

Case No.: S.E. 4355

Applicant: Brandywine  
Enterprises, Inc.

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

ORDER OF DENIAL

IT IS HEREBY ORDERED, after review of the entire record, including the opinion of the Court of Special Appeals, and after hearing argument from the parties, that Application No. S.E. 4355, for a special exception for a rubble fill, on property described as 167.03 acres of land in the O-S Zone, approximately 2,220 feet north of the intersection of MD 381 and MD 382, in Brandywine, Maryland, is hereby:

DENIED, for the reasons stated in the findings of fact and conclusions of law attached hereto as Exhibit A, and also for the reasons stated in the District Council's findings of fact and conclusions of law dated September 14, 2001, attached hereto as Exhibit B, all of which are hereby adopted as the basis for the denial of the application.

Adopted this 31st day of October, 2006, by the following vote:

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

Opposed:

Abstained: Council Member Hendershot

Absent: Council Members Campos and Harrington

Vote: 6-0-1

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: \_\_\_\_\_  
Thomas E. Dernoga  
Chairman

ATTEST:

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

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Subject Application: This application was the subject of the Findings of Fact and Conclusions of Law attached to the order of denial approved by the District Council on September 14, 2001. Those findings and conclusions (referred to herein as the September 2001 order) are hereby incorporated by reference in these findings and conclusions. The September 2001 order is attached as Exhibit B.

2. Purpose: The purpose of these findings and conclusions is to address and comply with the remand order of the Court of Special Appeals of Maryland, requiring an additional articulation of the facts to support the September 2001 order. These findings and conclusions supplement (but do not replace) those in the 2001 order.

3. Contents: The District Council denied the Brandywine application, S.E. 4355, because the record did not support the findings required of the Council under § 27-317 of the Zoning Ordinance. (The Council also denied the application for other reasons, including a failure of proof that the proposed rubble fill would be “necessary to serve the projected growth” in Prince George’s County, as required in § 27-406. This Council order, however, does not address reasons for denial other than those concerning the general special exception standards in § 27-317.)

In this order, the Council further articulates the reasons for its findings that Brandywine’s proposed rubble fill has characteristics not inherent in the use, characteristics that would make its operation at this site particularly hazardous; that this site has characteristics which would cause this operation to have a uniquely detrimental effect on adjacent properties and the neighborhood; and that the neighborhood has resources that: (a) would be uniquely and adversely affected by the proposed use; and (b) are uniquely deserving of protection from those adverse impacts.

4. Zoning Ordinance provisions:

**SUBDIVISION 9. SPECIAL EXCEPTION APPROVAL**

**SEC. 27-317. REQUIRED FINDINGS.**

- (a) A Special Exception may be approved if:
- (1) The proposed use and site plan are in harmony with the purpose of this Subtitle;
  - (2) The proposed use is in conformance with all the applicable requirements and regulations of this Subtitle;
  - (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;
  - (4) The proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area;
  - (5) The proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood; and
  - (6) The proposed site plan is in conformance with an approved Tree Conservation Plan.

**Sec. 27-102. Purposes.**

- (a) The purposes of the Zoning Ordinance are:
- (1) To protect and promote the health, safety, morals comfort, convenience, and welfare of the present and future inhabitants of the County;
  - (2) To implement the General Plan, Area Master Plans, and Functional Master Plans;
  - (3) To promote the conservation, creation, and expansion of communities that will be developed with adequate public facilities and services;
  - (4) To guide the orderly growth and development of the County, while recognizing the needs of agriculture, housing, industry, and business;
  - (5) To provide adequate light, air, and privacy;
  - (6) To promote the most beneficial relationship between the uses of land and buildings and protect landowners from adverse impacts of adjoining development;
  - (7) To protect the County from fire, flood, panic, and other dangers;
  - (8) To provide sound, sanitary housing in a suitable and healthy living environment within the economic reach of all County residents;
  - (9) To encourage economic development activities that provide desirable employment and a broad, protected tax base;
  - (10) To prevent the overcrowding of land;
  - (11) To lessen the danger and congestion of traffic on the streets, and to insure the continued usefulness of all elements of the transportation system for their planned functions;

- (12) To insure the social and economic stability of all parts of the County;
- (13) To protect against undue noise, and air and water pollution, and to encourage the preservation of stream valleys, steep slopes, lands of natural beauty, dense forests, scenic vistas, and other similar features;
- (14) To provide open space to protect scenic beauty and natural features of the County, as well as to provide recreational space; and
- (15) To protect and conserve the agricultural industry and natural resources.

