IN THE MATTER OF THE APPLICATION OF PULLEN TOUR SERVICE, INC. FOR A VARIANCE ON PROPERTY LOCATED ON THE W/S HAMMONDS FERRY ROAD, 175' S OF RESEARCH AVE (3118 HAMMONDS FERRY RD)	* BEFORE THE * COUNTY BOARD OF APPEALS * OF * BALTIMORE COUNTY
13TH ELECTION DISTRICT 1ST COUNCILMANIC DISTRICT	* CASE NO. 06-389-A

* * * * * * * * *

OPINION

This matter comes before the Board on an appeal ~~by People's Counsel for~~ Baltimore County, and Maryland Citizens for the Environment and citizens and residents in the surrounding area of the property in question, including Shirley Arrington, Heather Hall, Dawn and Darrick Horsey, Danielle and Erik Bowers, Susan and Patrick Gilbride, and Lynn and Jim Good. The appeal is from a decision of the Deputy Zoning Commissioner (D.Z.C.) granting the variances in question subject to certain conditions. A hearing was held before the Board on May 9, 2007. Petitioner, Pullen Tour Service, Inc., was represented by Timothy L. Fitts, Esquire. People's Counsel, Peter M. Zimmerman, and various members of the Maryland Citizens for the Environment were present and participated. Briefs were submitted on June 5, 2007, and public deliberation was held on June 26, 2007.

Facts

Pullen Tour Service, Inc., (Petitioner) owns the property located at 3118 Hammonds Ferry Road in the western area of Baltimore County. The property is approximately .65 gross acre in size and is essentially rectangular with an L shape towards the rear.

The neighborhood is a mix of industrial and residential uses. The Pullen property is zoned Industrial (M.L.-I.M.); however, it adjoins residential properties immediately to the north and west.

Some of these properties are zoned Industrial and others are zoned D.R. 5.5. Across Hammonds Ferry Road and Virginia Avenue, respectively to the east and south, there are larger properties used for trucking facilities.

Petitioner seeks the following variances:

1. From § 409.A2 and 409.A2.6 to permit a paving surface of compacted stone without paint striping in lieu of the required paint striped durable and dustless paving surface;
2. From § 243.3 to permit a rear yard setback of 1.5 feet in lieu of the required 50 feet;
3. From § 243.2 to permit a side yard setback of 1.5 feet in lieu of the required 50 feet;
4. From § 243.4 to construct a building 1.5 feet in lieu of the required 125 feet to the nearest boundary line of a residential zone; and
5. From § 243.1 to permit a front yard setback of 1.5 feet in lieu of the required 75 feet.

The Deputy Zoning Commissioner granted variances as follows:

1. From § 243.3 to permit a rear yard setback of 10 feet in lieu of the required 50 feet;
2. From § 243.2 to permit a side yard setback of 5 feet in lieu of the required 50 feet;
3. From § 243.4 to construct a building 5 feet in lieu of the required 125 feet to the nearest boundary line of a residential zone; and
4. From § 243.1 to permit a front yard setback of 5 feet in lieu of the required 75 feet.

He also set the following conditions:

1. That the Petitioner shall submit landscape and lighting plans to the Baltimore County Landscape Architect for review and approval to insure that the new building is properly screened from the adjoining residential uses, including those in the M.L. zone and to buffer adjacent properties from the visual impact of the building.
2. Lighting will be directed on the subject property and not on adjacent properties.
3. All washing of buses, waste removal and maintenance will be perform within the enclosed building.

The D.Z.C. further ordered that the variance from § 409.8A.2 and 409.8A.2.6 to permit a

paving surface of compacted stone without paint striping in lieu of the required paint striped durable and dustless surface be denied and that the Petitioner be directed to resubmit its stormwater plans to the County's Department of Environmental Protection and Resource Management (DEPRM)for re-evaluation and approval.

Before the Board, the Petitioner had accepted the D.Z.C.'s variances, and had submitted a letter to DEPRM dated June 14, 2006 citing the D.Z.C.'s Order and requesting that DEPRM grant relief for the durable and dustless area to allow the Petitioner to grade the lot and use gravel on the lot in lieu of the stormwater management plan. This was approved by the Deputy Director of DEPRM on June 15, 2006 with a signature on the letter submitted to them by Patrick C. Richardson, engineer for the Petitioner.

It appears that, upon purchasing the property in question, the Petitioner sought an opinion letter from the Baltimore County zoning office as to the classification of Petitioner's business. By letter dated November 15, 2001, Donna Thompson, a Planner II in the Zoning Review Office with the Department of Permits and Development Management (PDM), stated:

> The property shown on the zoning map is designated M.L.-I.M. (Manufacturing, Light –Industrial, Major). The use as described in your letter being a small charter bus business would fall under the definition of a transit storage and repair yard. Enclosed please find a copy of this definition found in the Baltimore County Zoning Regulations. Per Section 253.1.B.19 (BCZR), this use is permitted as a right in the zone provided that no building or commercial vehicle, storage /parking is located within 100 feet of any residential zone, boundary, or within 100 feet of the right-of-way of an existing or proposed interstate highway…

The Petitioner relied on the zoning opinion letter and obtained permits for fencing and sewer and placed a trailer on the property and began operating the business in December 2004. On October 21, 2005, the Baltimore County Code Enforcement Office issued Petitioner a citation # 05-5498 for the operation of a "transit storage and repair yard" without benefit of a use permit and

illegal use of trailers. The case was still active pending the outcome of the Board of Appeals decision.

Petitioner is aware of the 100-foot requirement which does not allow him to park buses within 100 feet of the residential zone to the north of his property. He parks the buses on the southeast corner of the property and is proposing to build a large building which extends into the L portion of his property to use for repairs of the buses, cleaning, and waste disposal. At the present time, the waste-dumping station for which Petitioner has a permit is within the 100-foot area from the D.R. 5.5 zone. In addition, Petitioner has a trailer parked within that 100-foot zone, and at the southernmost end of the property, he has a house trailer which is being used as an office. Petitioner proposes to put a foundation under the house trailer to make it more of a permanent type of modular building.

