

Case No.: S.E. 4347

Applicant: Maryland Reclamation, LLC

COUNTY COUNCIL OF PRINCE GEORGE'S COUNTY, MARYLAND,  
SITTING AS THE DISTRICT COUNCIL

ORDER OF DENIAL

IT IS HEREBY ORDERED, after review of the administrative record and consideration of argument from the parties, that Application No. S.E. 4347, for a special exception for a rubble fill on property described as approximately 131.5 acres of land in the R-R Zone, on the east side of Brown Station Road, to the north of Brown Road and approximately 2,700 feet south of White House Road, in Upper Marlboro, Maryland, is hereby:

DENIED, for the reasons stated in the findings of fact and conclusions of law attached hereto as Exhibit A, which are hereby adopted as the basis for denial of the application.

Adopted this 22nd day of September, 2003, by the following vote:

In Favor: Council Members Shapiro, Bland, Dean, Dernoga, Exum, Harrington,  
Hendershot, Knotts and Peters

Opposed:

Abstained:

Absent:

Vote: 9-0

COUNTY COUNCIL OF PRINCE GEORGE'S  
COUNTY, MARYLAND, SITTING AS THE  
DISTRICT COUNCIL FOR THAT PART OF  
THE MARYLAND-WASHINGTON REGIONAL  
DISTRICT IN PRINCE GEORGE'S COUNTY,  
MARYLAND

BY: \_\_\_\_\_  
Peter A. Shapiro, Chair

ATTEST:

\_\_\_\_\_  
Redis C. Floyd  
Clerk of the Council

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The subject property, zoned R-R, includes about 131.5 acres, on the east side of Brown Station Road, north of Brown Road and about 2,700 feet south of White House Road. The site lies just west of the Ramblewood residential community and just east, across Brown Station Road, of the Robshire Acres community. The property was farmed for many years before the 1970s, was also mined for sand and gravel, and has been used recently as a Class 3 fill. The applicant here proposes use of the property as a rubble fill, which requires a special exception in the R-R Zone.

2. The Technical Staff and Planning Board recommended approval of the special exception, with conditions. Residents in the area and their civic and homeowners associations appeared in opposition. Staff and Planning Board did not (and were not able to) determine whether the proposed rubble fill is "necessary to serve the projected growth in Prince George's County," as must be proved under § 27-406 (h) of the Zoning Ordinance. At the time of their reviews the District Council had not completed action on the Ritchie Reclamation application, S.E. 4408. Moreover, staff did not -- and consequently Planning Board did not -- apply correctly the proof requirements in § 27-406 (h).

3. The chief reasons for neighborhood opposition to the application are the anticipated adverse effects (noise, odors, and visual effects) on residences and residential areas near the site and the truck traffic (and its perceived safety and congestion

problems) from the operations. The record reflects, first, that the residential communities along Brown Station Road have been visited with more than their fair and reasonable share of mining and landfill uses, “temporary” in nature, over the last 30 years or more; second, that noise, odors, and visual effects from existing and past mining, landfill, and other resource recovery and solid waste disposal activities in the neighborhood, as well as from the power lines traversing the neighborhood and the constant truck traffic along Brown Station Road, have been continuing problems for the residents for many years; and third, that neighborhood opposition witnesses showed by substantial evidence that the proposed rubble fill operations will increase for years the adverse noise, odors, visual, and traffic safety effects now present in the neighborhood from existing landfill and other operations.

4. The main reason the District Council must deny this application is that the applicant, even with staff and Planning Board assistance, did not prove that the proposed rubble fill is "necessary" to "serve" the County's "projected growth," within the meaning of § 27-406 (h) of the Zoning Ordinance.

To make these proofs, a rubble fill applicant must show what the projected County growth in the next 15 years will be, how the proposed facility will "serve" that projected growth, and how the facility is "necessary" to serve that growth. Stated another way, and perhaps over-simplified, the requirement calls for a showing of how projected County growth will be adversely affected, if the proposed rubble fill is not

approved. If projected County growth will not be affected by the presence or absence of the proposed facility, then it cannot be said, for purposes of § 27-406 (h), that the facility is "necessary" to serve that growth.

These requirements were not correctly stated or addressed by the applicant, the Technical Staff, or the Planning Board. They also were not correctly applied by the Examiner.

#### Prior Proceedings

5. Application No. S.E. 4347 has been pending since April 1999. Delays in processing were caused by staff review requirements, postponements at the request of the applicant and others, and a remand by the District Council in 2002. The main reason for the delays in this case, however, was that many hearings were required to complete the record of testimony before the Examiner. This case, in comparison to S.E. 4408, the rubble fill case on nearby Ritchie-Marlboro Road, a case reviewed at the same time as this one, had many more witnesses and many more hearings, and there was consequently some delay before the Examiner completed the review.

The S.E. 4347 applicant may complain that it was unfair for its final decision to be made after the S.E. 4408 case decision. The two applications were in a sense in competition, as to the "necessary to serve the projected growth" issue, and this application was filed months before S.E. 4408. But no unfairness in procedure was imposed in this case, S.E. 4347. The applicant here cannot show in the record a

deliberate or wrongful delay caused by staff, Examiner, Council, or parties to the proceedings. Any complaint the applicant might have about procedural delays cannot be based upon a violation of its rights under the Zoning Ordinance or the Regional District Act, Art. 28, Md. Ann. Code. Moreover, the Council at this time cannot correct prior procedural delays.