**Sec. 27-104. Minimum requirements.**

In interpreting and applying the provisions of the Zoning Ordinance, they are the minimum requirements for the promotion of the purposes of this Subtitle.

**Sec. 27-142. Burden of proof.**

The burden of proof in any zoning case shall be the applicant's.

**Sec. 27-141. Based on record.**

The final decision in any zoning case shall be based only on the evidence in the record, and shall be supported by specific written findings of basic facts and conclusions. In addition, the Council may take judicial notice of any evidence contained in the record of any earlier phase of the approval process relating to all or a portion of the same property, including the approval of a preliminary plat of subdivision.

**Subdivision 8: District Council**

**Sec. 27-314. Authorization.**

The District Council may approve Special Exceptions, in accordance with the requirements of this Subtitle (subject to the delegation of this authority to the Zoning Hearing Examiner in Subdivision 7, above).

**Sec. 27-425. O-S Zone (Open Space).**

**(a) Purposes.**

- (1) The purposes of the O-S Zone are:
  - (A) To provide for low density and development intensity as indicated on the General or Area Master Plans; and
  - (B) To provide for areas which are to be devoted to uses which preserve the County's ecological balance and heritage, while providing for the appropriate use and enjoyment of natural resources.

(2) The use of the O-S Zone is intended to promote the economic use and conservation of agriculture, natural resources, residential estates, nonintensive recreational uses, and similar uses.

(b) **Uses.**

(1) The uses allowed in the O-S Zone are as provided for in the Table of Uses (Division 3 of this Part).

(c) **Regulations.**

(1) Additional regulations concerning the location, size, and other provisions for all buildings and structures in the O-S Zone are as provided for in Divisions 1 and 5 of this Part, the Regulations Tables (Division 4 of this Part), General (Part 2), Off-Street Parking and Loading (Part 11), Signs (Part 12), and the Landscape Manual.

5. Special exception standards in Maryland: Special exception standards, and the applicant's burden of proof, were summarized by the Court of Special Appeals in *Futoryan v. City of Baltimore*, 157 Md. App.154, 171-74, 819 A.2d 1074 (2003). Referring to special exceptions and conditional use permits interchangeably, the Court said:

In *Anderson v. Sawyer*, 23 Md. App. 612, 329 A.2d 716 (1974), Judge Davidson for this Court thoroughly set forth both the procedures and the allocation of the burden of proof involved in the application for a conditional use permit. She explained initially how there is a presumption that a statutorily recognized conditional use is "in the interest of the general welfare," but that there may be particular "fact[s] or circumstance[s] negating the presumption." Accordingly, the decision to grant a conditional use is never automatic, but will be delegated to an administrative board to assess, in each particular case, whether the use will adversely affect "the neighboring properties."

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

23 Md. App. at 617, 329 A.2d 716 (emphasis supplied).

\* \* \*

It is the applicant, moreover, who bears the burden of persuading the administrative board that the desired use will not adversely affect the neighborhood.

*[T]he applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements .... If he shows to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden.*

23 Md. App. at 617, 329 A.2d 716 (emphasis supplied).

\* \* \*

If there is some evidence pointing in each direction, the issue is, by definition, “fairly debatable,” and the decision of the administrative agency, whichever way it goes, may not be reversed on judicial review as having been arbitrary or capricious.

*If the evidence makes the question of harm or disturbance or the question of the disruption of the harmony of the comprehensive plan of zoning fairly debatable, the matter is one for the Board to decide.*

23 Md. App. at 617, 329 A.2d 716 (emphasis supplied).

When, seven years later, Judge Davidson authored the opinion for the Court of Appeals in *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981), she repeated verbatim, 291 Md. at 11, 432 A.2d 1319, her earlier language from *Anderson v. Sawyer*. After thus putting the seal of approval on the standards articulated in *Anderson v. Sawyer*, *Schultz v. Pritts*, 291 Md. at 12, 432 A.2d 1319, summed up their collective impact:

*These standards dictate that if a requested special exception use is properly determined to have an adverse effect upon neighboring properties in the general area, it must be denied.*

(Emphasis supplied).

\* \* \*

*Schultz v. Pritts* itself was particularly helpful in clarifying the distinction between a permitted use and a merely conditional use (or special exception). With respect to permitted uses, Judge Davidson explained:

[W]hen the legislative body determines that the beneficial purposes that certain uses serve outweigh their possible adverse effect, such uses are designated as permitted uses and may be developed even though a particular permitted use at the particular location proposed would have an adverse effect above and beyond that ordinarily associated with such uses. For example, churches and schools generally are designated as permitted uses. Such uses may be developed, although at the particular location proposed they may have an adverse effect on a factor such as traffic, because the moral and educational purposes served are deemed to outweigh this particular adverse effect.