The Petitioner presented Patrick C. Richardson, Jr., its engineer, as its first witness. Mr. Richardson outlined the proposed use of the property and stated that the location for the proposed one-story building to house the office and repair functions of the business could only be placed in the L section of the property. Mr. Richardson contended that, because of the shape of the property, with the L section at the end, it was a unique piece of property. He stated that it was necessary for the buses to turn around and maneuver within the 100-foot area from the D.R. 5.5 property and stated that it was his opinion that this would be allowed within the 100-foot area. He stated that they had received a letter from the zoning office indicating that the business was considered a transit storage and repair facility, and was allowed by right within the M.L.-I.M. zone, although no washing of buses or repairs would be allowed within the 100-foot area from the D.R. 5.5 zone north of the property.

It was Mr. Richardson's contention that the variances requested were necessary in order for the Petitioner to utilize the property and that he did not feel that the proposed building could be put on the property in any other place. He stated that landscaping would be placed within the 10-foot strips on the north side of the property to shield the property from the residential areas and that the runoff from the property would be channeled into Virginia Avenue after grading and using the crushed stone on the parking lot in lieu of the non-dust related surface.

The second witness presented by Petitioner was Mr. Hornett Pullen, owner of the Petitioner's business. He stated that he was aware of complaints that had been filed against the property and allegations of spilling effluent from the buses and wastewater discharge. He stated that he has to reapply for a permit for wastewater discharge every 6 months and that he currently has a permit. He also felt that there was no other way for him to operate his business other than to park the four buses on the southeast side of the property and to construct a building in order to repair and clean the buses. He stated that it was a 24-hour a day, seven-day a week operation and that buses would be coming in at various times during the night or leaving early in the morning. He stated that he has eight bus drivers and that the drivers come to the property and park their cars and pick up the bus. He has two people cleaning buses and two part-time employees working at the site 5 hours a day in the morning and 5 hours in the evening. He has a 42-foot trailer on the property used for storage, which is located 4 to 5 feet from the property of Heather Hall, resident just north of the property. Ms. Hall's property is zoned M.L.-I.M. The property north of her is zoned D.R. 5.5.

People's Counsel presented Dennis Wertz, Senior Planner with the Office of Planning. Mr. Wertz stated that he has visited the property, which is located in the 1st Councilmanic District.

Mr. Wertz stated that the office trailer on the property would not be allowed, even if a foundation was placed underneath the trailer to make it more permanent. Section 415 of the Baltimore County Zoning Regulations does not allow for trailers to be parked on this particular type of property. In his opinion, the Petitioner would need variances no matter where the building was placed on the property. Mr. Wertz felt that the property was not unique and his office recommended against the granting of the variances. Various photographs were shown with respect to the placement of trailers and the dumping station within the 100-foot reserve area, and pictures of the various homes surrounding the property were also admitted into evidence. People's Counsel also submitted a memorandum from Arnold F. "Pat" Keller III, Director of the Office of Planning to Timothy M. Kotroco, Director of PDM, dated March 3, 2006 in which the Office of Planning recommended that the requested variances be denied since they were inadequate and would adversely impact the residential properties. The letter went on to state, "Furthermore, the Petitioner has not demonstrated, nor can the Office of Planning determine, any practical difficulty or non-self-imposed hardship wherein compliance with the Baltimore County Zoning Regulations cannot be met."

Protestants presented Lorraine Young, daughter of Nelson and Vivian Seiler, who live to the west of the property. The Seiler property is zoned M.L.-I.M., but the Seilers live on the property and it is used as a residence. Ms. Young testified that buses parked close to the Seiler property emit diesel fumes and noise at all times of the day and night. She stated that they could not open the windows because of the dust and the smell of the fumes. She also stated that lights were so bright at night that they did not need to put lights on in the home, and for the past 2 years they have suffered from light and noise. In addition, when it rains, water flows off the Petitioner's

property onto the Seiler property and causes flooding of the property.

Ms. Young also stated that she has seen dumping of wastewater at the waste station spill on the ground and the smell is offensive to her. Her mother, Mrs. Seiler, also testified and affirmed her daughter's statements.

Heather Hall testified. She lives at 3114 Hammonds Ferry Road, just north of the Pullen property, and her property is zoned M.L.-I.M. She also complained of engine noises and noise from the workers cleaning and servicing the buses at all times of the day and night. She complained of the odor from the dump tank and did not feel that any of the recommended conditions would shield her property.

Eric Bowers of 2363 Research Avenue testified on behalf of the Protestants and stated that his property is directly north of the proposed office building. He stated that he is concerned about the noise and the large building being proposed to be constructed right next to his property. He feels that it will lower the value of the property, and that the planting of trees would not alleviate his concerns. The noise and fumes were also offensive to him.

Brenda Harney, a community leader in the area, felt that allowing the Petitioner to utilize the property as proposed would be detrimental to the residents of the area, confirming the testimony of the other residents who testified.

Issues

The issues involved herein were as follows:

1. Is the Pullen operation considered to be a transit storage and repair yard?

2. Pursuant to § 253.4, what is the scope of permitted uses in an M.L. zone within 100 feet of the residential zone? Specifically, is it permissible for Pullen to use this area for access,

maneuvering and cleaning of buses and for a dump station?

3. Pursuant to § BCZR 101 and 415.2, is Pullen's existing and proposed trailer use near Virginia Avenue permissible?

4. Pursuant to BCZR § 307.1, does the property meet the standard of "uniqueness" which results in "practical difficulty" so as to justify the requested variances? Moreover, are the proposed variances consistent with the intent of the relevant zoning regulations and the public safety, health and welfare?

