eight feet in depth, with each lift covered by at least six inches in depth of clean earth, *see* COMAR 26.04.07.18E and F;

9. A two foot thick earth cover over the highest lift to provide a smooth surface on which to place layer 10;

10. A forty millimeter thick geomembrane cap;

11. A composite drainage net (The purpose of layers 10 and 11 is to restrict stormwater from reentering the rubble once the cell is closed.); and

12. Two feet of soil with vegetation.

DCRCo estimates that the Site will be operational as a rubble landfill for five to ten years. When a cell is closed its elevation above ground level will be forty feet, according to the Board's finding. (FN5)

DCRCo plans to limit trucks traveling to the Site to the following route: U.S. Route 301 to Maryland Route 544, east on Route 544 to Maryland Route 313, south on Route 313 to Hackett Corner Road, east on Hackett Corner Road to Glanding Road, and north on Glanding Road to the Site. This route ***482** would be reversed for return trips. It avoids Millington and Sudlersville.

The State Highway Administration and the County Public Works Department have recommended that Glanding Road, presently eighteen feet wide with no shoulders, and Hackett Corner Road, presently twenty feet wide with no shoulders, be widened along the above-described route to twenty-two foot roadbeds with four foot shoulders on each side. DCRCo will make these improvements at its expense. In addition, enlarged turning radii, and lanes for traffic to bypass a left turn movement and for traffic making a right turn to merge, would be built at points along the route at DCRCo's expense. The existing rights of way are sufficient to accommodate these improvements.

In an effort to insure that customers' trucks follow the above-described route, DCRCo proposes, and the County Departments recommend as a condition, that an electronic tracking system be used. Each truck driver must obtain in advance a device utilizing technology similar to the "M-Tag" used on toll roads. When the truck arrives at the scales at the Site, information from this device will be downloaded to disclose any violations of the required route. For a second violation a driver will be denied access to the Site for one year; access will be denied permanently for a third violation.

In addition, DCRCo, as a condition of the special exception, would enter into a contract with an independent governmental authority to provide a full-time checker at the Site, to insure that only waste that is authorized to be deposited in a rubble landfill is deposited at the Site. (FN6)

Additional facts will be set forth in discussing particular arguments of the parties.

***483 III. The Board's Hearing and Decision**

DCRCo presented a prima facie case through a corporate officer, an engineer, a [807 A.2d 164] traffic consultant, a real estate appraiser, an environmental consultant, and a fact witness from DNR. Representatives of the County's Planning and Zoning Department and Public Works Department presented the recommendations of those agencies for approval, subject to conditions. The Protestants presented evidence through an environmental consultant, a professor of toxicology, a realtor, a DNR manager for fresh water fisheries, the Director of Environmental Health from the County Health Department, numerous protesting citizens, and elected public officials.

In its two to one decision the Board found the following adverse effects:

"The substantial or undue effects would include [1] the forty (40) foot mound that is proposed on-site; [2] the substantial increased truck traffic, and [3] the increased speed of the trucks due to the upgrading of the existing roadways; [4] the 'human' characteristics of the various personnel that would be involved in maintaining the tracking system; [5] the additional cumulative impact of the proposed use in an area where there is already a landfill; [6] the diminished property values that would result from the second landfill and substantial truck traffic on existing residential properties; [7] the potential--and perhaps catastrophic--impacts on the adjacent Unicorn Branch and Unicorn Lake and Millpond; [8] the potential impact on drinking water in the area; [and] [9] the negative impact on residential, rural roadways.

"The majority of the Board finds the testimony regarding [10] what will and will not be accepted as waste in the rubble fill is less than credible. Similarly, [11] the details of the truck tracking system seem less than efficient or reliable. [12] There are certainly other sites within the district that would have direct--or more direct--connection to a major highway, such as U.S. Route 301. [13] The up to seventy-five (75) trucks traveling the proposed rural roads, ***484** particularly at early hours of the morning, will negatively impact on the neighborhood. [14] The majority notes with concern the adjacent residential property, school aged children, school buses, and safety factors that would adversely be affected by truck traffic. [15] The cumulative impact of two landfills will substantially impact the neighboring community by devaluing residential properties. [16] There are clearly other sites within the zone that would have a more substantial clay buffer separating the 'drinking water' aquifers, and which would not be adjacent to important natural conditions, such as Unicorn Branch and Unicorn Lake."

IV. Scope of Review

[2] [3] [4] In reviewing the decision of an administrative agency, "we reevaluate the decision of the agency, not the decision of the lower court." *Gigeous v. Eastern Correctional Instit.*, 363 Md. 481, 495-96, 769 A.2d 912, 921

(2001) (citing *Public Serv. Comm'n v. Baltimore Gas & Elec. Co.*, 273 Md. 357, 362, 329 A.2d 691, 694-95 (1974)). The scope of our review of administrative agency action is narrow and we are "not to substitute [our] judgment for the expertise of those persons who constitute the administrative agency." *United Parcel Serv., Inc. v. People's Counsel for Baltimore County*, 336 Md. 569, 576-77, 650 A.2d 226, 230 (1994) (internal quotations omitted). Accordingly, this Court is tasked with " 'determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.' " *Board of Phys. Quality Assurance v. Banks*, 354 Md. 59, 67-68, 729 A.2d [807 A.2d 165] 376, 380 (1999) To view preceding link please click here (quoting *United Parcel Serv.*, 336 Md. at 577, 650 A.2d at 230).

[5] [6] With regard to questions of fact, we will only disturb the decision of an administrative agency if "a reasoning mind reasonably could [not] have reached the factual conclusion the agency reached." *Baltimore Lutheran High Sch. Ass'n v. Employment Sec. Admin.*, 302 Md. 649, 662, 490 A.2d 701, 708 (1985). Thus, "[a] reviewing court should defer to the agency's ***485** fact-finding and drawing of inferences if they are supported by the record." *Banks*, 354 Md. at 68, 729 A.2d at 380-81.

V. Narrowing the Issues

Although the Board expressed recognition of the *Schultz v. Pritts* requirements, the scattershot approach in the Board's decision did not distinguish between adverse effects that are common to rubble landfills and those that the Board found to be unique to the Site. Those findings that are not candidates for possibly satisfying the *Schultz* test must be culled first from the Board's list of reasons.

When the County authorized landfills as special exceptions in the agricultural use district, the County authorized a use that would be elevated substantially above ground level (fact-finding 1). Contemporary landfills no longer fill a hole to the level of the ground surrounding the hole. At the Site, the elevated landfill will be less offensive, visually, than ordinarily would be the case because high voltage electricity lines, supported by metal towers, traverse the Site.

When a location which has not been used as a rubble landfill is used as a rubble landfill, it draws trips by large trucks. Consequently, an increase in truck traffic (fact-finding 2) is not unique to the Site. Similarly, because a landfill may be located in an agricultural zone, truck travel on rural roads is implicit (fact-findings 9 and 13). Presumably the County could have adopted a zoning map or solid waste management plan that limited rubble landfills to certain locations along Route 301 (fact-finding 12), but it did not do so.

The Board's fact-findings 4, 10, and 11 appropriately might be called human frailty reasons, *i.e.*, that the checker may not check and the trackers may not

track. There is no basis for concluding that the independent checker or DCRCo's employees engaged to work at the Site will be less reliable than if they were engaged to work at a landfill located elsewhere.

The appellees' real estate expert demonstrated that residential property located adjacent to a landfill is less valuable than property that is not (fact-finding 6). The appellees' expert, ***486** however, presented no evidence that property values would be more adversely affected by a landfill at the Site than would the value of properties adjacent to or in the vicinity of a landfill elsewhere in the zone. Indeed, when one considers that the properties in the neighborhood are already adversely affected by high voltage electrical transmission lines and their supporting towers, as well as by railroad tracks, any decline in value that the proposed landfill causes at the Site would seem to be less than that near a landfill at some other location.

For the foregoing reasons we hold that fact-findings 1, 2, 4, 6, 9, 10, 11, and 13 are not candidates for possibly satisfying the *Schultz* test.

Recognizing that there must be substantial evidence under the *Schultz v. Pritts* rule to sustain the denial of the conditional use, Protestants select for emphasis the aspects set forth below:

> "There were four separate and independent bases for the Board's finding the impact of this proposed rubble fill on adjoining and surrounding properties [807 A.2d 166] unique and different in kind or degree from that inherently associated with such a use: First, the uniqueness of the fishery aspects of Unicorn Branch and Unicorn Lake [fact-findings 7, 8, and 16]; Second, the underlying thinness of the clay strata between the Columbia and the Aquia aquifer below the proposed site [fact-findings 7, 8, and 16]; Thirdly, the uniqueness and special impacts of two landfill operations on the same road in the same community [fact-findings 5 and 15]; and finally, the impact of truck traffic upon the narrow roads accessing the subject site as opposed to a location on a major highway which would have less of an impact [fact-findings 3, 9, 13, and 14]."

[7] Appellees' first and second supporting reasons, involving Unicorn Branch, Unicorn Lake, and the aquifers may be considered together. Appellees, by opinion testimony, undertook to show that leachate contamination of groundwater, leachate contamination of surface water, and thermal pollution adversely would affect fish in the Unicorn waters and drinking ***487** water in the aquifers. Applicant argues, correctly in our view, that the *Schultz* requirement is not satisfied simply by identifying some unique characteristic of the neighborhood. In order for a unique characteristic of the neighborhood to support the denial of a conditional use it is necessary that the ordinary adverse effects of the conditional use be greater at the location in question, because of the unique characteristics of that location's neighborhood, than would be the case if the use were located elsewhere in the zone. Applicant submits that, although Unicorn Branch and Unicorn Lake, with their aquatic life, may be unique features of the

neighborhood, there is a lack of substantial evidence that the proposed landfill will have an adverse effect on the Unicorn waters.

Applicant also argues that issues concerning whether a landfill would pollute surface and groundwater are to be decided by MDE in the State permit process, and not in a zoning case. Appellees respond that Envir § 9-210, see note 2, *supra*, which brings the State permit process to a halt until a county advises MDE that zoning and land use requirements have been met, demonstrates that there is no preemption of the County's role. Further, appellees submit that § 18-1-132(d)(7)(vi)6 of the County Code injects environmental considerations into the zoning process.

VI. Evidentiary Sufficiency--Surface and Groundwater

(Fact-findings 7, 8, and 16)

[8] The Protestants produced Richard D. Klein (Klein) as their environmental science expert witness. Klein was employed by DNR from 1969 to 1987, where he rose from the position of a conservation aide to that of manager of the Save Our Streams Program. Thereafter, he has rendered consulting services through his corporation, Community & Environmental Defense Services. He holds no degrees or certifications as a hydrologist, chemist, biologist, civil engineer, or sanitary scientist.

Klein opined that there were possible adverse effects on Unicorn Branch and Unicorn Lake from the proposed rubble ***488** landfill. He pointed out that Unicorn Branch has an abundance and diversity of fish, and in particular, it is the only stream on the Eastern Shore, south of Cecil County, in which brown trout are found throughout the year. Moreover, the DNR fish hatchery at Unicorn Lake is one of only two warm water fish hatcheries in Maryland. In addition, the State built, at considerable expense, a fish ladder at the dam forming Unicorn Lake.

[807 A.2d 167] Klein presented a worst case scenario of the metal content of leachate. He admittedly used, as the metal concentration in leachate, the highest concentration that he could find for a given metal, as reported in data that had been collected at forty rubble landfills. (FN7) The maximum levels presented by Klein exceed MDE standards for the protection of aquatic life. The landfills on whose data Klein relied were unlined landfills. (FN8) Because a manufacturer of synthetic liners and of closing caps for cells guarantees the life of the materials for only thirty years, Klein opined that, thirty or more years in the future, leachate containing worst case concentrations of metals would work its way to Unicorn Branch and Lake. He stated that, "[a]t that point [in time], this entire toxic brew is going to be released into the adjoining waterways."

[9][10] It is well established that " 'an expert's opinion is of no greater probative value than the soundness of his reasons given therefor will warrant.' "

Surkovich v. Doub, 258 Md. ***489** 263, 272, 265 A.2d 447, 451 (1970) To view preceding link please click here (quoting *Miller v. Abrahams,* 239 Md. 263, 273, 211 A.2d 309, 314 (1965)). An expert opinion "derives its probative force from the facts on which it is predicated, and these must be legally sufficient to sustain the opinion of the expert." *State Health Dep't v. Walker,* 238 Md. 512, 520, 209 A.2d 555, 559 (1965). *See also Jones v. State,* 343 Md. 448, 682 A.2d 248 (1996) (expert testimony by police officer that he was able to identify crack cocaine by touch was nothing more than a conclusion); *Beatty v. Trailmaster Prods., Inc.,* 330 Md. 726, 625 A.2d 1005 (1993) (holding inadmissible auto reconstruction expert's opinion that height of bumper on truck was unreasonably dangerous, where height complied with industry standards and no scientific studies or emerging consensus supported opinion); *Wood v. Toyota Motor Corp.,* 134 Md.App. 512, 760 A.2d 315 (trial judge did not err in excluding expert testimony regarding the danger of air bags because the expert "never explained how the data upon which he relied led him to the conclusion that the size of the vent holes caused appellant's injuries"), *cert. denied,* 362 Md. 189, 763 A.2d 735 (2000); *Skrabak v. Skrabak,* 108 Md.App. 633, 673 A.2d 732 (expert's opinion regarding goodwill value of a corporation based on facts that did not support opinion and on "guesswork and speculation"), *cert. denied,* 342 Md. 584, 678 A.2d 1048 (1996). *See also Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999); *General Elec. Co. v. Joiner,* 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997); *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

Klein's opinion is not substantial evidence that metals contained in leachate will adversely affect the Unicorn waters. Klein's opinion necessarily rests on the following assumptions:

> [807 A.2d 168] --At some time more than thirty years after the closing of a cell, there will be a total failure of the synthetic liner and cover and that the second, geosynthetic clay (bentonite), lining of the cell bottom either will not have been installed or will suffer, concurrently, a catastrophic failure of unknown ***490** origin, inasmuch as Klein gives no protective effect to the second liner in his assumption. (FN9)
>
> --The failure of the cover will not be minor, *i.e.*, holes that would be capable of repair.
>
> --The failure of the liner will not be minor, will not be detected by the monitoring system, and leakage of leachate will not be reduced by the collection system to insignificant levels.
>
> --During the operational life of a cell, *i.e.*, when the working face of the cell is uncovered, water passing through the cell to the leachate collection system will not have eliminated the most easily removable of the metal particles in the rubble.

--The maximum concentrations of metals at unlined landfills utilized in Klein's opinion are comparable to the levels to be anticipated thirty or more years in the future at the subject rubble fill with its double lining and leachate collection system.

--The leachate would work its way as groundwater to Unicorn Branch and Lake, although the unlined municipal solid waste landfill, now closed, which is adjacent to the Unicorn waters, has had no adverse effect on their unique qualities.

--The more than 1,000 foot journey of the leachate from the Site to the Unicorn waters will occur without undergoing natural attenuation processes, including dilution and absorption.

Klein's opinion that leachate will adversely affect Unicorn waters is speculation.

Klein also presented the Board with a scenario, adversely affecting the Unicorn waters, that might take place before the hypothetical total failure of the plastic liners and covers would occur. Hypothesizing a 1.3 inch rainfall, he opined that a discharge of 8636 cubic feet of stormwater from 12.2 acres of ***491** the Site draining into the westernmost stormwater management basin could reach a temperature of 97° F and that the surfaces of Glanding and Hackett Corner Roads would produce a runoff at 83° F. The combined surface waters, in the witness's opinion, would cause the temperature of Unicorn Branch to rise to 72.8° F, which is above the 68° F that is the optimum temperature for trout.

The 97° F temperature was based on the maximum summertime measurement of water in three highway ponds in Anne Arundel County that are designed to discharge completely within six, twelve, and twenty-four hours. The western stormwater management basin at the Site, however, will discharge only during high volume rain storms when the temperature of the runoff will be the same as the rainfall temperature. Otherwise, the draw down from that basin will be over two to seven days, thus reducing volume discharged at any one time.

Further, Klein acknowledged that his road runoff calculation is premised upon 7.76 acres of impervious road surface, a figure which he also acknowledged included the preexisting roads, and not simply the additional surface that would result from the widening to accommodate truck [807 A.2d 169] traffic generated by the proposed landfill. On cross-examination the witness stated that 5.5 or 6 acres of surface area of the 7.76 acres of road utilized by him in his calculation represented the existing roads. Under *Schultz v. Pritts* a preexisting road is not attributable to the proposed conditional use. Although Klein stated that he could calculate the revised runoff using only the area of the additional surface of the widenings, we have not been directed to that evidence and have not independently found it in this voluminous record. Nor have we been directed to, or found, a revised temperature impact on Unicorn Branch, based on the revised road surface runoff.

Klein also opined that the temperature of Unicorn Branch could reach 79.2° F, well above the lethal temperature for trout of 75° F. This latter scenario assumed an increase in the volume of the discharge from the western stormwater management basin from 8,636 cubic feet to 47,829 cubic feet.

***492** In order to increase the runoff from the Site that he determined drained into the westernmost stormwater basin, and thereby produce a trout killing temperature in Unicorn Branch, Klein assumed that the same 12.2 acres of the Site would be covered by an impermeable (but not yet disintegrated) cap. In other words, Klein assumed that the plastic cap would be placed over 12.2 acres of filled cells, but that the required two feet of soil would not have been placed over the plastic cap when the assumed 1.3 inch rain fell.

COMAR 26.04.07.18H requires that "[a] uniform compacted layer of earthen material not less than 2 feet in depth shall be placed over the final lift not later than 90 days following completion of that lift." (FN10) The western cell area of the Site is the twenty-one acre area that will be divided into three separate cells. Because the division is for efficiency of operation, each cell should be approximately seven acres. It is not reasonable to assume that one of the three cells would be 12.2 acres or larger and that the other two would be 4.4 acres or smaller. In order for Klein's hypothetical to be realized, *two* cells, successively, would have to be filled, covered with a plastic cap, but never covered with earth. Since the estimated operational life of the entire four cell landfill is five to ten years, Klein's scenario assumes that the first of the three western cells to be filled and covered with a plastic cap would remain exposed for better than a year, and that no soil cover would be applied until two cells had been filled. No reasonable fact finder could conclude that an area of fully exposed plastic cap would ever approach 12.2 acres.

In Klein's hypothetical scenarios, stormwater from the Site and the adjacent roads reach the Unicorn waters without any diminution in temperature or volume. Inasmuch as the two foot earth cover on a closed cell must be infiltrated by rain before the water reaches the plastic cap for collection into the stormwater system and eventual discharge, the rate of discharge ***493** from a stormwater basin is reduced by the dirt cover. (FN11) Nor does Klein's theory account for the cooling effect on surfaces of the initial rain in the assumed 1.3 inch storm. In addition, Klein's scenario does not account for the diminution in temperature that would occur when surface waters from the Site and adjacent roads mingle with rain as they pass over the land between[807 A.2d 170] those sources and the Unicorn waters. The added surface area of the public road improvements for the project is .028% of the entire Unicorn Branch and Lake watershed. The volume of the runoff from the western stormwater basin and the widened portion of the roads (assuming 1.51 acres) is .09% of the volume of the runoff into the Unicorn Branch drainage basin. These percentage calculations are uncontradicted.

Because material portions of the reasons underlying Klein's thermal pollution opinion are factually inaccurate, speculative, or both, there is a want of substantial evidence for utilizing thermal pollution to support the Board's

finding that there would be adverse effects on the Unicorn waters.

Also introduced into the record through Klein was a site plan of the proposed landfill on which the witness superimposed that portion of the "Unicorn Millpond" nontidal wetland of special State concern that overlaps the Site. (FN12) The "Unicorn Millpond" area of special State concern extends to a portion of the Site lying between the western and eastern disposal cell areas.

A "nontidal wetland" is

> "an area that is inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in ***494** saturated soil conditions, commonly known as hydrophytic vegetation."

COMAR 26.23.01.01B(62). "Nontidal wetlands of special State concern" have "exceptional ecological or educational value of Statewide significance." COMAR 26.23.01.01B(63).

As relevant to the instant matter, State regulations require a 100 foot buffer around nontidal wetlands of special State concern. See COMAR 26.23.01.04A(1). At one point DCRCo's proposed use encroaches approximately twenty-five feet into the required buffer zone. The total area of all encroachments shown on appellees' exhibit is .25 of an acre. DCRCo's engineer testified that the buffer could easily be accommodated by a reduction in the "footprint," a reduction which would be demonstrated to MDE in a later phase of the permit process.

The Board did not find, as a reason for rejection of the conditional use, encroachment on a nontidal wetland of special State concern. Indeed, the Board seems to have accepted DCRCo's response to appellees' point. Encroachment on nontidal wetlands of special State concern is a non-issue on this appeal.

VII. Preemption

(Fact-findings 7, 8, 10, and 16)

In addition to the requirement that there be substantial evidence to support the Board's findings, the Board may not act in an area that State law has preempted through the MDE permitting process for rubble landfills. Determining where the line is drawn on the facts of this case between determinations to be made exclusively by MDE and those to be made by local government as part of the zoning process is not without difficulty.

Before a "person" may install, materially alter, or materially extend a refuse disposal system, a permit from MDE is ***495** required. [807 A.2d 171] *See* Envir§ 9-204(d). (FN13) The application must contain the complete plans and specifications for the installation. §§ 9-204(e)(1)(i) & 9-205. The Secretary

of the Department of Environment "may adopt reasonable and proper regulations for submission of plans." § 9-204(b)(1). MDE may deny a sanitary landfill permit based upon a finding, *inter alia*, "that operation of the sanitary landfill system would harm public health or the environment." § 9-212.1(2). The Department may also revoke or refuse to renew the permit for an operating landfill upon a finding "that continued operation of the landfill system would be injurious to public health or the environment." § 9-214(2). Further, the Secretary may order the installation of a refuse disposal system upon findings that the absence or incompleteness of such a system

> "(1) [i]s sufficiently prejudicial to the health or comfort of that or any other ... locality; or
>
> "(2) [c]auses a condition by which any of the waters of this State are being polluted or could become polluted in a way that is dangerous to health or is a nuisance.
>
> Envir § 9-222(a) and (b).

The Secretary's primary response to the legislative delegation, reviewed above, is Title 26, Subtitle 4, Chapter 7 of COMAR. In applying its regulations, the Department is obliged to

> "consider all material required to be submitted under these regulations to evaluate whether any of the following factors is *likely* to occur or has occurred. A person may not engage in solid waste handling in a manner which will *likely:*
>
> ....
>
> "(4) Cause a discharge of pollutants to waters of this State unless otherwise permitted under [Envir §§ 7-232 or 9-323];
>
> ***496** "(5) Impair the quality of the environment; or
>
> "(6) Create other hazards to the public health, safety, or comfort as may be determined by the [Secretary or the Secretary's designee]."
>
> COMAR, *supra*, Reg. 03 (emphasis added).

Regulations 13 through 18 of Chapter 7 specifically address rubble landfills and, by incorporation, the informational requirements for an application imposed by Reg. 06B(1) through (9). The latter includes information on surface waters, wells, and "the geology at the site based on available data." Reg. 06B(3)(a)-(c), (f), (g), and (7).

Review of the application is divided into three phases. DCRCo's application

is currently in Phase I. The report for Phase II of the process must describe "the soils, geology, and hydrology of the proposed site." Reg. 15A. This report must "be developed and signed by a geologist who possesses at least a bachelor's degree from an accredited college or university in the field of geology or a related field of earth science." *Id.* Phase II reports must include "information in sufficient detail to permit a comprehensive review of the project." *Id.* This information includes a topographic map showing "[s]urface waters and natural drainage features," Reg. 15A(1)(a), and "[a] discussion of the geologic formations directly underlying and in close proximity to the site, the present and projected use of these formations as a ground water source, and the hydrogeologic relationship between the formations." Reg. 15A(2). "[A]ll production wells within[807 A.2d 172] 1/2 mile of the site boundary" must be surveyed, Reg. 15A(3), and at least three separate groundwater contour maps prepared and submitted. Reg. 15A(4). A Phase II report must include "[a] discussion of the potential for the vertical *and horizontal movement of pollutants* into the waters of the State." Reg. 15A(9) (emphasis added).

If an application clears Phase II of the process, the applicant must then submit complete plans and engineering reports "prepared, signed, and bearing the seal of a registered professional ***497** engineer." Reg. 16A. At Phase III MDE considers, *inter alia,*

> "(11) *Methods of controlling on-site drainage, drainage leaving the site,* and drainage onto the site from adjoining areas. Erosion and sediment control provisions shall be approved by the local soil conservation district and satisfy the requirements of Environment Article, Title 4, Subtitle 1, and COMAR 26.09.01.
>
> "(12) A contingency plan for preventing or mitigating the pollution of the waters of this State.
>
> ....
>
> "(14) A system for monitoring the quality of the waters of the State around and beneath the site....
>
> ....
>
> "(20) A proposed method, engineering specifications, and plans for the collection, management, treatment, and disposal of leachate generated at the facility, including the calculations used to determine the estimated quantities of leachate to be generated, managed, stored, treated, and disposed."

Id. (emphasis added).

Regulation 16C regulates the cell liners and leachate collection systems. The liner is "to prevent *the migration of pollutants out of the landfill to the*

adjacent subsurface soil, ground water, or *surface water*." Reg. 16C(2) (emphasis added). MDE regulates all aspects of the liner system. Reg. 16C(3)-(7). MDE also regulates the operating procedures of rubble landfills including "Protection of Liner and Leachate Collection System," periodic, intermediate and final cover material, and "Environmental Protection." See Reg. 18B, F, G, H, and K.

Maryland appellate decisions have held that the State regulatory schemes for solid waste and for sewage sludge impliedly preempt various types of local legislation. *Holmes v. Maryland Reclamation Assocs., Inc.*, 90 Md.App. 120, 600 A.2d 864, *cert. granted*, 327 Md. 55, 607 A.2d 564, *and cert. dismissed*, 328 Md. 229, 614 A.2d 78 (1992), was a challenge by the developer of a rubble landfill to the validity of a Harford ***498** County ordinance which removed the proposed site from the waste management plan. When the repealer was passed in May 1990 a rubble landfill was a permitted use in a number of use districts. *Id.* at 135-36, 600 A.2d at 871. Judge Alpert, writing for this Court, after a careful review of the then statutes and caselaw, held that

> "the legislature intended to occupy the field of landfill regulation in a manner that limits a county's role to identifying the type of waste that may be disposed of in a rubble landfill, determining whether a proposed site is consistent with its [solid waste management] plan, and in determining whether a site meets 'all applicable zoning and land use requirements.' [Maryland Code (1987), § 9-210(1) of the Environment Article].... When the Harford County Council enacted [the repealer], it obviously did so because of a feared threat to ground water resources in the area and because of considerations related to land use compatibility. It was not a [807 A.2d 173] determination that the site was inconsistent with the Harford County solid waste management plan. Under the statutory scheme, as it exists between the state and Harford County, the 'specific determination concerning the hydrogeological conditions of the site and the area' was an impermissible invasion on the state's permit review prerogative."
>
> *Id.* at 157, 600 A.2d at 882.

In reaching this conclusion this Court considered part of the planning subtitle, Envir § 9-502(c), which provides that a regulation adopted under that subtitle "does not limit or supersede any other county ... law, rule, or regulation that provides greater protection to the public health, safety or welfare." This Court said:

> "Section 9-502(c) does not operate to allow a county to veto state law. Nevertheless, its terms are logically harmonious with a scheme that allocates separate domains to each government entity: the state to regulate the permit issuing process including the scientific environmental aspect of ***499** landfill operation, and the county to regulate other aspects such as planning and zoning."

146 Md.App. 469, 807 A.2d 156, Days Cove Reclamation Co. v. Queen Anne's County, (Md.App. 2002)

Id. at 147 n. 13, 600 A.2d at 877 n. 13.

After the opinion in *Holmes* was filed, the General Assembly, by Chapter 636 of the Acts of 1992, amended Envir § 9-210 to add the sequence of consideration of an application for a refuse disposal system permit that is currently set forth in Envir § 9-210(a). See note 2, *supra*.

In *Mayor & City Council of Baltimore v. New Pulaski Co. Ltd. Partn.*, 112 Md.App. 218, 684 A.2d 888 (1996), *cert. denied*, 344 Md. 717, 690 A.2d 523 (1997), the promoter of a new incinerator challenged an ordinance of Baltimore City that established a moratorium on new incinerators. This Court held that Subtitles 2 and 5 of Title 10 of the Environment Article, dealing with the state licensing scheme and solid waste management plans, respectively, "indicate an intent of the General Assembly comprehensively to occupy the field of solid waste management." *Id.* at 231, 684 A.2d at 894. The moratorium was held to be invalid because it usurped the State of "its exclusive authority over county plans and the relevant permitting process." *Id.* We also concluded that "a ban on incinerators is not a traditional area of regulation controlled by local government, except for legitimate zoning and planning reasons." *Id.*, 112 Md.App. at 231, 684 A.2d at 895.

Similar to the foregoing cases is *DCRCo I, supra*, 122 Md.App. 505, 713 A.2d 351. It was a challenge to the deletion of the Site involved in these proceedings from the solid waste management plan. In holding that the deletion was invalid, this Court undertook to synthesize the then cases saying:

> "[T]he cases yield the conclusion that the legislature did not preempt by implication the field of landfill utilization with respect to traditional zoning matters, including the location of landfills. Instead of abrogating local zoning authority, the legislature enacted a statutory scheme designed to foster cooperation between the State and local authorities. Nevertheless, the actions of the County in the instant case ***500** transcend ... traditional zoning matters ... and fall squarely within the purview of *Holmes* by breaching the 'permit' power that is specifically reserved for the State."

Id. at 526, 713 A.2d at 361 (internal citation and footnote omitted).

The most recent pronouncement by the Court of Appeals on preemption of local law by State environmental regulation is *Soaring Vista Props., Inc. v. County [807 A.2d 174] Comm'rs of Queen Anne's County*, 356 Md. 660, 741 A.2d 1110 (1999) To view preceding link please click here , *rev'g.* 121 Md.App. 140, 708 A.2d 1066 (1998). There the promoter of a sewage sludge storage facility sought a declaration invalidating two sections of the Queen Anne's County zoning ordinance that were enacted after the promoter had obtained a State permit for the project. The plaintiff contended that these provisions, which required a conditional use permit for the sewage sludge storage facility, were preempted by Md.Code (1982, 1996 Repl.Vol.), §§ 9-230 through 9-249 of the Environment Article, as they were in effect when the State permit was granted. The suit was filed before any

conditional use zoning proceedings had been conducted, and thus, unlike the present case, no reasons had yet been stated by the Board for any action on the application. The Court of Appeals held that the State statutes under which the permit had been granted preempted the County's conditional use requirement.

The Court reasoned that *Talbot County v. Skipper*, 329 Md. 481, 620 A.2d 880 (1993), presented the controlling analysis. The case involved a Talbot County prohibition against applying sewage sludge until the landowner's utilization permit from the State had been filed in the land records. *Skipper* had concluded that the State regulatory scheme relating to sewage sludge addressed a multitude of issues, was comprehensive and specific, and thereby preempted the local law. *Soaring Vista*, 356 Md. at 665, 741 A.2d at 1112. On the other hand, " '[i]n those circumstances where the General Assembly intended that local governments may act with regard to sewage sludge utilization, it expressly said so.' " *Id.* at 665, 741 A.2d at 1113 (quoting *Skipper*, 329 Md. at 492, 620 A.2d at 885) (alteration in original). Under the statutes regulating ***501** sewage sludge that were in effect when the storage permit was granted, the General Assembly expressly had recognized the role of local zoning as to the location of sewage sludge*composting* facilities, but not as to storage facilities. *Id.* at 666, 741 A.2d at 1113. Although Chapter 611 of the Acts of 1999 had amended Envir § 9-233(1) to require that sewage sludge storage facilities also "meet[ ] all zoning and land use requirements of the county," that later statute did not govern the permit in *Soaring Vista*.

[11] Envir §§ 9-204 through 9-229, constituting Subtitle 2, Part II, "Water Supply Systems, Sewerage Systems and Refuse Disposal Systems," are as comprehensive in their regulation as are Envir §§ 9-230 through 9-249 comprising Subtitle 2, Part III, "Sewage Sludge." Accordingly, the State statutes governing rubble landfills preempt local regulation, except to the extent specifically provided to the contrary. Consequently, we must determine which of the findings made by the Board in the instant matter fall within the express recognition of the local zoning role found in Envir § 9-210(a)(3).

[12] The legislative history of Envir § 9-210 demonstrates that the General Assembly's recognition of a local zoning role in landfill siting was not intended to encompass all aspects of what might be considered to be environmental protection. In Md.Code (1987), Envir § 9-210 provided that MDE could not issue a permit for a landfill until:

> "(1) The landfill meets all zoning and land use requirements of the county where the landfill is or is to be located; and
>
> "(2) The Department has a written statement that the board of county commissioners or the county council of the county where the landfill is to be located does not oppose the issuance of the permit."

[807 A.2d 175] Senate Bill 224 of the 1992 Session of the General Assembly proposed to alter the process for permitting refuse disposal systems to be

located in charter counties or municipal corporations. As introduced the bill would have required that application ***502** be made to the executive of the site's governmental unit who would "analyze the permit application to determine if the proposed refuse disposal system meets the environmental requirements of the county or municipal corporation...." 1992 Md. Laws at 3738. If the executive approved the application, the matter would be submitted to the legislative body with a recommendation for acceptance or rejection. If the legislative body approved the application, it would certify to MDE that certain requirements had been met, including the requirement that "the site meets the environmental requirements of the county or municipal corporation." *Id.* at 3739. Absent a favorable resolution of the legislative body of the governmental unit, MDE was prohibited from issuing any permit for a proposed refuse disposal system.