291 Md. at 21, 432 A.2d 1319.

A merely conditional use (or special exception), by contrast, is one with respect to which the beneficial purpose, albeit compatible with permitted uses, does not necessarily outweigh the possible adverse effects. It is for this reason that an administrative agency must engage in the process of weighing, on a case by case basis, probable benefit versus probable detriment. *Schultz v. Pritts* further explained:

*When 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. For example, funeral establishments generally are designated as special exception uses. Such uses may not be developed if at the particular location proposed they have an adverse effect upon a factor such as traffic because the legislative body has determined that *the beneficial purposes that such establishments serve do not necessarily outweigh their possible adverse effects.*

291 Md. at 21-22, 432 A.2d 1319 (emphasis supplied).



In *Cromwell v. Ward*, 102 Md. App. 691, 702, 651 A.2d 424 (1995), Judge Cathell explained for this Court why a proposed conditional use must thus be subjected to the weighing process.

“A conditional use is a desirable use which is *attended with detrimental effects which require that certain conditions be met.*” “A special exception [or conditional use] involves a use which is permitted . . . *once certain statutory criteria have been satisfied.*”

(Citations omitted).

6. Findings of fact: Rubble fill characteristics and adverse impacts at the proposed location.

a. Entrance location. The entrance road for Brandywine’s proposed rubble fill operation will be used by all dump trucks, including large (20-ton) trucks and trucks with trailers, hauling rubble to the site. It is directly off of Brandywine Road, MD 381. The entrance has been placed at a point where the sight distance, for truck drivers exiting the property, will not be adequate to assure the safety either of the trucks and workers using the exit or the public using MD 381. The Council on this issue accepts the testimony of Dr. Carter and incorporates it into these findings. The Council does not agree with or accept the testimony of the applicant’s designated traffic expert, who revised her testimony after cross-examination, who did not perform a speed study, and who could not account for the characteristics of the road, as described below.

The Council finds that the entrance road to the proposed fill has been located at a point where MD 381 has no left-turn lane or acceleration/deceleration lanes, and no space on which such lanes could be constructed. The Council accepts the uncontradicted testimony of the witnesses with personal knowledge of conditions on MD 381: these witnesses, area residents, stated that MD 381 is winding, heavily traveled, and presently not safe for an entrance road for large trucks. One witness, Mr. Baker, counted between 500 and 600 trucks on MD 381 during one ten-hour period, not including school buses

and delivery trucks. Other witnesses stated that MD 381 has blind curves and lacks shoulders, in many places. From the testimony on the usage and nature of the road alone, the Council concludes that the proposed entrance will be sited at a location uniquely unsafe to workers and other citizens in the neighborhood. The Council credits and accepts the testimony of witnesses with personal knowledge of actual conditions on MD 381, that drivers exceed the speed limit there. That fact worsens, makes more serious and detrimental, the already unacceptable level of risk.

The Council finds as a fact that the unsafe locating of an entrance road is not a feature inherent to the operation of rubble fills. That characteristic is unique to this rubble fill, as sited in this particular location. The Council also finds as a fact that the combination of unsafe conditions appearing in this record are particular to this entrance on this section of MD 381. The Council denied this application in accordance with its duties to apply the Zoning Ordinance, and § 27-317 (a), in such a way as to assure the safety of the citizens of the County.

Sections 27-317 (a) (1) and (4) permit approval of a special exception use only when “[t]he proposed use and site plan are in harmony with the purpose of this Subtitle,” the Zoning Ordinance, and “[t]he proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area.” The purposes of the Zoning Ordinance, in § 27-102, include: “To protect and promote the health, safety, morals comfort, convenience, and welfare of the present and future inhabitants of the County,” and “[t]o lessen the danger and congestion of traffic on the streets, and to insure the continued usefulness of all elements of the transportation system for their planned functions.” The Council is persuaded that the operation of the proposed rubble fill at this location will uniquely adversely affect the safety of the residents and workers in the area. The dangers this use poses as located would not be posed by a rubble fill with a properly-sited entrance on a less hazardous stretch of road.