Decision

The Board has reviewed the testimony, evidence, briefs, and the law in this matter and has determined that the requested variances should be denied.

Issues No. 1 – What is the classification of the Pullen operation?

BCZR § 101 defines transit storage and repair yard as "a site used primarily for the storage and maintenance of common carriers and for the repair of equipment associated with vehicles."

People's Counsel contends that the Pullen operation should also be classified as a service garage. A service garage is defined as "a garage, other than a residential garage, where motor driven vehicles are stored, equipped for operation, repaired or kept for remuneration, hire or sale."

While the Pullen operation could possibly fit into that definition, it is the opinion of the Board that the Petitioner should not be classified as a garage but as a transit storage and repair yard. Section 101 of the BCZR defines transit center and transit facility. In both of those definitions, there is reference to operation by the State Mass Transit Administration. In the definition of transit storage and repair yard, there is not reference to the Mass Transit Administration. The Board is aware that there are other bus operations within the County and the State in addition to the Pullen

operation. There is no reference given to any other definition in the law other than the one found in § 101 of the BCZR that would cover such operations. Therefore, it is the opinion of the Board that the Pullen operation and similar operations are properly classified as transit storage and repair yards.

Issue No. 2 – What is the scope of permitted uses by Petitioner within the M.L. zone within 100 feet of a residential zone?

The site plan submitted by Petitioner shows that more than half of Petitioner's property is within 100 feet of the D.R. 5.5 zoned boundary which traverses the rear of the residential properties facing Research Avenue on the north. Although permitted by right in an M.L. zone, the operations of Petitioner must abide by the controls of BCZR § 253.4 which states:

> Within 100 feet of any residential zone, boundary, or the right of way of any street abutting such a boundary, only passenger automobile accessory parking and those uses permitted in M.R. zones, as limited by the use regulations in section 241, are permitted.

Section 241.1 of the BCZR includes transit storage and repair yards, but states: "The following uses are permitted, provided that their operations are entirely within closed buildings, except where approval of a development plan indicates otherwise." The Pullen plan was not submitted for review under BCZR 240; therefore, the only permitted uses within 100 feet of the D.R. 5.5 zoned boundary must be enclosed within buildings, apart from passenger automobile parking. Therefore, the Board finds that the dumping station, the cleaning of the buses, the maneuvering of the buses, the parking of the flatbed trailer, and the use of a dump truck within that 100-foot area is prohibited.

Issue No. 3 – Is the Pullen existing and proposed trailer use near Virginia Avenue permissible?

Section 415.2b of the BCZR sets forth the allowable uses of trailers in a business or

industrial zone. Utilization of a trailer for an office for a transit facility or storage yard is not encompassed within the allowed uses of § 415.2b.

The engineer for Petitioner, Mr. Richardson, contended that the permanent foundation for the trailer would be permissible and converted to a modular building. However, as pointed out by People's Counsel's witness, Dennis Wertz, the definition of trailer set forth in BCZR § 101 applies whether or not there is a permanent foundation. It states:

> Trailer (or mobile home) – Any of the various types of vehicles or mobile homes, with or without motive power, including small structures transportable by a pick-up truck or similar vehicle, which are used for human habitation or for business purposes, but excluding vehicles used only for transportation of materials, products or animals. A trailer (or mobile home) shall still be regarded as such even though its mobility may have been eliminated by removing its wheels, or otherwise, and placing it on a stable foundation or rigid supports. Recreational vehicles, as defined herein, are excepted from this definition.

Therefore, the Board finds that the parking of the trailer on the Petitioner's property is in violation of § 415.2B and must be removed.

Issue No. 4 – Is the property so unique that it results in practical difficulty for the Petitioner, thereby justifying the requested variances?

While Petitioner's engineer contended that the property was unique because of the L-shaped portion extending from the rear of the property, there was no evidence that this property was unique when compared with other properties in the area. A review of Petitioner's site plan shows other properties in the area that have similar type formations, thereby not making this property unique. The word "unique" as set forth by the Court in *Cromwell v. Ward*, 102 Md.App. at 710 (1995) states:

> Uniqueness of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, environmental factors, historical significance,

access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions), or other similar restrictions. With respect to structures, it would relate to such characteristics as unusual architectural aspects and bearing or party walls.

Even if the property is considered to be unique, the Board finds that the Petitioner has failed to establish the criteria to determine "practical difficulty." In *McLean v. Soley*, 270 Md. 208, 214-215 (1973), the Court established the criteria for practical difficulty, stating:

> 1) Whether compliance with the strict letter of the restrictions governing various variances would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.
>
> 2) Whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners.
>
> 3) Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.

Petitioner contends that the use as a transit storage and repair yard is the "highest and best use" that can be utilized by the Petitioner on this property. The highest and best use is not the criteria which has been established to determine practical difficulty. There are many uses that could be utilized on the property which are allowed in M.L.-I.M. zones. Unfortunately, Petitioners have chosen a use that is not suitable for the property. In the opinion of the Board, the construction of the building on the property and the conducting of the business on a ½-acre piece of property is overcrowding the land. It also intrudes on the utilization of the property by the residents in the area west and north of the property. The fumes, noise and lights during all hours of the day and night prevent the residents from adequately using and enjoying their properties. Granting the variance would not do substantial justice to other property owners in the area and therefore this is a second

reason for the failure to grant the variance. In addition, the crush stone proposed to be utilized on the property would not be a proper surface for a parking facility for buses and other automobiles since it would tend to generate dust and also would not be adequate for handling runoff of the water in the area.

It is unfortunate that the Petitioner relied on the letter from zoning staff member Donna Thompson and the countersigned approval of DEPRM's Thomas Vidmar to Mr. Robertson's 2006 letter relating to stormwater management, as well as wastewater discharge permits issued by PDM, in proceeding to begin its operation. While County offices attempt to be helpful to Developers and the general public, their letters should clarify the fact that those issues are subject to public review and, in many instances, the full legal development process. Such opinions, where they conflict with the law, are not binding on the public. See *Cromwell v. Ward*, 102 Md.App. 691, 722 (1995); *Marzullo v. Kahl*, 366 Md. 158, 194-199 (2001); and *River Walk Apartments v. Twigg*, 396 Md. 527, 543 (2007).