All of these provisions were stricken in the course of passage of Senate Bill 224. When enacted as Chapter 636, that legislation, in relevant part, added the three requirements and the sequence of requirements, now found in Envir§ 9-210(a)(1), (2), and (3). See note 2, *supra*.

[13] Thus, insofar as landfills are concerned, the traditional zoning and land use decisions which, under our cases reviewed above, are to be made by the local government do not include determining what is necessary in order to protect the environment from the pollutants that are generated specifically by a rubble landfill. Applying this interpretation to the evidence in this case produces varying results.

[14] The Board found less than credible the type of waste that would and would not be accepted at the Site (fact-finding 10). This subject involves the enforcement of any State permit that might be issued, and it is not a matter of local zoning.

[15] The evidence from John Nickerson, the Director of Environmental Health for the County Health Department, was that, because the Calvert formation is twenty feet thick at the Site, but is 100 feet thick in other parts of the County, there would be less possibility at some other location that ***503** leachate, which in some way might enter the Columbia aquifer, would pass through the Calvert aquiclude and enter the water supply in the Aquia aquifer. This risk (fact-findings 8 and 16) is to be evaluated exclusively by MDE during the permit process.

[16][17] Similarly, the risk that pollutants in leachate, such as metals, will be commingled with groundwater or surface water and produce adverse effects offsite (fact-finding 7) is for MDE's exclusive evaluation in the permit process. Indeed, the amendments to the County Zoning Code by Ordinance 99-04, which eliminated groundwater considerations, seem to recognize as much. Further, the reference in § 18-1-132(d)(7)(vi)(6) of the County Zoning Code to protection of "environmentally sensitive areas" as a consideration for denying a conditional use for a rubble landfill is preempted to the extent that that provision might be applied to the risk of an escape of rubble landfill leachate from containment.

146 Md.App. 469, 807 A.2d 156, Days Cove Reclamation Co. v. Queen Anne's County, (Md.App. 2002)

[18][19] On the other hand, stormwater management is a traditional concern of the zoning process. *See, e.g., Overton v. Board of County Comm'rs of Prince George's County,* 225 Md. 212, 170 A.2d 172 (1961); *People's Counsel for Baltimore County v. Mangione,* 85 Md.App. 738, 584 A.2d 1318 (1991); *Clise v. Phillips Coal, Inc.,* 40 Md.App. 609, 392 A.2d 1177 (1978). We interpret MDE's power to evaluate the [807 A.2d 176] potential for "horizontal movement of pollutants," COMAR 26.24.07.15.A(9), and "to prevent the migration of pollutants out of the landfill to the adjacent ... surface water," Reg. 16C(2), to refer to pollutants which landfills generate, but not to include forms of pollution that are common to many types of land uses. Consequently, whether surface runoff or stormwater maintenance basin discharge will cause thermal pollution is within the power of the local zoning authorities to decide (fact-finding 7). In the instant matter, however, there was not substantial evidence to support such a finding by the Board.

We also hold that the subject matter of the Board's fact-findings that are not discussed above in this Part VII are ***504** within the local zoning role that is excluded by Envir § 9-210(a)(3) from the otherwise general preemption effected by State law. Specifically, subject matters within the local zoning power are illustrated by the Board's fact-findings 1 through 6, 9, and 11 through 15.

VIII. Two Landfills

(Fact-findings 5 and 15)

[20] The Board also based its denial of the conditional use on "the additional cumulative impact of the proposed use in an area where there is already a landfill" (fact-finding 5). The Board further found that "[t]he cumulative impact of two landfills will substantially impact the neighboring community by devaluing residential properties" (fact-finding 15). In its brief the County describes fact-finding 5 as the "[a]dditional cumulative impact of the proposal in an area in which there is an existing landfill." Appellees' (County's) Brief at 8. These findings are not supported by the evidence. It is uncontradicted that the former landfill on County-owned property on the west side of Glanding Road has been closed and capped for some time. Protestants argue that "[t]he Board further found an additional basis that the proposed site in this existing community is unique and special and that centered upon the existence of a closed sanitary landfill and a currently active transfer station directly across Glanding Road from the subject site." Appellees' (Protestants') Brief at 28. Protestants' paraphrase of the Board's finding is not what the Board literally said.

Appellees rely upon *Brandywine Enters., Inc. v. County Council for Prince George's County,* 117 Md.App. 525, 700 A.2d 1216, *cert. denied,* 347 Md. 253, 700 A.2d 1214 (1997); *Moseman v. County Council of Prince George's County,* 99 Md.App. 258, 636 A.2d 499, *cert. denied,* 335 Md. 229, 643 A.2d 383 (1994); and *Entzian v. Prince George's County,* 32 Md.App. 256, 360 A.2d 6 (1976), in each of which this Court ***505** affirmed the denial by the zoning authority of a special

exception for a landfill. Of these three decisions, only *Moseman* and *Brandywine* involved two landfills. Supporting the denial in *Entzian* were the facts that the proposed landfill abutted a natural park area and that the site contained deep ravines which sloped to the Patuxent River so that the landfill operation would destroy surface water systems, cause severe erosion problems, and potentially carry sediment and leachate directly to the Patuxent River. 32 Md.App. at 265, 360 A.2d at 11.

The application in *Moseman* sought a second landfill across the road from an existing, operational landfill. The existing landfill was permitted to operate with unlimited truck trips. 99 Md.App. at 264, 636 A.2d at 502. It was "the existence of the adjoining rubble fill currently in operation" which created the unique adverse impact at the proposed site. *Id.*

Brandywine involved a 450-acre site principally used for sand and gravel mining. [807 A.2d 177] A portion of that property had been granted a special exception in 1982 for a rubble landfill and that permission was enlarged to 177 acres in 1988. The application in the reported case was made in 1993, seeking to extend the rubble landfill by an additional 118 acres. The applicant attempted to avoid the holding of *Moseman* by contending that actual operations on the additional 118 acres would be postponed until the closing of the then existing cells that operated under the prior permission. Factors which made the additional area uniquely adverse included the fact that, when the landfill would be closed, a cluster of four homes would have 100 foot high piles of rubble on three sides. *Brandywine,* 117 Md.App. at 537, 700 A.2d at 1222. Further, there would be a cumulative adverse impact, even under the applicant's proposal, inasmuch as an active landfill operation would continue at the site for twenty-two years. *Id.* at 539, 700 A.2d at 1222. In the instant matter the landfill would not surround any residential properties and the operational life of the landfill is estimated at five to ten years.

***506** The Applicant, on the other hand, finds comfort in *Mossburg v. Montgomery County,* 107 Md.App. 1, 666 A.2d 1253 (1995), *cert. denied,* 341 Md. 649, 672 A.2d 623 (1996). That case involved the siting of a solid waste transfer station in an industrial zone. The Board of Appeals' denial of a special exception was affirmed by the circuit court. This Court reversed, with directions that the circuit court order the Board of Appeals to grant the special exception. The site proposed for the solid waste transfer station was on the easterly side of Southlawn Creek. Across that creek was a former Montgomery County landfill and incinerator on property which drained into the same drainage basin as the proposed use. *Id.* at 14, 666 A.2d at 1260. The decision is consistent with the conclusion that the proposed solid waste transfer station in combination with the closed landfill and incinerator, did not furnish substantial evidence of a unique, cumulatively adverse effect on the neighborhood.

Photographs in evidence in the instant matter show that the closed County landfill lies somewhat below the grade of Glanding Road. The former landfill is unimproved and is covered by grass, bushes, and, in some areas, trees. Access to

the receptacles constituting the "residential solid waste convenience center" is from Glanding Road via a lane which passes through a stand of trees. These trees partially screen the waste receptacles from Glanding Road.

Allen Boyles, whose property abuts the southern boundary of the Site and lies across Glanding Road from the County landfill property, built his house when the County landfill was in operation. Describing the closed landfill he said, "It's just a convenience center now for local Queen Anne's County only residents, and that's all it is. Very little trash."

On these facts, there is a lack of substantial evidence to find that the "residential solid waste convenience center," in conjunction with the Site, creates a uniquely adverse effect in this neighborhood.

***507 IX. Traffic Safety**

(Fact-findings 3 and 14)

[21] The Board referred to "the increased speed of the trucks due to the upgrading of the existing roadways" as a reason for denying the conditional use (fact-finding 3). The Board's point seems to be that trucks traveling to and from the Site will be able to move more quickly than they would have been able to do were the roads not improved. Of course, the purpose of the State and County highway engineers in recommending the road improvements[807 A.2d 178] was to *improve* traffic safety. In any event, although the Protestants were unanimous in their concerns over truck traffic, we fail to see how the speed of trucks on trips to or from the Site will be any greater than the speed of trucks on trips to or from a rubble landfill at some other location in the zone. The economics of the shipping of rubble dictate that large trucks be used. Large trucks require roads of a certain size. Roads of a size sufficient to accommodate large trucks adequately and safely will be necessary to service a rubble landfill, wherever located. Further, the drivers of trucks traveling roads serving a rubble landfill, wherever located, are obliged to honor the posted speed limit.

In support of the denial of Applicant's request, the Board also noted with concern "the adjacent residential property, school aged children, school buses, and safety factors that would adversely be affected by truck traffic" (fact-finding 14). This finding raises a characteristic of the Site which may or may not be unique, as it bears on the safety of school children.

There are bends in Glanding Road above and below the entrance into the property of Allen Boyles and his family. He is worried that trucks using Glanding Road will strike his children, who wait at the end of his driveway to board a school bus at 7:00 a.m. and who return at 3:30 p.m. Conventional, painted signs warn motorists on Glanding Road that they are approaching a school bus stop. Nevertheless, DCRCo caused its traffic engineer to investigate the situation after the close ***508.** of the Protestants' case. In DCRCo's rebuttal case, its traffic engineer testified that DCRCo will, at its expense, cause the

installation of electronic warning signs on Glanding Road that would function during the hours when children would be picked up or dropped off by the school bus.

This Court has recognized that "[v]irtually every human activity has the potential for adverse impact." *Mossburg*, 107 Md.App. at 25, 666 A.2d at 1265. Here, the Applicant's proposed additional condition to the grant of the conditional use so mitigates the risk that it cannot be considered an adverse traffic impact of the proposed landfill at the Site.

X. Conclusion

For all of the foregoing reasons we shall reverse the judgment of the Circuit Court for Queen Anne's County and remand this matter with instructions for that court to direct the County Board of Appeals to grant the requested conditional use.

JUDGMENT OF THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY REVERSED. CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO REVERSE THE ORDER OF THE BOARD OF APPEALS AND TO REMAND THIS MATTER TO THE BOARD OF APPEALS WITH INSTRUCTIONS TO ISSUE A CONDITIONAL USE, CONSISTENT WITH THIS OPINION.

COSTS TO BE PAID BY THE APPELLEES.

[807 A.2d 179]

TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLE

(FN1.) In Queen Anne's County the three County Commissioners sit as the Board of Appeals.

(FN2.) Envir (2001 Supp.), § 9-210 in relevant part provides:

"(a) *In general*.--Subject to the provisions of subsection (b) of this section, the Secretary may not issue a permit to install, materially alter, or materially extend a refuse disposal system regulated under § 9-204(a) of this subtitle until the requirements set forth in this subsection are met in the following sequence:

"(1) Except for the opportunity for a public informational meeting, the Department has completed its preliminary phase 1 technical review of the proposed refuse disposal system;

"(2) The Department has reported the findings of its preliminary phase 1 technical review, in writing, to the county's chief elected official and planning commission of the county where the proposed refuse disposal system is to be located; and

"(3) The county has completed its review of the proposed refuse disposal

system, and has provided to the Department a written statement that the refuse disposal system:

"(i) Meets all applicable county zoning and land use requirements; and

"(ii) Is in conformity with the county solid waste plan.

"(b) *Completion of requirements.*--Upon completion of the requirements of subsection (a)(1) and (2) of this section, the Department shall cease processing the permit application until the requirements of subsection (a)(3) of this section are met."

In Subtitle 2 of Title 9 of the Environment Article a "refuse disposal system" includes a landfill. See Envir § 9-201(e)(4).

(FN3.) We were advised at oral argument that the County property serves as a collection point, principally for recyclables.

(FN4.) As defined in MDE regulations dealing with solid waste management, " 'leachate' means liquid that has percolated through solid waste and has extracted, dissolved or suspended material from it." COMAR 26.04.07.02(15).

(FN5.) The evidence most favorable to the appellees is that a closed cell will rise, at a maximum, approximately fifty feet above surrounding grade, according to DCRCo's engineer.

(FN6.) An independent third-party checker is a requirement for an unlined landfill under MDE regulations, but that precaution is not required for a lined landfill.

(FN7.) A 1995 EPA study, *Construction and Demolition Waste Landfills,* estimated that there were approximately 1,800 construction and demolition landfills in the United States at that time. *Id.* at ES3.

(FN8.) At one point in his cross-examination Klein acknowledged that all of the data used in his opinion were from unlined landfills. Later in his cross-examination Klein said that he used the concentrations for chromium, zinc, mercury, lead, cadmium, silver, and copper that had been determined from samples taken in November 1995, March 1996, November 1996, February 1998, and April 1999 at a rubble landfill in Washington County, Maryland that is a lined landfill. We have been unable to reconcile this testimony with the reports from Washington County that are attached to Klein's written report. The comparison is set forth in the chart below. All data are presented in milligrams per liter.

***508** (FN9.) Bentonite is a high-swelling and low permeability clay. In theory, if water were to leak through a hole in the overlying plastic membrane, the bentonite would, on contact with water, swell and fill the hole.

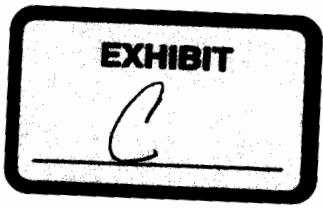
(FN10.) DCRCo's evidence is that plastic caps are usually covered with soil either immediately or within forty-eight hours after deployment and seaming.

(FN11.) DCRCo's evidence is that infiltration can require seven to seventy days.

(FN12.) COMAR 26.23.06.01Q(12) simply designates "Unicorn Millpond" as a nontidal wetland area of special State concern. Although DCRCo does not concede that MDE would delineate as the nontidal wetland the same area as did Klein, Klein's evidence is uncontradicted.

(FN13.) In Subtitle 2 of Title 9 of the Environment Article " '[p]erson' includes the federal government, a state, county, municipal corporation, or other political subdivision." Envir § 9-201(d).

Citation/Title
107 Md.App. 1, 666 A.2d 1253, Mossburg v. Montgomery County, (Md.App. 1995)



*1 107 Md.App. 1

666 A.2d 1253

Court of Special Appeals of Maryland.

William H. MOSSBURG, Jr., et al.
v.
MONTGOMERY COUNTY, Maryland, et al.
No. 58, Sept. Term, 1995.
Oct. 2, 1995.
Reconsideration Denied Dec. 7, 1995.

The Circuit Court, Montgomery County, S. Michael Pincus, J., affirmed order of county board of appeals denying applicants' request for special exception for operation of solid waste transfer station in I-2 industrial zone in county, and applicants appealed. The Court of Special Appeals, Cathell, J., held that board's decision to deny special exception was not based on substantial evidence of adverse impacts at the subject site greater than or above and beyond impacts elsewhere in this particular I-2 zone or in any other I-2 zones and therefore, decision was arbitrary and illegal.

Reversed and remanded.

West Headnotes

[1] Zoning and Planning ⚷1
414 ----
414I In General
414k1 Nature in General.
Zoning is an interference (if done correctly, a permissible one) with propert owner's constitutional rights to use his own property as he sees fit.

[2] Zoning and Planning ⚷70
414 ----
414II Validity of Zoning Regulations
414II(B) Regulations as to Particular Matters
414k70 Complete Prohibition of Use Within Municipality.

[See headnote text below]

[2] Zoning and Planning ⚷87
414 ----
414II Validity of Zoning Regulations
414II(B) Regulations as to Particular Matters
414k87 Variances or Exceptions.
There was no illegality on part of legislative body of county in establish

that solid waste transfer operations were permitted as special exceptions only in I-2 industrial zones of county; in fact, had that policy-making body chosen to prohibit such uses altogether, court would not be inclined to question its powers to do so unless, in so doing, it eliminated all viable economical uses of property.

[3] Zoning and Planning 481
414 ----
414IX Variances or Exceptions
414IX(A) In General
414k481 Nature and Necessity in General.
Special exception/conditional use in zoning ordinance recognizes that legislative body of representative government has made policy decision for all of the inhabitants of the particular governmental jurisdiction and that the exception or use is desirable and necessary in its zoning planning provided certain standards are met.

[4] Zoning and Planning 489
414 ----
414IX Variances or Exceptions
414IX(A) In General
414k489 Grounds for Grant or Denial in General.
It is not whether special exception/conditional use is compatible with permitted uses that is relevant in administrative proceedings and thus, in special exception cases, general compatibility is not normally proper issue for agency to consider for that issue has already been addressed and legislatively resolved; by designating special exception, legislative body has deemed it to be generally compatible with the other uses.

[5] Zoning and Planning 489
414 ----
414IX Variances or Exceptions
414IX(A) In General
414k489 Grounds for Grant or Denial in General.
In special exception cases, the question is not whether use permitted by way of special exception will have adverse effects (adverse effects are implied in the first instance by making such uses conditional uses or special exceptions rather than permitted uses), but rather whether adverse effects in particular location would be greater than adverse effects ordinarily associated with particular use that is to be considered by agency.

[6] Zoning and Planning 502.1
414 ----
414IX Variances or Exceptions
414IX(A) In General
414k502 Particular Structures or Uses
414k502.1 In General.
Question in case involving applicants' request for special exception for operation of solid waste transfer station in I-2 industrial zone was not whether

station had adverse effects (it inherently had them) nor was it whether station would have adverse effects at this proposed location (certainly it would and those effects were contemplated by statute); proper question was whether those adverse effects were above and beyond, i.e., greater here than they would generally be elsewhere within the areas of the county where they might be established, i.e., the other few I-2 industrial zones.

[7] Zoning and Planning 502.1
414 ----
414IX Variances or Exceptions
414IX(A) In General
414k502 Particular Structures or Uses
414k502.1 In General.

Court of Special Appeals' discussion of county board of appeals' denial of applicants' request for special exception for operation of solid waste transfer station in industrial zone would be primarily directed to board's findings of adverse effects since the special exception had, by the very reason of provisions for its existence, been predetermined by the legislative, policy-making body of county to be generally beneficial.

[8] Zoning and Planning 539
414 ----
414IX Variances or Exceptions
414IX(B) Proceedings and Determination
414k537 Weight and Sufficiency of Evidence
414k539 Particular Uses.

County board of appeals' finding that environmental concerns warranted denial of applicants' request for special exception for operation of solid waste transfer station in I-2 industrial zone in county was not based upon substantial evidence and, accordingly, was arbitrarily made; the clear and uncontradicted evidence was that those agencies in county charged with determining whether there would be unacceptable adverse environmental impact from the use on the subject site determined that there would not be and there was no evidence that environmental impact of applicants' use at the subject site would be greater, or above and beyond, that impact elsewhere within the I-2 zone or other I-2 zones in county.

[9] Zoning and Planning 539
414 ----
414IX Variances or Exceptions
414IX(B) Proceedings and Determination
414k537 Weight and Sufficiency of Evidence
414k539 Particular Uses.

County board of appeals' decision to deny special exception for operation of solid waste transfer station in I-2 industrial zone in county was not based on substantial or sufficient evidence of adverse impacts at the subject site greater than or above and beyond the impacts elsewhere in this particular I-2 zone or in any other I-2 zones and therefore, decision to deny special exception was arbitrary and illegal.

[666 A.2d 1255] *3 Todd D. Brown (Joseph P. Blocher and Linowes and Blocher, on the brief), Silver Spring, for appellants.

Karen L. Federman Henry, Associate County Attorney (Charles W. Thompson, Jr., County Attorney, and A. Katherine *4 Hart, Senior Assistant County Attorney, on the brief), Rockville, for appellee Montgomery County.

Norman G. Knopf (Dennis M. Cate and Knopf & Brown on the brief), Washington, DC, for appellees Twin Lakes, et al.

William Jensen, Rockville, on the brief, pro se.

Argued before MOYLAN, WENNER and CATHELL, JJ.

CATHELL, Judge.

William H. Mossburg Jr., *et al.*, appeal from an order of the Circuit Court for Montgomery County that affirmed the order of the Montgomery County Board of Appeals denying appellants' request for a special exception for the operation of a solid waste transfer station in an I-2 Industrial Zone in the Southlawn Lane industrial corridor of Rockville, a zone in which such uses are permitted as special exceptions.

This case is a companion case to one also on appeal and being considered by the same panel of this Court, *Mossburg v. Montgomery County* [No. 57, 1995 Term], which involves the grant of declaratory and injunctive relief, foreclosing Mossburg's attempt to continue the operation of a solid waste transfer operation at another location as a legal nonconforming use. The case*sub judice* arises out of appellants' attempt to transfer the business from that location to the one in the instant case. In order to do so, a special exception is necessary.

There have been several judicial proceedings involving this matter. At least one has proceeded as far as the Court of Appeals. The companion case, at one point, at least facially, was subject to a compromise via a consent agreement before an administrative agency. That settlement contemplated the possible relocation of the operation. At that time, the Montgomery County zoning code did not permit such uses in any zone. The County apparently amended the code to provide for such uses in certain industrial zones. The legislative process began as an attempt to classify such uses as permitted in the designated zone. For whatever reason, by the time the *5 process was completed, solid waste transfer uses were permitted in I-2 Industrial Zones, but only as special exceptions.

The inventory of I-2 Zones in Montgomery County is apparently extremely limited. (FN1) The I-2 industrial corridor at issue here is already intensively built up with heavy industrial uses, as we shall hereafter discuss.

On this appeal, appellants present two questions:

107 Md.App. 1, 666 A.2d 1253, Mossburg v. Montgomery County, (Md.App. 1995)

I. Was the Board of Appeal[s]'s denial of the application on remand the result of impermissible "change of mind" conclusions and therefore arbitrary and capricious?

II. Were the reasons given by the Board of Appeals for its denial of the application supported by substantial evidence of record?

[666 A.2d 1256] Before discussing the facts of this particular case, it may be helpful to discuss, once again, (1) how provisions for special exceptions are created in zoning codes, (2) the policy statements made by the creation of those provisions, (3) the inherent permissive nature of such exceptions, and (4) the proper focus to be utilized in determining whether a proposed special exception satisfies the conditions of the statute.

[1] Any discussion of any zoning matter, be it, *inter alia*, rezoning, special exceptions/conditional uses, or variances, must always recognize that zoning is an interference (if done correctly, a permissible one) with a property owner's constitutional rights to use his own property as he sees fit. The Fifth ***6** Amendment to the United States Constitution provides, in pertinent part:

> No person shall be ... deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation.

See also Article 24 of the Maryland Declaration of Rights. In *Offen v. County Council*, 96 Md.App. 526, 625 A.2d 424 (1993), *aff'd in part, rev'd in part on other grounds*, 334 Md. 499, 639 A.2d 1070 (1994), we noted that, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1012-15, 112 S.Ct. 2886, 2892-93, 120 L.Ed.2d 798 (1992), the Supreme Court there said that, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), the Court "had first recognized" that

> [i]f ... the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]."

Offen, 96 Md.App. at 550-51, 625 A.2d 424. We went on, in *Offen*, to describe part of the history of zoning generally and its legitimate regulation of uses of private property, recognizing the awesome (but not unlimited) power of government to regulate such uses.

[2] In that regard, we perceive no illegality, in the case *sub judice*, on the part of the legislative body of Montgomery County in establishing that solid waste transfer operations are permitted as special exceptions only in the I-2 Industrial Zones of Montgomery County. In fact, had that policy-making body chosen to prohibit such uses altogether, we would not be inclined to question its

powers to do so unless, in so doing, it eliminated all viable economical uses of a property. (FN2) Appellants, in the case *sub judice,* do not challenge the ***7** power of the County to provide for the use by way of a special exception, but question whether the body charged with administering that law, *i.e.*, the Board, has done so properly.

Special Exceptions

We noted, in *Cromwell v. Ward,* 102 Md.App. 691, 701, 651 A.2d 424 (1995), citing *Stacy v. Montgomery County,* 239 Md. 189, 193, 210 A.2d 540 (1965), that "[a] special exception ... is expressly permissible...." *See also Montgomery County v. Merlands Club, Inc.*, 202 Md. 279, 288, 96 A.2d 261 (1953); *Cromwell,* 102 Md.App. at 702, 651 A.2d 424 (citing *Eberhart v. Indiana Waste Systems, Inc.*, 452 N.E.2d 455, 459 (Ind.App. 3 Dist.1983) ("A conditional use [(FN3)] is a desirable use which is attended with detrimental effects which require that certain conditions be met.")); *Ash v. Rush County Bd. of Zoning Appeals,* 464 N.E.2d 347, 350 (Ind.App. 1 Dist.1984) ("A special exception involves a use which is permitted ... once certain statutory criteria have been satisfied.").

[3] We noted, in respect to attempts to utilize variance procedures to eliminate conditions, in the conditional use case of *Chester Haven Beach Partnership v. Board of Appeals,* 103 Md.App. 324, 336, 653 A.2d 532 [666 A.2d 1257] (1995), that it is "the generally accepted proposition[ ] that, if the express conditions ... are met, it is a permitted use because the legislative body has made that policy decision." Thus, we conclude, as this Court and the Court of Appeals often have, that a special exception/conditional use in a zoning ordinance recognizes that the legislative body of a representative government has made a policy decision for all of the inhabitants of the particular governmental jurisdiction, and that the exception or use is ***8** desirable and necessary in its zoning planning provided certain standards are met.

The modern seminal case, authored by the late Judge Davidson (who had herself risen through the community organizations and the planning/zoning arena of Montgomery County), is *Schultz v. Pritts,* 291 Md. 1, 432 A.2d 1319 (1981). That case, with but minor modifications, and with but one or two strained deviations, *see Board of County Comm'rs v. Holbrook,* 314 Md. 210, 550 A.2d 664 (1988), remains the standard by which special exception questions are resolved. After furnishing legal and historical background, Judge Davidson noted for that Court that

> [w]hen the legislative body determines that *other uses are compatible with the permitted uses* in a use district, but that the beneficial purposes such other uses serve do not outweigh their *possible* adverse effect, such uses are designated as conditional or special exception uses. Such uses cannot be developed *if at the particular location proposed* they have an adverse effect *above and beyond* that ordinarily associated with such uses.

Schultz, 291 Md. at 21-22, 432 A.2d 1319 (emphasis added, citations omitted).

[4][5][6] Thus, it is not whether a special exception/conditional use is compatible with permitted uses that is relevant in the administrative proceedings. The legislative body, by designating the special exception, has deemed it to be generally compatible with the other uses. In special exception cases, therefore, general compatibility is not normally a proper issue for the agency to consider. That issue has already been addressed and legislatively resolved. Moreover, it is not whether a use permitted by way of a special exception will have adverse effects (adverse effects are implied in the first instance by making such uses conditional uses or special exceptions rather than permitted uses), it is whether the adverse effects in a particular location would be greater than the adverse effects ordinarily associated with a particular use ***9** that is to be considered by the agency. As Judge Davidson opined in *Schultz:*

> [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 22-23, 432 A.2d 1319 (emphasis added). The question in the case*sub judice,* therefore, is not whether a solid waste transfer station has adverse effects. It inherently has them. The question is also not whether the solid waste transfer station at issue here will have adverse effects at this proposed location. Certainly, it will and those adverse effects are contemplated by the statute. The proper question is whether those adverse effects are above and beyond, *i.e., greater here* than they would generally be elsewhere within the areas of the County where they may be established, *i.e.*, the other few I-2 Industrial Zones. In other words, if it must be shown, as it must be, that the adverse effects at the particular site are greater or "above and beyond," then it must be asked, greater than what? Above and beyond what? Once an applicant presents sufficient evidence establishing that his proposed use meets the requirements of the statute, even including that it has attached to it some inherent adverse impact, an otherwise silent record does not establish that that impact, however severe at a given location, is greater at that location than elsewhere.

In the recent case of *Sharp v. Howard County Bd. of Appeals,* 98 Md.App. 57, 73, 632 A.2d 248 (1993), Judge Harrell, for this [666 A.2d 1258] Court, noted the position of the appellants in that case:

> [A]ppellants postulate that *Schultz v. Pritts* can only be correctly applied if the agency ... first identifies the universe of potential adverse effects inherently associated with the abstract special exception use (which the legislative ***10** body was presumptively aware of when it permitted the use only after the grant of a special exception). With those inherent adverse effects in mind, the Board must then analyze which of the actual adverse

> effects on adjoining and surrounding properties demonstrated in the particular application exceed, in kind or degree, the inherent adverse effects due to the proposed location of the subject property of the application.

Judge Harrell then acknowledged the *Schultz* Court's discussion of the nature of the requisite adverse effect that would compel denial of a special exception. That discussion involved a contrasting review of two cases--*Deen v. Baltimore Gas & Elec. Co.*, 240 Md. 317, 214 A.2d 146 (1965), involving overhead power lines, and *Anderson v. Sawyer*, 23 Md.App. 612, 329 A.2d 716 (1974), *cert. denied*, 274 Md. 725 (1975), which, like *Schultz*, involved a funeral home. In discussing the cases, we quoted a portion of *Deen* that appears especially appropriate here:

> Appellants assert that it was error for the Board to fail to consider the future effects which the high tension wires would have on the health, safety and general welfare of the locality.... This factor was without relevance in this case, *because there was no evidence produced at the hearing which would show that the effect of high tension wires ... [in] this area would be* ***in any respect different than its effect on any other rural area.*** *Section 502.1 implies that the effect on health, safety or general welfare must be in some sense unique or else a special exception could never be granted in such an area....*

Sharp, 98 Md.App. at 77-78, 632 A.2d 248 (bold added). We likewise emphasized in *Sharp* portions of our *Anderson* decision:

> "... *Because there were neither facts nor valid reasons to support the conclusion that the grant of the requested special exception would adversely affect adjoining and surrounding properties in any way other than result from the location of any funeral home in any residential zone,* ***the *11 evidence presented by the protestants was, in effect, no evidence at all.***"

Id. at 79, 632 A.2d 248 (bold added.)

We shall now consider the issues of this case--*i.e.*, the evidence presented and the findings of the Board, findings affirmed by the trial court--keeping in mind as we do what we said about special exceptions in *People's Counsel v. Mangione*, 85 Md.App. 738, 747-48, 584 A.2d 1318 (1991):

> The term "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." *Cadem v. Nanna*, 243 Md. 536, 543, 221 A.2d 703 (1966). *It is a part of a comprehensive zoning plan, sharing the presumption that it is in the interest of the general welfare* and is, therefore valid. It is a use which has been legislatively predetermined to be conditionally compatible with the uses permitted as of right in a particular zone.... In sum, special exception

> is a "valid zoning mechanism that ... the legislative body has determined can, *prima facie,* properly be allowed in a specified use district, absent any fact or circumstance in a particular case which would change this presumptive finding."

85 Md.App. at 747-48, 584 A.2d 1318 (some emphasis added, footnote and citations omitted). We also keep in mind the standard of review we reiterated in *Mangione,* at 750, 584 A.2d 1318:

> The general standard of judicial review of most administrative factfinding 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." *Holbrook,* 314 Md. at 218, 550 A.2d 664 (quoting *Supervisor of Assess. v. Ely,* 272 Md. 77, 84, 321 A.2d 166 (1974)). Specifically, we shall review facts [666 A.2d 1259] and circumstances upon which the Board could have found that the special exception use and location proposed would cause an ***12** 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. *Holbrook,* 314 Md. at 217-18, 550 A.2d 664. [Footnotes omitted.]

We shall first direct our attention to appellants' second issue. We shall recite the facts as necessary.

II.

Were the reasons given by the Board of Appeals for its denial of the application supported by substantial evidence of record?

[7] We address the relevant portion of the "Opinion of the Board," *i.e.,* the findings and opinion of the Board. As the special exception here at issue has, by the very reason of provisions for its existence, been predetermined by the legislative, policy-making body of Montgomery County to be generally "beneficial," *Schultz, supra,* and presumptively compatible, our discussion of the Board's opinion will be primarily directed to its findings of adverse effects.

In its findings, the Board stated that the majority of its

> members remain concerned, as they were in 1990,[(FN4)] about the impact of the proposed special exception on the environment and on traffic safety. The Board concludes that the application must be denied because the applicant has not met its burden on these two vital issues.

We shall thus limit this portion of our review to those issues, *i.e.,* findings the Board states are the basis for its denial of the application, *i.e.,* the "environment" and "traffic safety." We shall attempt to focus on the

relationship those two findings have in respect to the standards that apply in cases involving special exceptions, especially to the requirement that such adverse effects be greater, *i.e.*, above and ***13** beyond, the adverse impact generally in other areas where such special exceptions are permitted. We therefore look for evidence, if any, in the record of the adverse effects and impact that could generally be expected as an inherent adverse impact anywhere in the I-2 Zones in order to determine whether the environmental and traffic safety impact at the subject site is greater.

The Board found that there would be adverse impact from runoff from the subject site into a tributary that ultimately drains into Rock Creek, the Potomac River, and the Chesapeake Bay. There is evidence to support that finding. There was no evidence, however, that other areas in this particular I-2 industrial corridor do not drain into the same tributary. The exhibits indicate that other properties in the corridor very possibly do. Moreover, there was no evidence as to whether the three other I-2 Zones located elsewhere in Montgomery County (Pepco, Montgomery Industrial Park, Brookville) drain into Rock Creek, the Potomac River, or the Chesapeake Bay watershed. Indeed, we know of no areas in Montgomery County where storm water runoff does not ultimately drain into the Chesapeake Bay. (FN5) We note again that the exhibits in the record indicate that Rock Creek, through its tributary, Southlawn Creek, drains the entire Southlawn I-2 industrial corridor, the specific I-2 Zone at issue here.