b. Volume of traffic and intensity of use. The applicant shows in this record that the proposed rubble fill operation will be highly intensive, with substantial

truck traffic for its own corporate operations, many rubble fill off-loading truck trips, and considerable noise, dust, and unsightly conditions. The Council further finds that the intensity of use for this Brandywine operation is not an inherent characteristic of rubble fill operations generally. This applicant proposes a use that will generate 200 truck trips daily on MD 381, over a ten-hour day. That level of use comes to about 20 truck trips per hour. Even if the trucks arrived and departed at a uniform rate, a truck will leave or arrive every three minutes. The applicant stated that it would not (and could not, as a practical matter) require trucks to arrive on a uniform schedule, so arrivals and departures will be even more frequent, in some time intervals. A large number of the trucks would be tractor-trailers or dump trucks, fully loaded with rubble. Moreover, the facilities will serve only Brandywine's own rubble disposal needs. The operation the applicant proposes will not be open to the public.

As to the intensity of the use, and the hours of operation, and without evidence from the applicant on that question, the Council is not persuaded that the arrival and departure of twenty large commercial dump trucks each hour in a ten-hour day is either inherent to the use or a necessary characteristic of the operation of a rubble fill.

The Council accepts the testimony of witnesses who are residents in the neighborhood. They stated that MD 381 is presently overburdened with truck traffic, that there are already traffic back-ups at the entrance to Camp Schmidt, across MD 381 from the subject site, and that those back-ups involve vehicles carrying children. Testimony indicates that MD 381 is used also by farm vehicles, and that an unusually high number of school buses use the roads in the area. Buses from five different schools use MD 381, and the applicant's trucks would travel on parts of approximately 120 bus routes. Almost 10%, of the County's school children attend the cluster of schools in the area. The Council accepts the testimony of residents with personal knowledge of the neighborhood that children must stand on the road to wait for their school buses, because it lacks a shoulder, and school buses must stop in the middle of the road.

The Council notes the concerns of witnesses who testified that trucks carrying heavy loads will have difficulty stopping on MD 381, which has blind curves, where

sight distances are short. The trucks have made ruts which drivers straddle in the rain, to avoid hydroplaning. The District Council also notes that the applicant's estimate of truck trips did not include the trips of tank trucks servicing the site. The Council finds that the proposed rubble fill use would add a high volume of truck traffic to a road which is now barely accommodating a problematic mix of cars, farm vehicles, school buses, and commercial trucks.

The Council finds that the high volume of traffic contemplated for Brandywine's proposed operation, especially in combination with the unsafe placement of the entrance, would create traffic conditions uniquely hazardous to the safety of the workers, farm workers, school children, bus and truck drivers, and other citizens using MD 381 near the site entrance and at Camp Schmidt. The Council finds that the addition of this volume of large and heavily loaded trucks to an already burdened road will pose dangers to people along the road. The Council also accepts the testimony of residents who testified that this volume of trucks arriving at the use will generate loud braking noises and noxious exhaust.

Language in the opinion of the Court of Special Appeals might suggest that the Council, in articulating its findings of fact, should address facts introduced in cases involving other rubble fills in other counties. Without conceding that that is legally required, the Council will address that point here. The Council finds that it is persuaded by the facts in this record concerning this use in this location that the proposed intensity of this use is not inherent to the operation of a rubble fill, and, further, that this use is sited in a manner and in a neighborhood that make the operation unusually and unacceptably dangerous, on MD 381. Even if the Council could rely on facts not in the record, the Council is not persuaded by facts referred to in other cases concerning other rubble fill uses with other entrances on other roads.

The Council finds that the dangers that this rubble fill would pose to the people using MD 381 outweigh any benefits offered by the proposed private rubble fill. The application does not meet the statutory criteria cited above, in §§ 27-102 and 27-317.

c. Use of heavy machinery near the property line. The District Council finds that heavy equipment operations would be located very close to the property line separating the subject property from historic St. Thomas' Church and its cemeteries. As stated in the September 2001 order, Exhibit B, the Council accepts the testimony of Dr. Knio, who testified about the excess noise that would come over the property line. The Council incorporates Dr. Knio's testimony by reference into these findings, as he visited the site. Dr. Knio explained that Brandywine's analysis of the effect of the rubble fill noise on St. Thomas' assumed a buffer of 100 feet of forest, but that the site lacked 100 feet of forest along the St. Thomas property line. The Council accepts Dr. Knio's explanation that the applicant's witness erroneously separated the heavy machine noise from the truck noise, when, in fact, the sound effects at the property line would be cumulative. Dr. Knio testified that excessive noise, over the 65 decibels allowed by State noise regulations, would trespass onto the church property by 320 feet. The applicant's expert did not rely on credible data: he admitted that he did not know whether his numbers were correct. COMAR § 26.02.03 provides that the noise levels of the operation may not exceed 65 dBA.