ORDER

THEREFORE, IT IS THIS 9th day of August, 2007 by the County Board of Appeals of Baltimore County

ORDERED that the variance requested from the Baltimore County Zoning Regulations as follows:

1. From § 409.A2 and 409.A2.6 to permit a paving surface of compacted stone without paint striping in lieu of the required paint striped durable and dustless paving surface;
2. From § 243.3 to permit a rear yard setback of 5 feet in lieu of the required 50 feet;
3. From § 243.2 to permit a side yard setback of 5 feet in lieu of the required 50 feet;
4. From § 243.4 to construct a building 5 feet in lieu of the required 125 feet to the nearest

boundary line of a residential zone; and

5. From § 243.1 to permit a front yard setback of 1.5 feet in lieu of the required 75 feet

be and the are hereby **DENIED.**

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, Panel Chairman

Wendell H. Grier

Edward W. Crizer, Jr.

IN THE	*	IN THE
MATTER OF	*	CIRCUIT COURT
PULLEN TOUR SERVICE, INC.	*	FOR
	*	BALTIMORE COUNTY
	*	Case No. 03-C-07-10143

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

OPINION AND ORDER

On September 3, 2008, a hearing on Petitioner's Administrative Appeal was held before the Honorable Judith C. Ensor. After a thorough review of the entire record, the memoranda filed by the parties, the arguments presented by counsel and the relevant case law, the decision of the County Board of Appeals for Baltimore County ("the Board") to deny the Petitioner's request for five variances is hereby AFFIRMED.

I. FACTUAL BACKGROUND

Pullen Tour Service, Inc. (sometimes "Pullen" or "Petitioner") owns the property located at 3118 Hammonds Ferry Road in Baltimore County, Maryland. Petitioner's Memorandum of Law, p. 2. The property is approximately .65 acre and is essentially rectangular in nature with an L shape towards the rear. Transcript ("Tr.") pp. 21, 30. The Pullen property is zoned as Manufacturing-Light, with an Industrial-Major overlay. Tr. p. 20. It adjoins residential properties immediately to the north and west. Tr. pp. 24-35. Some of these residential properties are zoned Industrial while others are zoned Density Residential. *Id.* Across Hammonds Ferry Road and Virginia Avenue, respectively to the east and south, there are larger properties, which, like the Pullen property at issue, are used for trucking facilities. Tr. pp. 25-26. These properties, however, unlike that

belonging to Pullen, are not in close proximity to the surrounding residences. Tr. pp. 88-89.

Pullen is a tour bus service company that owns approximately four busses. Tr. p. 51.[1] Petitioner parks, repairs, and washes the busses on the subject premises.[2] Tr. p. 21. Tr. pp. 22-23. At this point, there are no restrictions on the hours of Petitioner's business. Tr. pp. 55, 117. Indeed, it is virtually a 24/7 operation. *Id.* Petitioner also has a permit for a waste dumping station on the property, where it empties waste from the busses. Tr. pp. 94, 97. Also on the property, Petitioner maintains a large storage facility trailer (in which it parks the busses), and a smaller trailer, which Petitioner uses as an office. Tr. pp. 24, 66, 103.

The instant issues arose when Petitioner proposed to construct a bus maintenance building on the L-shaped portion of the property, which is surrounded by residences on three sides. Memorandum of People's Counsel, p. 2. Due to the proposed location of the building and its close proximity to the surrounding residences, Pullen petitioned the Deputy Zoning Commissioner ("D.Z.C.") for five variances, four of which were granted. Specifically, the D.Z.C. granted the following variances to four setback requirements:

1. From §243.3, to permit a rear yard setback of 1.5 feet in lieu of the required 50 feet;
2. From §243.2, to permit a side yard set back of 1.5 feet in lieu of the required 50 feet;

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[1] The testimony presented at the hearing before the Board indicated, however, that there have been as many as six busses on the property. Tr. pp. 122, 158.

[2] It is now undisputed that the Pullen property qualifies as a transit storage and repair yard. Tr. 22-23. People's Counsel for Baltimore County originally contended that the Pullen property should be characterized as a service garage. That said, after the Board issued its opinion that the Pullen property qualified as a transit storage and repair yard, People's Counsel chose not to contest the issue. Memorandum of People's Counsel, p. 2. Therefore, the classification of the Pullen property as a transit storage and repair yard is not an issue on appeal.

3. From §243.4, to construct a building 1.5 feet from the nearest boundary line of a residential zone in lieu of the required 125 feet; and
4. From §243.1, to permit a front yard setback of 1.5 feet in lieu of the required 75 feet.

The D.Z.C, however, imposed special conditions on these variances.[3] The D.Z.C. denied the requested variance to the durable and dustless surface requirement and directed Pullen to resubmit its proposal to use gravel in lieu of the storm water management plan to the Department of Environmental Protection and Resource Management ("DEPRM") for re-evaluation. Tr. pp. 34-35. Pullen followed the recommendation of the D.Z.C. and resubmitted its proposal, which DEPRM approved on June 15, 2006. Tr. p. 35.

In response to the decision of the D.Z.C., People's Counsel for Baltimore County ("People's Counsel") and many of the residents in the vicinity of the Pullen property appealed to the Board. Following a full *de novo* hearing, on May 8, 2007, the Board denied all of the variances requested by Petitioner, including the four variances that were previously granted by the D.Z.C., as well as the variance to the durable and dustless surface requirement. Dissatisfied with the Board's decision, Petitioner filed the instant appeal.