[666 A.2d 1260] Appellants asserted below, and here, that the drainage pattern of the industrial uses of the subject site runs from the site, *i.e.*, the southeast side of Southlawn Lane, to Southlawn ***14** Creek, and argue that runoff would, therefore, cross Southlawn Lane and find its way into that Creek. This pattern of runoff is due to the presence of a hill behind the subject site and, apparently, behind the other sites as well. It appears from the exhibits that most, if not all, of the existing uses in the I-2 Zone along the Southlawn Lane industrial corridor to the north of Gude Drive that abut on the lane drain in that direction as well. (FN6) If so, and it appears so, Southlawn Creek is subject to drainage from the printing plant, the Levine junkyard, the Wilcoxon operation, Montgomery Concrete batching operation, Montgomery Scrap Corporation (apparently a metal recycling facility), F.O. Day Co. (a construction company that appears to process scrap material at this location), Brigham & Day Paving Company, Genstar Stone Products Co., and A.H. Smith Asphalt Plant. Rockville Fuel and Feed and Beltway Movers also abut on Southlawn. Just behind Beltway Movers is Genstar Asphalt (another asphalt mixing plant) and, between Beltway Movers and Rockville Fuel and Feed, abutting on Southlawn, is another concrete batching plant, which utilizes, among other vehicles, numerous concrete and dump trucks.

Additionally, on the westerly side of Southlawn Creek, partially to the rear and across the Creek from the uses we have identified as being generally on the west side of Southlawn Lane, is a former Montgomery County landfill and incinerator operation that appears from the exhibits to be in the Southlawn/Rock Creek drainage basin. Moreover, there is a Montgomery County Sewage Treatment Plant off of Gude Drive, whose rear property line abuts on a wooded area that

appears to be contiguous with Southlawn Creek and its drainage basin.

In respect to the environmental issue, the Board concluded that it "cannot approve a use which it believes would run counter to the steps currently being taken to protect and ***15** improve Southlawn Creek. Denial is warranted for this reason alone." Interestingly, in so finding, the Board ignored the County Environmental Planning Division's (EPD) findings and recommendations, including the fact that "staff would recommend conditional approval subject to the applicant revising the currently approved ... plan and obtaining approval from MCDEP." Appellant revised the plan and agreed to meet the criteria and conditions of EPD. We shall further address this "environmental issue," *infra*.

In discussing traffic safety, the Board of Appeals initially acknowledged that a preliminary plan of subdivision will ultimately be required before actual permits for a solid waste transfer station could issue. It then acknowledged that the Planning Board was the proper body to evaluate the adequacy of the roads to handle the traffic generated by the use. It noted that § 59-G-1.21(a)(8) of the Montgomery County Code directs the Board of Appeals to condition the grant of a special exception on the Planning Board's determination of adequacy, *i.e.*, to defer to the Planning Board, and acknowledged that it is not its function to determine the adequacy of intersections or other facilities in respect to traffic. "Therefore, this Board will not make a finding about the adequacy of nearby intersections *or other elements* related to the adequacy of public facilities." (Emphasis added.) Nevertheless, it immediately did that which it has just said it would not do, by bootstrapping specific traffic safety matters under the general provisions of the Code.

The Board then paid lip service to the *Schultz* requirement of site specific adverse impact by saying:

> The Board's findings about traffic safety relate to the unique location of the subject property within the I-2 Zone. The subject property faces Southlawn Lane, which is a four lane road until just west of the Mossburg site.

[666 A.2d 1261] Only one other established use is northeast of, *i.e.*, farther out, ***16** the Southlawn Lane industrial corridor from Gude Drive, (FN7) that being the printing plant. This commercial printing plant also has truck loading and off-loading facilities and, from the photos admitted in evidence, parking for scores of vehicles. Further, it is situated on the two-lane portion of the road. It appears that Montgomery Concrete, a batching, mixing, and truck loading plant, across Southlawn Lane, is just south of the subject site. It fronts Southlawn Lane at the point where the road narrows. The exhibits show numerous heavy trucks at that location. The Levine property is situated on the southeast side of Southlawn Lane, abutting the subject site. It is, apparently, a junkyard--or at least a storage area for junked vehicles. Approximately 100 or more vehicles, including trucks and trailers, are shown situated on that location on the exhibits admitted in evidence. The Levine property is also on the two-lane section of Southlawn Lane.

Next to the Levine property, on the same side of Southlawn Lane as the subject property, is a site identified as the J.W. Wilcoxon property. It is located approximately where Southlawn Lane begins to narrow to less than four lanes. In the exhibit in evidence, in addition to buildings and cars, there were eleven or twelve trucks of various sizes on the site at the time the pictures were taken, and several vehicle trailers in addition to other equipment the purpose or use of which is unclear. On the west side of Southlawn Lane is another J.W. Wilcoxon facility abutting on "Incinerator Lane," south of Montgomery Concrete. It contains what appears to be large garages and warehouses. In addition to numerous cars, there are many trucks of various sizes, including tractor-trailer trucks and front-end loaders, and stored timber, pilings and other lumber situated on the site. These uses are all situated at the two-lane area of Southlawn Lane and/or at, or near, the point of its transformation from four to two lanes.

***17** The Board determined that this particular site is unique because it abuts on what is a two-lane road and because trucks cannot continue past the subject property because of restrictions on a bridge located further up Southlawn Lane. The Board stretches the facts to support the result it desires to achieve. The truck traffic generated by the subject site will not go past the subject site in any event. The traffic generated by the use terminates at the use. These trucks will not "proceed past" the subject site, so the fact that they *cannot* proceed past it because of a bridge is irrelevant. Except for the printing plant, the exhibits reflect no present industrial use in this I-2 Zone past the subject site. As the Board posits, the I-2 Zone contemplates the intense involvement of heavy trucks. When the legislative body provided for the subject special exception in I-2 Zones, it necessarily contemplated heavy truck traffic as normally associated with the use. As we indicate elsewhere, this legislative body knew exactly the type of business or use for which it was providing (as it had been involved in litigation over it) and devised the special exception process, at least partially, to address this specific use. (FN8)

The Board went on to find that the subject use generated a heavy traffic load, and that there would be many left turns *from* the subject site onto Southlawn Lane across both lanes of traffic because right turns from the subject site would be restricted because of the bridge. What the Board and appellees fail to recognize is that, even though trucks are required to exit left, though their destinations might be to the right, because the bridge forecloses that direction of travel, these vehicles are trucks that, without the bridge limitation, would be approaching the site from the direction of the bridge and making a left turn across the same opposing traffic and the same two lanes into the site. In actuality, left turns across two lanes of [666 A.2d 1262] traffic are not increased; they would be approximately ***18** the same. They are, because of the bridge, unidirectional. The traffic problem would be roughly the same. The existence of the bridge does not increase those problems.

The Board went on to note, *not find:*

> In addition, if trucks cannot enter the site because too many trucks are

already there, the only place for them to wait is on Southlawn Lane, effectively blocking the eastbound lane. *While the petitioner indicated that the site could accommodate all the trucks that he expects to arrive at one time, the Board appreciates the seriousness of the problem if the estimates prove to be faulty. If* trucks block the eastbound lane waiting to enter the site, other eastbound vehicles must either wait behind them, thus backing up traffic on Southlawn Lane, or they must pull out into the westbound lane to go around the truck. On a road as narrow as Southlawn Lane, this *may* pose a serious traffic hazard.

The Board heard testimony that the County plans to widen Southlawn Lane to four lanes in front of and beyond the Mossburg site. The roadway would be relocated to the north, and the existing pavement would become a service drive in front of the site. The Board believes that this would be a much better configuration to handle the high volume of heavy truck traffic expected at the site. However, in 1990 when this testimony was presented, the widening of Southlawn Lane was not included in the County's six-year Capital Improvements Program. Given several years of serious fiscal difficulty for the County, the Board is doubtful that Southlawn Lane will be widened in the near future. *In any event, if the weight limitations on the bridge continue, outgoing trucks will still be restricted to left turns only.* [Emphasis added.]

This statement by the Board is not a finding of what is, but what *may* be. It is mere speculation, and not a finding of present or future adverse impact that would be different here than elsewhere on Southlawn Lane or in the other I-2 Zone areas of Montgomery County.

***19 The Statute(s)**

Section 59-C-5.2 of the Code, "Land Uses," offers a general definition of I-2 "Heavy Industrial" uses:

A fundamental distinction between heavy industrial uses and light industrial uses involves the character of the industrial development. Typically, heavy industrial uses require larger sites to accommodate activities that often involve a variety of concurrent industrial processes on one site. *Heavy industrial developments generally involve larger volumes of heavy truck traffic and are located near specialized transportation links such as rail and major highways. In addition, heavy industrial uses are often noisy, dusty and dirty, as compared to other types of industrial and commercial activities. Heavy industrial uses are restricted to land classified in the I-2 Zone because the large scale nature of such uses, the traffic impacts, and environmental effects could be disruptive to lighter intensity industrial and commercial areas.* [Emphasis added.]

Included in permitted uses in I-2 Heavy Industrial Zones are bakeries, blacksmith shops, ornamental iron works, machine shops, battery plants, contracting storage yards, dry cleaning plants, small part manufacturing, food production, including packing, packaging, and canning, fuel storage, ice

manufacturing and storage, sheet metal manufacturing, numerous other manufacturing operations, including paint manufacturing, mobile home manufacturing, the manufacturing of paper products, stoneworks, distillation of alcohol, breweries, coal and tar operations, asphalt and concrete mixing plants, chemical and dye works, foundries, incinerators, junk yards, off-loading, storage and transfer of sand, gravel, or rocks, rock crushing (washing and screening), sanitary landfills, steam power plants, sugar refineries, pipelines, railroad yards and tracks, building material sales (wholesale or retail), lumberyards, outdoor storage quarries, and sand, gravel, and clay pits. In addition to solid waste transfer stations, other special exceptions that are permitted include fertilizer mixing plants, cable communication systems, [666 A.2d 1263] heliports, gas stations, shooting ranges, and stockyards.

***20** A solid waste transfer station is defined in § 59-A-2.1. as "[a] place ... where solid waste is taken from collection vehicles and placed in other vehicles or containers for transportation to other intermediate or final disposal facilities."

The general provisions in respect to all special exceptions include:

59-G-1.21. General conditions.

(a) A special exception may be granted when the board, the hearing examiner, or the district council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:

(1) Is a permissible special exception in the zone.

(2) Complies with the standards and requirements set forth for the use in division 59-G-2.

(3) Will be consistent with the general plan for the physical development of the district, including any master plan or portion thereof adopted by the commission.

(4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions and number of similar uses.

(5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood; and will cause no objectionable noise, vibrations, fumes, odors, dust, glare or physical activity.

(6) Will not, when evaluated in conjunction with existing and approved special exceptions in the neighboring one-family residential area, increase the number, intensity or scope of special exception uses sufficiently to affect the area adversely or alter its predominantly residential nature. Special exception uses in accord with the recommendations of a master or sector plan are deemed not to alter the nature of an area.

***21** (7) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area.

(8) Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm

drainage and other public facilities. If the special exception use requires approval of a preliminary plan of subdivision in accordance with chapter 50 of this Code, title "Subdivision of Land," the adequacy of public facilities will be determined by the planning board at the time of subdivision approval. In that case, the board of appeals must include such planning board approval as a condition of the grant of the special exception.

By reason of the holdings in *Schultz, supra,* and its progeny, such general conditions as are applied to special exceptions are themselves subject to the limitation that the adverse effects must be greater than or above and beyond the effects normally inherent with such a use anywhere within the relevant zones in the regional district (Montgomery County in this case). In the absence of a provision in the zoning statute clearly requiring a stricter standard than *Schultz, Schultz v. Pritts* applies. As we indicate elsewhere, some adverse impact is contemplated or the use would be permitted generally without resort to the special exception process. As so limited, the general provisions would have added to them, by operation of the language of the case law, *i.e., Schultz,* limiting language similar to that that we emphasize below as we reiterate certain of the relevant general conditions:

59-G-1.21. General conditions.

....

(5) Will not be [*more*] detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood [*at the subject site than it would be generally elsewhere in the zone or* [666 A.2d 1264] *applicable other zones*]; and will cause no [*more*] objectionable noise, vibrations, fumes, odors, ***22** dust, glare or physical activity [*at the subject site than it would generally elsewhere in the zone or applicable other zones*].

....

(7) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area [*more at the subject site than it would generally elsewhere in the zone or applicable other zones*].

See also the more recent Court of Appeals special exception case of *Harford County v. Earl E. Preston Jr. Inc.*, 322 Md. 493, 588 A.2d 772 (1991), wherein, after restating that portion of *Schultz* in respect to adverse impacts "above and beyond" inherent impacts of special exceptions, that Court rejected our contention that a *Gowl v. Atlantic Richfield Co.*, 27 Md.App. 410, 341 A.2d 832 (1975), standard had been engrafted in Harford County's statute. The Court of Appeals, in *Preston,* reiterated the continued viability of the *Schultz* standard in special exception cases; Judge Karwacki, for the Court, opined, at 503, 588 A.2d 772, "[W]e find no intention ... to substitute a *Gowl* test for the test ... for measuring ... adverse impact ... which we adopted in *Schultz*." It is with the caveats, found in the clauses we have added and emphasized above, in mind

that we review the actions of the Board, as affirmed by the trial court.

Utilizing the standard of review discussed, *supra,* in assessing the Board's determination of applicant's compliance with the "General Conditions" of the statute, *but including* the emphasized limitations that we feel must be considered when a special exception--deemed to be part of comprehensive zoning--is considered, we perceive that the application for a special exception has been wrongly denied. We explain.

First, the Board utilized only two findings in its denial--traffic safety and environmental concerns, *i.e.,* wastewater/stormwater management. We address the wastewater management issue first. The legislative body of Montgomery County has expressly provided for the environmental effects ***23** of private solid waste transfer stations, in the County's comprehensive Solid Waste Management Plan. Moreover, the County expressly included the area of this subject property in the Southlawn Lane industrial corridor in that plan in order that the State would "process Travilah Recovery's application for a solid waste permit at the new site. The County supports this amendment to facilitate moving the operation to the new site." The County went on to emphasize that solid waste management was primarily to be part of the waste management plan, noting in the amendment to its waste management plan:

II.I.3.c(2), Transfer Stations, private.

> Private persons who wish to operate solid waste transfer stations or recycling facilities in Montgomery County may not do so without a State solid waste disposal permit. The State will not issue a permit unless the site is shown in the Comprehensive Solid Waste Management Plan. With respect to these sites:
>
> 1. The County will review and comment on State solid waste disposal permit applications.
> 2. The site and any facility on the site must comply with all existing and future County laws and with relevant parts of this ten year solid waste management plan.
> 3. The County, as part of its review of permit applications, will designate materials which may be handled by private transfer stations and recycling facilities. These designations will be made at the time of application according to public solid waste flow control needs and may change from application to application.

This statute clearly indicates that the actual governmental monitoring of environmental concerns relating to a private solid waste transfer operation would be part of the County's waste management program, as opposed to its zoning programs. It reads: "The County, *as part of its review of permit applications, will designate....*" [Emphasis added.] The permit application therein mentioned thus provides for the ***24** County's review of the State permitting process in respect to any particular permit application.

[666 A.2d 1265] In the case *sub judice*, it was uncontradicted that handling of the materials to be transferred would be conducted inside a building serviced by interior drains that would funnel any drainage into the sanitary (not storm) sewer system. Thus, runoff from the interior operations, *i.e.*, that matter considered most polluting, would not drain ordinarily into Southlawn Creek. The sanitary system met the approval of the appropriate County agencies. Thus, as designed, it is rain water, *i.e.*, storm water, drainage that *might* periodically affect the Creek basin.

The Montgomery County Department of Environmental Protection designed and then approved a stormwater management plan for use at the subject site that included streambank protection by appellants off the subject site. Additionally, the Department required the construction of a sediment outlet trap on site and utilization of an oil/grit separator on site. All of these were agreed upon and the Department gave its approval, on July 11, 1989, that, insofar as the County was concerned, the wastewater and storm water control measures were sufficient. Subsequent agreements and covenants concerning maintenance of the required systems and bonding were duly formalized by execution and recordation of documents among the land records. As we have indicated, the Planning staff of the County recommended approval of the special exception, subject to appellants meeting certain conditions. The evidence clearly indicates that appellants have met and/or have agreed to meet those conditions.

Thus, the evidence is clear and uncontradicted that those agencies in Montgomery County charged with determining whether there would be an unacceptable adverse environmental impact from the use on the subject site have determined that there would not be.

But even more important, as we indicated earlier, there is absolutely no evidence, in respect to environmental concerns, that the environmental impact of appellants' use at the subject ***25** site would be greater, or above and beyond, that impact elsewhere within the I-2 Zone in this industrial corridor or other I-2 Zones in that part of the regional district situated in Montgomery County. In fact, all of the evidence indicates that the impact would be the same anywhere within this I-2 industrial corridor; from the evidence, the entire area appears to be in the Southlawn Creek watershed. Additionally, there is no evidence that the impact would be different in other I-2 Industrial Zone areas in the County. Virtually every human activity has the potential for adverse impact. Zoning recognizes this fact and, when concerned with special exceptions and conditional uses, accepts some level of such impact in light of the beneficial purposes the legislative body has determined to be inherent in the use. It regulates the level of adverse impact by prohibiting only that level that is not inherent in the use. It does that primarily, as we have said, by restricting only those uses, the impact of which is greater at a particular location than it would generally be elsewhere. Appellants, by obtaining and producing at the hearing the extensive documentation in regards to the sanitary and storm water management plans, and evidence of the approval of those plans by the appropriate agencies, satisfied the burden of establishing that the use at this site was, in regards to the environmental matters, in compliance with the special exception provisions,

as limited by the case law we have described, *i.e.*, that there would be no additional adverse environmental impact because of the specific location of this use at the subject site.

[8] The protestants merely reiterated and attempted to argue that the impact from the use was greater than that stated by the Department of Environmental Planning. Even if that were so, and we are not persuaded that it is, there was insufficient evidence (virtually none) from which a reasoning mind could have determined that the impact at this site on Southlawn Lane was unique or different than the impact would be elsewhere in this I-2 Industrial Zone (north of the intersection of Southlawn Lane and Gude Drive) or, for that matter, any different than in any other I-2 Zone in the ***26** County. Accordingly, this finding of the Board was not based upon substantial evidence. It was a finding arbitrarily made.

Traffic

The Montgomery County Master Plan describes this Southlawn Lane I-2 industrial [666 A.2d 1266] area as developed with heavy industrial uses, and as undesirable for residential use. As we have previously noted, the traffic patterns that might be caused by the bridge restriction would not cause any extra impact on through traffic flowing on Southlawn Avenue, in that ingress and egress lane crossing would be the same, in total, had there been no restriction on the use of the bridge.

We agree with the Board's legal conclusion that the impact of traffic flows, and the pattern caused thereby are, in Montgomery County, primarily delegated to the Montgomery County Planning Board. Moreover, as we have indicated, regardless of where in this I-2 industrial corridor this use was to be conducted, the traffic impact, including both the crossing of lanes and the potential for backups, if any, would be the same. There is no evidence to the contrary.

It is equally clear that traffic backups, if they were to exist (and the Board's discussion of the issue is little more than speculation in the face of appellants' substantial evidence that most traffic would be contained on site) would occur as trucks arrived, *i.e.*, on the easterly and southeastern side of Southlawn Lane. If such a backup of entering traffic did occur, and was as extensive as appellees contend, it would only extend a short distance on the two-lane portion of Southlawn Lane. If it were extensive, it would extend to the four-lane section of that road. The subject site is at the end of that four-lane section and at the end of the built-up area. Thus, most, if not all, of the traffic of other heavy trucks generated within this I-2 Zone would not pass by the subject site because that traffic must exit and enter via Gude Drive by virtue of the bridge limitations. Additionally, on the east side, large tracts of property are not being used at all and thus do not, at present, generate substantial traffic.

***27** The Master Plan and the I-2 Zone contemplate heavy truck traffic in I-2 Heavy Industrial Zones. The proposed use will not generate anything more. The

fact that residents of residential areas outside the zone perceive that additional industrial activity in this industrial zone will generate heavier truck traffic, making their attempts to utilize this industrial corridor more difficult, does not make the traffic stemming from appellants' use--a use that is presumed to be in conformance with comprehensive zoning--unique, greater, or above and beyond that which would occur anywhere else in the zone. The generic traffic concerns of appellees do not constitute substantial evidence upon which the Board could have based its decisions.

When Montgomery County created I-2 Heavy Industrial Zones, it made a policy statement that heavy industrial uses, and the traffic generated thereby, were necessary. When the County provided, by way of special exception, that solid waste transfer stations could be conducted there, it made an additional policy statement, as relevant to the Board's findings in the present case, that such uses were appropriate, beneficial, and generally compatible, so long as, at any particular location, the traffic safety and environmental impact would be no greater than, *i.e.*, would not be above and beyond, the adverse impacts inherent in such uses if conducted at an alternate site. Moreover, when Montgomery County created the provisions for special exceptions for solid waste transfer stations, it knew what that use entailed because the special exception, and the inclusion of this site in the solid waste management plan, resulted, at least in part, from appellants' operation at another site, the County's desire to stop the operation there, and the County's cooperation in seeking to have it moved elsewhere, *i.e.*, to the subject site. Not only were the general impacts of solid waste transfer stations contemplated, but the specific impacts of *this particular operation* were also contemplated.

Moreover, the planning staff reported to the Board that

> the adequacy of public facilities will be determined by the Planning Board at time of subdivision....
>
> ....
>
> ***28** The staff ... finds the location of a transfer station at this location acceptable. This area of Southlawn Lane is characterized by large, heavy trucks carrying cement, concrete products, building materials, fuel and similar bulky products....
>
> [666 A.2d 1267] ....
>
> Community Plans North Division of the technical staff recommended approval ... concluding the use was compatible with the other uses....
>
> The Transportation Planning Division ... recommended approval....
>
> ....
>
> The Environmental Planning Division recommended approval....

....

The Development Review Division ... finds that the use limited to 400 tons is consistent with the Montgomery County Comprehensive Solid Waste Management Plan....

....

The staff agrees with the findings and recommendations of the technical staff and further finds that the use conforms with the development standards of the I-2 Zone.... [T]he staff finds ...:

....

3. ... [T]hat the location of a solid waste transfer station at this location is consistent with the other uses allowed in the I-2 Zone and is consistent with the Upper Rock Creek Master Plan.
4. The proposed use ... will be in harmony with the general character of neighborhood considering the character of activity. The use ... will have*less impact* ... than existing uses....
5. The staff further finds that the transfer station ... will not be detrimental to the use, enjoyment, economic ***29** value or development of surrounding properties or general neighborhood....

....

8. The use will be served by adequate facilities.... [Emphasis added.]

The staff then recommended approval subject to certain conditions.

The protestants appear to protest the increasing development of this area of I-2 Industrial Zoning. The purpose of creating such zones is to restrict and concentrate heavy industrial activity to certain designated portions of the County. The concepts embodied in such zoning contemplate that these particular areas will become more industrialized in order that other zones will not be subject to those types of uses--uses the legislative body has determined are necessary. As long as the County experiences population growth, there must be a development of wholesale and retail businesses to service the up-front needs of the growing population. There will also be a continuous need for the management and disposal of end result problems, *i.e.*, the waste products of human society. Something has to be done with it. Even a cursory examination of the exhibits admitted in the case *sub judice* causes a succinct observation--if not here, where? The answer cannot be "nowhere," as the legislative body has inferentially determined that the operation is needed and should be conducted somewhere.

To the extent appellees, Twin Lakes Citizens Association and Manor Lake Civic Association, are displeased with the County's decision to permit such uses as special exceptions in industrial zones in the first instance, an alternate, and perhaps better, recourse would be to petition the legislative body for amendments

to the County zoning code prohibiting such uses generally, rather than attacking the applications for special exceptions on a piecemeal, "not in my backyard," basis. Zoning *policy* is generally better, and more appropriately addressed, in legislative forums, rather than quasi-judicial or judicial forums. Normally, *general* objections to legislative ***30** initiatives are better addressed legislatively. As we noted earlier, however, efforts to prohibit the handling within Montgomery County of the waste therein generated might not sit well with those neighbors of the County that might end up with Montgomery County's problems.

[9] The Board's decision to deny the special exception was not based on substantial or sufficient evidence of adverse impacts at the subject site greater than or above and beyond the impacts elsewhere in this particular I-2 Zone, or in any other I-2 Zones. It was, therefore, arbitrary and illegal.

We shall reverse the decision of the circuit court affirming the denial of the Board of the [666 A.2d 1268] application for special exception and shall direct that court to order the Board to grant the special exception. In so doing, the Board may consider the imposition of those reasonable conditions that the record reflects have already been recommended by staff and agreed upon by appellants.

In light of our decision, we find it unnecessary to address appellants' "change of mind" argument, except to note that the collective mind of the Board did not change. We would question, however, whether the change of mind doctrine would apply in the first instance when the decision of the entity making the decision remains the same, even if one or more of the component parts, *i.e.*, members of the entity, may have changed their individual minds.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY REVERSED; CASE REMANDED TO THE CIRCUIT COURT FOR THAT COURT TO REVERSE THE DECISION OF THE BOARD AND TO ORDER THAT THE BOARD GRANT THE SPECIAL EXCEPTION; COSTS TO BE PAID BY APPELLEES.

[666 A.2d 1269] ***31.** APPENDIX

TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLE

(FN1.) In a statement to the Board, appellants' counsel, without objection, noted:

> As this Board knows ... we have basically four pockets of industrial zoning in the county; the Pepco site ..., Montgomery Industrial Park on Route 29 ..., a pocket of Industrial-2 around Brookville ... and Southlawn Lane.
>
> ... [T]hat deal [at Montgomery Industrial Park] fell through....
>
> He couldn't buy anything from Pepco ... that is obvious; and the ground at Brookville ... doesn't exist as far as vacant, available ground. So his only choice was to go to Southlawn Lane.

(FN2.) Of course, if all jurisdictions prohibited such uses, the debris presumably would not be permitted to leave Montgomery County and would accumulate at the locations throughout the County where it first became debris. Whether a county can legislate that the debris accumulating within its borders cannot remain there is another question for another day and might well raise interesting issues to be addressed by the State.

(FN3.) As we pointed out in *Cromwell v. Ward*, 102 Md.App. 691, 699 n. 5, 651 A.2d 424 (1995), special exceptions and conditional uses are clearly intertwined.

(FN4.) Apparently, the Board misspoke. In 1990, a majority of its members voted to grant the special exception. Because of a "super-majority" requirement, since ruled invalid, it was not granted.

(FN5.) An official publication of the Maryland Department of Natural Resources, "Trees for Maryland's 'Watersheds,' " provides:

Maryland has six major watersheds. A small percentage of water in the western most part of the State [the Youghiogheny River watershed in Garrett County] flows to the Ohio River, through the Mississippi and eventually to the Gulf of Mexico. Another small percentage in the east [situated completely within Worcester County] flows directly to the Atlantic Ocean. The remaining water, ["Potomac River Watershed," "West Chesapeake Watershed," "Susquehanna River Watershed," "East Chesapeake Watershed," and the "Patuxent River Watershed"] approximately 90%, drains into the Chesapeake Bay.

(FN6.) Attached hereto is a photocopy of a photograph admitted below, showing the relative locations of Southlawn Lane and the uses situated on that road. Mossburg's proposed location is identified as "Site."

(FN7.) See the photocopy attached hereto that shows the relative location of the existing industrial uses and the subject site in this industrial corridor.

(FN8.) We are informed that there is *out there* another special exception case involving a similar use that appellees contend generated the creation of this particular special exception legislation. The record is unclear. In any event, it was created to address solid waste transfer operations.

Baltimore County Government
Zoning Commissioner
Office of Planning and Zoning

Suite 113 Courthouse
400 Washington Avenue
Towson, MD 21204

(410) 887-4386

December 20, 1993

John Gontrum, Esquire
819 Eastern Boulevard
Baltimore, Maryland 21221

J. Carroll Holzer, Esquire
305 Washington Avenue, Suite 502
Towson, Maryland 21204

RE: Project No. 92285Z
Case No. XI-611 & 94-87-SPHXA
Petitions for Special Hearing, Special Exception and Variance/
Development Plan
Honeygo Reclamation Center, Inc. Petitioner/Developer

Gentlemen:

Enclosed please find the decision rendered in the above captioned case. The Hearing Officer's Petitions/Development Plan Order have been approved.

In the event the decision rendered is unfavorable to any party, please be advised that any party may file an appeal within thirty (30) days of the date of the Order to the County Board of Appeals. If you require additional information concerning filing an appeal, please feel free to contact our Appeals Clerk at 887-3391.

Very truly yours,

Lawrence E. Schmidt
Zoning Commissioner

LES:mmn
att.
cc: Mr. Adam E. Paul, Jr.
cc: All various County agencies

IN RE: DEVELOPMENT PLAN HEARING AND PETITIONS FOR SPECIAL HEARING SPECIAL EXCEPTION & VARIANCE 300 ft. NW of intersection of Philadelphia & Silver Spring Rds Honeygo Run Park 5th Councilmanic District Honeygo Run Reclamation Center, Inc., Developer

* BEFORE THE

* ZONING COMMISSIONER

* Case No. XI-611 & 94-87-SPHXA (Project No. 92-285-Z)

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

HEARING OFFICER'S OPINION AND DEVELOPMENT PLAN/VARIANCE ORDER

This matter comes before the Hearing Officer/Zoning Commissioner as a combined development plan review hearing and zoning petition hearing for the proposed project known as the Honeygo Run Reclamation Center. The zoning petitions and development plan are presented by the owner of the subject property, Honeygo Run Reclamation Center, Inc. The property owner requests approval of the development plan submitted as Petitioner's Exhibit No. 4. That approval is sought pursuant to the development plan regulations as codified in Section 26-206 of the Baltimore County Code.

As to the zoning petitions, they come before me as Zoning Commissioner pursuant to the authority granted by Section 26-127 of the Baltimore County Code and Section 500 of the Baltimore County Zoning Regulations (B.C.Z.R.). A Petition for Special Exception, Petition for Special Hearing, and Petition for Zoning Variance are all filed. As to the Petition for Special Exception, relief is sought to allow an "Excavation Controlled" on the subject site in an M.L.R. zone, pursuant to Section 248.4 of the B.C.Z.R. The definition of Excavation Controlled in Section 101 of the B.C.Z.R. encompasses the mining operation on this site. It is to be noted from the onset that this site has been actively mined for sand and gravel since the 1920s. Thus, that use would be permissible as a nonconforming use pursuant to Section 104 of the B.C.Z.R. However, the Petitioner wishes to legitimize the use through the special exception process. As

a second prong of the special exception petition, relief is requested to allow a rubble landfill operation on the subject site, pursuant to Section 218.1 of the B.C.Z.R. It is envisioned that the rubble landfill operation will commence when the excavation operation ceases. Obviously, the mining operations have resulted in the creation of deep pits throughout the property. The Petitioner desires to fill these pits through the rubble landfill operation. Thereafter, the property will be conveyed to Baltimore County for use as a recreational facility, to include ball fields and similar facilities.

As to the Petition for Special Hearing, approval is sought for a proposed concrete recycling and wood waste chipping operation as accessory uses to the existing mining operation and proposed rubble landfill. That is, the site will be improved with a concrete recycling operation and wood recycling center. In addition to accepting rubble waste for burial and disposal, the site will accept concrete and wood waste and contain facilities to grind and recycle those materials.

Lastly, two variances are requested. The first is from Sections 409.8A.2 and 409.8A.6 of the B.C.Z.R. to allow a crushed concrete surface for the internal haul road in lieu of the required durable and dustless surface and to permit same without the required permanent striping for offstreet parking facilities. Second, a variance is sought from Section 413.6.B. of the B.C.Z.R. to allow two free standing signs with 50 sq. ft. per face, and 8 ft. in height, in lieu of the permitted one free standing sign with 25 sq. ft. per face with a permitted height of 6 ft.

As noted above, this matter was scheduled for a combined hearing on the development plan and zoning petitions which was conducted over seven (7) full days. At that hearing, the Developer was represented by John B.

Gontrum, Esquire. Several Protestants, including individuals and community groups appeared and participated. Nottingham Improvement Association, Inc., White Marsh Civic Association, Irene Albin, Bernard and Edna Jednoralski and Gladys Cook were all represented by J. Carroll Holzer, Esquire.

A substantial volume of testimony and evidence was offered. The testimony will be recounted here, in relevant part. However, 15 full double sided tapes were used to record the proceedings. They reflect the full record of this case. Moreover, 28 Petitioner's exhibits and 12 Protestants' exhibits were accepted and form part of this case file. Lastly, the Hearing Officer visited the site and the surrounding locale. All of this body of evidence was considered carefully by me in adjudging the merits of the zoning petitions and development plan.

As to the history of the development plan process, a Concept Plan was originally submitted and a meeting thereon held on December 7, 1992. This meeting was continued and completed on December 14, 1992. Thereafter, as required, a Community Input Meeting was conducted on January 7, 1993 at the White Marsh Library. Thereafter a development plan was submitted and a meeting held thereon on September 22, 1993. The Hearing Officer's hearing commenced on October 15, 1993 and the last day of hearing was on November 10, 1993. Counsel were then allowed until December 3, 1993 to submit memorandum in lieu of closing argument. Memorandums have been submitted by both the Developer/Petitioner and Protestants and have been carefully read and considered by the Hearing Officer. Moreover, it was agreed by all parties that the Hearing Officer's opinion would be rendered no later than 15 days after the due date for those memorandums, as required by the Baltimore County Code.