Present Application

6. Both staff and Planning Board recommended approval of the application, with conditions. These recommendations were made prior to the full merits hearing before the Examiner, and neither the Technical Staff nor the Planning Board had the benefit of a full presentation of the evidence. Only Examiner and Council had that.

Moreover, all three reviewing entities -- Technical Staff, Planning Board, and Zoning Hearing Examiner -- have misinterpreted and misapplied the Zoning Ordinance standards applicable in this case. The applicant here was required to prove general compatibility with adjacent properties and neighborhood, under § 27-317 of the Zoning Ordinance, and it was also required to prove that it met the special requirements for rubble fills in § 27-406. In particular, § 27-406 (h) provides:

When approving a Special Exception for a rubble fill, the District Council shall find that the proposed use is *necessary to serve the projected growth* in Prince George's County.

(Emphasis added.) Staff, Planning Board, and Examiner required a showing only that existing rubble fill capacity in the County will run out in the next 15 years. They did not

then ask for proof of adverse effects on the County's projected growth. From the proof of likely exhaustion of capacity in 15 years, staff, Board, and Examiner concluded, without evidence, that the subsection (h) standard was satisfied. But the Ordinance section requires more than that.

7. The District Council remanded this case to the Examiner for a review primarily of the issue whether the proposed Brown Station Road rubble fill would be "necessary to serve . . . projected growth," under § 27-406 (h). Staff on remand did an additional analysis, the applicant produced testimony from a solid waste management expert, and the case was returned to the Council. But neither staff nor applicant adequately addressed the "necessary to serve" issue, and the Examiner also misapplied it.

#### Findings and Conclusions

8. The District Council concludes that neither staff nor Planning Board nor applicant, even with the testimony of solid waste management expert Robert Brickner, showed that this proposed rubble fill is "necessary to serve the projected growth in Prince George's County." The staff reviewers and the applicant, as well as the Examiner, decided that this requirement, in § 27-406 (h) of the Zoning Ordinance, was met if it were proved that existing fill capacity in the County would be exhausted in a few years (less than 15) and that there were no nearby fills outside the County to receive rubble after that. But they did not relate this finding about capacity to projected growth, and

without proof that growth would diminish or otherwise be adversely affected, neither applicant nor staff showed what is required under subsection (h).

9. The staff analysis, initially and on remand, projected a number of "scenarios" for rubble fill capacity in Prince George's County in the next 15 years. Each scenario depends on approval of one or more of the pending applications, including S.E. 4408 and S.E. 4347. It is agreed by the parties, and the District Council finds, that rubble fill capacity in the County will be exhausted within 10 years, unless at least one of the pending applications is approved. But that is all the "scenarios" analysis shows: the analysis does not, without more, meet the requirements of § 27-406 (h).

10. As the opposition points out, fill capacity outside Prince George's County must also be considered. The Examiner received evidence of existing and operating rubble fills outside the County, in Anne Arundel, but ultimately she decided that even those fill operations would not offer capacity to make up for in-County facilities which would be exhausted. No one made a thorough examination of rubble fills or fill capacity in the surrounding jurisdictions, the Examiner did not require one, and the record has no evidence that reductions in fill capacity will adversely affect growth.

11. Neither staff nor applicant considered what will happen when in-County and nearby rubble fills reach their capacity, in the next 10-year period. It was not shown that the absence of rubble fill capacity at existing operational sites will have any effect, good or bad, on County building or County growth. No historical data was presented, to



show that growth in the past has diminished because of a lack of rubble fill capacity. No predictive analyses or models were offered, to show that growth in the future – growth of any kind, commercial or industrial or residential or otherwise – would be affected, in any way. Staff, applicant, and Examiner concluded that if and when in-County rubble fill capacity is exhausted, then (ipso facto, or by definition) growth will be affected. They did not consider, for example, that Montgomery County has no rubble fills at all, but continues to grow, or that all Maryland counties have enjoyed some growth since the 1990s, yet very few have rubble fills.

12. The Zoning Ordinance requires more proof than what the applicant offered. This applicant could not and did not prove that its proposed rubble fill – even without considering other pending rubble fill applications – is necessary to serve Prince George’s County’s projected growth.

13. On the “necessary to serve” issue, the District Council also notes that S.E. 4408, the Ritchie Reclamation rubble fill application in the neighborhood just to the west of the Brown Station Road neighborhood, was recently approved. When the applicant there obtains the necessary State permit approvals, then the S.E. 4408 rubble fill will add sufficient capacity to provide in-County facilities, to “serve” projected County growth, until about 2015 or 2016.

14. The District Council further concludes, as argued by opposition residents, particularly those in the Ramblewood and Robshire Acres communities, that the

applicant did not prove, as is required by § 27-317 of the Zoning Ordinance, that the proposed rubble fill at this location will not cause adverse effects greater than would be anticipated at other locations in the R-R Zone. This proposed S.E. 4347 site is much closer to established residential subdivisions than other R-R sites, including the S.E. 4408 site recently approved by the District Council. Visual, noise, and odor effects from a rubble fill at the subject location will be much greater than would be anticipated at the S.E. 4408 property and other R-R zone locations. This proof in the record offers an additional reason to deny the application.

15. Because the applicant did not prove that its proposed rubble fill facility is “necessary to serve the projected growth in Prince George’s County,” § 27-406 (h), and because the applicant did not show that anticipated adverse traffic, noise, odor, and visual effects at this location will be no worse than they would be at other R-R locations in the County, § 27-317, the application must be denied.