II. DISCUSSION

A variance constitutes an authorization for that which is otherwise prohibited by an applicable zoning ordinance. *Cromwell v. Ward*, 102 Md. App. 691, 699, 651 A.2d

[3] The D.Z.C. directed Pullen to submit landscape and lighting plans to the Baltimore County Landscape Architect for approval in order to ensure that the new building would be properly screened from adjoining residential uses and to buffer those residential properties from the visual impact of the building. Additionally, the D.Z.C. instructed that lighting be directed onto the Pullen property only and not onto adjacent properties. Lastly, the D.Z.C instructed Pullen to perform the washing of busses, waste removal, and maintenance within the enclosed building.

424, 428 (1995). Variances are to be granted sparingly, only in rare instances and under peculiar and exceptional circumstances. *Trinity Assembly of God of Balt. City, Inc. v. People's Counsel for Balt. County, et al.*, 407 Md. 53, 79, 962 A. 2d 404, 419 (2008)(quoting *Cromwell*, 102 Md. App. at 703, 651 A.2d at 430). Indeed, "[t]o do otherwise would decimate zonal restrictions and eventually destroy all zoning regulations." *North v. St. Mary's County*, 99 Md. App. 502, 518, 638 A.2d 1175 (1994) (quoting *Marino v. Mayor and City Council*, 215 Md. 206, 216, 137 A.2d 198, 202 (1957)).

A. Standard of Review

"The scope of judicial review of administrative fact-finding is a narrow and highly deferential one." *Trinity*, 407 Md. at 78, 962 A. 2d at 418. The decision of an administrative agency will not be set aside unless it is arbitrary, illegal, or capricious. *Becker v. Anne Arundel County*, 174 Md. App. 114, 138, 920 A.2d 1118, 1132 (2007) (citing *Mortimer v. Howard Research & Dev. Corp.*, 83 Md. App. 432, 441, 575 A.2d 750, 754 (1990)). When faced with making that determination, it is the responsibility of the reviewing court to consider all of the evidence properly before the zoning authority and then "decide whether the question before the agency was fairly debatable. An issue is fairly debatable if reasonable minds could have reached a different conclusion on the evidence, and if the conclusion is supported by substantial evidence in the record." *Id.* Substantial evidence is "defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Becker*, 174 Md. App. at 138, 920 A.2d at 1132 (2007) (quoting *Snowden v. City of Baltimore*, 224 Md. 443, 448, 168 A.2d 390,

392 (1961)). The fairly debatable test is analogous to the clearly erroneous standard. *Mortimer*, 83 Md. App. at 441, 575 A.2d at 755.

As pointed out by the Court of Special Appeals in *Enviro-Gro Technologies v. Bockelmann*, 88 Md. App. 323, 594 A.2d 1190 (1991), the underlying reason for the fairly debatable rule is that "zoning matters are, first of all, legislative functions and, absent arbitrary and capricious actions, are presumptively correct if based on substantial evidence; even if substantial evidence to the contrary exists." *Id.* at 335, 594 A.2d at 1196. Thus, if the decision rendered by the zoning authority is fairly debatable, the reviewing court must affirm it. *Red Roof Inns, Inc. v. People's Counsel for Baltimore County*, 96 Md. App. 219, 223, 624 A.2d 1281, 1283 (1993). Simply put, as long as the issue is fairly debatable, "the courts will not substitute their judgment for that of the administrative body." *Eger v. Stone*, 253 Md. 533, 542, 253 A.2d 372, 377 (1969). While the Court must correct decisions that are arbitrary and not based on substantial evidence, "...it will not substitute its own independent examination of or its own judgment on the facts for those of the agency to which the carrying out of state policy has been delegated." *Snowden*, 224 Md. at 445, 168 A.2d at 391.

B. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE BOARD'S DECISION TO DENY PETITIONER'S REQUEST FOR VARIANCES.

Baltimore County Zoning Regulations ("BCZR") Section 307.1 governs the granting of variances. Section 307.1 makes clear that a variance may be granted only "where special circumstances or conditions exist that are peculiar to the land or structure which is the subject of the variance request and where strict compliance with the zoning regulations for Baltimore County would result in practical difficulty or unreasonable hardship." The determination of whether the variances should be granted in this case is a

"two-step inquiry." *Umerley v. People's Counsel*, 108 Md. App. 497, 506, 672 A.2d 173, 177 (1996). The Court must determine (1) whether there is substantial evidence on the record to show that the Pullen property is "unique," thereby causing the zoning ordinance to have a disproportionate impact on the property and, only if the property is determined to be unique, (2) whether an unreasonable hardship results from the disproportionate impact of the ordinance. *Id.*

1. PETITIONER'S PROPERTY IS NOT UNIQUE.

In *Cromwell*, the Court of Special Appeals set forth the standard for determining whether a property is "unique."

> "Uniqueness" of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, *i.e.*, its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions.

Id. at 710, 651 A.2d at 434. Applying this standard to the case at bar, there is substantial evidence in the record to support the Board's finding that Petitioner's land is not unique.

Petitioner argued before the Board and maintains on appeal that the property is unique because of its L-shape and its location vis-à-vis various zoning classifications. While Mr. Richardson, who was called by Pullen and accepted as an expert, did not specifically indicate that the property is unique, he did testify that it is "kind of turned, it's irregular, kind of narrow with this little odd protrusion out the back…to the north side." Tr. p. 30. The Board found, however, when it reviewed the site plan submitted by Petitioner, that other properties in the area had similar configurations. *See* Board's Opinion, p. 10. Additionally, Mr. Dennis Wertz ("Mr. Wertz"), who was called by People's Counsel and, like Mr. Richardson, accepted as an expert, testified that the

"parcel itself isn't peculiar." Tr. p. 112. In fact, according to Mr. Wertz, the property "isn't really exceptional in any way.... It is L-shaped but it's basically rectangular. It has a width of about 110 feet and a depth of 190 to 200 feet." *Id.* Mr. Wertz opined that the Pullen property is neither an odd shaped lot, nor the type of lot that would necessarily require such extensive variances. Tr. p. 140.