Although the relevant testimony presented by the witnesses will be detailed hereinafter, a brief overview of the property and project is appropriate. The property is comprised of approximately 64 acres and, as noted above, zoned M.L.R. It is located on the north side of Silver Spring Road, west side of Old Philadelphia Road (Route 7), east side of I-95 and south of Cowenton Avenue in the White Marsh area of Baltimore County.

As noted above, the site is presently used and has been used for many years for mining operations. These operations fall within the definition of an Excavation Controlled, as defined within Section 101 of the B.C.Z.R. However, it is clear that the mining operations are nearly completed. In that the property has been mined out and the available minerals fully extracted, the Petitioner wishes to redevelop the property for use as a rubble landfill. This proposal appears to make logical sense in that the rubble will be utilized to fill up the pits previously created. The landfill operation will be comprised of three cells. The first to be utilized (cell 1) is located on the western portion of the site near I-95. The center of the site is comprised of cell 2 which will be utilized when cell 1 has been filled. The smallest cell, cell 3, is located on the eastern site adjacent to Old Philadelphia Road. That cell will be filled last. Immediately to the north of cell 3 is the concrete recycling and wood waste recycling centers. Moreover, the sole means of vehicular access to the site will by by way of an access road on the northwest corner of the site. This access road will provide vehicular ingress/egress from Old Philadelphia Road. The proposed entrance/exit will be improved to accommodate the anticipated truck traffic as shown on the development plan. Generally, trucks delivering waste to the site will enter the site

from Old Philadelphia Road where they will be inspected and pass the offices and inspection stations provided. They will then be directed to dispose their loads in whatever cell is operational at that given time or at one of the recycling centers. Obviously, a fee will be collected for each truckload of rubble to be received. The Petitioner anticipates that the capacity of the site will be 4,000,000 cubic yards of space and that 400,000 cubic yards will be utilized per year; with a life expectancy of the fill for 10 years. After the fill is completed, the owner/operator proposes to turn the facility over to Baltimore County's Department of Recreation and Parks. Thereinafter, it will be utilized to house ball diamonds, athletic fields and similar recreational purposes.

Testifying on behalf of the Petition was Frank Roscoe, a Professional Engineer, who is a Vice-President at Century Engineering. Mr. Roscoe is the Project Manager for this development and has coordinated all of the various engineering studies prepared in support of the zoning Petitions and Development Plan. He qualified as a professional engineer with expertise in site design and planning and more particularly was designated as an expert in storm water management and sediment control.

Mr. Roscoe testified that he was very familiar with the area and described the surrounding uses. The property is surrounded by both commercial and residential uses. To the southwest is the Honeygo Trailer Park and several residences. Other residential communities exist to the north. To the east is the McIlvain Lumber Yard and the Knight Trucking Company. The property is bounded on the west by I-95. Mr. Roscoe also identified and also introduced into evidence the development plan (Petitioner's Exhibit No. 4). This is a 10 page plan which includes numerous plats reflecting the studies which have evaluated the parcel and the pro-

posed use. Mr. Roscoe noted that the site is zoned M.L.R. and that such zoning designation permits an Excavation Uncontrolled as of right. An Excavation Controlled, which includes surface mining activities, is permitted by special exception. Thus, a special exception has been requested to clean up, from a zoning standpoint, the activity which goes on at present. Mr. Roscoe also indicated that approximately 12 acres of the site continue to be mined at the present time pursuant to a mining permit issued by the State. The balance of the site has been mined out over the years. Sand and gravel is extracted from the soils.

Mr. Roscoe also described the setback buffers to the proposed rubble fill operation. He noted that the proposed landfill would be setback a minimum of 100 ft. on all sides. Mr. Roscoe also noted that this site had received C.R.G. approval for a project to be known as the I-95 Business Center. This was a combination/office warehouse facility which would contain over 870,000 sq. ft. of warehouse/office use. The site would contain numerous large buildings and large impervious parking and road network area. No doubt if this plan would be implemented traffic generated to the site would be substantial. However, these plans have been abandoned in favor of the proposed rubble fill. Mr. Roscoe also described the proposed access to the facility. He noted that the sole means of vehicular access would off Philadelphia Road. The proposed access lane is 35 ft. wide and 100 ft. in length. Near the entrance, the road would be paved. However, the haul road would then continue into the interior of the site and would be constructed of crushed concrete stone material.

He also described other features of the proposed landfill. That is, there would be an inspection station near the entrance and also inspection at the working cells to ensure only permitted material would be accepted.

The operation would be divided into a 3 cell operation with only one cell working at any one time. Thus, only a limited open dumping area will be exposed. He also described other improvements to the site which include the installation of a water line so as to provide two fire hydrants on the site. These hydrants will be located where wood chips are stored near the wood recycling facility. Mr. Roscoe also described the material which will be accepted; namely, demolition debris, paving, stumps and similar items. He contrasted these items with the garbage and household waste items which are allowed at a sanitary landfill. Also, this facility will not accept tires, asbestos, drums, white goods and hazardous waste.

He also described the extensive review and permitting process procedures required for approval to be obtained from the State. In addition to County approval, the facility will need approval from the Maryland Department of Environment. Also a permit will be needed to ensure air quality and to regulate the wood waste and concrete recycling center.

Mr. Roscoe also testified that the State approval process may take 3 to 4 years, thus it can be expected that the facility would not be operational for some time. He also noted that the fill area will be a minimum of 100 ft. from all wetlands to ensure that the wetlands are not compromised.

Mr. Roscoe also discussed the storm water management plan. He noted that the middle of the site will have the highest elevation and that there will be a swale around the perimeter. This will provide excellent drainage and water quality management. There will be no need for a storm water management pond due to the swale system. Calculations show that there will be less storm water runoff than presently occurs due to the installation of the swale system. This method of storm water management, known as

the "reach routing system", captures the water and disposes same into the underground water system within the perimeter of the site. He noted the existence of the Honeygo Run on the north portion of the site and efforts made by the Petition to protect same from contamination. He observed that the stream would have to rise more than 6 ft. above the 100 year flood plain to cause flooding into the fill. That is, his studies show that even in the worse case scenario (100 year storm) the water would have to rise 6-1/2 ft. (12 ft. in most places) to flood into the fill. Thus, he concluded that the development will have no adverse affect on the flood plain, wetland or storm water management issues. Actually, he concluded that storm water would be more better managed than is presently the case.

As to the ground water, Mr. Roscoe testified that 12 wells have been on site for approximately 1 year in addition to 12 piezometers. The water has been monitored by these devices for more than one year to ensure that a clear understanding as to the ground water system has been realized. The effects of the proposed use on the ground water system were explained in detail by other witnesses.

Mr. Roscoe opined that the recycling center will have three positive effects on the use of the property. It will (1) extend the life of the landfill (2) provide a profitable operation for the operator and (3) will provide the opportunity to additional sorting to ensure that hazardous materials are not placed into the fill. Also, he said that personnel will be trained by the Fire Department to prevent the possibility of an underground fire and that the sprinkler truck will be kept on the property to control dust and be available in the event of any type of fire. Also, he indicated that most traffic will be routed from I-95 onto Ebenezer Road to Route 40 to Philadelphia Road into the site. The developer has promised

to assist in the realignment of the intersection of Cowenton, Ebenezer and Philadelphia Roads in the future. There is no F level of service intersection nearby. In Mr. Roscoe's view, traffic appears not to be a problem.

As to security, the site will have a 8 ft. high chain link fence around the perimeter. There will also be lighting, a significant berm and vegetation. In terms of the timetable of operation, it is anticipated that cell No. 1 will be filled after three years, cell No. 2, after 8 years, and cell No. 3 after 10 years. As to the development plan, Mr. Roscoe believes that all County issues have been resolved and community issues have been addressed. He also noted, the significant community involvement in the project which was received through a Community Advisory Committee. This Committee has assisted in the resolution of many issues. Among the changes to the plan, which have been implemented due to the Community Advisory Committee input, are (1) the water truck (2) the movement of the inspection station towards the interior of the site to provide internal traffic stacking spaces, (3) additional landscaping near the entrance, (4) a left turn only lane at the exit of the site onto Philadelphia Road, (5) elimination of the entrance to the property from Silver Spring Road and (6) a limitation to the height of the top off.

As to cross examination, he admitted that the precise location of the gate was not shown on the plan. This must be added. He also admitted that the number of trucks going in and out per day is variable and advised that the type of vehicles bringing rubble would be roll offs, which are similar to tractor trailers, and 10 wheel dump trucks. He also acknowledged that many of the safeguards built into the plan are dependent on the operator complying with the proposed manual. He opined that 18 to 20 tons of debris would come in per truck and was questioned as to how an inspec-

tor can see and inspect each load, particularly with a large volume of traffic entering the site on a daily basis. He said there would be sufficient inspections to ensure that no hazardous materials would be accepted. He also noted that material eventually destined for the subject site would be sorted where it was being collected as part of "razing permit" process. This additional inspection provides further opportunity to evaluate the material to be disposed. He did admit certain unclarity as to the developer's exact responsibility relating to the realignment of the intersection at Cowenton, Ebenezer and Route 7. Also, he acknowledged that the slope of the finished fill will be 4% per the State's requirement. There will be steeper slopes to the north and east with a more gradual slope towards the south and west.

Also testifying on behalf of the Petitioner was Robert Harris, a civil engineer, employed with Century Engineering. Mr. Harris submitted an extensive resume (Pet. Exh. No. 17) as well as an extensive traffic study which he had conducted relative to the site and surrounding locale. (Pet. Exh. No. 13). He testified as a traffic expert as to his studies and conclusions.

Mr. Harris conducted an extensive study concerning the proposed entrance/exit from the site. As part of this study, he conducted counts of traffic volume on Philadelphia Road. He also computed the stopping distance necessary based on the posted speed limit (40 mi. per hr.). His calculations and studies are shown within his report. Based on the studies, Mr. Harris concluded that there was sufficient sight distance for both exiting vehicles from the landfill as well as for traffic northbound and southbound on Philadelphia Road. That is, both drivers of vehicles exiting the operation, as well as general traffic on Philadelphia Road,

will have sufficient distance to identify vehicles and avoid accidents from traffic generated by the proposed operation. Moreover, Mr. Harris noted that the actual average speed limit on Philadelphia Road at the site was less than the 40 mi. an hour speed limit. According to his studies, the average vehicles proceeding northbound traveled at 39 miles an hour and the average southbound speed was 37 mi. per hour.

Mr. Harris also calculated the peak traffic to be generated by this use. He concluded that 240 trips in and 240 trips out would be generated per day. Of this amount, 13% would be generated during the A.M. peak hours and 7% during the P.M. peak traffic hours for vehicular traffic on Philadelphia Road. Computing these percentages into actual vehicle trips, he concluded that 35 trucks would come in and out during the morning peak hour and 35 trucks in and out during the evening peak hour. In Mr. Harris' opinion, such a volume could be handled by the existing and surrounding road network. Therefore, he concluded that the traffic generation produced by the proposed use would not adversely affect the traffic scheme in this area. Lastly, Mr. Harris observed that the Petitioner has agreed to post a no right turn for vehicles exiting the site onto Philadelphia Road. Thus, traffic would be mandated to proceed north. He felt that this restriction was appropriate in that a routing of traffic to the north of the site onto Ebenezer Road and ultimately to Route 40 and the surrounding interstate highway would reduce potential traffic congestion in the residential neighborhoods which lie to the south of the property.

Also testifying in favor of the Petition was John Rist, an environmental engineer who is also employed with Century Engineering. Mr. Rist's field of expertise related to the environmental effects expected to be produced by the landfill operation, as they relate to noise levels. Mr.

Rist referred to standards produced not only by the State (see Code of Md. Regulations) but also federal highway standards. Based on his studies, as codified within his analysis marked as Petitioner's Exhibit No. 19, Mr. Rist concluded that noise expected to be generated from this site would not adversely affect the surrounding locale. He noted that the loudest pieces of equipment expected to be present on the site were the concrete crusher and wood shredder. He has reviewed the manufacturer's informational booklet about this machinery as part of his noise evaluation study. Mr. Rist concluded that the wood shredder would generate 70 decibels of noise at a distance of 25 ft. and the concrete crusher would produce 80 decibels of noise at 25 ft. This can be compared to a lawn mower, which would be expected to generate 95 decibels at a distance of 3 ft. Moreover, Mr. Rist noted that approximately 7.5 decibels are reduced at each doubling of the distance measured. Using these calculations and information, Mr. Rist evaluated potential noise levels at the Cooney/Bennett properties to the south of the site, the Hampshire Village community on Philadelphia Road and the trailer park community to the southeast of the property. From all of these points, Mr. Rist concluded that noise levels would be acceptable. Moreover, he noted that the ambient noise levels in this area are approximately 57 decibels. Ambient noise is defined as the existing background noise levels generated by traffic, machinery, people and other natural sources. Mr. Rist compared the ambient noise levels at this site favorably to suburban and urban areas. Thus, based on the existing scenario, the size of the site and the expected noise to be generated, Mr. Rist concluded that noise pollution would not be significant and that the amount of noise to be generated on the property would not harmfully affect the surrounding locale.

Another expert witness who testified on behalf of the Petitioner was Dickson Wood. Mr. Wood is also employed with Century Engineering and is a professional geologist. He testified extensively as to his studies and conclusions regarding the ground water under this site and the potential effects of the proposed special exception uses. Although he has not finalized his comprehensive studies, Mr. Wood was able to offer a number of opinions. These were largely the result of information which was obtained from 12 monitoring wells and 7 piezometers which have been monitoring ground water on site for more than one year.

Mr. Wood testified that there are two existing aquifers under the surface at this site. The upper aquifer begins at a depth of approximately 40 ft. below the natural grade. This aquifer is covered by a layer of sand and silt materials. The water contained within this upper aquifer contains some acidity, nitrates and iron. Mr. Wood opined that the water found in this upper aquifer is not drinkable. Below this aquifer, according to the witness' testimony, is a thick layer of silt and clay. Below this level is a second aquifer which Mr. Wood labeled a confined aquifer. That is, he testified that the aquifers are separated and that the ground waters which exist in each do not co-mingle. Thus, Mr. Wood believes that any pollutant which might affect the upper aquifer would not affect the confined (deeper) aquifer.

Mr. Wood also determined the ground water flow direction. These flow directions are shown on Petitioner's Exhibit No. 22. Although unable to determine the exact flow rate, Mr. Wood testified that the ground water will not flow across the Honeygo stream. Also, Mr. Wood opined that the direction of the ground water flow was away from the trailer park, which constitutes the nearest residential neighbors to the site. Mr. Wood also

noted on direct examination that additional reviews would be necessary in order to obtain State of Maryland Department of the Environment approvals and that information obtained from the monitoring devices on site would be reviewed at least two times per year during the operation. Thus, he concluded that if any pollution resulted, same could be controlled before it adversely affected ground water offsite.

On cross examination, Mr. Wood's opinions were broadened. He conceded that he did not know the rate of flow or the quantity of ground water flow. Moreover, he admitted that an analysis had not been completed to fully adjudge the impact of recharge on the Honeygo Run. That is approximately 25% of the volume in the unconfined aquifer feeds into the Honeygo Run. However, Mr. Wood did state that due to the large recharge area of the site, there would be little possibility of a significant adverse impact by storm water infiltration into the Honeygo Run.

A significant point raised on cross examination was Mr. Wood's testimony about the standards regarding the necessary distance to be maintained between the bottom of the fill and the top of the aquifer. Mr. Wood placed great reliance on the standard which has been established by the State requiring a 5 ft. cover from the top of the ground water to the bottom of the fill. Mr. Wood insisted that this distance would be maintained uniformly throughout the site. Unfortunately, he did not explain why the 5 ft. was an appropriate distance from a geological standpoint. Instead, there appeared to be a blind reliance upon this standard without independent inquiry as to whether it was sufficient at this site. That is, Mr. Wood relied significantly on the State standards, rather than offering expert geological opinion as to the validity of those standards in this instance.

Mr. Wood was recalled on a later day after additional studies had been performed by him. The testimony offered at that time was in response to testimony offered by the Protestants' expert witness, Dr. Robert Kondner. Mr. Wood noted that the rate of flow was determined by the grade of the aquifer (the amount of drop ground water takes in a given distance) and the porosity (the level of porous nature in a given material). Based on these two characteristics as found on this site, Mr. Wood concluded that the ground water would move approximately .7 ft. per day at this site. Thus, ground water will move approximately 200 to 250 ft. per year. Moreover, Mr. Wood noted that as ground water approached the Honeygo Run, the gradient was less and the water would slow down. The significance of this testimony was to support Mr. Wood's conclusion that any pollution to the ground water would not escape the site quickly. With the required monitored wells and piezometers, Mr. Wood believes that any potential problem can be detected and resolved before adversely impacting the underlying confined aquifer and the ground water systems below adjacent properties.

Also testifying on behalf of the Petitioner was James Krawczyk, another Century employee in the Environmental Division. Mr. Krawczyk qualified as an expert engineer and in landfill design. Mr. Krawczyk testified at length about the State process which governs approval and regulation of landfills. Apparently, this is a four stage process. Phase I constitutes a preliminary general application which has been made by the Petitioner at this time. Mr. Krawczyk noted, however, that the State would not consider the application until local zoning approval was obtained. Thus, the State process will continue only after the decision herein is rendered and finalized. Following the Phase I preliminary studies, Phase II is undertaken.

This phase includes submission of significant geology and ground water studies, which will no doubt be prepared in part by Mr. Wood. Assuming those studies are appropriate and are accepted, the process then moves into Phase III regarding the design of the landfill. The final review, Phase IV involves a public hearing on the proposed use.

Mr. Krawczyk corroborated the testimony offered by Mr. Wood regarding the 5 ft. standard between the bottom of the fill and top of the ground water. Mr. Krawczyk noted that this distance was established based upon the State's studies of other landfills. The State's position, in Mr. Krawczyk's view, is that this is a safe distance and ensures adequate protection to the underground water system. Mr. Krawczyk noted the Maryland Department of the Environment will insist that the fill operation not adversely impact the nature and character of the ground water below the site.

In designing the proposal, Mr. Krawczyk admitted that he had a "fair way to go between the plans prepared now and the final plans". He noted that these plans would be submitted to the State after zoning approval was obtained. However, Mr. Krawczyk listed a number of mitigating factors which have been developed and will be included in the plans. In his view, these factors will eliminate the possibility of adverse affect of the landfill operation on the surrounding locale. First, he observed that the list of materials to be accepted by the landfill will be limited. There will be no toxic or other hazardous chemicals nor materials such as asbestos, tires, etc. Secondly, Mr. Krawczyk noted that the site was protected by an extensive berm including an earth berm and 100 ft. buffer distance which would protect the Honeygo Run and neighboring properties. Thirdly, he described the operations manual which has been prepared and was de-

scribed in more detail by Mr. Volpe. He admitted that strict adherence to that manual was necessary to ensure that the landfill would be environmentally safe. He also noted that the waste will be compacted on an ongoing basis and that a cover will be placed upon waste every day. Every third day, a more extensive cover will be placed on the disposed rubble. Mr. Krawczyk also described in significant detail the State inspections while the site is operational. He noted that the regulatory review by the State has become much more extensive in recent years to ensure that landfills do not detrimentally affect natural resources of the State and surrounding properties. In his view, the proposed site meets all of the State's standards.

Mr. Krawczyk also talked about liners. These are devices which are inserted into a landfill as a protection from leachate, i.e., seeping contaminates into the ground water system. Liners can be man made (plastic) or natural dense soils, such as clay. Mr. Krawczyk does not believe a liner is appropriate in this case. He noted that they can break and fail, thereby causing a concentration of leachate to be released at a particular location. Overall, Mr. Krawczyk agreed with the testimony offered by Mr. Wood relating to the minimal potential of environmental impact by this landfill.

On cross examination, Mr. Krawczyk did admit that a nondetrimental operation of this site was dependent in large part upon proper operation of the facility. That is, if the operation manual is not followed closely, the chances for pollution and detrimental impact on the surrounding locale are increased. As is obvious from their presentation, the Protestants aver that the operation as proposed can be carried out as planned.

Further, Mr. Krawczyk held fast to his position that a liner was not appropriate in this case. Although admitting that same can provide additional protection, he does not believe that it is necessary in this instance and notes the possibilities of failure of the liner and large concentration of leachate at the failure site.

Mr. Krawczyk also testified extensively about the State regulatory system. As noted above, initial permits are issued only after a four phased inspection. Moreover, Mr. Krawczyk described the ongoing regulation of the landfill by the Maryland Department of Environment. He noted that landfill permits are good for a period of three years and the landfill undergoes an annual inspection to meet current Maryland regulations. Thus, there will be an ongoing review of the operation on this site. Mr. Krawczyk also noted that the Petitioner had a large economic incentive to conduct a clean operation. The cost of cleanup of any potential pollutions are excessive as well as potential sanctions imposed by the State.

As is with Mr. Wood, Mr. Krawczyk was also recalled during the Petitioner's presentation of rebuttal testimony. He emphasized again that the objective of the landfill was to create a disposal system friendly to the environment. He also discussed extensively the liner which the Protestants seek in this case. He noted that the recommendation as to the liner would occur only during the Phase II State review. He was unable to make any firm recommendation until the Phase II studies were done but corroborated his opinion that he does not believe a liner is necessary. In sum, the necessity and the type of liner required will be determined by the State.

Another expert witness testifying on behalf of the Petitioner was Sam G. Crozier. Mr. Crozier was accepted as an expert land planner/landscape

architect. He extensively discussed the proposed special exception uses, including the existing landfill excavation use and the proposed rubble fill operation.

As to the mining operation, he opined that same is not injurious to the health, safety and general welfare of the community and, therefore, complies with the special exception test set forth in Section 502.1 of the B.C.Z.R. Specifically, he noted that this use has been ongoing at the site for many years and, therefore, the effects of the use are well known. He noted that there was no proof of an existing traffic problem generated by this use, that the use did not pollute or overcrowd the property or its environs, and that there was no evidence of any detrimental effect. He also observed the existence of other mining operations to the south of the site, including the extensive Genstar property which is located nearby. Thus, he concluded that the existing use on the subject site is compatible with the surrounding location.

As to the proposed rubble fill operation, he noted many of the safeguards proposed by the Petitioner which he believes will minimize the impact of the use on the surrounding locale. This includes the significant landscaping and buffering which is to surround the perimeter of the property. This landscaping and buffering will shield the property and the effects of the rubble use on the surrounding locale. Moreover, Mr. Crozier viewed the single vehicular access from Philadelphia Road as appropriate. This will allow the Petitioner to control access to the site and direct traffic away from the residences on Silver Spring Road. Mr. Crozier discussed the inherent effects of any rubble landfill operation and concluded that they would not affect the surrounding locale near this property in any unique fashion.

Mr. Crozier also discussed the concrete recycling and wood chipping operation. He opined that same should be considered accessory to the landfill operation. He noted that there are temporary uses and would be shut down when the landfill was full. He also observed that they are appropriate and consistent type uses with the landfill operation.

Lastly, Mr. Crozier discussed the proposed signage and the variance necessarily related to same. He believes that the requested variance should be granted in that the amount of signage proposed is entirely appropriate for a site of 64 acres. He also noted the commercial activity around the property and that the proposed signage was consistent with existing signage in the community. He described the proposed signs as long, narrow and low; sufficient to provide needed directions to the site, not billboard in character and not intended to overwhelm and adversely affect the surrounding locale.

The last expert witness presented by the Petitioner was Robert W. Sheesley, a principal in the firm of Brightwater, Inc., and the former director of Baltimore County Department of Environmental Protection and Resource Management. Mr. Sheesley qualified as an expert witness in the areas of environmental science; specifically water, stream quality and natural resource conservation.

Mr. Sheesley is well familiar with the site from his days at Baltimore County and the extensive studies he has made in anticipation of this project. His testimony concerned Honeygo Run, a stream which borders the entire north perimeter of the site. This stream, as well as Winless Run, feed into the Bird River. From there, the water flows into the Gunpowder River and eventually to the waters of the Chesapeake Bay. Mr. Sheesley was, no doubt, retained by the Petitioner to ensure the quality of Honeygo

Run so as to prevent any detrimental effect from the proposed use from reaching the Chesapeake Bay and its tributaries.

Mr. Sheesley testified at great length about the Honeygo Run and the Bird River. He noted that these bodies of water are under stress at the present time, as a result of deforestation of land in this portion of the water shed and the increase in impervious surface. Moreover, the soils around the stream bed have become very erodible, which foster an extensive amount of sediment into the stream and ultimately to Bird River. Mr. Sheesley produced a report (Pet. Exh. No. 27) and a series of photographs which indicates points of stress along the stream and the severe erosion which has taken place. This erosion creates a destabilization of the stream system and results in an over sedimentation of the water system. This over sedimentation endangers aquatic life, including both fish, water vegetation, and other species which populate the system.

In order to correct this existing situation, Mr. Sheesley proposes three solutions. The first is to reduce and manage the flow of water into the system. In this respect, Mr. Sheesley observed that approximately 1600 acres drain into the stream. Limiting the volume and flow of runoff into the stream is an appropriate method to control sedimentation. Secondly, he notes that the water flow should be directed into the center of the stream channel. As shown from many of the photographs submitted, large sediment bars are created which disrupt the water's natural flow. These need be eliminated and/or reduced in order to protect the health of the system. Thirdly, Mr. Sheesley proposes increasing the vegetation on the existing stream banks.

Mr. Sheesley entered into a very technical explanation of how controlling these three factors would rehabilitate the health of the Honeygo

Run. In fact, he has prepared a plan to implement these procedures in the event the Petitions are approved and the development plan accepted. That is, the Petitioner offers to rehabilitate the 1,000 ft. length of Honeygo Run along its border if the plan is approved. Mr. Sheesley views this as an extremely positive development for this portion of the water shed.

As to the effects of the proposed use on the stream, Mr. Sheesley offered a cautious opinion that the proposed use will not be detrimental to the health of the water system. He noted that the site must be managed in accordance with the Operations Manual to ensure that only acceptable materials were allowed into the fill. Moreover, the proposed buffers must be preserved in order to protect the stream system. In sum, the developer is willing to commit to an extensive renovation of this portion of the Honeygo Run if this project is approved. This, of course, will be a benefit to the surrounding locale and bay tributary system, assuming that the proper safeguards are maintained once the operation of the landfill begins.

Mr. Sheesley remained steadfast to his opinions on cross examination. He did emphasize, however, that his conclusions would remain valid only if the proposed use was managed correctly. He also noted that safe operation of this facility is but a piece of the puzzle necessary to ensure revitalization of the Honeygo Run. Continuing development, farming activities and the removing of the forest cover have all contributed the stream's demise.

Mr. Sheesley was recalled to the stand and offered testimony following the presentation of testimony by the Protestants' expert witnesses. He re-emphasized his earlier conclusions and disputed some of the standards which had formed the basis of the Protestants' expert's opinions.

Significantly, Mr. Sheesley also discussed the need for the liner. In his view, the regulatory agencies of Baltimore County cannot require a liner; that issue is preempted by the authority of the Maryland Department of the Environment. However, he concluded that the State may very likely require a liner to safeguard the sensitive environment in this locale. However, he was unable to commit to a specific personal opinion in this respect, deferring instead to the State's judgment.

In addition to the expert witnesses produced by the Petitioner in support of the proposal, two members of a community advisory group, formed by the Petitioner, testified. This community advisory group was formed after the project was initially proposed. The purpose of the group was to obtain community input on a regular basis. No doubt the Petitioner sought to minimize community opposition through this advisory committee and also obtain valuable community input as to modifications to the plan. One such member of the community advisory committee who testified was Raymond Holter, who resides on Allender Road in White Marsh. He testified as to the use of the site as a sand and gravel excavation operation for many years. He further noted that he had been on a landfill regulatory committee established by Baltimore County since 1982 and had participated in reviewing plans for other landfills including the Eastern Landfill. As to the proposed project in White Marsh, he noted the citizens have had a great deal of impact and the applicant, in his view, has made exemplary efforts to satisfy the community concerns. In his opinion, all appropriate community concerns have been satisfied and addressed through the Petitioner's revisions to the plans. He does not anticipate any traffic problems and believes that there will be no pollution, be it water, noise or

air. Moreover, he is impressed by the fact that the Petitioner proposes to return the site to the County for use as a park in 10 years.

Also testifying from the community advisory group was Carlton Bennett. Mr. Bennett lives in the notch formed on the south of the subject property on Silver Spring Road. The Bennett property, as well as its neighbor (Cooney), are the closest residential properties. Mr. Bennett's testimony was candid and creditable. He recognized the obvious, that no one would like to live next to a landfill if it could be avoided. In his view, if the project could be prevented, he would favor the site remaining in its present condition. However, he conceded the Petitioner's right to develop the property and request the special exception and development approvals sought in this case. Recognizing those rights, Mr. Bennett expressed concerns as to pollution, noise, traffic and security. He noted that he had expressed these concerns sometime ago to the Petitioners and was satisfied with their response. He believes that the operation, if conducted carefully and regulated by the State and Baltimore County, will not cause an adverse affect to the locale.

On cross examination, he reiterated his concerns over living next to an operating landfill. He also expressed some concerns about his well in that his property is not supplied by public water. However, he believes that with proper precautions, the safety of his water will be guaranteed. He also acknowledged that he will acquire approximately one acre of property along the north portion of his site after the landfill operation is completed. Thus, he stands to gain additional land if the project moves ahead. Lastly, Mr. Bennett was pleased that the entrance on Silver Spring Road was to be closed and opined that a sole vehicular access on Philadelphia Road would eliminate any of his concerns as to traffic congestion.

Also testifying in support of the Petition were two representatives of Baltimore County; namely, Andrea VanArsdale from the Office of Planning and Zoning and Albert Svehla, Asst. Director of the Department of Recreation and Parks. Ms. VanArsdale submitted her agency's written comments regarding the project dated September 21, 1993 and October 6, 1993, as amended. As noted in those comments, the Petitioner and the Office of Planning and Zoning (OPZ) have reached an agreement as to certain restrictions and changes to the plan. With the implementation of these changes and restrictions, the plan is now supported by OPZ. OPZ's support includes an endorsement of both the development plan, as submitted, as well as the Petition for Special Exception. Within her testimony, Ms. VanArsdale noted the need for certain services and infrastructure within the Honeygo area. The needed infrastructure includes both waste disposal sites, which will be provided by the landfill, as well as recreation and park facilities, which will be provided on this site after the landfill is utilized and capped. Thus, the public benefit to be gained by these uses outweighs any potential detrimental effect on the surrounding locale. Moreover, Ms. VanArsdale indicated that OPZ had no open issues on the merits of the development plan as submitted. She acknowledged a monetary payment to be made to the County by the developer in lieu of a previous request that a pedestrian bridge be constructed over I-95.

As to Mr. Svehla's testimony, he noted that the site would serve the White Marsh community and White Marsh recreation council. He stated that the development of the site a a park was not originally a part of Recreation and Parks' Master plan. However, he believes that the site is a good place for ball fields in that it is close to the major roadways in this area (I-95, Philadelphia Road, Route 40, etc.) and is near a high growth

area. He likened the proposal to the development of Longview Golf Course and other recreation projects, which converted property which had been previously utilized for landfill purposes. He also noted that the site was being offered to Baltimore County at no cost which he believes constitutes a real public benefit in view of the fiscal restraints imposed on local government in this time.

There was also significant testimony about conversion of the site to athletic fields. Counsel for the Protestants believes that the site will be sloped to such a degree so as to make the property's use for athletic fields untenable. Specifically, four softball/baseball diamonds and two soccer/football fields are proposed. Mr. Svehla noted that a 2% slope is needed on any athletic field to promote drainage and that his department was satisfied with the slope of the proposed field. Mr. Svehla seemed convinced that his department could work with the developer, Maryland Department of Environment and other regulatory agencies after the landfill was capped to convert same to useable athletic fields. He did acknowledge, however, that the site could not be turned over to the County in phases. That is, vehicular access and use of the site would be prohibited until the entire operation was completed. Since Cell one is farthest from Old Philadelphia Road and would be capped first, users of the park facilities thereon would be forced to travel through the active operations on Cells two and three before accessing the fields on Cell one. Clearly, this is neither practical nor feasible. Nonetheless, Mr. Svehla's support for the project is understandable in that his agency stands to gain needed space for facilities. Thus, the Department of Recreation and Parks supports the project under these guidelines.

The final witness produced by the Petitioner was Charles Volpe. Mr. Volpe is a principal in Honeygo Run Reclamation Center, Inc. and will be the individual largely responsible for the facility's operation. He detailed his background and testified that he has been in the waste disposal industry for approximately 18 years. His duties at a company owned by him, Commercial Refuse, Inc., have provided him with experience as to disposal of commercial waste. He admitted, however, that he has never managed a landfill, per se. He has been involved, however, with the operation of the Days Cove Landfill and the Michaelsville Landfill in Aberdeen, Maryland. Mr. Volpe's testimony mainly addressed a number of concerns which were raised by the Protestants. He described in great detail the Operation Manual (Pet. Exh. No. 24) which was submitted and discloses the planned operation of the facility. He commented on the Advisory Committee which had been formed of concerned community members. This committee has provided the Petitioner with a number of suggestions which have been enacted. These suggestions have, in many respects, calmed the Protestants' fears. He proposes keeping the committee intact during the entire life of the project to assure community input as to the operation.

One of the changes arising out of the Advisory Committee concerns was the relocation of the interior gate and increased stacking spaces. As noted on the plan, the gate has been relocated so as to provide 16 stacking spaces between the inspection station and Philadelphia Road. Mr. Volpe noted that these spaces could be doubled by lining waiting vehicles side by side so as to give the site a 32 space stacking capacity. He also noted that the hours of operation of the facility would be 7:00 A.M. to 5:00 P.M. (Monday thru Saturday) and that the outer gate would open at approximately 6:00 A.M. The stacking scheme which has been developed will

ensure that vehicles waiting to enter the site will not queue onto Philadelphia Road and cause traffic congestion.

Mr. Volpe also described in detail the inspection system. He also agreed to restrict the plan by funding the salary of an independent inspector to assure that unacceptable material was not been placed on the site. He noted that both video cameras and personal inspection would be utilized on the site to ensure that only permitted waste was being accepted. Moreover, radio contact will be available between the inspector at the cell and the inspection station to ensure a continuity of inspection. Moreover, Mr. Volpe noted that users of the site who presented unacceptable material would be sanctioned, including but not limited to an assessment of the costs to remove objectionable material and prohibition from additional utilization of the site. Other features of the plan which had been added to address public fears was the installation of a 4,000 gallon water truck. Mr. Volpe noted that this truck would be utilized to reduce dust and would also be available to provide immediate water in the event of fire.

Additionally, Mr. Volpe described the evolution of the site from a landfill and eventual transfer of same to the Baltimore County's Department of Recreation and Parks. He believes that this will provide beneficial services to the Baltimore County community at large in that it will provide necessary infrastructure (rubble landfill) while ultimately providing needed recreational space. Lastly, Mr. Volpe noted a number of other conditions which had been agreed to between the developer and the County including the developer's rehabilitation of the Honeygo Run as described by Mr. Sheesley and improvements to the intersection at Cowenton Avenue, Ebenezer Road and Route 7. Finally, Mr. Volpe evaluated and commented

upon the specific requirements set forth in Section 502.1 of the B.C.Z.R. He believes that the proposed use will not be detrimental to the health, safety and general welfare of the community and that the proposed use complies with the special exception standards set forth within that section.

Testifying in opposition to the request were numerous residents of the surrounding locale. They were spearheaded by Adam Paul, who testified both individually and on behalf of the White Marsh Civic Association. Mr. Paul is a former Baltimore County Police Officer and has been employed in a number of other law enforcement positions. He cited ten specific concerns relating to the proposed use.

First, he was concerned about storm water management and the lack of a storm water management pond on site. He commented on the Petitioner's proposal to construct a swale around the perimeter of the property. He believes that this is an inadequate system to dispose of storm water. He expressed concerns that if a landfill is not lined, storm water could get into the underlying aquifer.

Second, Mr. Paul expressed certain concerns regarding the expected traffic to be generated from this site. In this regard, he drew on his vast experience as a police officer in Baltimore County. He believes that the proposed access/egress from the property on Philadelphia Road is inadequate. He also expressed concerns about the needed realignment of the Cowenton Road/Ebenezer Road/Old Philadelphia Road intersection which is located to the north of the site. Overall, Mr. Paul opined that he does not believe that Philadelphia Road was intended to carry the volume of traffic which is anticipated to be generated by this site.

Mr. Paul's next area of concern regarded the ultimate use of the property by the Department of Recreation and Parks. He questioned whether there was need for park space and athletic areas in this portion of the County. He expressed an opinion that there were other sites nearby which could accommodate athletic fields and recreational facilities if they were truly needed. He also observed that there were no sidewalks in the Philadelphia Road corridor which could make potential pedestrian traffic to the park dangerous.

The next area of concern expressed by Mr. Paul related to the ground water. This tied into his expressed reservations about the storm water management system. As set forth in much of the expert testimony produced by the Protestants, Mr. Paul believes that potential contamination of ground water could result from this site.

Mr. Paul also expressed concerns over the operation of the site. He stated the obvious; that if the landfill is not operated as proposed, the potential detrimental effects of same will be magnified. This is clearly the case, although same does not necessarily justify denial of the Petition for Special Exception and development plan. The Petitioner's commitment to operate the facility in a proper and prudent manner and assurance that the governmental regulatory authorities will monitor such an operation is important.

Six, Mr. Paul believes that the proposed use is inconsistent with the property's M.L.R. zoning. He believes that this development is fiscally irresponsible and that development of the parcel as an office park would increase the tax base to Baltimore County. He also observed a number of residences nearby which, he believes, are incompatible with the proposed use. Although understandable, Mr. Paul's comments regarding the expected

tax revenue which could be generated from the site are irrelevant. My decision in this case must be governed by the development regulations, the zoning regulations and case law. Comparison to other operations and their expected tax generating potential is not germane.

Surprisingly, Mr. Paul also objects to the restoration of Honeygo Run by the developer. It would seem that this is a benefit which everyone would appreciate. Clearly, preservation and restoration of our natural resources, including the Honeygo Run, is in the public interest. Although he acknowledged such, Mr. Paul objects to a perceived impropriety of the developer offering such services in exchange for OPZ's support of the project. I am appreciative of these sentiments and clearly the merits of the subject Petition and development plan must be considered in accordance with the applicable provisions of law. However, imposing reasonable restrictions on the Petitioner to benefit the health of the surrounding environment is appropriate.

Mr. Paul's remaining objections regarding the adjacent trailer park, the impact on the general health and welfare of the community, and fire protection were also duly noted within the record.

A number of other residents also testified. Among them was Ann Witlow who resides north of the intersection of Ebenezer and Cowenton Roads on Philadelphia Road. As did Mr. Paul, she expressed concerns over traffic to be generated by the site. She also fears any new development in the area which might increase storm water runoff and flooding to her property. However, it appears that her house is situated such a distance from this property that flooding would not be an issue as it relates to the subject site.

Also testifying was Barbara Bell, who lives approximately one mile south of the site on Philadelphia Road in the community of Nottingham. She noted a potential for structural damage to her house if truck traffic were increased. She observed that Philadelphia Road already carries a number of heavy trucks from the commercial/industrial uses which are in this area. She fears that the opening of a landfill would dramatically increase truck traffic in her area which could compromise the structural stability of her house.

Also testifying was Jesse Carr, a nearby resident of Philadelphia Road. He is a long time resident of this area and testified as to the history of the site and his recollection of same from when he was a child and played near this property. He believes that the landfill should only be allowed with a liner so as to protect the ground water in this area. He is also concerned about the finished grades of the property, although he clearly did not review the plan in detail.

Also testifying in opposition was James Maszczenski. He lives on Ebenezer Road around the corner from the site and down the street from the intersection of Philadelphia and Ebenezer Roads. He presented very real concerns about the traffic pattern at the Ebenezer Road/Philadelphia Road intersection. He noted that that large trucks have difficulty negotiating the turns at this intersection. He testified as to his personal knowledge of the heavy truck traffic at this locale and his observations that many trucks are unable to negotiate that corner. Often, traffic congestion will result when trucks are attempting to make this turn.

Based on part of Mr. Maszczenski's testimony, I visited the intersection and observed traffic. Unfortunately, no tractor trailers passed at the time of my visit. However, dump trucks and other commercial vehicles

were able to negotiate the corner without difficulty. Nonetheless, I am appreciative of Mr. Maszczenski's concern and the obvious need for realignment of the Ebenezer Road/Cowenton Road/ Philadelphia Road intersection.

Roy Reiner, President of Oliver Beach Community Association also testified. His association is concerned about the potential contamination of the Honeygo Run which leads to Bird River and ultimately to the Gunpowder River. He also expressed concerns over traffic and opined that if this Zoning Commissioner seriously considers the issue, the project would be denied.

Richard T. Burnett, a resident of Oliver Beach echoed Mr. Reiner's testimony. He, likewise, is concerned over potential pollution to the waterways in the Eastern end of the County and traffic concerns. He also expressed a concern whether out of state haulers would be able to utilize the site.

Marie Simoes, on behalf of the Nottingham Improvement Association, also testified in opposition. Nottingham is a residential community which is located approximately 1-1/2 miles south of the site on Philadelphia Road. She echoed many of the concerns previously set forth, including traffic, pollution, etc. She succinctly stated her general concerns that the proposed use at this location would negatively affect the quality of life in the residential communities which are nearby. She expressed a perceived conflict between the inherent nature of the immediate use as a landfill and the future use of the property as a park. That is, Mrs. Simoes believes that the diametrically opposed potential uses are inconsistent and incompatible. I am appreciative of this sentiment, however, need only refer Mrs. Simoes to Longview Golf Course and similar projects which have been developed in this manner. At first blush, a landfill operation

and park are on the opposite ends of the zoning use spectrum. However, upon further consideration, both provide important services and satisfy public needs. The services offered by a landfill operation are needed. Once the operation is completed, conversion of the property to another useful purpose is appropriate. There should be no prohibition on ball playing and recreational activities in the middle of an urban area. One need only examine Oriole Park at Camden Yards to see recreational opportunities being provided in the midst of an, otherwise, urban/manufacturing/business community. Mrs. Simoes was also concerned about the proposed operation of the site and whether the stated safeguards testified to by the Petitioner would actually be implemented. She is also concerned about many of the other inherent effects of the property, including potential pollution and noise.

The last lay Protestant who appeared was Ms. Julie Smith, who resides in Rogers Forge. It is quite difficult to understand Ms. Smith's standing to testify in this case, in that she did not appear on behalf of the organization in which she is a member, namely, the Sierra Club. Rather, she appeared in an individual capacity. Clearly, Ms. Smith is against all landfills. However, she did admit to a preference for the landfill to be located where proposed in lieu of downtown Rogers Forge. Ms. Smith's well meaning comments concerning pollution and the health of the Chesapeake Bay and its tributaries are well taken. Often it is most difficult to balance the uses such as the one proposed with the goal of a pristine environment. Clearly, careful balancing of these considerations is needed.

The Protestants also produced expert witnesses in reference to the issues presented in this case. These included Richard D. Klein, a principal in the firm of Community and Environmental Defense Services. Mr.

Klein was formerly employed by the Maryland Department of Natural Resources and did a number of studies while in that employment of landfills and issues related to those presented in this case. He was presented as an expert witness as to the environmental impact of landfills on aquatic systems. There was extensive cross examination of Mr. Klein on voir dire. His educational background is limited and he is not a college graduate. He did not qualify as an expert in the areas of hydrology, chemistry, biology, civil engineering, sanitary sciences, soil sciences or hydrogeology. However, based upon is broad work experience and background, he was accepted as an expert to offer opinion testimony regarding the environmental impact of the landfill on the surrounding water system.

In this respect, Mr. Klein reviewed the studies and plans offered by the Petitioner and was present for much of the testimony presented during the hearing. After presenting the foundation for his studies, he offered the following opinions.

He first took issue with the standards employed by the Maryland Department of Environment within the Code of Maryland Regulations. He noted that the standards for evaluating impacts on the ground water in this case are based on the State standards for drinking water. These standards are less stringent than those mandated by the State for the protection of aquatic life. That is, the Maryland Department of Environment will evaluate this project in accordance with drinking water standards rather than the more stringent aquatic life standards. When questioned by the Zoning Commissioner as to why drinking standards were not as rigorous, Mr. Klein noted that the aquatic life live within the water system and are less tolerant of certain pollutants. Thus, Mr. Klein opined that even if the proposed landfill does not adversely affect the surrounding aquatic system

when adjudged pursuant to MDE's standards, there still could be great detrimental effect to the aquatic life which reside in the Honeygo Run as a result of the impact of this use. Specifically, Mr. Klein opined that the underlying aquifer, the wetlands on or near the site, the Honeygo Run and the Bird River are all at risk.

In order to remedy these potential effects, Mr. Klein offered two alternatives. First, he proposed that a liner be inserted in the bottom of the fill operation. He proposed both a synthetic and natural clay liner to assure that leachate would not penetrate into the underground water system. Secondly, Mr. Klein suggested that the distance between the bottom of the fill and water table be increased to more than the required 5 feet. This would provide an additional safety net to ensure that pollution would not enter the underlying system. Lastly, this witness commented that the proposed landfill use would detrimentally effect this locale in a manner unique than the inherent effects of the use. Specifically, he pointed to the unusual natural features of the surrounding locale, including the existence of the Honeygo Run and aquifer, which he believed distinguished this site from other similarly zoned properties.

Also testifying as an expert witness was Dr. Robert Kondner, a civil engineer. Dr. Kondner testified extensively about potential contamination of the ground water system from the operation of the proposed landfill. He offered a variety of technical opinions about potential contamination of the underlying aquifer. Essentially, he noted that the soils on site were very porous and therefore would absorb a large percentage of the rainfall which falls on site. That is, there will be very little storm water runoff because of the high absorbency characteristics of the surface conditions. A full 85% of the rain on the site will be absorbed into the

soil by his calculations. Using this rate of absorbency, Dr. Kondner then computed the amount of actual water which would enter the site based on the annual rain projections for this area. In this respect, he concluded that 10,317 liters of water per day, per acre, would be infiltrated into the ground. Due to this large volume of rain water which will be absorbed, Dr. Kondner believes that the underlying aquifer will be contaminated. That is, the rain water will pass through the porous soils and enter the underlying aquifer without proper filtration. In order to mitigate this effect, he proposes an extensive series of liners including a combination of clay and a synthetic liner.

As with all witnesses, I am required to adjudge the credibility of Dr. Kondner's testimony. In this respect, it was difficult to accept this expert's testimony as accurate. It is first important to note that Dr. Kondner admitted that he had never been to the site and his conclusions were based entirely upon his review of the studies and exhibits presented by the Petitioner. Certainly, a field investigation would be appropriate for any expert witness in order to personally inspect conditions on which opinions would be based. Moreover, Dr. Kondner appeared to misinterpret some of the Petitioner's exhibits relating to ground water levels. His conclusions regarding absorbency also ignored interim levels of cover which will be applied on a regular basis as the cells are filled. That is, the Petitioner proposes to cover waste as same is accumulated. This natural cover would affect the absorbency and filtration of any rain water which would enter the system. Although this expert's educational and experienced credentials are indeed impressive, his evaluation of the subject site appear to be less than thorough and his conclusions therefore were questionable.

Having summarized the testimony and evidence offered, attention is next turned to the relief requested. Consideration is first given to the Petition for Zoning Variance which has been filed. Therein, the Petitioner requested relief from Sections 409.8A.2, 409.8A.6 and 413.6.B of the B.C.Z.R. The first two of these sections mandate a required durable and dustless surface paving of the internal roadway and permanent striping for the offstreet parking facilities. The remaining section limits signage to one free standing sign with 25 sq. ft. per face, 6 ft. in height.

As to the parking requirements, the Petitioner proposes a crushed concrete surface in the haul road which will not be striped. As to the signage, two free standing signs with 60 sq. ft. per face, 8 ft. in height, are requested.

Zoning variances must be evaluated in accordance with Section 307.1 of the B.C.Z.R. This section sets forth a three prong test. It provides that the Petitioner must demonstrate practical difficulty or unreasonable hardship, that a granting of a variance will be in strict harmony with the spirit and intent of the regulations, and that the relief granted will be without injury to the public health, safety and general welfare. Moreover, the definition of practical difficulty is well settled at law. McLean v. Soley, 270 Md. 208 (1973). To prove practical difficulty for an area variance, the Petitioner must meet the following:

> 1) whether strict compliance with requirement would unreasonably prevent the use of the property for a permitted purpose or render conformance unnecessarily burdensome;
>
> 2) whether the grant would do substantial injustice to applicant as well as other property owners in the district or whether a lesser relaxation than that applied for would give substantial relief; and

3) whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.

Anderson v. Bd. of Appeals, Town of Chesapeake Beach, 22 Md. App. 28 (1974).

As to the haul road requirements, I am persuaded that the Petitioner has met its burden. It is entirely logical for the haul road to be constructed of a nondurable material. First, the material to be used for construction (crushed concrete) will be readily available on site from the concrete recycling facility. Also, the road's configuration may be altered during the life of the landfill. That is, different areas of the site will be utilized during the 10 year expected life span of this facility. Thus, the length and configuration of the roadway will be changing. Moreover, this road will be used only for customers and employees of the site; that is, it is not a public facility. A crushed concrete surface will also promote better drainage and absorbency. For all of these reasons, it is entirely appropriate for this variance to be granted and strict adherence to Sections 409.8A.2 and 409.8A.6 should not be required.

As to the signage variance, I am, likewise, persuaded that this should be granted. The signs proposed by the Petitioner, as shown on the site plan, are entirely consistent with a property of this size. Clearly, two signs will not overwhelm a 64 acre parcel. Moreover, they are necessary in order to direct traffic and improve conditions at the vehicular entrance to the site. They will provide advance notice of the precise location of the entrance road to customers. I concur with the Petitioner's assertions that the signs proposed are the minimal necessary in order to serve their necessary function.

Next for consideration is the Petition for Special Hearing. Therein, the Petitioner requests approval of the proposed concrete recycling and wood waste chipping operations as permitted accessory uses to the existing mining operation and the proposed rubble landfill. Accessory uses are defined in Section 101 of the B.C.Z.R. Essentially, they are uses which are subordinate to a principal use, are subordinate in area, extent or purpose to a principal use, are located on the same lot as the principal use and contribute to the comfort, convenience or necessity of the business and industry involved in the principal use. In applying the characteristics of the recycling operations to the principal uses described, it is clear that all features of this definition are met. The recycling facilities are obviously located on the same site and are reasonable and appropriate uses in connection with the mining operation and proposed rubble landfill. They will particularly compliment the rubble landfill use by providing an additional sorting mechanism. Further, the life of the fill will be expanded by diverting material which might otherwise be buried in the fill to the recycling center. Moreover, I am persuaded that the accessory uses will not be detrimental to the health, safety and general welfare of the community. I am persuaded, in this respect, by the fact that these uses are located in the interior of the site and not on the perimeter. The testimony of Mr. Rist, the noise expert, was particularly persuasive and unchallenged. For these reasons, I will, likewise, grant the Petition for Special Hearing so as to approve these accessory uses.

The next item for consideration is the Petition for Special Exception. This is also a two prong request; for approval of both the existing Excavation Controlled business as well as the future rubble landfill operation. As to the Excavation Controlled operation, it is clear that same

should be approved. This operation has existed on this site for many years and no doubt predates many of the surrounding land uses. Moreover, this is an area of the County in which operations of this type are well known and have been conducted for many years. As noted above, the Genstar operation is a short distance south of this site. Thus, the mining operation fits in well with the surrounding locale. Moreover, much of the locale has grown up with this operation in place and has adjusted to the inherent effects of such an operation. I find no evidence that the mining operation is detrimental to the health, safety and general welfare of this community. I am satisfied that the Petitioner has satisfied the standards enunciated in Section 502.1 of the B.C.Z.R. which must be applied to all special exception uses. Thus, the special exception, for this use, will be and is hereby granted.

The next issue for consideration relates to the other prong of the special exception relief requested; namely, that approval be given to allow a rubble landfill. This issue sparked the most controversy and opposition from the surrounding communities. As noted above, consideration of special exceptions is governed by Section 502.1 of the B.C.Z.R. Therein, a laundry list of considerations are listed which the Zoning Commissioner must apply to any proposed special exception use. Those standards relate to the anticipated impact of the proposed special exception use on the surrounding locality involved and whether the said use would be detrimental to the health, safety and general welfare of the community. Specific considerations as to traffic, pollution, over taxing of public utilities, etc., are all listed.

Although these standards must be applied, it is to be noted that a special exception use is a use which has been predetermined by the Balti-

more County Council to be conditionally compatible with the uses permitted as of right in a particular zone. See Rockville Fuel and Feed Company, Inc., v. Board of Appeals of the City of Gaithersburg, 257 Md. 183, 262 A.2d 499 (1970). Moreover, the Petitioner does not have the burden of establishing affirmatively that the proposed use will be a benefit to the community. Anderson v. Sawyer, 23 Md. App. 612, 329 A.2d 716 (1974).

The leading case in Maryland on special exceptions is Schultz v. Pritts, 291 Md. 1, 432 A2d 1319 (1981). Counsel for both parties have cited this case as controlling. Moreover, Schultz has been revisited by the Court of Special Appeals in Peoples Counsel v. Mangione 85 Md. App. 788 (1991), and most recently in Sharp v. Howard County Board of Appeals, No. 103, Sept, Term, 1993. These cases all discuss the special exception standard and the "unique effect" test which has been formulated by the courts. As noted above, a special exception use is presumptively appropriate. It has been predetermined by the local legislative body to be conditionally compatible with the uses permitted as of right in a given zone. Moreover, the courts have recognized that all special exception uses, by their very nature, cast certain inherent effects on their surroundings. For example, almost any commercial/industrial use can be expected to generate more traffic than an undeveloped property. These effects, in and of themselves, are not sufficient, however, to warrant a denial of the special exception. These characteristics must result in an adverse effect upon the adjoining and surrounding properties different than that which would, otherwise, result from the special exception use if located elsewhere within the zone. Pritts, supra, pg. 1327.

In Mangione, the Petitioner proposed constructing a nursing home within the center of a residential community in Lutherville. The court

noted that the construction and maintenance of the home would introduce additional traffic to the area and exacerbate a storm water runoff problem. Although these by-products of the use were inherent in the placement of a nursing home anywhere, the court sustained a denial of the special exception use by the County Board of Appeals due to the unique effect caused by these impacts in this area. Particularly, the character of the community in which the nursing home was planned was such that these inherent effects would cause detriment to a greater extent than would normally be the case.

In Sharp, the same law was applied but a different result was reached. In that case , the court, although identifying certain inherent impacts which would result from the operation of a small private airport, concluded that those impacts produced no unique effect on the locale in which the airport was to be located. Thus, the special exception use in that case was approved.

Applying these principals to the present case, the Protestants have presented two issues which they submit justifies a denial of the special exception. The first of these is traffic. In this respect, the Protestants claim that the special exception use should be denied because of the potential traffic congestion which might result. The Protestants argue that the narrowness of Philadelphia Road, a difficult intersection at Philadelphia Road, Ebenezer Road and Cowenton Avenue and the residential communities to the south all justify a denial of the special exception. I disagree.

In my view, traffic will not be so uniquely affected so as to justify a denial of the special exception. The site is located within close proximity of I-95 and U.S.Route 40, major thoroughfares in the eastern end of

Baltimore County. These thoroughfares were, no doubt, constructed to provide major arterial avenues for commercial vehicles. The presence of these major roadways in the immediate vicinity is, in my view, significant. As to Philadelphia Road, I am persuaded by the expert traffic testimony presented by the Petitioner. Particularly with the improvements offered by the Petitioner, I believe the roadway will be able to effectively handle the amounts of proposed traffic. Certainly, appropriate restrictions should be added to ensure minimal traffic impact. Moreover, the Petitioner has offered improvement to the Cowenton Avenue, Ebenezer Road and Old Philadelphia Road intersection which will be required as a condition to my approval. Moreover, the traffic control plans proposed for the access to the site must be implemented. These controls include the prohibition on trucks from turning southbound on Philadelphia Road as well as the physical improvements to the access point as shown on the site plan. I am convinced that as restricted in the manner set forth above, traffic will not be adversely effected.

The second issue presented relates to pollution. The Protestants fear pollution to the underground aquifers in the area and Honeygo Run from this facility. In addressing these concerns, it is first important to note the Petitioner's argument that this Zoning Commissioner is preempted from considering this issue by State regulations. That is, the Petitioner argues that this is an issue for another day, namely, during the Phase II consideration of the project by the Maryland Department of the Environment. Although I am appreciative of MDE's review, I am not persuaded that I may not consider this issue. The standards set forth in Section 502.1 of the B.C.Z.R. are broad and sweeping. I must consider all adverse impacts of a proposed use to the locale. Moreover, the Petitioner's ex-

perts' testimony relating to the State's deference of this issue until local zoning approval is obtained is significant. In my view, the State recognizes the authority of the local zoning ordinances to consider these issues. Thus, I will fully review this issue.

As recounted above, the testimony offered by the various expert witnesses regarding the pollution was diverse. Perhaps, the most credible testimony offered was that from Mr. Sheesley. He candidly admitted that he felt the State may require a liner after its investigation. It is clear from the testimony of all of the witnesses that environmental concerns for landfills are weighed more heavily at this time then in the past. Mr. Krawczyk, in fact, indicated that it is much more difficult to obtain State approval now then 10 years ago.

In considering this issue, I am particularly cognizant of the site's location near the Honeygo Run. This is an important tributary which ultimately feeds into the Chesapeake Bay. The preservation of the health of this tributary and the entire water shed is significant. Although I am satisfied that the Petitioner's will operate the site in accordance with their plans, the possibility of leachate entering the underwater table and Honeygo Run is real. Moreover, the porous nature of the soils on this site support a conclusion that the natural filtration of any leachate will not be effective as might be the case on another property.

After considering all of the issues, I believe that some type of liner on this site is appropriate. However, I am uncertain as to what is most appropriate. Dr. Kondner's suggestion of a combination clay/synthetic liners appears to be overkill. The determination of the exact type and quality of liner is difficult. In view of this dilemma, I will defer any final decision. My Order will contain a restriction to

require some type of liner at the bottom of the fill. However, the nature of the liner will be deferred pending the developer's application with the Maryland Department of Environment. If MDE requires a liner, I shall incorporate their final decision within my Order. That is, I will defer to that agency as to the particulars of the liner to be required. If no liner is required by MDE, the Zoning Commissioner shall reconvene this hearing by way of Petition for Special Hearing to determine the type of liner to be utilized.

In addition to these two major issues, several other concerns were voiced by the Protestants. These included the qualifications of the owner to operate the landfill and whether the landfill may be restricted to only local users. As to his qualifications, I am persuaded that Mr. Volpe possesses a sufficient background to run the landfill. To date, the presentation made by the Petitioner showed a high degree of professionalism and forethought. I am convinced that he will properly operate this facility as promised. Moreover, I will require certain restrictions to ensure same. As to the Constitutional issue, the Petitioner has agreed to limit rubble to only local customers. I believe that this limitation is appropriate. If it is unconstitutional, that issue is for the courts to decide. Thus, I will approve the plan with that self imposed restriction to be added. However, if it cannot be enforced because of constitutional failing, I do not find that condition so necessary as to warrant a denial of the special exception.

For the aforementioned reasons, I shall grant the Petition for Special Exception as requested. In my view, the proposed use meets the Schultz v. Pritts test and can be operated without unique detriment to the surrounding locale.

The next issue for consideration relates to the development plan. As required in the development regulations, I must determine if there are any open issues which need be resolved in evaluating the plan. The Petitioner's testimony and comments from Baltimore County representatives showed that there are no unresolved issues. The developer's plan as amended and filed, meets all County technical standards and regulations. The Protestants' concerns, clearly, relate more to the special exception use. Thus, the development plan will be approved.

Finally, as touched upon above, certain restrictions need be added to ensure the safety of the surrounding locale. It initially need be noted that the plan is approved as submitted. That is, the developer shall comply with the red line comments added on the plan to satisfy certain County concerns. Moreover, compliance with the development plan comments offered by the County agencies is required. Moreover, certain other restrictions shall be imposed, many of which the Petitioner previously agreed to. They are:

(1) Some type of liner will be required as set forth above. The exact nature and type of liner required will be deferred to the judgment of the Maryland Department of the Environment. If they do not require such a liner, a Petition for Special Hearing need be filed to reconsider this issue. This will enable the parties to complete studies and enable the zoning authority to render an intelligent decision as to this issue.

(2) The period for utilization of the special exception shall be 5 years. I am appreciative of the long and arduous regulatory procedure which the Petitioner must complete through the State of Maryland. Thus, an extension of this nature shall be given, as has been requested by the Petitioner.

(3) Upon full utilization of the fill and capping of same, the property shall be transferred to Baltimore County, for use by the Department of Recreation and Parks, at no cost to Baltimore County.

(4) The Petitioner shall be required to restore Honeygo Run, in a manner substantially similar to that proposed within the report authored by Robert Sheesley (Pet. Exh. No. 27). The restoration shall be completed within 5 years from the date of the issuance of final permits authorizing the rubble fill operation.

(5) The Petitioner shall cooperate fully with the Department of Public Works in Baltimore County and the Maryland State Highway Administration in the realignment of the intersection of Maryland Route 7/Cowenton Avenue/Ebenezer Road including the conveyance of any property adjacent thereto necessary to realign said intersection, at no cost to the appropriate State or County agencies.

(6) The Petitioner shall pay the salary and necessary related expenses for an independent inspector to periodically monitor the operation of the landfill. This individual shall ensure that regular and thorough inspections of material is ongoing and ensure that the operation is conducted in a manner consistent with what is proposed in the Operations Manual. The identify and specific duties of this individual shall be determined by the Community Advisory Committee, which the Petitioner shall maintain and keep in place throughout the life of the fill.

(7) The Petitioner shall prepare and submit to ZADM, within 10 days from the date of this Order, a development plan which reflects and incorporates the terms, conditions and restrictions, if any, of this Order.

Pursuant to the zoning and development regulations of Baltimore County as contained within the B.C.Z.R. and Subtitle 26 of the Baltimore Coun-

(1) Some type of liner will be required as set forth above. The exact nature and type of liner required will be deferred to the judgment of the Maryland Department of the Environment. If they do not require such a liner, a Petition for Special Hearing need be filed to reconsider this issue. This will enable the parties to complete studies and enable the zoning authority to render an intelligent decision as to this issue.

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(7) The Petitioner shall prepare and submit to Zoning Administration and Development Management (ZADM), within 10 days from the date of this Order, a development plan which reflects and incorporates the terms, conditions and restrictions, if any, of this Order.

Any appeal from this decision must be taken in accordance with Section 26-209 of the Baltimore County Code and other applicable provisions of the law..

LAWRENCE E. SCHMIDT
Zoning Commissioner
for Baltimore County

LES:mmn

portion thereof underground would be greater than locating it overhead, in any given case, shall not in itself be deemed sufficient cause to prevent a requirement for underground construction. [B.C.Z.R., 1955.]

(7) Any other matter or thing deemed by him or them to be material in connection with the public health, safety or general welfare. [B.C.Z.R., 1955.]

Section 412--SANITARY LANDFILLS AND RUBBLE LANDFILLS[6]
[B.C.Z.R., 1955; Bill No. 145, 1962; No. 97, 1987.]

412.1--Landfills must comply with all applicable requirements of the Baltimore County Department of Health and the Department of Environmental Protection and Resource Management.

412.2--All landfills must comply with the County's applicable permit requirements.

412.3--Screening shall be provided of such types and at such locations as may be required by the Zoning Commissioner on recommendation of the Director of Planning and Zoning.

412.4--Road access shall be adequate for the truck traffic generated by the landfill.

412.5-A post-use land reclamation plan approved by the Baltimore County Soil Conservation District and the Baltimore County Office of Planning and Zoning and the Department of Environmental Protection and Resource Management is required before the use may be authorized by the Zoning Commissioner.

412.6--A landfill may not be located within 100 feet of any property line or well or septic system or within 100 feet of any stream or natural water course or wetlands or floodplain.

412.7--The Department of Environmental Protection and Resource Management periodically shall inspect a rubble landfill in order to monitor the type of waste material being received for disposal.

412.8--The right to maintain a rubble landfill which is not in compliance with this section and which was in operation before the effective date of this section shall cease one hundred eighty days after the effective date, unless within that time the owner or agent files with the Zoning commissioner a petition for approval of a special exception.

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August 17, 2004

VIA HAND DELIVERY
Kathleen C. Bianco, Administrator
Board of Appeals
Room 49
400 Washington Avenue
Towson, Maryland 21204

Re: Republic Services, Inc.-
Honeygo Run Reclamation Center, Inc.
Appeal Case No.: 04-089 SPHX
Our File No.: 078708/00001

Dear Kathy:

Enclosed for filing please find the original and three copies of the Memorandum of Petitioner prepared in connection with the above reference matter.

Very truly yours,

John B. Gontrum

JBG/kml
Enclosures
cc: (All With Enclosures)
John T. Willis, Esquire
C. William Clark, Esquire
Peter Max Zimmerman, Esquire

314115

IN THE MATTER OF:

RE: 10710 Philadelphia Road; N & S side of Silver Spring Road, W of Philadelphia Rd
11th Election & 5th Councilmanic Districts
Legal Owner(s): Honeygo Run Reclamation Ctr, Inc., Philip J Auld, Area President, et al; Contract Purchasers: Honeygo Run Reclamation Ctr, Philip J. Auld, President

PETITIONERS

* BEFORE THE

* COUNTY BOARD OF APPEALS

* OF

* BALTIMORE COUNTY

* CASE NO. 04-089-SPHX

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

MOTION REQUESTING EXTENSION FOR FILING OF BRIEF

1. Pursuant to Section 501 and Appendix H of the Baltimore County Zoning Regulations, Protestant hereby respectfully requests that the Board approve an extension of the filing of the Briefs in the above-referenced matter.

2. The basis for this request is the delay in the receipt of the transcripts from the two different court reporters, and related exhibits, as well as the volume and length of the transcripts (245 and 311 pages, respectfully) and exhibits to be considered by the Board.

3. Accordingly, in order to permit a comprehensive and complete argument to the Board of Appeals with proper citation to the transcripts and exhibits and permit appropriate reproduction of the Briefs and exhibits, an extension of the Briefs is requested until August 20, 2004.