In terms of the actual location of the Pullen property, an industrial property is not unique simply because it is surrounded by residential properties. As pointed out by People's Counsel, the primary purpose of zoning laws is to address the situation where an industrial business finds itself surrounded by residences and, therefore, must adjust its plan to the area standards. Memorandum of People's Counsel, pp. 21-22.

Mr. Wertz's testimony, at a minimum, rendered the uniqueness issue fairly debatable. There exists substantial evidence in the record to support the Board's conclusion that Pullen failed to establish that the subject property is unique, either by virtue of its configuration, location, or both.[4]

2. NO PRACTICAL DIFFICULTY EXISTS SO AS TO JUSTIFY THE REQUESTED VARIANCES.

A landowner must address three factors in order to establish the existence of "practical difficulty," including:

1) Whether compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the owner

[4] Given this Court's determination that there is substantial evidence in the record to support the Board's decision with respect to the lack of uniqueness of the Pullen property, it is not necessary to consider the issue of whether there is sufficient evidence in the record to support the Board's finding that a practical difficulty did not exist. "Unless there is a finding that the property is unique, unusual, or different, the process stops here and the variance is denied without any consideration of practical difficulty or unreasonable hardship." *Trinity*, 407 Md. at 80, 962 A.2d at 420 (quoting *Cromwell*, 102 Md. App. at 703, 651 A.2d at 430). In light of the fact that the issue of practical difficulty was addressed by the Board, in the interest of completeness, and with the intent to provide a full record, the Court will go on to consider whether there is substantial evidence in the record to support the Board's finding as to this issue.

from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.

2) Whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners.

3) Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.

McLean v. Soley, 270 Md. 208, 214-15, 310 A.2d 78, 7873 (1973). A review of the record makes clear that there is substantial evidence to support the Board's decision that Petitioner is not faced with a "practical difficulty" so as to justify the requested variances.

i. PETITIONER'S COMPLIANCE WITH ZONING RESTRICTIONS WILL NEITHER PREVENT IT FROM USING THE PROPERTY FOR A PERMITTED PURPOSE NOR WILL PETITIONER'S CONFORMITY BE UNECESSARILY BURDENSOME.

With regard to the first factor set forth in *McLean,* the Board found that Petitioner's compliance with the zoning restrictions will neither prevent it from using the property for a permitted purpose, nor be unnecessarily burdensome. *Id.* at 214-15, 310 A.3d at 787. Mr. Richardson suggested that Petitioner's use of the property as a transit storage and repair yard is the "highest and best use" of that property. Tr. p. 79. According to *McClean*, however, the "highest and best use" of land is not a factor to be considered in determining the existence of a "practical difficulty." *Id.* In fact, upon further questioning by People's Counsel, Mr. Richardson conceded that he was not aware of any zoning regulations that use a "highest and best use" of land as a standard for variances. Tr. p. 79.

Additionally, there was ample testimony from both experts that there are many other uses for the Pullen property. Specifically, Mr. Wertz stated that the zone allows "...a wide range of uses. It allows a variety of light manufacturing uses. It allows office uses. It allows a rental operation, it allows warehousing." Tr. pp. 112-13. Even Mr. Richardson admitted that there are various uses allowed in this type of zone, including office and warehouse uses. Tr. p. 78.

There is substantial evidence in the record to support the Board's conclusion that Petitioner's compliance with the zoning restrictions is not "unnecessarily burdensome," and conformity with said restrictions does not prevent Petitioner from using its property for a permitted purpose. Simply put, notwithstanding the zoning limitations in place, many uses can be made of the property.

ii. THE REQUESTED VARIANCES WOULD NOT DO SUBSTANTIAL JUSTICE TO OTHER PROPERTY OWNERS IN THE SURROUNDING AREA AND LESSER VARIANCES WOULD BE MORE APPROPRIATE. PUBLIC SAFETY AND WELFARE WILL NOT BE SECURED IF THESE VARIANCES ARE GRANTED.

The second factor in determining whether a "practical difficulty" exists as delineated in *McLean* is whether the variances requested by Petitioner would do substantial justice to Petitioner as well as other property owners in the surrounding area, or whether lesser variances would be more appropriate. *McLean,* 270 Md. at 214-15, 310 A.3d at 787. The final consideration is whether relief can be granted in such a fashion that the public safety and welfare will be secured. *Id.* Even if Petitioner had been able to muster sufficient evidence as to the first factor, it did not and could not overcome the substantial justice, public safety and welfare burden.

At the very outset, Petitioner conceded that its requested variances are extreme. Specifically, the first two variances requested by Pullen sought a setback of 1.5 feet in lieu of the required 50 feet, a difference of 48.5 feet. The third variance requested by Petitioner sought a setback of 1.5 feet in lieu of the required 125 feet, a difference of over 120 feet. Petitioner also asked the Board to permit a front yard setback of 1.5 feet in lieu of the required 75 feet. Again, this request calls for a very substantial variance.

Mr. Wertz testified that, if Petitioner constructed the building at a location other than on the L-shaped portion of the property, which, as already mentioned, is surrounded by residences on three sides, Petitioner would require lesser variances. Tr. p. 120. Mr. Wertz specifically stated, "[w]ell, the setback variances are extreme.... And I don't see any reason given the size and shape of the property that the proposed building has to be where the plan shows it." Tr. p. 114.

Again, there is substantial evidence in the record to support the Board's decision that the variances requested by Petitioner were extreme, and that lesser variances would be needed if the Petitioner placed the building on another part of its property. Accordingly, the decision of the Board in this regard must be affirmed.