Respectfully submitted,

John T. Willis, Esq.
Bowie and Jensen, LLC
29 W. Susquehanna Avenue
Towson, Maryland 21401
Attorney for Protestants,
Sobczak Family, LLC

IN THE MATTER OF:	*	BEFORE THE
RE: PETITION FOR SPECIAL EXCEPTIONS	*	BOARD OF APPEALS
AND VARIANCES	*	FOR
10710 Philadelphia Road; N & S side of Silver Spring Road, W of Philadelphia Rd 11th Election & 5thCouncilmanic Districts Legal Owner(s): HoneygoRun Reclamation Ctr, Inc., Philip J Auld, Area President, et al; Contract Purchasers: Honeygo Run Reclamation Ctr., Philip J. Auld, President	* * * * * * *	BALTIMORE COUNTY Case No. 04-089-SPHX
PETITIONERS	*	

BRIEF OF PROTESTANT

STATEMENT OF THE CASE

The Honeygo Run Reclamation Center, Inc. (then owned by different local individuals), previously received approval for a special exception to operate a rubble landfill by decision of the Zoning Commissioner for Baltimore County in Case No. 94-87-SPHXA on December 13, 1993. Subsequent to receiving that approval from the Zoning Commissioner for the requested special exceptions, related variances and development plan, a permit was issued by the Maryland Department of Environment on January 8, 1997, for the operation of a rubble landfill on the north side of Silver Spring Road. (Permit No. 1993-WRF-10338)

On August 22, 2003, the Petitioner, Honeygo Run Reclamation Center, Inc. (now a wholly owned subsidiary of Republic Services, Inc., the nation's third largest waste management company, hereinafter sometimes called "HRRC" or "Petitioner"), together with the property owners of seven additional parcels of land who are Contract Sellers to HRRC, filed a petition for a special exception for a controlled excavation and for a special exception for a rubble landfill along with an application for a

special hearing requesting related amendments, exceptions, determinations, variances, modifications, eliminations and terminations of the previous decisions of the Zoning Commissioner for Baltimore County rendered on December 13, 1993.

After two days of hearing, the Zoning Commissioner of Baltimore County issued a decision on January 5, 2004, granting the Petitioners requests for special exceptions and variances. The Protestant, Sobczak Family, LLC, filed a timely appeal from the decision of the Zoning Commissioner on February 3, 2004, to the Baltimore County Board of Appeals. The People's Counsel for Baltimore County also filed an appeal on January 13, 2004, to the Board from the decision of the Zoning Commissioner.[1]

STATEMENT OF FACTS

The Petitioner, Honeygo Run Reclamation Center, Inc., is the owner and operator of a rubble landfill located at 10710 Philadelphia Road in the 5th Councilmanic District of Baltimore County. The approved, currently operating rubble landfill occupies 38.3 acres on a 68.4095 acre tract of ground that was previously the site of a sand and gravel excavating operation that dated back to the 1920's. This tract of land is bounded on the north by the stream known as HoneyGo Run, on the south by Silver Spring Road and residential properties, on the east by Philadelphia Road and on the west side by Interstate 95. The existing rubble landfill was granted a permit by the Maryland Department of the Environment on January 8, 1997, and began landfill operations on March 29, 1999 (See Transcript 7/14/04, page 202).

The Petitioner, Honeygo Run Reclamation Center, Inc., is the owner of three parcels and the contract purchaser of seven additional parcels of land on which it seeks to establish a rubble landfill utilizing 41.1 acres out of 49.8 acres as rubble disposal area. The properties proposed to be used as a

[1] By letter, dated, June 29, 2004, The People's Counsel indicated that because of the passage of Bill 58-04 that it would not appear at the hearing in this case.

rubble landfill in the case before the Board are or were previously used as residential dwellings and a trailer park or are undeveloped land in the zoned "MLR" zoning classification.

The Petitioner proposes to construct on these additional properties, by excavation and fill, an enormous man-made structure. The magnitude of the proposed rubble landfill is difficult to describe in writing and difficult to comprehend without visual inspection. The completed structure will cover 41.1 acres or 1,790,316 square feet) of land and is being designed to contain 5.6 million cubic yards of rubble landfill material. The proposal is to excavate to depths ranging from 20 to 70 feet below existing grade on the various parcels of property. The finished rubble landfill is proposed to have a grades ranging from 20 to 110 feet above the elevation of the existing land. (See Petitioners Exhibits 3 (A-D) and 5 (Sheets 1-14)).

Numbers alone do not adequately convey the size and scale of the Petitioners' proposed project. As illustrated in Appendix A attached to this Brief, the new acreage proposed to be used as a rubble landfill is larger in size than the entire complex of government and commercial buildings surrounding the Towson Courthouse and county government complex. The combined rubble landfill area is as large as the greater Towson business district. As illustrated on Appendix A attached to this Brief, the combined rubble landfills will consume acreage comparable to the area bounded by Bosley Avenue on the west, the Towsonsontown Boulevard on the south, Delaware Avenue and to the end of the Towsontown Mall on the east and peaking at Fairmount Avenue on a line to Bosley on the north.

The proposal to pile rubble up to 110 feet over existing grade is equivalent to a 10-12 story building that may be seen along one of the Towson business area streets. Such buildings include the First Financial Group Building at 401 Washington Street and The Mercantile-Towson Building at 409 Washington Street. Imagine walking out of the Towson Courthouse and seeing mountains of rubble rising 110 feet above where you are standing in every direction for a quarter of a mile (1600 feet). From

the courthouse plaza to the bank buildings is the same horizontal distance as the proposed peak of the rubble landfill to the property line of the Sobczak Family LLC property. See Attached Appendix B. In summary, the Petitioners are proposing to construct one of the largest man-made structures in Baltimore County.

ARGUMENT

The potential adverse consequences of landfills on adjacent and neighboring property owners have been generally recognized in the evolution of the land use statutes, ordinances, regulations and judicial decisions applicable to Baltimore County, and throughout the State of Maryland. In Baltimore County, "dumps" and "landfills" have been specifically acknowledged and specially treated since the county zoning ordinance was first adopted in 1955. The current zoning ordinance of Baltimore County continues to reflect the legislative judgment of the Baltimore County Council of the necessity for special requirements for landfills in the balancing of interests among different property owners and between the private interests of property owners and the general public.

The beginning "NOTE" to Section 502 of the Baltimore County Zoning Ordinance, entitled "Special Exceptions," states in pertinent part, "A few uses such as dumps and junkyards, are inherently so objectionable as to make extra regulations and controls advisable even in the M.H. Zone to which they are restricted." Rubble landfills are only permitted by special exception in five (5) out of the thirty-six (36) zoning classifications in Baltimore County. Rubble landfills are not a permitted use in any zoning classification. There is a with the unique exception for limited rubble landfills as an accessory use or structure in the R.C.2 (Agricultural) Zone "provided that the actual fill area does not exceed 3% of the total contiguous acreage of the property in the same ownership." (Section 1.A.01.29.j., Baltimore County Zoning Regulations.)

Section 412 of the Baltimore County Zoning Regulations, titled "Sanitary Landfills and Rubble Landfills," was comprehensively revised in 1997 with the express legislative intent "to help minimize the short- and long-term effects of sanitary and rubble landfills." Section 412 is an example of the excellent balance of interests that Baltimore County previously made with regard to sensitive land use issues. The current provisions of Section 412 provide for a 500 foot "edge" to rubble and sanitary landfills. This edge includes buffer area of 300 feet, with appropriate screening, and a transition area of 200 feet, with appropriate vegetation, contouring and height requirements and limitations. Section 412 further provides for concept plan requirements, development plan requirements, the posting of security for grading and a post-use reclamation plan for all rubble landfills as well as compliance with federal, state and county environmental regulations.

I. The Petitioner's Proposed Use Should be Subject to the Requirements of Section 412 of the Baltimore County Zoning Regulations in Existence at the Time of the Filing of its Petition.

The Petitioner asserted during the hearing before the Baltimore County Board of Appeals that the Petitioner's proposed rubble landfill should be exempt from the reasonable requirements of Section 412, enacted in 1997, because of the recent passage of Bill No. 58-04 by the Baltimore County Council. Subsequent to the decision of the Zoning Commissioner in this case and the filing of appeals to this Board of Appeals by the People's Counsel for Baltimore County and the Protestant, Sobczak Family, LLC, the Baltimore County Council sought to exclude specifically the proposed rubble landfill requested by the Petitioners.[2] Bill No. 58-04, effective June 2, 1004, sought to amend Section 412.3 as follows:

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[2] The Baltimore County Council previously had considered Bill No. 12-04 which also purported to clarify "the application of Bill 28-1997 upon previously approved landfills" but that bill was withdrawn on March 1, 2004, before any public votes were taken during a legislative session of the Council.

> "Any landfill for which a development plan was approved, pursuant to Bill 1-1992, as amended, prior to the effective date of Bill No. 28-1997 shall comply with the landfill requirements in effect at the time of the original approval. The zoning regulations in effect at the time of the approval of the development plan for the original landfill shall apply to any subsequent expansion, refinement or material amendment to the development plan for the landfill. Landscaping or screening shall be provided within the one hundred foot wide buffer area as may be required by the Director of Permits and Development Management." (See Petitioners' Exhibit 9.)

A. Bill No. 58-04 is Unconstitutional Under Maryland Law.

Section 33 of Article III of the Constitution of Maryland provides in pertinent part: "The General Assembly shall pass no special Law, for any case, for which provision has been made, by an existing General Law." This state constitutional prohibition against special laws also applies to the legislative actions of county and municipal government. In Mears v. Town of Oxford, 52 Md. App. 407, 420, n.11(1982), the Court of Special Appeals noted. "While the constitutional provision speaks to the power of the General Assembly, it logically applies to the legislative bodies of municipalities to which the General Assembly had delegated power." See also Vermont Federal Savings and Loan Association v. Wicomico County, 263 Md. 178 (1971).

The purpose of Section 33 of Article III has been thoroughly explored by the Court of Appeals in a long line of cases dating to the 19th century. The Court observed nearly a century ago that "One of the most important reasons for the provision in the Constitution against special legislation is to prevent one who has sufficient influence to secure legislation from getting an undue advantage over others." Mayor and City Council of Baltimore v. The United Railways and Electric Company of Baltimore, 126 Md. 39, 52 (1915). The Court of Appeals has gradually developed the test for unconstitutional special laws, adding additional factors in order to bring the test closer to prevention of its underlying purposes which were succinctly summarized in Cities Service Co. v Governor, 290 Md. 553, 569-70 (1981).

In the instant case, it is uncontroverted that Bill No. 58-04 was passed specifically to assist the Petitioner, Honeygo Run Reclamation Center, Inc. The Petitioners' expert witness, Mr. William Monk, an experienced and knowledgeable planning and zoning consultant in Baltimore County, stated unequivocably on direct examination as follows:

"Q. Have you had occasion to review Council Bill 58-04?

A. I have.

Q. This was a bill passed by the County Council on May 3rd, effective June 11, 2004?

A. Yes.

Q. I show you this. Is this a copy of that bill?

A. Yes.

Q. Now, the discussion of this bill actually occurred in the context of this particular expansion, did it not?

A. It did.

Q. Are you aware of any other open rubble landfills in Baltimore County that would qualify under this bill?

A. There are none." (Transcript; July 14, 2004, page 164)

What the Baltimore County Council attempted to do in passing Bill 58-04 was the same kind of unconstitutional legislative action that the Maryland General Assembly attempted in exempting "mass merchandisers" from the divestiture of service stations. The Court of Appeals held such legislative action unconstitutional in Cities Service Company v. Governor, 290 Md. 553 (1981). In Cities Service Company, the Montgomery Ward department store sought and was granted an exception from a divestiture law that required all Maryland producers of gasoline to divest themselves of any retail gas service stations. Similar facts and circumstances existed in Beauchamp v. Somerset County, 256 Md.

541 (1970), where legislation purporting to exempt "all American Legions in Somerset County" from a sanitary tax was found to be a special law in violation of the constitution because there was, in fact, only one American Legion post that would have had to pay the tax.

The advantage sought by the Petitioner, HRRC, under Bill 58-04 is to avoid the more extensive buffering and site development requirements of Section 412 than those that would apply to any other existing or potential rubble landfills. First and foremost, the advantage that would accrue to HRRC of non-compliance with Section 412 is the avoidance of the required 500 foot edge "paralleling the boundaries of the site." Also being avoided are the detailed buffering and transition area requirements which include screening specifications and height limitations. For example, under Section 412.C.2.c. it is required that "At completion of a landfill, the height of the highest point above the existing grade at the boundary between the buffer and transition areas shall be no greater than 30 feet." Under the Petitioners' proposed plan before the Board, the height of the proposed completed landfill would, at some points to the rear of the Protestant's property, be in excess of 50 feet above the existing grade at 300 foot parallel line from adjacent property owners required by Section 412.

The intended practical effect of Bill No. 58-04 was to exempt the Petitioner, HRRC, and HRRC alone, from the general legislative regulation of landfills outlined in Section 412 of the Baltimore County Zoning Regulations. As the Petitioner, HRRC, has admitted, there are no other sites in the county that could qualify for the exception crafted by the Baltimore County Council. There simply are no other rubble landfills that received a development plan approval pursuant to Bill 1-1992 before the effective date of Bill 28-1997. (See Protestant's Exhibit 1, "Baltimore County Solid Waste Management Plan," and Transcript, July 14, 2004, page 164). The timing and legislative history of Bill 58-04, passed during the pendency of this proceeding, cements the fact that the legislative action was a "special Law" in violation of the Section 33 of Article 33 of the *Constitution of Maryland.*

B. Petitioners are not Exempt from Section 412 Because the Proposed Use Is Not Simply An Expansion of an Existing Landfill.

The Petitioner should not be exempt from Section 412 because the Petitioner is, in reality, proposing to construct a new landfill. There are substantial and significant differences between the existing rubble landfill and the new proposed rubble landfill area. These differences include: (a) In the previous Case No. 94-87-SPHXA, the rubble landfill consisted of a unified tract of land of with a single owner. The Petitioner is requesting that ten additional parcels of property, with six separate owners, now be developed with a controlled excavation and a rubble landfill. (b) The parcel previously approved for a rubble landfill was located entirely on the north side of Silver Spring Road, a public roadway. The proposed new rubble landfill would not only be located on both sides of Silver Spring Road but would close, excavate and bury that public roadway with up to 110 feet of rubble above current ground elevation. (c) The existing rubble landfill was the site of a former sand and gravel mining operation that was operational since the 1920's. The proposed new rubble landfill area contains properties that were, and are, residential in character or are undeveloped MLR zoned land. (d) The proposed new rubble landfill area will utilize more acreage for disposal than the current operating rubble landfill. Clearly, the Petitioner is proposing a new landfill on different properties and not simply an expansion of an existing landfill on a single tract of land already owned by the Petitioner.

C. Petitioners' Proposed Rubble Landfill is not exempt from Section 412 as enacted In Bill 28-199.

Prior to the passage of Bill No. 58-04 by the Baltimore County Council, Section 412 of the Baltimore County Zoning Regulations provided as follows:

> "Any landfill or expansion thereof for which a development plan was approved prior to the effective date of Bill No. 28-1997 shall comply with the landfill requirements in effect at the time of the original approval."

Assuming arguendo that the Petitioner's proposed use is considered an expansion of the existing rubble landfill, it should not be exempt from Section 412 because there was no development plan approved for the expansion prior to May 22, 1997, the effective date of Bill 28-1997, which created the current requirements contained in Section 412 of the Baltimore County Zoning Regulations. Nothing in the previous case decided on December 13, 1993, which approved a development plan for the existing rubble landfill operation, hinted or contemplated an expansion on the properties now proposed for the location of the new excavations and rubble landfill. In fact, one of the then adjacent owners (Carlton Bennett), who the Zoning Commissioner found on page 24 of his 1993 decision "candid and creditable," testified in the 1993 hearings that he was to "acquire approximately one acre ... after the landfill operation is completed" from the rubble landfill owners. The Bennett property is now included in the Petitioner's plan for a new rubble landfill, having been subsequently acquired by the Petitioner, HRRC. The Petitioner's original permit from the Maryland Department of Environment, dated January 8, 1997, was issued with the express description "north side of Silver Spring Road. Attached to Petitioner's Exhibit No. 2 in the proceeding below before the Zoning Commissioner is a letter from the Petitioner's (HRRC) Area Vice President, Philip J. Auld, dated August 16, 2002, requesting an amendment to the Baltimore County Solid Waste Management Plan "to provide for the expansion/addition of its existing rubble landfill." The County Council Resolution 18-03 adding the proposed expansion of the Honeygo Run Reclamation Center rubble landfill to the Baltimore County's Solid Waste Management Plan was approved on February 20, 2003. Accordingly therefore, by chronology, definition, fact and regulation, there could not have been, and there was not, any approval of a development plan for the "expansion" of the existing landfill prior to the effective date of Bill No. 28-1997. The Petitioner's broad interpretation of Section 412 presented in the proceedings before the Zoning Commissioner would mean that all landfills (open and closed) existing in Baltimore County prior to the effective date of Bill No. 28-1997

could expand without any such expansion being subject to the requirements of the current Section 412. Such a broad interpretation would potentially deregulate all previous landfills from even the strictures of the 1987 version of Section 412 and have them subject only to "requirements in effect at the time of their original approval."

D. The Petitioner Failed to Comply With the Conditions Imposed in Case No. 94-87-SPHXA.

The Petitioner is not saved from the requirements of Section 412 by the approval of a site development plan by the Zoning Commissioner in the previous Case No. 94-87-SPHXA, because the restrictions and conditions of that approval were not followed. Therefore, that prior approval should be considered null and void and of no force and effect with respect to the interpretation of the Section 412, as currently enacted. On December 13, 1993, the Zoning Commissioner approved the development plan for the existing rubble landfill subject to restrictions including transfer of the land to Baltimore County "upon full utilization of the fill," restoration of Honeygo Run, and payment of "the salary and necessary related expenses for an independent inspector to periodically monitor the operation of the landfill." (*See* pages 47-51, Decision of December 13, 1993.) In addition, the Petitioner" agreed to limit rubble to only local customers." (See page 46, id.). [3]Such a restriction is permissible under Maryland law and should have been enforced. *See* J. Roland Dashiel Realty Co. v, Wicomico County, 122 Md.App. 239 (1998). As evidenced by the documents introduced in the instant case and the testimony of the Petitioner's witnesses, none of the restrictions noted above were followed.

The Petitioner's Request for Special Hearing seeks to modify or eliminate restrictions imposed on the development plan ten years after their imposition. The Protestant, Sobczak Family, LLC, objects to this attempt to remedy the Petitioner's non-compliance with the 1993 approval of a development plan

[3] It is interesting to note that on page V-12 of the Baltimore County Solid Waste Management Plan it was indicated that in the Petitioners' rubble landfill: "No waste being accepted from out-of-state." See Protestant's Exhibit 1.

for the existing rubble landfill and asserts that Section 412 of the Baltimore County Zoning Ordinance should apply to the Petitioner's Request for Special Exceptions in this case. The reasonable requirements of Section 412 would satisfy most of the concerns of the Protestant with respect to the potential impact of the rubble landfill on, and provide the protection needed for, the continued productive use of the Sobczak Family property.

II. The Petitioners' Proposed Use is Inconsistent with the Master Plan for Baltimore County and Should be Denied.

In accordance with the duly adopted Charter of Baltimore County, Maryland, the County Council of Baltimore County is required to adopt a Master Plan. As stated in Section 523 of the County Charter: "The master plan shall be a composite of mapped and written proposals setting forth comprehensive objectives, policies and standards to serve as a guide for the development of the county." Zoning issues are to be "consistent with the master plan." Although the Master Plan is a guide not a mandate; it is not a guide that can be simply ignored or disregarded when convenient. The Master Plan must be considered by all appropriate county entities in their respective decision making processes.

The various parcels of land proposed to be utilized for a rubble landfill by the Petitioners are located in the Perry Hall-White Marsh Growth Area as designated by the Baltimore County Master Plan 2010. This is an area of unique significance to the future of Baltimore County as one of only two specified growth areas in the county. It comprises approximately 12,000 acres or 18.8 square miles of land in eastern Baltimore County. One of the key components of the growth area is to promote economic development as the area is "the fastest growing employment area in the county." (See Baltimore County Master Plan 2010, page 185) The "Actions" that are to be taken by the County in order to be consistent with the Master Plan 2010 are listed on page 186 and include the following:

"1. Encourage the most prestigious kinds of development to occur in the vicinity of the town center.
2. Encourage the development of industrial and office-research parks associated with a landscaped campus theme on Parcels adjacent to White Marsh Boulevard and I-95. Ensure that White Marsh Boulevard continues to present an upscale quality image appropriate for the corporate businesses in the area.
5. Encourage particularly high quality development for all non-residentially zoned land between the town center and Pulaski Highway."

A rubble landfill is plainly not an "industrial and office research park with a landscaped campus theme." A rubble landfill does not "present an upscale quality image appropriate for the corporate businesses in the area." Utilizing nearly fifty acres of "MLR" zoned land for a rubble landfill in not "particularly high quality development." The Petitioners' proposed use of the MLR zoned properties are clearly not consistent with the Baltimore County Master Plan 2010 as testified to by Mr. Al Barry, an experienced and knowledgeable planner. (Transcript, July 21, 2004, pages 155, 165, 166). The economic contributions to the county cited by the Petitioners pale in comparision, measured in terms of tax base and payroll, with other authorized uses of the property. The Sobzcak Family LLC property with a premier national tenant, Rockwell Collins, generates far more economic benefit and tax base on a much smaller parcel that does the existing rubble landfill operation on over 68 acres. (See Protestant's Exhibit No. 8). The Protestant's use of his property is wholly consistent with the Baltimore County Master Plan 2010 and stands in stark contrast to the Petitioners' proposed use which should be rejected as inconsistent with the Master Plan.

III. The Petitioners' Proposed Use Violates the Applicable Standards for Special Exceptions Required by Section 502 of the Baltimore County Zoning Regulations.

Section 502 of the Baltimore County Zoning Regulations establishes principles and conditions that must be considered by the County Board of Appeals. It is submitted that the Petitioners' proposed rubble landfill offends several of these requirements as presented hereinbelow:

A. The Petitioner's Proposed Use is Inconsistent With the Property's Zoning Classification and with the Spirit and Intent of the Zoning Regulations.

All of the property Petitioner seeks to use for a rubble landfill is located in the M.L.R. zoning classification the purpose of which is set forth in Section 247 of the Baltimore County Zoning Ordinance:

> "to permit grouping of high types of industrial plants in industrial subdivisions in locations with convenient access to expressways or other primary roadways so as to minimize the use of residential streets; to fill special locational needs of certain types of light industry; to permit planned dispersal of industrial employment centers so as to be conveniently and satisfactorily related to a residential communities; and as transitional bands between residential or institutional areas and M.L. or M.H. Zones."

There is a very limited supply of land in Baltimore County with the MLR zoning classification. (See Petitioners Exhibit 8). There are only 937.5 acres and another 140 acres MLR-1M. out of a total of 391,216.3 acres in Baltimore County.[4] It is submitted that the ten separate parcels of M.L.R. zoned land that the Petitioner proposes to use as a rubble landfill are ideally situated to satisfy the definition of an M.L.R. zone. This 49.8 acre area, along with adjacent parcels along White Marsh Boulevard and Philadelphia Road, arguably represent the best location in Baltimore County for the "high type of industrial plants" contemplated by the M.L.R. zoning classification. This area contains the only largely undeveloped M.L.R. acreage along Interstate 95, the most heavily traveled expressway in Eastern

[4] Information obtained from the Baltimore County Office of Planning.

Baltimore County. The interchange with White Marsh Boulevard (Md. Route 43), slated for even more future improvements, makes this area ideal to fulfill the purposes of the M.L.R. Zone.

The proposed rubble landfill is not a "high type of industrial plant." A landfill, unlike other permitted uses and special exceptions, permanently disables land from productive use and severely limits future alternative uses of the affected property. If the Petitioner's proposed use were approved, it would mean that approximately 12.5 percent of the total acres located in the M.L.R. zone in Baltimore County would, at one site, be unavailable to fulfill the purposes and intent of the zone. (*See* Petitioners' Exhibit No. 6.) Given the limited availability of land designated for the M.L.R. zoning classification, and the existing development on M.L.R. zoned parcels in Baltimore County, approval of the Petitioner's application would, in essence, be destroying the full potential of the M.L.R. zone in Baltimore County and would be inconsistent "with the purposes of the property's zoning classification" and "the spirit and intent" of the zoning regulations. The Petitioners' proposed use be consistent with the Baltimore County Master Plan 2010 as stated hereinabove in Argument II. (Section 502.1.G., Baltimore County Zoning Ordinance)

B. The Petitioner's Proposed Use Overcrowds the Land.

The size and scale of the Petitioner's proposed use is enormous. The Petitioner proposes to construct a rubble landfill on 49.8 acres of M.L.R. zoned land not currently used for that purpose. As reflected on the plans submitted to the Zoning Commissioner and the Board of Appeals, the proposed rubble landfill would require substantial excavations to over 70 feet below the existing ground level. More significantly, the proposed rubble landfill at completion would be in excess of 110 feet above existing ground level. (See Petitioners' Exhibit 5 Sheets 10 and 11) The proposed new rubble landfill would have a capacity of 5,600,000 cubic yards of rubble. This proposed use would be among the largest man-made structures in Baltimore County.

The Petitioner has asserted that the proposed new rubble landfill is necessary to meet "county needs" citing the passage of County Council Resolution 18-03. An examination of the Baltimore County Solid Waste Management Plan and official records filed with county departments and the MDE make it clear that the Petitioner's proposed use is not being done simply to meet the "county needs." If this case were only about "county needs" the size and scale of the proposed development plan would be very different. The Baltimore County Solid Waste Management Plan currently contains estimates far below the annual tonnage and cubic yards flowing into the existing rubble landfill. (See Protestant's Exhibit 1, page V-9). If the Petitioner had complied with the 1993 restriction "to limit rubble to only local customers," the existing rubble landfill would have more capacity to accommodate "county needs." In the 2001 Annual Tonnage Report filed by the Petitioner with the Waste Management Administration of the Maryland Department of Environment, it is reported on page two that 165,762 tons (58.25%) of the 284,572 tons accepted at the rubble landfill were from out-of-state. In the 2002 Annual Tonnage Report filed by the Petitioner, it is reported that only 51.66% out of the 329,881.22 tons accepted at the rubble landfill were from non-Baltimore County sources. In the 2003 Annual Tonnage Report filed by the Petitioner, it is reported that only 43.86% of the 282,920 tons came from Baltimore County.

Make no mistake and do not be mislead, the existing rubble landfill has become, and the proposed new rubble landfill area will be, not simply be a facility to accommodate the needs of Baltimore County but it will be a mid-Atlantic regional facility for one of the nation's largest waste management companies. The Petitioner's proposed use at the proposed location would violate Section 502.1.D. of the Baltimore County Zoning Ordinance as it would "tend to overcrowd land." If the rubble landfill is considered a man-made structure subject to the area requirements of the MLR zoning district, it is estimated to contain ten times the "F.A.R." of buildings that could be constructed on the properties. (Transcript, July 21, 2004, page 158). Further, it would "overwhelm and dominate the surrounding

landscape," especially adjacent properties such as the Protestant's property. The Petitioners' proposed rubble landfill could be half the size, half the height and depth to accommodate the needs of Baltimore County. *See* People's Counsel v. Mangione, 85 Md. App. 738, 752 (1991). At a minimum, the Petitioner's proposed use should be subject to the height, area, bulk, floor area and design criteria of other man-made structures.

C. The Petitioners' Proposed Rubble Landfill Interferes with Adequate Light and Air.

The Petitioners' proposed uses of a controlled excavation and a rubble landfill will literally change

the landscape of the affected properties. Consuming over eighty percent of the acreage or square footage of the properties to be part of the new rubble and rising to heights in excess of 100 feet over existing grade elevations, the proposed rubble landfill will also substantially affect the light and air of the adjacent property owners. As Mr. Miller observed in expressing his concerns about the Petitioners' proposed uses, "The sun would go down earlier." (Transcript, July 21, 2004, page 72).

To believe the generalized statements offered by the Petitioners that the dust and debris can easily be controlled is simply to defy common sense You cannot excavate million yards of earth without creating significant and substantial dust and debris. You cannot fill a rubble landfill with 5.6 million cubic yards of debris without creating significant and substantial dust and debris. You cannot have two hundred dump trucks of construction debris making trips to the landfill and dumping their loads without creating significant and substantial dust and debris.

The general manager of the HoneygoRun existing facility took selected pictures of the operation of the current landfill. The first picture is illuminating. (See Petitioners' Exhibit 10A). It depicts dust coming from the dump truck making a trip to the rubble landfill. That trip, replicated over two hundred times a day within 175 feet of the Sobczak building on a haul road, storage area and parking area will

deposit layers of dust on the cars in the parking lot and on the building and windows of the building. It will interfere with the customary and ordinary use of the property by the Tenant. There can be no more picnics while the landfill is under construction or the being filled with rubble and debris.

Mr. Sobczak expressed significant concern over the approaching mass of rubble landfill with its generation of dust and debris and reviewed a series of photographs showing the impact of moving a rubble landfill closer to his property. (See Protestant's Exhibits 6A-J). Mr. Biller, the Vice President of the Tenant Rockwell Collins, expressed serious doubts about his employees being able to continue to use the outside of the property in a manner to which they are accustomed. (See Protestant's Exhibits 9A-J). There is also concern about the impact of the approaching rubble landfill on the sensitive work being performed by Rockwell Collins in the building on the Sobczak property. As demonstrated on the attached Appendix C, it has been calculated that screening would have to be 46' high to block the weight of the proposed rubble landfill from the occupants of the Sobczak Family property.

IV. The Petitioner's Proposed Use Violates the Standards for Special Exception Under Maryland Caselaw

The standard for the granting of special exceptions in Maryland was enunciated by the Court of Appeals in Schultz v. Pritts, 291, Md. 1 (1981). After a lengthy discussion of prior decisions the Court declared:

> "We now hold 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." *Id.,* at 22-23.

The Protestant submits that the Petitioner's "particular use proposed at the particular location proposed"

fails to meet this judicial standard. The adverse impacts that exist at the particular location proposed by the Petitioners' to become a rubble landfill that are beyond those impacts associated with other areas in the MLR zoning classification include, as discussed hereinabove in Argument II, the direct conflict with the Baltimore County Master Plan 2010 and the plain disruption of the purposes of the MLR zoning classification. The proposed location is at the intersection of one of the counties premier transportation intersections—Interstate 95 and White Marsh Boulevard (Md Route 43) which is labled by the State Highway Administration as the "Road to Opportunity." The proposed rubble landfill will consume an inordinate amount of the limited supply of MLR land that is available in Baltimore County. In the eastern part of Baltimore County, in the designated Perry Hall White Marsh Growth Area, the available undeveloped MLR zoned land will be virtually eliminated.

In the Memorandum from the Baltimore County Department of Economic Development, dated July 9, 2003, it is noted "Because of the existing rubble landfill, the additional acreage does not lend itself to other suitable economic development uses, such as attracting new industrial users to the site." (Petitioner's Exhibit No. 6.) The logic of this observation also applies to the impact of the Petitioner's proposed use on the Protestant's property. In addition, the cumulative impact of a mammoth landfill being constructed alongside of the existing rubble landfill, quickly rising only 100 feet from a property line would be devastating to the potential use of Protestant's property. There is a substantial difference between the top height of the current rubble landfill being located approximately 1200 feet from the Protestant's property and the top height of the proposed huge new rubble landfill being approximately 450 feet from the Protestant's property. *See* Brandywine Enterprises, Inc. v. County Council for Prince George's County, 117 Md. App. 525 (1997) and Moseman v. County Council, 99 Md. App. 259 (Md. App. 1994). Locating a rubble landfill at this particular location with have a direct impact on a high quality adjacent office/manufacturing facility that is wholly consistent with the purposes of the MLR

zoning classification. The use of the premises, especially outside, will be severely impacted. The diminution of the Protestant's property value will be immediate and significant affecting current market value and future income producing potential. (See Transcript, July 21, 2004, pages 34-40 and 45-48).

The Zoning Commissioner noted on page four of the previous decision, dated December 13, 1993, that the subject property "has been mined out" and the Petitioner's proposal for a rubble landfill "appears to make logical sense in that the rubble will be utilized to fill up pits previously created." In contrast, the Petitioner's proposed use at the proposed location of these different properties for a rubble landfill is illogical. Instead of being utilized "to fill up pits previously created," the Petitioner proposes to construct a veritable mountain of rubble at elevations as high as 110 feet above current ground level. Indeed, the Petitioner's proposed development plan is incongruous with the meaning of a landfill. Webster's Third New International Dictionary of the English Language, Unabridged, defines landfill as the "disposal of trash and garbage by burying it under layers of earth in low ground." (*emphasis added*) The property proposed to be used by the Petitioner does not fit this definition nor the popular understanding of a landfill but is, in fact, utilizing "airspace" to build a structure to receive rubble.

In consideration of the nature of the existing topography of the land proposed to be used by the Petitioners, the intent and purpose of the M.L.R. zone, the conflict with the Baltimore County Master Plan 2010, the severe impact on the adjacent property owners, and the potential impacts on groundwater and air quality, the adverse impacts of the "particular use proposed at the particular location proposed" are substantially beyond what they would be at other locations in the M.L.R. zone and the Petitioners' Application for special exceptions should therefore be denied. Schultz v. Pritts, 291 Md. 1 (1981). and Board of County Commissioner's v. Holbrook, 314 Md. 210 (Md. 1988).

V. The Petitioners Failed to Satisfy the Standards for the Granting of a Variance

Under Section 307 of the Baltimore County Zoning Regulations the County Board of Appeals has the power to grant variances "where strict compliance with the Zoning Regulations for Baltimore County would result in practical difficulty or unreasonable hardship" and "Furthermore, any such variance shall be granted only if in strict harmony with the spirit and intent of said height, area, off-street parking or sign regulations, and only in such manner to grant relief without injury to public health, safety and general welfare."

In interpreting the authority of administrative entities to grant variances, Maryland courts have consistently cautioned that they should not be approved liberally. They must be "substantial and urgent" and not simply for the "convenience of the applicant." See McLean v. Soley, 270 Md. App. 208 (1973) and Anderson v. Board of Appeals, 22 Md App., 28, (1974). See also Daihl v. County Board of Appeals of Baltimore County, 258 Md. 157 (1970). In Cromwell v. Ward, 102 Md. App. 691 (1995), Judge Cathell, then on the Court of Special Appeals reviewed the subject of variances under Maryland law in considerable depth. In reversing the grant of a variance, Judge Cathell stated:

> "We conclude that the law in Maryland and in Baltimore County under its charter and ordinance remains as it has always been-- a property's peculiar characteristic or unusual circumstances relating only and uniquely to that property must exist in conjunction with the ordinance's more severe impact on the specific property because of the property's uniqueness before any consideration will be given to whether practical difficulty or unnecessary hardship exists.". (Id., at 720)

The Petitioners presented vague and generalized statements about the necessity for changing the elevation of the "haul road" but presented no facts relating to when, how often or the associated costs with such changes. No evidence or testimony was presented about the "practical difficulty" or "unreasonable hardship" that would relate to compliance for a durable surface around the maintenance shop, equipment storage areas and parking areas shown on the Petitioners plans. (See Petitioners'

Exhibits 3 and 5.) There was no showing that the properties to be utilized have any "peculiar characteristics or unusual circumstances" that would warrant a variance. In fact, the elevation changes are caused solely by the Petitioners' proposal to excavate land to extreme depths and to construct a fill area to unusual heights in order to maximize their capacity. In addition to the variances sought by the Petitioner under Section 409 of the Baltimore County Zoning Regulations, the Protestant suggest that the rubble landfill operations may be considered to be "trucking facilities" in Section 410 of the Baltimore County Zoning Regulations and should comply with those site development requirements.

The Petitioners' generalized claims for variances are made without regard for the substantial impact their proposed activity will have on the adjacent property owners and tenants. Without any cost information, this Board cannot adequately assess the Petitioners claims. What is revealed in the documents filed by the Petitioner, HRRC, with state and county authorities is that the rubble landfill operation is a big business.

The annual tonnage reports filed by the Petitioner, HRRC, indicate that the annual gross revenue from the operation of the facility exceeds twelve and half million dollars ($12,500,000.00) without consideration of the income generated from recycling.[5] Without any substantial evidence of record to support "practical difficulty" or "unreasonable hardship," the Petitioners' request for variances should be denied, especially as the will adversely impact the use and enjoyment of the Protestant's property and the other adjacent property owners between the proposed rubble landfill and Philadelphia Road.

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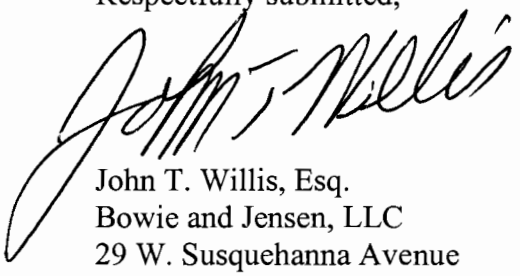
[5] See Protestant's Exhibit 4 which are the Annual Tonnage Reports submitted by the Petitioner, Honeygo Run Reclamation Center,
Inc. to the Maryland Department of Environment in the regular course of business. The estimate of annual gross revenue was
made by using a annual tonnage of 280,000 times the $45.00 fees per load indicated on the attachments to the 2003 report.
Additional revenues will be generated by the Petitioner from the sale of recycled material and if the annual tonnage is exceeded
in future years.

CONCLUSION

This is an unusual case with unique facts and circumstances. The sheer size and scale of the Petitioner's current and proposed use of property as a rubble landfill makes it difficult to balance the needs and interests of Baltimore County as well as the affected individual property owners. The Petitioner's rubble landfill is so large it has literally consumed everyone and everything in its path. Individual property owners who appeared at the 1993 hearing have had their properties bought and included in the new proposed landfill area. A public road is proposed to be closed and covered with rubble landfill material in excess of 100 feet over its existing grade. The only undeveloped land in the MLR zoning classification in a designated growth area would be lost forever to permitted uses if the Petitioners' application for a special exception is approved. One of the largest areas of undeveloped land in the MLR zoning classification in the entire county will become permanently disabled for future productive use. And, the Protestant's property, along with the other adjacent individual property owners along Philadelphia Road will have the full use and enjoyment of their properties seriously jeopardized and devalued if the Petitioners' Application were granted.

For the aforegoing reasons, the Petitioners' Application for Special Exceptions for a controlled excavation and rubble landfill should be denied. Further, the Petitioner's requests for various amendments, exceptions, modifications, eliminations, variances and terminations set forth in the Petitioner's Application for Special Hearing should be denied. Should this Board of Appeals grant the Petitioners' Application and requests, the Board should impose such conditions and restrictions that would substantially lessen the adverse impacts of the Petitioners' proposed use on the Protestant and its Tenant. (See Section 502.2, Baltimore County Zoning Regulations).

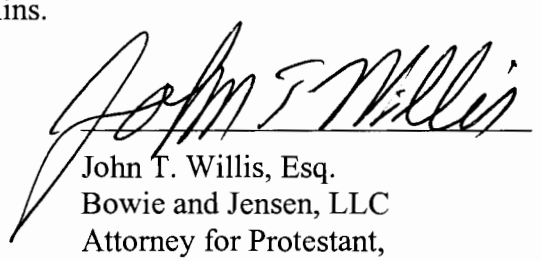
Respectfully submitted,



John T. Willis, Esq.
Bowie and Jensen, LLC
29 W. Susquehanna Avenue
Towson, Maryland 21401
Attorney for Protestants,
Sobczak Family, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of August, 2004, a copy of the foregoing Memorandum was mailed, postage prepaid, to John B. Gontrum, Esq., Whiteford, Taylor & Preston, LLP, 210 W. Pennsylvania Avenue, Suite 400, Towson, Maryland 21204, Attorney for Petitioner(s); to Peter Max Zimmerman, People's Counsel for Baltimore County, Room 47, Old Courthouse, 400 Washington Avenue, Towson, Maryland 21204; and to C. William Clark and Robert L. Hanley, Jr., Nolan, Plumhoff & Williams, Chartered, 502 Washington Avenue, Suite 700, Towson, Maryland 21204, Attorney for Protestant, Rockwell Collins.



John T. Willis, Esq.
Bowie and Jensen, LLC
Attorney for Protestant,
Sobczak Family, LLC

IN RE: PETITIONS FOR SPECIAL HEARING AND SPECIAL EXCEPTION – N & S/S Silver Spring Road, W/S Philadelphia Road **(10710 Philadelphia Road)** 11th Election District 5th Council District

Honeygo Run Reclamation Center, Inc., et al
Petitioners

* BEFORE THE

* ZONING COMMISSIONER

* OF BALTIMORE COUNTY

* Case No. 04-089-SPHX

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Zoning Commissioner for consideration of Petitions for Special Hearing and Special Exception filed by the owners of the subject property, Donald C. Lentz, Personal Representative of the Estate of Carl H. Lentz; Charles F. Volpe and Jane Volpe; the Honeygo Mobile Park, by Wayne B. Night, Owner; Nottingham Village, Inc., by Bruce S. Campbell III, Senior Vice President; and Baltimore County, Maryland, a body politic, by Dr. Anthony G. Marchione, Administrative Officer, and the Contract Purchasers, Honeygo Run Reclamation Center, Inc., by Phillip J. Auld, Area President, through their attorney, John B. Gontrum, Esquire. The Petitioners request a special exception, pursuant to Section 248.4.A of the Baltimore County Zoning Regulations (B.C.Z.R.) for an "excavation, controlled" and a "rubble landfill" facility in a M.L.R. zone. In addition, the Petitioners request a special hearing, pursuant to Section 412.3 of the B.C.Z.R. as it references Section 412 under the 1987 regulations, seeking approval of the following: **1)** an amendment to the previously approved site plan and Order issued in Case No. 94-87-SPHXA for a landfill expansion and the relocation of accessory uses; **2)** a special exception for an "excavation, controlled" in conjunction with a special exception for a "rubble landfill" on the same site; **3)** a determination that the special exceptions as part of the expansion of the existing operations have no time limit for utilization, or alternatively, a five year period for utilization of the special exceptions; **4)** the modification or elimination of Restrictions 3, 4 and 6 of the Order issued in Case No. 94-87-SPHXA; **5)** the continuation of the existing variance

and 409.8.A.6 of the Baltimore County Zoning Regulations (B.C.Z.R.) to permit a crushed concrete surface for the internal haul road and parking areas in lieu of the required durable and dustless surface and to permit same without the required permanent striping for off-street parking facilities; and, **6)** a termination of the special exception granted in Case No. 3902-RX for a trailer court. The subject property and requested relief are more particularly described on the site plan submitted which was accepted into evidence and marked as Petitioner's Exhibit 5.

Appearing at the requisite public hearing in support of the request were Phillip J. Auld, Area President of Republic Services, Inc., the parent company of Honeygo Run Reclamation Center, Inc.; David Taylor, Landscape Architect with Morris & Ritchie Associates, Inc., the consultants who prepared the site plan for this property; and John B. Gontrum, Esquire, attorney for the Petitioners. Also appearing and testifying in support of the request were Monte Kamp, General Manager of the facility; George Frizzell, an appraiser; Florin Gheorghiu, a hydrogeologist, and William P. Monk, a Land Use Planning and Zoning Consultant. Bruce S. Campbell III, Senior Vice President of Nottingham Village, Inc., co-owner of the subject property; Donna Irons and Mark Pedersen, also appeared. John T. Willis, Esquire appeared on behalf of the Sobczak Family, LLC, adjacent property owners/Protestants. The sole witness who appeared and testified in opposition to the request on behalf of that family was William M. Pellington.

The subject property under consideration is located on the northwest side of Philadelphia Road and Silver Spring Road, near the Maryland Route 43/I-95 interchange in White Marsh. The overall tract contains a combined gross area of 116.85 acres, more or less, zoned M.L.R. A portion of the property is currently owned and utilized as a rubble landfill by Honeygo Run Reclamation Center, Inc. That property is identified on the site plan (Petitioner's Exhibit 5) as Parcel #107 and contains approximately 68 acres in area. The balance of the acreage (approximately 48 acres) is comprised of a number of separate parcels jointly owned by a number of individuals as identified above. In fact, there are 11 additional separate parcels that are included under the instant Petitions. These are identified on the plan as Parcels 16A, 16B, 27, 649, 686, 739, 763, 764, 765, 776 and 796. Mr. Knight owns Parcels 16A, 16B and 649; Nottingham Village, Inc. owns Parcels 27 and

686; the Lentz family owns Parcels 739; Charles and Jane Volpe own Parcel 776; the Honeygo Mobile Park owns Parcel 796 and the Honeygo Run Reclamation Center, Inc. owns Parcels 763, 764 and 765.

By way of background, the development plan for that portion of the tract referred to as the existing rubble landfill, identified as Parcel #107, was considered by the undersigned Zoning Commissioner/Hearing Officer under prior Cases Nos. XI-611 and 94-87-SPHXA. In that case, Honeygo Run Reclamation Center, Inc. sought development plan approval and zoning relief to continue then-existing mining operations and a proposed rubble landfill on its 68-acre tract. Following a lengthy public hearing, a 51-page written opinion was issued by the undersigned on December 17, 1993, approving the development plan and granting the zoning relief, subject to certain restrictions and conditions as more fully set forth therein. The Petitioners now come before me seeking approval to expand the rubble landfill operation onto the adjoining 48 acres.

Testimony and evidence offered was that the mining operations that existed in 1993 were ultimately completed and the site then developed and utilized as a rubble landfill. The area of the rubble landfill is more particularly shown on a colorized plan that was submitted into evidence as Petitioner's Exhibit 3A. Mr. Taylor, who prepared the site plan, Mr. Auld of Republic Services, Inc., and Mr. Kamp, the General Manger of the Honeygo Reclamation Center, offered testimony regarding the general operation of the landfill in recent years and the site plan. Mr. Kamp's testimony was particularly helpful in understanding the day to day operation on the site. He testified that the landfill operation began in March 1999 and operates six days a week, Monday through Saturday, with more limited hours on Saturday. Trucks enter the site from an access road off of Philadelphia Road and their loads are weighed and inspected. He described in some detail the material accepted and how it is processed. Generally, the landfill accepts construction and demolition debris. Certain materials, such as concrete and soil, are recycled and this material is then sorted. There are three separate cells in the existing operation. Mr. Kamp indicated that Cell 1 has been filled to capacity and Cell 2 is approximately 85% full at the present time. He anticipated that utilization of Cell 3 would begin in late 2003. Messrs. Kamp and Auld also described the

monitoring process and general business operation on the site. Their testimony was persuasive to a finding that the landfill operation is well managed and has been conducted without detrimental impacts to surrounding properties. In addition to a rigorous inspection/sorting procedure, wells and piezometers have been installed to insure that the landfill is not accepting inappropriate or hazardous material. Any material that is determined to be unacceptable during the inspection process is rejected. Apparently, the operation enjoys an outstanding safety record. The Maryland Department of the Environment (MDE) oversees the operation. Although counsel for the Protestants questioned certain aspects of the operation, the testimony and evidence offered was persuasive to a finding that the facility is efficiently operated and complies with the rigorous state and local standards imposed for the operation of a rubble landfill.

Although the Petitioner has operated the facility in accordance with the approval granted in Cases Nos. XI-611 and 94-87-SPHXA, the evidence presented demonstrated that the existing cells are filling up and that the landfill operation has a limited life span. Thus, the applicants propose the acquisition of the neighboring parcels described above and the expansion of the rubble landfill operation onto those parcels. The details of the expansion are more particularly shown on Petitioner's Exhibits 3A, 3B, 3C and 3D. Collectively, these exhibits are a series of plans that depict the existing outline of the rubble landfill as well as the proposed expansion. The plans are persuasive to a finding that the expansion will be on contiguous parcels and that surrounding properties and land uses will be appropriately buffered.

Section 412 of the B.C.Z.R. sets out specific regulations governing the operation of sanitary and rubble landfills. The applicability of that Section is a major issue in this case. The Petitioner avers that the standards set out in Section 412 are not applicable to the proposed expansion. This argument relies upon the language of Section 412.3 of the B.C.Z.R. which states "Any landfill or expansion thereof for which a development plan was approved prior to the effective date of Bill No. 28-1997 shall comply with the landfill requirements in effect at the time of the original approval." The regulations that were in effect at the time the existing operation was

approved (1993) do not require the extensive buffers and screening required under the current regulations.

The Protestants argue that the requirements of Section 412 are applicable. In essence, its argument is that the proposal is not an "expansion" but rather, is a new operation and as such, the current requirements in Section 412 are applicable. The Protestants offer a variety of arguments in support of its position that the instant proposal is a new operation. First, it is claimed that the land on which the Petitioner is proposing to expand its operation is made up of additional parcels that were not part of the original proposal. Second, it is noted that the additional parcels of land are owned by individuals/entities different from the applicants in the original proposal. Finally, it is observed that Parcel 107, which was previously approved for the operation, is located entirely on the north side of Silver Spring Road. The new rubble landfill operation will include lands on both sides of the road and as explained at the hearing, will result in the closure of that road.

In response thereto, the applicant offers several arguments. First, it is clear that Baltimore County Government considers the proposed operation to be an expansion. The applicant offered a copy of Resolution No. 1803, which was passed by the County Council and amended Baltimore County's 1992 Solid Waste Management Plan. That Bill references a "proposed expansion" of the Honeygo Run Reclamation Center. Moreover, the written comment in support of the instant Petitions from the Department of Economic Development expresses support for the "expansion of the Honeygo Reclamation Facility."

The undersigned Zoning Commissioner was unable to locate any controlling decision by an appellate court of this State that clarifies when a land use is considered "new" versus when it is an expansion.[1] Indeed, there was no case law offered by either party in support of their position. Section 101 of the B.C.Z.R. defines certain words used throughout the regulations. Further, that Section provides that if a word is not defined in the B.C.Z.R., the reader is directed to Webster's

[1] In Pierce v. Montgomery Co., 116 Md. App 522, 698 A2d 1127 (1997), the Court of Special Appeals dismissed whether the construction of additional buildings constituted an expansion of an existing special exception. Unfortunately, that holding is not relevant here.

Third New International Dictionary. The word "expansion" is not defined in the B.C.Z.R. but is defined in Webster's as "The act or process of increasing in extent, size, number, volume or scope." Utilizing this definition and based upon the testimony and evidence offered, I am persuaded that the proposal is in fact an expansion and not a new operation. I rely upon the following findings in reaching this decision. First, there is no authority that an expansion must, by definition, remain within the four corners of the property previously designated. In this case, the fact that the new lands that will be used in the operation lie immediately adjacent to and abut the existing operation is significant. The new parcels are not separated by a public road or in fee properties owned by others. These are abutting parcels that will be combined into a single tract, not unlike that frequently presented scenario wherein a developer acquires multiple adjacent properties and develops same with an integrated and comprehensive plan. Second and perhaps most important, the testimony of Mr. Auld and Mr. Kamp was persuasive to a finding that the operation on the new lands will be used as a continuation of the existing operation. The means of access is the same, as is the procedure utilized in accepting rubble. I place great reliance upon the fact that the use of the new lands is indeed a "carryover" of the existing operation and the processes employed thereon are a continuation of the existing operation.

The Protestant also argues that even if the use is an expansion, there should be no exemption from Section 412 because no development plan was approved for the "new lands" prior to May 22, 1997. This assertion misinterprets the clear meaning and intent of that regulation. Obviously, a development plan cannot be in place for the "new lands" that are proposed for the rubble landfill expansion. The development plan approved in the prior case was concerned only with that acreage within the four corners of the existing landfill operation. Nonetheless, the clear intent of Section 412.3 is to exempt any landfill operation for which development plan approval was obtained prior to the effective date of Bill No. 28-1997. The development plan approved in the prior case was before that date. Given that the instant proposal is an expansion of the existing operation, an amendment to the previously approved development plan is appropriate and the new plan approval relates back to the prior approval. Finally, it is to be noted that this is the only rubble

landfill presently operating in Baltimore County. It is clear that the County Council envisioned the potential expansion of this facility not only when Bill No. 28-1997 was enacted, but also when the Council amended its Solid Waste Management program.

The Protestant further contends that the Petitioner is not exempt from the requirements of Section 412 because certain conditions and restrictions of the approval in the prior case have not been met and that the prior approval should be considered null and void due to this alleged failure to comply. In this regard, there is no record of any zoning violation or other action taken by Baltimore County or other interested persons alleging that the operation has not followed the requirements and conditions established in the prior development plan approval. Some of the restrictions imposed relate to requirements once the landfill is filled to capacity, which has not yet occurred. Simply stated, the Protestant's assertions in this regard are misplaced. The conditions and restrictions imposed were not "conditions precedent" to the approval and operation of the landfill. Thus, that some of the restrictions have not yet been satisfied does not prohibit the proposed expansion.

Turning to the relief requested within the Petitions, it is clear that the test to be applied is as set forth in Section 502.1 of the B.C.Z.R. Essentially, that Section requires a finding that the proposed use will not be detrimental to the health, safety and general welfare of the locale. The specific standards to be addressed are enunciated in Subsections A through I of Section 502.1. In this regard, the overwhelming weight of the testimony and evidence presented was persuasive to a finding that the proposed expansion will comply with these standards. There was a substantial volume of testimony and evidence offered by the Petitioner in support of that finding and little testimony/evidence offered by the Protestants.

The undersigned particularly notes the applicability and similarity of the subject case to Mossberg v. Montgomery Co., 107 Md. App. 1 A2nd 1253 (1995). In Mossberg, the zoning authority in Montgomery County considered a proposed special exception/conditional use for a solid waste transfer station. Solid waste transfer stations are similar to rubble landfills to the extent that they are not favored land uses. They can produce noise, dust and other impacts which can be

detrimental to adjacent properties. Nonetheless, there is a need for solid waste transfer stations, rubble landfills and similar disfavored land uses in our modern society.

In Mossberg, infra, the Court of Appeals noted the inherent impacts associated with the concrete batching plant. The Court observed that the special exception/conditional test was not reliant upon the existence of those impacts, which are assumed in the first instance by designation of the use as a special exception/conditional use rather than a use permitted by right. Rather, the test to be applied is whether the use proposed carried an impact that was particularly egregious to the locale in which it is proposed.

In the instant case, the Protestant offered testimony and evidence regarding the scarcity of M.L.R. zoned land in Baltimore County. This testimony was offered in support of its proposition that the proposed use at this location would create adverse impacts above and beyond those inherently associated with the use.

I disagree. Again, weight is given to the undisputed fact that the landfill has existed for several years at this location and that ongoing operations have continued without apparent detrimental impact to the health, safety and general welfare of the locale. The absence of large-scale opposition to the instant proposal is a factor that supports this conclusion. In my judgment, the impacts associated with the proposed expansion do not adversely impact the surrounding locale in a manner over and above the inherent effects of any rubble landfill. I am appreciative of the size and scope of the expansion. Indeed, the scale of the facility, both existing and proposed, is quite large. However, properly managed, I believe that this use is appropriate at this location.

Having reached these conclusions, the relief requested within the Petitions for Special Hearing and Special Exception shall be granted. I find that the proposal represents an expansion of the existing facility, is therefore not applicable to the current requirements of Section 412 of the B.C.Z.R., and can be carried on without detrimental impacts to the surrounding locale in accordance with the standards established in Section 502.1 of the B.C.Z.R.

Pursuant to the advertisement, posting of the property and public hearing on these Petitions held, and for the reasons set forth herein, the relief requested shall be granted.

THEREFORE, IT IS ORDERED by the Zoning Commissioner for Baltimore County this 5th day of January, 2004 that the Petition for Special Hearing to approve a special exception, pursuant to Section 248.4.A of the Baltimore County Zoning Regulations (B.C.Z.R.) for an "excavation, controlled" and a "rubble landfill" facility in a M.L.R. zone, in accordance with Petitioner's Exhibit 5, be and is hereby GRANTED; and,

IT IS FURTHER ORDERED that the Petition for Special Hearing, pursuant to Section 412.3 of the B.C.Z.R. as it references Section 412 under the 1987 regulations, seeking approval of the following: **1)** an amendment to the previously approved site plan and Order issued in Case No. 94-87-SPHXA for a landfill expansion and the relocation of accessory uses; **2)** a special exception for an "excavation, controlled" in conjunction with a special exception for a "rubble landfill" on the same site; **3)** a determination that the special exceptions as part of the expansion of the existing operations have no time limit for utilization, or alternatively, a five year period for utilization of the special exceptions; **4)** the modification or elimination of Restrictions 3, 4 and 6 of the Order issued in Case No. 94-87-SPHXA; **5)** the continuation of the existing variance from Sections 409.8.A.2 and 409.8.A.6 of the Baltimore County Zoning Regulations (B.C.Z.R.) to permit a crushed concrete surface for the internal haul road and parking areas in lieu of the required durable and dustless surface and to permit same without the required permanent striping for off-street parking facilities; and, **6)** a termination of the special exception granted in Case No. 3902-RX for a trailer court, in accordance with Petitioner's Exhibit 5, be and is hereby GRANTED.

IT IS FURTHER ORDERED that any appeal of this decision must be entered within thirty (30) days of the date hereof.

LAWRENCE E. SCHMIDT
Zoning Commissioner
for Baltimore County

LES:bjs

ORDER RECEIVED FOR FILING
Date 1/5/04
By BJS

Zoning Commissioner

Suite 405, County Courts Building
401 Bosley Avenue
Towson, Maryland 21204
Tel: 410-887-3868 • Fax: 410-887-3468

Baltimore County

James T. Smith, Jr., County Executive
Lawrence E. Schmidt, Zoning Commissioner

January 5, 2004

John B. Gontrum, Esquire
Whiteford, Taylor & Preston
210 W. Pennsylvania Avenue, Suite 500
Towson, Maryland 21204

RE: PETITIONS FOR SPECIAL HEARING & SPECIAL EXCEPTION
N & S/S Silver Spring Road, W/S Philadelphia Road
(10710 Philadelphia Road)
11th Election District – 5th Council District
Honeygo Run Reclamation Center, Inc., et al - Petitioners
Case No. 04-089-SPHX

Dear Mr. Gontrum:

Enclosed please find a copy of the decision rendered in the above-captioned matter. The Petitions for Special Hearing and Special Exception have been granted, in accordance with the attached Order.

In the event any party finds the decision rendered is unfavorable, any party may file an appeal to the County Board of Appeals within thirty (30) days of the date of this Order. For further information on filing an appeal, please contact the Department of Permits and Development Management office at 887-3391.

Very truly yours,

LAWRENCE E. SCHMIDT
Zoning Commissioner
for Baltimore County

LES:bjs

cc: Mr. Donald C. Lentz, 5206 Silver Spring Road, Baltimore, Md. 21128
Mr. & Mrs. Charles Volpe, 5210 Silver Spring Road, Baltimore, Md. 21128
Mr. Wayne B. Knight, Honeygo Mobile Park, 8814 Cowenton Ave., Baltimore, Md. 21128
Mr. Bruce S. Campbell, III, Senior V.P., Nottingham Village, Inc.
100 W. Pennsylvania Ave., Towson, Md. 21204
Dr. Anthony G. Marchione, Baltimore County Administrative Officer
Mr. Phillip Auld, Honeygo Run Reclamation Center,
10710 Philadelphia Rd., Baltimore, Md. 21128
Mr. Mark Pedersen, 4400 Mt. Pisgah Road, York, Pa. 17402
Ms. Donna Irons, 140 Marks Road, Millersburg, Pa. 17061
Mr. David Taylor, Morris & Ritchie Assoc., Inc., 110 West Road, #245, Towson, Md. 21204
John T. Willis, Esquire, Bowie & Jenson, 29 W. Susquehanna Ave., Towson, Md. 21204
People's Counsel; Case File

IN RE: PETITION FOR SPECIAL HEARING AND SPECIAL EXCEPTION 10710 Philadelphia Road; N & S side of Silver Spring Road, W of Philadelphia Rd 11th Election & 5thCouncilmanic Districts Legal Owner(s): HoneygoRun Reclamation Ctr, Inc., Philip J Auld, Area President, et al; Contract Purchasers: Honeygo Run Reclamation Ctr., Philip J. Auld, President Petitioners	*	BEFORE THE ZONING COMMISSIONER FOR BALTIMORE COUNTY Case No. 04-089-SPHX

RECEIVED
NOV 17 2003
ZONING COMMISSIONER

MEMORANDUM

Statement of the Case

The Petitioner, Honeygo Run Reclamation Center, Inc. (now a wholly owned subsidiary of Republic Services, Inc., the nation's third largest waste management company) has filed an application for a special exception for a controlled excavation and a special exception for a rubble landfill along with an application for a special hearing requesting related amendments, exceptions, determinations, variances, modifications, eliminations and terminations of previous decisions of the Zoning Commissioner.

On December 13, 1993, by decision of the Zoning Commissioner for Baltimore County (Case No. 94-87-SPHXA), the Honeygo Run Reclamation Center, Inc. (then owned by different local individuals), received approval for a special exception to operate a rubble landfill. The approved, currently operating rubble landfill is located on a site previously used for a sand and gravel mining operation. This property consists of a single tract of land bounded on the north by the stream known as HoneyGo Run, on the south by Silver Spring Road and residential properties, on the east by Philadelphia Road and on the west side by Interstate 95. Subsequent to receiving approval from the Zoning

Commissioner for the requested special exceptions, related variances and development plan, a permit was issued by the Maryland Department of Environment on January 8, 1997, for the operation of a rubble landfill on the north side of Silver Spring Road. (Permit No. 1993-WRF-10338)

ARGUMENT

I. The Petitioner's Proposed Use Should be Subject to the Requirements of Section 412 of the Baltimore County Zoning Ordinance.

The potential adverse consequences of landfills on adjacent and neighboring property owners have been generally recognized in the evolution of the land use statutes, ordinances, regulations and judicial decisions applicable to Baltimore County, and throughout the State of Maryland. In Baltimore County, "dumps" and "landfills" have been specifically acknowledged and specially treated since the county zoning ordinance was first adopted in 1955. The current zoning ordinance of Baltimore County continues to reflect the legislative judgment of the Baltimore County Council of the necessity for special requirements for landfills in the balancing of interests among different property owners and between the private interests of property owners and the general public.

The beginning "NOTE" to Section 502 of the Baltimore County Zoning Ordinance, entitled "Special Exceptions," states in pertinent part, "A few uses such as dumps and junkyards, are inherently so objectionable as to make extra regulations and controls advisable even in the M.H. Zone to which they are restricted." Rubble landfills are only permitted by special exception in five (5) out of the thirty-six (36) zoning classifications in Baltimore County. Rubble landfills are not a permitted use

in any zoning classification with the unique exception as an accessory use or structure in the R.C.2 (Agricultural) Zone "provided that the actual fill area does not exceed 3% of the total contiguous acreage of the property in the same ownership." (Section 1.A.01.29.j., Baltimore County Zoning Ordinance.) Section 412 of the Baltimore County Zoning Ordinance, titled "Sanitary Landfills and Rubble Landfills," was last revised in 1997 with the express legislative intent "to help minimize the short- and long-term effects of sanitary and rubble landfills." Section 412 contains detailed requirements for buffer areas, transition areas, traffic considerations and compliance with federal, state and county environmental regulations.

The Petitioner asserts that the proposed rubble landfill, which is the subject of this case, should be exempt from the reasonable requirements of Section 412 because of Subsection 412.3, which states:

> "Any landfill or expansion thereof for which a development plan was approved prior to the effective date of Bill No. 28-1997 shall comply with the landfill requirements in effect at the time of the original approval."

The Protestant, Sobczak Family LLC, believes that the reasonable requirements of Section 412 should apply to the Petitioner's request for special exceptions based upon one or more of the reasons presented hereinbelow.

First, the Petitioner should not be exempt from Section 412 because the Petitioner is, in essence, proposing to construct a new landfill. The significant differences between the existing rubble landfill and the new proposed rubble landfill area include: (a) In the previous Case No. 94-87-SPHXA, the rubble landfill consisted of a single parcel of property with a single owner. The Petitioner is requesting that nine additional parcels of property, with seven separate owners, now be developed with a controlled excavation and

a rubble landfill. (b) The parcel previously approved for a rubble landfill was located entirely on the north side of Silver Spring Road, a public roadway. The proposed new rubble landfill would not only be located on both sides of Silver Spring Road but would close, excavate and bury that public roadway with up to 110 feet of rubble above current ground elevation. (c) The existing rubble landfill was the site of a former sand and gravel mining operation that was operational since the 1920's. The proposed new rubble landfill area contains properties that were, and are, residential in character or are undeveloped. Clearly, the Petitioner is proposing a new landfill on different properties and not simply an expansion of an existing landfill on a single property already owned by the Petitioner.

Second, even if the Petitioner's proposed use is considered an expansion of the existing rubble landfill, it should not be exempt from Section 412 because there was no development plan approved for the expansion prior to May 22, 1997, the effective date of Bill 28-1997, which created the current requirements contained in Section 412 of the Baltimore County Zoning Ordinance. Nothing in the previous case decided on December 13, 1993, which approved a development plan for the existing rubble landfill operation, hinted or contemplated an expansion on the properties now proposed for the location of the new excavations and rubble landfill. In fact, one of the then adjacent owners (Carlton Bennett), who the Zoning Commissioner found on page 24 of his decision "candid and creditable," testified in the 1993 hearings that he was to "acquire approximately one acre ... after the landfill operation is completed" from the rubble landfill owners. The Bennett property is now included in the Petitioner's plan for a new rubble landfill. The Petitioner's original permit from the Maryland Department of Environment, dated January 8, 1997, was issued with the express description "north side of Silver Spring

Road." The Petitioner's Area Vice President, Philip J. Auld, testified that he began discussing expansion with Baltimore County officials "about two and a half years ago." Attached to Petitioner's Exhibit No. 2 in this case is a letter from Mr. Auld, dated August 16, 2002, requesting an amendment to the Baltimore County Solid Waste Management Plan "to provide for the expansion/addition of its existing rubble landfill." The County Council Resolution 18-03 adding the proposed expansion of the Honeygo Run Reclamation Center rubble landfill to the Baltimore County's Solid Waste Management Plan was just approved on February 20, 2003. Accordingly therefore, by definition, fact and regulation, there could not have been, and there was not, any approval of a development plan for the "expansion" of the existing landfill prior to the effective date of Bill No. 28-1997. The Petitioner's broad interpretation of Section 412 would mean that all landfills existing in Baltimore County prior to the effective date of Bill No. 28-1997 could expand without any such expansion being subject to the requirements of the current Section 412. Such a broad interpretation would potentially deregulate all existing landfills from even the strictures of the 1987 version of Section 412 and have them subject only to "requirements in effect at the time of their original approval."

Finally, the Petitioner is not saved from the requirements of Section 412 by the approval of a site development plan by the Zoning Commissioner in the previous Case No. 94-87-SPHXA, because the restrictions and conditions of that approval were not followed. Therefore, that prior approval should be considered null and void and of no force and effect with respect to the interpretation of the Section 412, as currently enacted. On December 13, 1993, the Zoning Commissioner approved the development plan for the existing rubble landfill subject to restrictions including transfer of the land to Baltimore

County "upon full utilization of the fill," restoration of Honeygo Run, and payment of "the salary and necessary related expenses for an independent inspector to periodically monitor the operation of the landfill." (*See* pages 47-51.) In addition, the Petitioner "agreed to limit rubble to only local customers." (page 46). Such a restriction is permissible under Maryland law and should have been enforced. *See* J. Roland Dashiel Realty Co. v, Wicomico County, 122 Md.App. 239 (1998). As evidenced by the documents introduced in the instant case and the testimony of the Petitioner's witnesses, none of the restrictions noted above were followed.