In addition, at the hearing before the Board, there was significant testimony from the experts and the residents surrounding the subject property regarding the noise, fumes, dust, and water run-off caused by the current operations on the Pullen property. Petitioner argued that the granting of the requested variances and resulting construction of the building would alleviate these concerns. The Board, however, reasonably found that the requested variances would not do justice to the other property owners and would not result in securing public safety and welfare.

First, the proposed building clearly presents an issue in terms of its close proximity to surrounding residences. Mr. Wertz stated that Petitioner is "...tucking it into that L part of the property, but [Petitioner is] putting it at a location that is closest to the adjacent residences and closest to the residential boundary line." Tr. p. 114. In fact, Mr. Wertz testified that the proposed building site is extremely problematic because "[t]he closer you get to the residences, the [worse] it becomes." Tr. p. 125. Additionally, Ms. Lorraine Young ("Ms. Young"), a resident owning land adjacent to the Pullen property, indicated that the proposed building would be only one and a half [feet] from her fence. Tr. p. 144.

The Pullen operation is a 24/7 business. Both Mr. Richardson and Mr. Wertz indicated that there are currently no restrictions in place limiting the hours of operation. Tr. pp. 55, 117. As a result, according to the residents, they are forced to deal with noise at all hours of the day and night. Ms. Young, in particular, said that she often is awakened between 2:00 a.m. and 4:00 a.m. when Petitioner's employees are performing maintenance on the busses. Tr. p. 143. She testified that "...the noise from that building and from them working is ridiculous. I can hear them – they might as well be in my house. And I'm talking all hours of the night. It's not just during the day, which wouldn't be a problem. But it's when I'm trying to get some sleep. They are very loud." Tr. p. 146. Heather Hall, another resident owning land in close proximity to Petitioner's property, expressed a similar concern with the noise not only from the engines, but also from the workers themselves. Tr. p. 180.

In addition, numerous neighbors testified that the fumes from the Pullen property are so intense that they cannot open the windows to their homes or enjoy their yards.

According to Ms. Young, "...when they turn the busses on, you can smell the fumes," and "we cannot use the patio portion of our yard when the busses are running." Tr. p. 149. Furthermore, the neighbors are adversely impacted by water runoff. Ms. Young testified that, when there is severe rain, there is substantial runoff. Tr. p. 154. Mr. Nelson Seiler, another neighbor, echoed Ms. Young's testimony in this regard, stating that, every time a heavy rain occurs, there are six to eight inches of water runoff that ends up in his driveway. Tr. pp. 173-74.

As already mentioned, it is Petitioner's position that the proposed building will, in fact, alleviate many of the concerns about which the surrounding residents now complain. Indeed, the testimony presented to the Board shows that Petitioner intended to work with the neighbors to mitigate the effects of Pullen's operations. Mr. Arnett Pullen ("Mr. Pullen") testified that he was aware of his neighbors' concerns and attempted, in every way, to address the issues. Tr. p. 97. In fact, Mr. Pullen testified regarding the specific steps he took to address the complaints raised by residents, including continually renewing his permit for the waste dumping station and ensuring that the lights were pointed directly onto his property.[5] Tr. pp. 97-100.

The evidence before the Board demonstrated that Petitioner's effort to address the neighbors' concerns is negated by the fact that there remain many uncertainties regarding the proposed plan for the building. For example, Mr. Richardson admitted that, in his plan, there is no limit on the height of the building:

Q: So at this point there's no limit on the height of the building?

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[5]The transcript from the May 8, 2007 hearing before the Board is incomplete as it does not contain the entire testimony of Mr. Pullen. According to the transcript of the proceedings, "TAPE 2 IS BLANK ON BOTH SIDES TESTIMONY APPEARS TO BE OMITTED." Tr. p. 100, ll. 5-6. It appears, however, based on the testimony that was recorded, that Mr. Pullen was willing to work with residents in the surrounding community in order to alleviate their concerns regarding the proposed building.

A: I don't believe I put one on the plan other than labeling it as a one story structure.

Tr. p. 53. Similarly, Mr. Richardson conceded that he failed to give much consideration to the size and shape of the building:

Q: You actually haven't given any detailed thought to the size and shape [sic] of the building.

A: [Mr. Pullen] hasn't hired an architect to do a design of the building itself. Not that I'm aware of.

Tr. p. 54. Further, Mr. Richardson candidly admitted that he was not certain about the specifics of the Pullen operation. Tr. p. 58. He stated, "I really don't know the operation that [Mr. Pullen's] doing at this point in time, all of the specifics of it." Tr. p. 58. In fact, Mr. Richardson was not able to state with any degree of certainty exactly how Petitioner would use the property after the proposed building was constructed:

Q: [L]et's assume for the sake of argument that all of the neighbor's objections were overcome and the Board were to grant this. Is it part of the proposal that we're dealing with a maximum of four busses on this site at any one time?

A: That's what our plan shows. I can't get into the operation that Mr. Pullen would want to propose on the site. But the plan shows basically that there's room to park four busses on here adequately.

Tr. p. 51.

Mr. Wertz indicated that the plan does not reflect any details with respect to the design of the building. His testimony was as follows:

Well, the other thing, it's not clear how that building is going to be designed. There's going to be a lot of noise happening inside that building. It's not clear

> whether there are going to be openings in those walls that adjoin the residences. So the rear of that building, for example, are there going to be windows? Is there going to be a doorway? If you have a window, first of all, noise is going to -- you are going to hear noise greater than without the window. If you have a window and the window is open, whatever noise is generated is more easily going to be heard outside that building.

Tr. pp. 125-26. Importantly, Mr. Wertz also pointed out that "...there weren't any restrictions put on any openings on the exterior of the building that would help mitigate the noise.....none of that was –it looked like no thought was given to it at all." Tr. p. 126. Mr. Wertz concluded that, if the various requested variances were granted, "there [would] be a severe impact on the neighboring residential uses." Tr. p. 133. He made clear that, in his expert opinion, the "setback and paving variances [would] result in adverse impacts on the adjacent residential uses, for example, noise, fumes and dust. Tr. p. 133. He went on to say "that the variances that are requested...aren't the minimum that would afford relief." Tr. p. 133. He suggested "that somebody needs to take another look at the site and see how things can be relocated on the site so they would be less objectionable, no serious impact on the adjoining residential uses." Tr. p. 133.