The Petitioner's Request for Special Hearing seeks to modify or eliminate restrictions imposed on the development plan ten years after their imposition. The Protestant, Sobczak Family, LLC, objects to this attempt to remedy the Petitioner's non-compliance with the 1993 approval of a development plan for the existing rubble landfill and asserts that Section 412 of the Baltimore County Zoning Ordinance should apply to the Petitioner's Request for Special Exceptions in this case. The reasonable requirements of Section 412 would satisfy most of the concerns of the Protestant with respect to the potential impact of the rubble landfill on, and provide the protection needed for, the continued productive use of the Protestant's property.

II. The Petitioner's Proposed Use is Inconsistent With the Property's Zoning Classification and with the Spirit and Intent of the Zoning Regulations.

All of the property Petitioner seeks to use for a rubble landfill is located in the M.L.R. zoning classification the purpose of which is set forth in Section 247 of the Baltimore County Zoning Ordinance:

> "to permit grouping of high types of industrial plants in industrial subdivisions in locations with convenient access to expressways or other primary roadways so as to minimize the use of residential streets; to fill special locational needs of certain types of light industry; to permit planned dispersal of industrial employment centers so as to be conveniently and satisfactorily related to a residential communities; and as transitional bands between residential or institutional areas and M.L. or M.H. Zones."

It is submitted that the area consisting of nine separate parcels of M.L.R. zoned land that the Petitioner proposes to use as a rubble landfill epitomizes the definition of an M.L.R. zone. This 49.8 acre area, along with adjacent parcels along White Marsh Boulevard and Philadelphia Road, arguably represents the best location in Baltimore County for the "high type of industrial plants" contemplated by the M.L.R. zone. This area contains the only largely undeveloped M.L.R. acreage along Interstate 95, the most heavily traveled expressway in Eastern Baltimore County. The interchange with White Marsh Boulevard (Md. Route 43), slated for even more future improvements, makes this area ideal to fulfill the purposes of the M.L.R. Zone.

The proposed rubble landfill is not a "high type of industrial plant." A landfill, unlike other permitted uses and special exceptions, permanently disables land from productive use and severely limits future alternative uses of the affected property. If the Petitioner's proposed use were approved, it would mean that a total of 117 acres out of the 940 acres of the M.L.R. zone in Baltimore County would, at one location, be unavailable to fulfill the purposes and intent of the zone. (*See* Protestant's Exhibit No. 6.) Given the limited availability of land designated for the M.L.R. zoning classification, and the existing development on M.L.R. zoned parcels in Baltimore County, approval of the Petitioner's application would, in essence, be destroying the full potential of the M.L.R. zone in Baltimore County and the inconsistent "with the purposes of the

property's zoning classification" and "the spirit and intent" of the zoning regulations. (Section 502.1.G., Baltimore County Zoning Ordinance)

III. The Petitioner's Proposed Use Overcrowds the Land.

The size and scale of the Petitioner's proposed use is enormous. The Petitioner proposes to construct a rubble landfill on 49.8 acres of M.L.R. zoned land not currently used for that purpose. As reflected on the plans submitted to the Zoning Commissioner, the proposed rubble landfill would require substantial excavations to over 70 feet below the existing ground level. More significantly, the proposed rubble landfill at completion would be in excess of 110 feet above existing ground level. The proposed rubble landfill would have a capacity of 5,600,000 cubic yards of rubble. This proposed use would be among the largest man-made structures in Baltimore County.

The Petitioner has asserted that the proposed new rubble landfill is necessary to meet "county needs" citing the passage of County Council Resolution 18-03. An examination of the Baltimore County Solid Waste Management Plan and official records filed with county departments and the MDE make it clear that the Petitioner's proposed use is not being done simply to meet the "county needs." If this case were only about "county needs" the size and scale of the proposed development plan would be very different. The Baltimore County Solid Waste Management Plan currently contains estimates far below the annual tonnage and cubic yards flowing into the existing rubble landfill. If the Petitioner had complied with the 1993 restriction "to limit rubble to only local customers," the existing rubble landfill would have more capacity to accommodate "county needs." In the 2001 Annual Tonnage Report filed by the Petitioner with the

Waste Management Administration of the Maryland Department of Environment, it is reported on page two that 165,762 tons (58.25%) of the 284,572 tons accepted at the rubble landfill were from out-of-state. In the 2002 Annual Tonnage Report filed by the Petitioner, it is reported that only 170,401.44 tons (48.34%) out of the 329,881.22 tons accepted at the rubble landfill were from non-Baltimore County sources. The existing rubble landfill has become, and the proposed new rubble landfill area will be, a mid-Atlantic regional facility for one of the nation's largest waste management companies. The Petitioner's proposed use at the proposed location would violate Section 502.1.D. of the Baltimore County Zoning Ordinance as it would "tend to overcrowd land." Further, it would "overwhelm and dominate the surrounding landscape," especially adjacent properties such as the Protestant's property. *See* People's Counsel v. Mangione, 85 Md. App. 738, 752 (1991). At a minimum, the Petitioner's proposed use should be subject to the height, area, bulk, floor area and design criteria of other man-made structures.

IV. The Petitioner's Proposed Use Violates the Standards for Special Exceptions

The standard for the granting of special exceptions in Maryland was enunciated by the Court of Appeals in Schultz v. Pritts, 291, Md. 1 (1981). After a lengthy discussion of prior decisions the Court declared:

> "We now hold 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." *Id.*, at 22-23.

The Protestant submits that the Petitioner's "particular use proposed at the particular location proposed" fails to meet this judicial standard. In addition to concerns about the potential adverse impacts to the health, safety and general welfare of the two hundred employees working at industrial/office building owned by the Protestant and the potential adverse impacts on groundwater and air quality from the Petitioner's proposed use (*See* Protestant's Exhibits 1 and 2), the Protestant is concerned about the unique adverse consequences of the Petitioner's proposed use on the Protestant's property.

In the Memorandum from the Baltimore County Department of Economic Development, dated July 9, 2003, it is noted "Because of the existing rubble landfill, the additional acreage does not lend itself to other suitable economic development uses, such as attracting new industrial users to the site." (Petitioner's Exhibit No. 6.) The logic of this observation also applies to the impact of the Petitioner's proposed use on the Protestant's property. In addition, the cumulative impact of a mammoth landfill being constructed alongside of the existing rubble landfill, quickly rising only 100 feet from a property line would be devastating to the potential use of Protestant's property. There is a substantial difference between the top height of the current rubble landfill being located approximately 1200 feet from the Protestant's property and the top height of the proposed huge new rubble landfill being approximately 450 feet from the Protestant's property. *See* Brandywine Enterprises, Inc. v. County Council for Prince George's County, 117 Md. App. 525 (1997).

The Zoning Commissioner noted on page four of the previous decision, dated December 13, 1993, that the subject property "has been mined out" and the Petitioner's proposal for a rubble landfill "appears to make logical sense in that the rubble will be

utilized to fill up pits previously created." In contrast, the Petitioner's proposed use at the proposed location of these different properties for a rubble landfill is illogical. Instead of being utilized "to fill up pits previously created," the Petitioner proposes to construct a veritable mountain of rubble at elevations as high as 110 feet above current ground level. Indeed, the Petitioner's proposed development plan is incongruous with the meaning of a landfill. Webster's Third New International Dictionary of the English Language, Unabridged, defines landfill as the "disposal of trash and garbage by burying it under layers of earth in low ground." (*emphasis added*) The property proposed to be used by the Petitioner does not fit this definition nor the popular understanding of a landfill. Curiously and accurately, Mr. Auld referred in his testimony to the landfill's capacity as "airspace."

In consideration of the nature of the existing topography of the land proposed to be used by the Petitioner, the intent and purpose of the M.L.R. zone, the severe impact on the adjacent property owners, and the potential impacts on groundwater and air quality, the adverse impacts of the "particular use proposed at the particular location proposed" are substantially beyond what they would be at other locations in the M.L.R. zone and should therefore be denied. Schultz v. Pritts, 291 Md. 1 (1981).

CONCLUSION

For the aforegoing reasons, the Petitioners' Application for Special Exceptions for a controlled excavation and rubble landfill should be denied. Further, the Petitioner's requests for various amendments, exceptions, modifications, eliminations, variances and terminations set forth in the Petitioner's Application for Special Hearing should be denied.

Respectfully submitted,

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Attorney for Protestants,
Sobczak Family, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of November, 2003, a copy of the foregoing Memorandum was mailed, postage prepaid, to John B. Gontrum, Esq., Whiteford, Taylor & Preston, LLP, 210 W. Pennsylvania Avenue, Suite 400, Towson, Maryland 21201, Attorney for Petitioner(s); and to Peter Max Zimmerman, People's Counsel for Baltimore County, Room 47, Old Courthouse, 400 Washington Avenue, Towson, Maryland 21204

John T. Willis, Esq.
Bowie and Jensen, LLC
Attorney for Protestant,
Sobczak Family, LLC

IN THE MATTER OF HONEYGO RUN RECLAMATION CENTER, INC. - SOUTHERN EXPANSION	*	BEFORE THE ZONING COMMISSIONER
10710 Philadelphia Road North and South Side of Silver Spring Road 5 th Councilmanic District 11th Election District	*	FOR BALTIMORE COUNTY
	*	CASE NO. 04-089-SPHX
Honeygo Run Reclamation Center, Inc. Petitioner		

RECEIVED

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ZONING COMMISSIONER

MEMORANDUM OF PETITIONER

STATEMENT OF THE CASE

Petitioner Honeygo Run Reclamation Center, Inc. filed the above referenced matter seeking a special exception pursuant to the Baltimore County Zoning Regulations (BCZR) Section 248.4A for an excavation, controlled in a M.L.R. zone and a special exception pursuant to BCZR Section 248.4A for a rubble landfill in a M.L.R. zone. In addition, Special Hearing relief was sought as follows:

(1) To amend the site plan and order in zoning Case No. 94-87-SPHXA for a landfill expansion and to permit relocation of accessory uses.

(2) To permit a special exception for an "excavation controlled" in conjunction with a special exception for a "rubble landfill" on the same site.

(3) To determine that the special exceptions as part of the expansion of the existing operations have no time limit for utilization, or alternatively, a five (5) year period for utilization of the special exceptions.

(4) To modify or eliminate the following conditions in the Order in Case No. 94-87-SPHXA: Conditions 3, 4 and 6.

(5) To continue the existing variance from BCZR Sections 409.8A.2 and 409.8A.6 to allow a crushed concrete surface for the internal haul road and parking areas in lieu of the required durable and dustless surface and to permit same without the required permanent striping for off street parking facilities.

(6) To terminate the special exception granted in Case No. 3902-RX for a trailer court.

STATEMENT OF FACTS

In Development and Zoning Case Nos. XI-611 & 94-87-SPHXA, special exceptions were granted for an "excavation controlled" and for a "rubble landfill" as defined in the BCZR. The hearings took up seven days of testimony in late 1993. The property was comprised of a little over 68 acres of which about 38 acres was proposed for landfilling. As the development project progressed through the engineering and approval process the anticipated capacity of the fill lessened. Placement of a liner and the reengineering that occurred as a result of the liner caused a significant diminution in capacity. The fill officially opened to receive outside traffic in 1999 after grading and excavation. After almost five (5) years of operation it has a projected life span of about another two (2) years.

Upon its inception a citizens' advisory group was formed. The advisory group has met continuously since the opening of the landfill. It is comprised of representatives of nearby residential community associations and immediate residential neighbors. They supported the waiver of the full development hearing process in this

case. At the hearing on the expansion in contrast to the initial special exception and development proceedings, there was no residential community opposition to the zoning requests.

In order to be able to file the requests in this hearing several preliminary steps had to be undertaken over several years. These steps involved public hearings and participation on numerous levels of government. In 1997 Bill 28-1997 was introduced to amend existing regulations pertaining to sanitary and rubble landfills. The existing landfill had been approved with a requirement of a 100' buffer. See Attachment A. The proposed regulations purported to regulate new landfills with a 500 foot buffer and transition area in addition to a finding of need and a minimum acreage of 50 acres. Although the amendments called for the filing of concept and development plans and contained other indicia that they were meant to cover only new landfills, an amendment was filed and adopted to the original bill which specifically exempted existing landfills and their expansion. Section 412.3 states: "Any landfill or expansion thereof for which a development plan was approved prior to the effective date of Bill No. 28-1997 shall comply with the landfill requirements in effect at the time of the original approval." At the time of the Bill's passage there were three operating landfills in Baltimore County. The one sanitary landfill was the Baltimore County landfill on Allender Road, which as a county facility already was exempted. A rubble landfill located adjacent to the county landfill in the confines of the Gunpowder Falls State Park (Days Cove Landfill) had been determined to be on public land and serving public needs and consequently not subject to local regulation. Only the Honeygo Reclamation

Facility approved in Case Nos. XI-611 and 94-87-SPHXA was subject to the county zoning and development regulations.[1] The Bill and amendment passed without objection.

During the 2000 comprehensive zoning map process the mobile home park located near the end of Silver Spring Road adjacent to the landfill was the subject of a zoning request to change the zoning from D.R. 3.5, which permits mobile home parks but not rubble landfills, to M.L.R. zoning, which permits rubble landfills but not mobile home parks. That zoning request was supported at all levels and approved by the county council.

In 2002 a request was made to the Baltimore County Department of Public Works for inclusion of the proposed expansion of the Honeygo Reclamation Center in the Baltimore County Solid Waste Master Plan.[2] This application required review by the Department of Public Works, and the conduct of a public hearing. The hearing notice was mailed to all adjacent property owners, and placed in numerous newspapers throughout the county. Not one person testified against the expansion. The matter was then forwarded to the Baltimore County Council, which adopted by resolution the amendment to the Solid Waste Management Plan approving the inclusion of the proposed expansion in the plan.

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[1] At this time the Days Cove landfill is closed pending a further expansion request from the State. Honeygo Reclamation Center currently is the only operating rubble landfill in Baltimore County.

[2] The counties of Maryland are required by state law (Annotated Code of Maryland, Environment, Title 9, Subtitle 5) to maintain a comprehensive plan managing its solid waste disposal for a ten year period. See COMAR 26.03.03.

Finally, earlier in 2003 the proposed expansion went before the Baltimore County Development Review Group for review of a request for a limited exemption under the Baltimore County Code from the hearing process. The hearing was advertised, and there was no opposition to the granting of the waiver of the hearing process for the expansion.

This proposal covers almost 49 acres contained in several parcels on both sides of Silver Spring Road. Although the acreage subject to the expansion is less than the original landfill, because of the melding of the buffer areas by adding to the existing rubble fill, the proposed fill area will be slightly larger than the original area. The entrance way from Philadelphia Road will remain unchanged. The recycling operation, which now accounts for about 50% more or less of the material brought on site will be moved from its current location near Philadelphia Road to the rear of the property near the former mobile home park. The elevations were derived in conjunction with the excavation to give the landfill the anticipated life of ten (10) years.

There has been activity in grading and excavation at the existing fill site as well as filling since at least 1998. Over that time there has been an exemplary record of compliance with state and local regulations. There have been no violations and no hazardous or nuisance conditions created at the site. There was no evidence put in the record to indicate that this record would change with the expansion. There was no evidence of any sort that the existing operation created any adverse impact to the surrounding properties.

At the hearing the Petitioner put on David Taylor, a landscape architect with Morris & Ritchey Associates, Monte Kamp, the general manager of the facility, and Philip Auld, the regional president of Republic Services, the parent company of the Petitioner. Mr. Taylor was accepted as an expert witness. The witnesses addressed not only the special exception requests but also the issues contained in the special hearing. The uses are clearly permitted in the zone and on their face are consistent with the public health, safety and general welfare.

The special hearing requests follow directly from the zoning requests and the approvals previously granted. The three conditions sought to be amended have been specifically addressed with the relevant constituencies. Recreation and Parks is not opposed to the removal of Condition 3, for it is a liability issue. If the facility is owned by the Petitioner and bonded by it, the use can be turned over to the public without ownership. In that way the county obtains a park use without the liability. The substance of the condition has not changed, only the form.

Condition 4 only is ripe now in that Petitioner had five years to do the work from final permits, which would have been the permit to operate, which was in 1998. The Department of Environmental Protection and Resource Management visited the issue in 1997 at the time that a red-lined plan was presented and a determination was made that such stream restoration was not necessary in this section. Any stream work that needed to be done was going to have to occur with the construction of the public sewer in the floodplain of Honeygo, which is on-going. DEPRM has not made any comments negative to this request in the advisory comments filed.

Condition 6 was not implemented because the Community Advisory Committee elected not to name and state the individual's duties. The Committee has been kept fully apprised of all issues and was well aware of the condition since several of the members were active in the first hearing. Given the reviews of the project which the state implemented in the late 1990's such independent review was deemed superfluous. [3] The condition mandated that a Community Advisory Committee be implemented by the Petitioner, which was done, and which the Petitioner intends to continue. There is no need for an independent reviewer, and there was no testimony or evidence that one was necessary.

The special hearing requests to extend the variances from the durable and dust free surface and the striping requirement were not opposed. Indeed, the Protestant's counsel stated that there were absolutely no problems with the operation of the existing facility in any regard. In this case the unique nature of the haul roads and parking areas, which shift over time indicate that the variance as granted was warranted and continues to be warranted.

The Protestant in this case put on the stand only one witness. The witness was the real estate agent marketing the property for the Protestant. He was not admitted as an expert but did opine that if the expansion occurred it could diminish the value of the property. He also offered that much of the building was subject to a lease that ran until

[3] It may also be that the change in ownership from the relatively inexperienced original operators to the much larger and more experienced current operator assuaged certain advisory group concerns over the quality of the operation.

2007.[4] He felt it might be hard to re-lease the premises for the same amount of rent. He acknowledged, however, that he was not an appraiser and was not familiar with land fill uses.

In addition to the realtor the Protestant introduced several documents. Two of the documents pertained to the existing landfill and went to its usage. Although it was anticipated that most of the tonnage into the facility would come from the Baltimore region, there was never a prohibition in the zoning order against other material from entering the facility. Indeed, the interstate commerce provisions of the United States Constitution preclude restrictions or discrimination in favor of purely local usage in cases such as this one. *See e.g.,* Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources, 504 U.S. 353, 112 S. Ct. 2019, 119 L.Ed. 2d 139 (1992); Chemical Waste Management v. Hunt, 504 U.S. 334, 112 S. Ct. 2009, 119 L.Ed. 2d 121 (1992); Philadelphia v. New Jersey, 437 U.S. 617, 98 S. Ct. 2531, 57 L.Ed. 2d 475 (1978). It would seem clear from the data available that the life of the landfill has not been shortened by the receipt of out of state material as much as by the reduction in capacity by the liner system and reengineering. There was no testimony about the data presented.

A third document was data from a monitoring report from 2002 and a fourth contained extracts from the Phase II report from the expansion. There was no testimony from Protestant about the documents. Petitioner did put on an expert

[4] Of more impact to value might be the lease term. As a lease term comes to a close, the speculative quality of whether the property can be re-leased at a favorable rent increases and with it the capitalization rate that one would put on the lease value, especially when the property value is based purely on the income stream as was indicated by the realtor. With an increase in the capitalization rate there is a concurrent decrease in present value of the income stream.

hydro-geologist, who testified that he had prepared the Phase II monitoring report of which excerpts had been filed and was familiar with the previous monitoring reports. He opined that nothing in the reports indicated any unsafe conditions resulting from the landfill at all. In fact, he opined that the numbers in the report were not atypical of what one would find anywhere in the area based on the natural geologic conditions. There was no rebuttal or explanation as to what the documents proved by the Protestant. There is no evidence that the State Department of the Environment is in any way concerned about or finds objectionable any of the information in the reports. There was no evidence linking the reports to any criteria in Section 502.1 of the BCZR.

Finally, the Protestant placed in evidence a county-produced map indicating the MLR zones in Baltimore County. There is no question but that the subject parcels represent one of the larger tracts of MLR zoned property. Protestant put on no witnesses about the usage or surroundings of the properties indicated on the map or how they differed from the subject site.

Petitioner put on William Monk, a land planner from Morris & Ritchie Associates, and an acknowledged expert on Baltimore County zoning to testify as to the locations shown on Protestant's Exhibit 5. He was familiar with all of the locations and found that there was nothing unique about this site that made the special exception use more burdensome than the other areas similarly zoned. In addition, he found that this site might be much more suitable than some of the other larger sites due to environmental constraints and the residential and commercial communities located adjacent to the other large sites.

In addition to Mr. Monk and the hydrogeologist Petitioner also put on Mr. George Frizzell, an appraiser with Lipman, Frizzell and Mitchell LLC, who testified that he had familiarity with other landfills and their impacts on surrounding properties plus he had done several appraisals of properties near the subject site. Mr. Frizzell opined that this site would have no negative impact on the adjacent industrial property as evidenced by the strong residential investment going in on adjoining property and the strong residential and commercial development now ongoing near the Texas landfill in central Baltimore County.

DISCUSSION

Protestant through counsel has raised five (5) issues in this case. They are the following:

1. Whether the proposed expansion is an expansion of an existing landfill subject to the regulations in effect at the time of the original approval or a new landfill subject to regulations adopted in 1997.
2. Whether landfills should be held to different standards of consideration from other special exception uses when evaluating the proposal under Section 502.1 of the BCZR.
3. Whether the proposed use at this location is inconsistent with the purpose of the zone.

4. Whether landfills should be held to different standards of consideration from other special exception uses when evaluating the proposal under Section 502.1 of the BCZR.

5. Whether the county needs are met by the proposed expansion of the facility.

It is important to recognize that the Protestant is not contesting any of the special hearing relief sought by the Petitioner. Indeed, the Protestant, through counsel, repeatedly indicated that the existing landfill operation has been exemplary and that there were no complaints or contest against the existing landfill and recycling operation. The real issues go to the proposed uses as requested by special exception.

It also is important to recognize that every county agency, which has reviewed the special exception requests, has indicated that the requests are consistent with the property's zoning and with their agency's standards and responsibilities at least insofar as the special exceptions are concerned.[5] Both Public Works and the Office of Economic Development fully support the relief requested.

1. IS THE PROPOSED EXPANSION REALLY AN EXPANSION?

[5] It is understood that there are still issues to be addressed with respect to the particular development including issues raised by Planning, Recreation and Parks and Environmental Protection, but these issues do not fundamentally contest the granting of the special exception requests.

There really is no other way in which to look at the proposal put forth by the Petitioner other than as an expansion of an existing landfill. The argument posed by the Protestant is sort of like asking: if it looks like a duck, quacks like a duck and flies like a duck is it really a duck?

The evidence presented clearly shows that what is physically proposed on the site is an expansion. It is directly tied into the existing facility and vertically as well as horizontally expands the existing facility. There is an economy to scale by tying in to the existing facility in that the setbacks previously established for the existing facility are used. If the acreage set aside for setbacks from the existing facility were added back to the facility then not only would the gross acreage of the existing facility be larger than the proposed addition, but also the area covered by the landfill would be larger.

The expanded facility uses the same recycling components of the existing facility but relocates them. The expanded facility uses the same entrance way and loading area as the existing facility. The expanded facility uses the same inspection station and scale as the existing facility, and it uses the same liner technology tied into the same leachate collection facility. Physically, the only difference is that the existing facility will cover more acreage and become higher. There was no evidence offered to the contrary.

Protestant has argued that there was no contemplation that the existing facility would become so large at the time the legislation was enacted, but there has been no proof whatsoever of any limits placed on the amount of expansion allowed. At the time of the legislation in 1997 this was probably the only private rubble landfill

operating under county supervision so clearly the expansion of this landfill was contemplated. There were no restrictions on the amount of the expansion. Such restrictions do explicitly exist elsewhere where there is an intent to restrict an expansion. A perfect example is the expansion of non-conforming uses. Initially, such uses were restricted to 50% by the old zoning regulations and now the expansion is restricted to 25% (BCZR Sec. 104.3). The restrictions on non-conforming use expansion, however, were absolutely explicit.

This use unlike a non-conforming use is a permitted use, and Bill No 28-1997 explicitly grandfathers existing landfills and their expansion. It does not render either the use or the expansion non-conforming. What it does say explicitly is that such uses are subject to a different set of regulations. Consequently, this expansion is subject to restrictions, which were the restrictions contained in Bill No. 97-1987, which was in effect when the existing landfill was approved.

Protestant argues that the number of parcels comprising the expansion was not contemplated. There never has been a "parcel" test in any zoning use. It is fairly common to have parcels accumulated for the purpose of a project. It is always difficult to say what was contemplated and what was not, which is why the courts have consistently held that it takes strong evidence to indicate that the legislature contemplated something different from the clear meaning of the legislation. *See* People's Counsel for Baltimore County v. Beachwood I Ltd. Partnership, 107 Md. App. 627, 670 A. 2d 484 (1995). In this case all of the parcel owners including Baltimore County signed the applications. It is ludicrous to say that the county government did

not intend to apply the expansion to the area across the road when the county government is signing an application to apply the expansion across the road.

Protestant also argued that the expansion could not be considered an expansion because the development plan approval was not finalized because the Petitioner had not complied with the development plan order. This would seem to be contrary to the assertions that the present operation was fine and that there were no issues with it. It also would negate the finality of the order in Case Nos. XI-611 and 94-87-SPHXA. This Order has been final for almost nine (9) years. Nevertheless, the existing landfill is in compliance with the development plan. There have never been any violations filed. The removal of the restrictions sought be special hearing are timely and make sense. The community group is meeting and is actively assisting in the preparation of plans for the expansion.

What really makes the argument of Protestant fail is that all of the evidence is that this existing landfill has met all county criteria as determined by the reviewing agencies, has been an excellent neighbor in its operation as evidenced not only by the lack of neighborhood opposition but also by the support of the community group and the proffers by Protestant's counsel as to the conduct and the lack of objection to the existing facility. The Baltimore County government through legislative action signed by the County Executive has passed amended legislation approving an expansion, granted rezoning to further the expansion, and has included the proposed expansion area as part of its obligation in addressing its solid waste disposal requirements.

felt that this use certainly was consistent with the property's zoning. The Baltimore County Office of Planning and the Zoning Bureau both agreed that there were no inconsistencies in the use of the property within the MLR zone at this location. There was actually no proof whatsoever offered to the contrary.

4. DOES THE SIZE AND SCALE OF THE PROPOSED FACILITY CREATE A UNIQUE ADVERSE IMPACT ON ADJOINING PROPERTIES?

The Petitioner's counsel is tempted to respond with a very short rejoinder. The Petitioner' counsel will refrain. The size and scale of this facility let alone the impact are nowhere close to the size and scale of the project litigated in Moseman v. County Council of Prince George's County, 99 Md. App. 258, 636 A. 2d 499 (1994). Hundreds of acres were involved in that case. The proposed landfill expansion would surround a group of homes on three sides; there was evidence of stream degradation, noise and odors from the existing landfills. There also was shared, inadequate access with the residences. None of these factors were presented in this case. The evidence actually showed that the residences did not believe themselves to be adversely impacted. The access was acknowledged by all witnesses to be superior, and there was no evidence of any environmental degradation. The site plans and testimony confirmed that the environment was being protected and that the buffer to the Protestant's site was actually significantly larger than required by code. In addition, Protestant's facility was positioned in such a way as to locate the warehouse and trucking uses in closer proximity to the proposed development than the office use and that a minimal amount

of the office use actually would have any view whatsoever of the filling activities. One entire building side facing the landfill has no windows and the other building side has no windows for 2/3's of its length. The visual impact with the planted buffer will be minimal. There can be no comparison with the landfill expansion in the other Moseman.

The proposed expansion is sized to meet the county's objective of handling demolition and construction debris for a period of ten (10) years. It is anticipated that with the construction of Route 43 within close proximity to the site along with other construction and redevelopment that capacity in the county would not otherwise be sufficient. The depth of the controlled grading is determined by ground water elevations, which have been determined after a year of monitoring. The horizontal expansion is physically limited by I-95, Route 43, Route 7, and adjacent wetlands. There is little else for the proposed expansion to go. The height, therefore, is determined by projected need, limitations on depth and horizontal expansion, and by projected recycling efforts, which do account for a substantial amount of the material brought on to the site. The Petitioner has sought to provide a height that will yield the necessary capacity yet also will provide a usable amenity of a park setting.

Statements by the legal counsel for Protestant are not evidence. Heard v. Foxshire Associates, LLC, 145 Md. App. 695, 806 A. 2d 348 (2002). His statements as to the height and scale are not evidence. The only evidence as to impact was that from the realtor, who suggested that the mere presence of the expansion would have a negative impact. There was no suggestion that any change in height or shape would have a

lesser impact or what would be a suitable size without an impact.[6] Consequently, the only evidence presented was that the landfill as designed would have virtually no impact on surrounding properties. In Sharp v. Howard County Board of Appeals, 98 Md. App. 57, at 77-78, 632 A. 2d 248 (1993) the Court emphasized a part of the decision of Anderson v. Sawyer, 23 Md. App. 612, 329 A. 2d 716 (1974), *cert. denied*, 274 Md. 725 (1975) in stating "...Because there were neither facts nor valid reasons to support the conclusion that the grant of the requested special exception would adversely affect adjoining and surrounding properties in any way other than 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.** [emphasis in original]" In this case the evidence presented by Protestant was, in effect, no evidence at all.

5. IS THERE A LEGAL "NEED" STANDARD TO BE APPLIED TO THIS SPECIAL EXCEPTION, AND IF SO, ARE THE COUNTY NEEDS MET BY THE PROPOSED EXPANSION?

This landfill expansion does not have to meet a "need" standard or show that a need exists under the zoning regulations. New landfills in Baltimore County are subject to certain findings made by the Director of Public Works. Such standards were

[6] Of course, some negative impact is inferred by the special exception requirement. As the court in Mossberg v. Montgomery County, 107 Md. App. 1, at 8-9, 666 A. 2d 1253 (1995) stated: "Moreover, it is not whether a use permitted by way of special exception will have adverse effects (adverse effects are implied in the first instance by making such uses conditional uses or special exceptions rather than permitted uses), it is whether the adverse effects in a particular location would be greater than the adverse effects ordinarily associated with a particular use that is to be considered by the agency."

not in effect under the legislation enacted in Bill No. 97-1987 (See Attachment A). There is no necessity of showing a need for the expansion.

Even if these standards were in effect, however, the Solid Waste Management Plan, which details the needs and objectives of the county, contains findings which indicate that there is a shortage of landfill capacity for the disposal of rubble waste generated by the county (as the only open rubble landfill such could be presumed); that without the expansion there will be a shortage in the next five (5) years (the existing Honeygo landfill by fact will reach capacity before the end of five (5) years and there are no other rubble landfills in the pipeline), and additional rubble landfill capacity is needed to comply with any regional agreement (each county has to have a plan for handling its rubble waste and the amendment to the solid waste plan was Baltimore County's way of responding to its requirement to comply). See Resolution No. 18-03 (Petitioner's Exhibit 2).

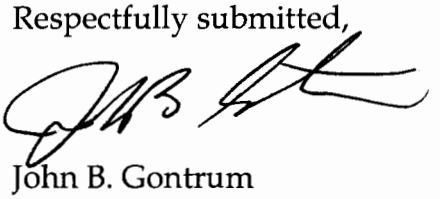
The evidence and comments from the Department of Public Works clearly indicate that the expansion is in the interest of Baltimore County. There is an acknowledged need to be served, and this proposal meets that need. Once again, Protestant failed to produce any evidence that the county need was being met elsewhere or that the county's adoption of the amendment to its solid waste management plan was in error.

CONCLUSION

Petitioner has met all of the standards contained in Sections 403, 412 and 502.1 of the B.C.Z.R. There has been no evidence introduced that indicates that these requirements have not been met. Petitioner has met its burden of production of evidence to show that this use at this location will not cause injury to the health, safety or general welfare of the public. The Protestant has failed to introduce any testimony or exhibits which indicate that this use at this location will create more of an adverse condition than at similarly zoned sites.

In conclusion Petitioner respectfully requests the Zoning Commissioner for Baltimore County to grant the special exception and special hearing relief requested.

Respectfully submitted,



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portion thereof underground would be greater than locating it overhead, in any given case, shall not in itself be deemed sufficient cause to prevent a requirement for underground construction. [B.C.Z.R., 1955.]

(7) Any other matter or thing deemed by him or them to be material in connection with the public health, safety or general welfare. [B.C.Z.R., 1955.]

Section 412--SANITARY LANDFILLS AND RUBBLE LANDFILLS[6]
[B.C.Z.R., 1955; Bill No. 145, 1962; No. 97, 1987.]

412.1--Landfills must comply with all applicable requirements of the Baltimore County Department of Health and the Department of Environmental Protection and Resource Management.

412.2--All landfills must comply with the County's applicable permit requirements.

412.3--Screening shall be provided of such types and at such locations as may be required by the Zoning Commissioner on recommendation of the Director of Planning and Zoning.

412.4--Road access shall be adequate for the truck traffic generated by the landfill.

412.5-A post-use land reclamation plan approved by the Baltimore County Soil Conservation District and the Baltimore County Office of Planning and Zoning and the Department of Environmental Protection and Resource Management is required before the use may be authorized by the Zoning Commissioner.

412.6--A landfill may not be located within 100 feet of any property line or well or septic system or within 100 feet of any stream or natural water course or wetlands or floodplain.

412.7--The Department of Environmental Protection and Resource Management periodically shall inspect a rubble landfill in order to monitor the type of waste material being received for disposal.

412.8--The right to maintain a rubble landfill which is not in compliance with this section and which was in operation before the effective date of this section shall cease one hundred eighty days after the effective date, unless within that time the owner or agent files with the Zoning commissioner a petition for approval of a special exception.