According to the residents, the noise, fumes, and water runoff currently prevent them from adequately using and enjoying their properties. Additionally, based on the testimony before the Board, significant details regarding the proposed building were simply not considered by Petitioner's engineer. Thus, there is no way of knowing with any degree of certainty whether the proposed building will alleviate or, for that matter, exacerbate the concerns of the surrounding residents.

Petitioner also desires to have a paving surface comprised of compacted stone instead of the required durable and dustless surface. Tr. p. 34. The Board found that the crushed stone would not be a proper surface for the operations carried out by Petitioner

since it would tend to generate dust and also would be inadequate for handling water runoff.

Specifically, Mr. Wertz explained the difficulty with allowing a stone surface, testifying that "...any time you have stone or gravel, there's the problem with dust. Driving on a stone surface can be noisy in and of itself. So you know, there are problems with dust and noise can also be a problem." Tr. pp. 113-14. Furthermore, Ms. Hall stated, "I have a real problem with the dust that's kicked up any time any of the busses move on that property. There's a cloud of dust that rolls over my house." Tr. p. 180.[6]

Therefore, there is substantial evidence in the record to support the Board's finding that granting any of the variances requested by Petitioner would neither do substantial justice to the other property owners nor promote the public welfare.

In sum, even if Petitioner was able to sustain its burden with respect to the "uniqueness" of the property, there is substantial evidence in the record to support the Board's finding that Pullen failed to meet the *McClean* standard.

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[6] Incidentally, Petitioner maintains that the Board erred in denying its request to use compacted stone as a paving surface because Pullen submitted its original storm water plans to DEPRM pursuant to the D.Z.C.'s order, and DEPRM approved the stone surface. According to Petitioner, the Board substituted its own opinion on this issue for that of DEPRM, instead of deferring to DEPRM. Petitioner's Memorandum of Law, pp. 18-19. The Board's review of the D.Z.C.'s decision, however, was *de novo*. Thus, the Board was in no way constrained by the rulings of the D.Z.C. *Boehm v. Anne Arundel* County, 54 Md. App. 497, 506, 459 A.2d 590, 596 (1983).

C. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE BOARD'S FINDING THAT PETITIONER'S OPERATIONS CONFLICT WITH THE M.L. ZONE LAND USE CONTROLS WITHIN 100 FEET OF A RESIDENTIAL ZONE.

Half of the Pullen property is located within 100 feet of the surrounding residential properties. Tr. p. 61. Therefore, Petitioner's operations must abide by BCZR Section 253.4, which states:

> Within 100 feet of any residential zone, boundary, or the right of way of any street abutting such a boundary, only passenger automobile accessory parking and those uses permitted in M.R. zones, as limited by the use regulations in section 241, are permitted.

Additionally, BCZR Section 241.1 provides:

> The following uses are permitted, provided that their operations are entirely within enclosed buildings, except where approval of the development plan indicates otherwise.

Thus, based on BCZR Sections 253.4 and 241.1, the only permitted uses within 100 feet of the surrounding residential properties, apart from passenger automobile parking, must be within enclosed buildings.

Mr. Richardson agreed with this recitation of the zoning regulations, adding that the proposed building is permitted "as a right in the zone provided that no building or commercial vehicle storage parking is located [within] 100 feet of any residential zone boundary or within 100 feet of the right of way of an existing interstate highway." Tr. p. 23. Mr. Richardson further testified, however, that the only access onto the Pullen property is within that 100-foot boundary. Tr. p. 61. He explained that "...any movement of the busses in and out of [the Pullen Property] is going to require them to cross into that 100 foot section." Tr. pp. 62-63. According to Mr. Richardson, "maneuvering busses around on the site is absolutely required...as part of the operation."

Tr. p. 64. Stating the obvious, Mr. Richardson opined "[y]ou can't store [the busses] there if you can't drive them there." Tr. p. 64. Therefore, the information before the Board, from Petitioner's own expert, is that there is no way for Pullen to run its operation without cutting into the 100-foot buffer zone.

Petitioner attempts to make a definitional distinction between the terms "operations" and "uses" as set forth in Sections 253.4 and 241.1. Specifically, Petitioner asserts that it is not the "use" that must be contained within an enclosed building, but the use's "operations." Petitioner's Memorandum of Law, p. 20. Based on this argument, Petitioner concedes that activities such as maintenance, mechanical repairs, and the cleaning and the emptying of waste must be performed within enclosed buildings. Petitioner's Memorandum of Law, p. 21. Petitioner argues, however, that the parking and maneuvering of busses do not have to be within enclosed buildings because "neither is inclusive within the term 'operations.'" *Id.*

First, even when using the definition of "operations" as provided in the Webster's Dictionary, it is clear that "operations" is a broad term, including the "doing or performing esp. of action: work, deed." Clearly, the parking and maneuvering of busses qualifies as an "action" or "deed." More importantly, however, the expert for Petitioner admitted that "moving busses around on the site is absolutely required ...as part of the *operation.*" Tr. p. 64 (emphasis added).

Therefore, there is substantial evidence in the record to support the Board's finding that the dumping station, the cleaning of the busses, the maneuvering of the busses, the parking of the flatbed trailer, and the use of a dump truck within that 100-foot area are all prohibited.

III. CONCLUSION

Upon consideration of all the evidence before the Court, it is this 30th day of June, 2009 by the Circuit Court for Baltimore County, ORDERED that the decision of the County Board of Appeals for Baltimore County, denying the five variances requested by Petitioner, is hereby AFFIRMED.

JUDITH C. ENSOR
JUDGE