The Council was not presented with evidence that an inherent characteristic of rubble fills is that heavy machine operations must be located so close to the boundary line that excess noise travels over the line. The Council finds that although noise may be an inherent effect of the operation of a rubble fill, noise over the property line at the level expected to occur at this operation is not. The planning and siting of this particular operation in relation to the property line, the lack of a sufficient buffer on the applicant's property, and the resulting detrimental effect of excess noise travelling off the site are unique to this application. (The Council also concludes that the deposit and movement of rubble on the site are parts of the rubble fill operation. They are not "construction" activities.)

The Council further finds that St. Thomas' Church and its cemeteries are unique cultural and historic resources in the zone, immediately adjacent to the subject property,

and that their rural setting is integral to their unique character. The Council accepts the testimony of witnesses who testified about their efforts to preserve the historic site, and also about the history of the church and its cemeteries. The Council accepts the testimony of Ms. Eig, an expert architectural historian and preservationist, who testified that the church and setting are included on the County's list of Historic Sites and Districts. The expert planner retained by the opposition testified credibly that St. Thomas' Church is unique in the zone of the subject property, and that the rubble fill would impact it through changes to its viewshed and the noise of truck traffic and heavy equipment. The location of this proposed rubble fill so close to the property line would be unusually and unnecessarily detrimental to any neighbor's ability to use his or her property, but it would be particularly detrimental to St. Thomas' Church, a unique and vulnerable historic resource.

The Council concludes that the proposed use, placed so close to St. Thomas' Church, will adversely affect the health, safety, or welfare of residents or workers in the area and will be detrimental to the use or development of adjacent properties or the general neighborhood, contrary to the requirements of § 27-317. The proposed use would particularly conflict with the purpose of the O-S Zone, to protect the County's heritage, and with the purpose of the Zoning Ordinance, to prevent noise pollution. Those adverse impacts are unique to this proposed location, and are substantially more severe than they would be at other locations.

d. Height of rubble mounds. The Council notes and accepts the statement in the Technical Staff Report that St. Thomas' and Camp Schmidt would have nearly unobstructed views of the proposed large rubble mounds the applicant will raise, and that no amount of on-site screening would obscure them. The Council also accepts Mrs. Jenkins's testimony that the proposed use will not provide for any screening for her property. The applicant did not introduce any evidence that it would screen the operation from the Jenkins property.

Specifically, the Council accepts the testimony of the landscape expert who visited the site and questioned the accuracy of the applicant's exhibit as to the extent of the buffer. The landscape expert also testified that existing trees would not conceal the rubble fill. The applicant's planner did not disagree that the rubble fill would always be visible from the St. Thomas' Church site. The applicant offered no testimony about the significance of the church site and no testimony that such adverse impacts would occur elsewhere in the O-S Zone. St. Thomas' Church and its setting are listed as an historic resource and included in the County's Historic Sites and Districts document, which is part of Prince George's County's General Plan. The church is one of only four meeting house style churches remaining in the County, the only one in the O-S Zone, and the one that is most historically intact. Its isolated setting distinguishes it from the others.

This record contains no facts from which the Council could conclude that the construction of rubble mounds rising 100 feet above the lowest point of the site is inherent in the use or operation of a rubble fill. The applicant's corporate witness testified that it would not be economically feasible to lower the mounds, to put less rubble in them, but the applicant then lowered the proposed height of the mounds, in the rebuttal part of its case. The Council finds that the record does not contain credible testimony to show that applicant's proposed height is inherent in rubble fill operations. It further finds that the siting of mounds in a location where they cannot or will not be screened is not inherent in the use but rather is a circumstance particular to the topography of this site and this applicant's proposed site plan and operations.

Even if the proposed height of the mounds were deemed to be inherent to the use, the Council finds that the sight of these mounds will have a particularly detrimental effect on this neighborhood. The view of these large rubble mounds will have a particularly detrimental effect on the ability of Camp Schmidt to provide the County's school children with an outdoors experience, on the ability of St. Thomas' Church to realize its potential as a historic and cultural site, and on the ability of Mrs. Jenkins to use and enjoy her property. The Council accepts residents' and others' testimony that this neighborhood contains a number of historic sites in addition to St. Thomas', and that

creating large rubble mounds in this uniquely historic area would be particularly adverse to the purpose of the O-S Zone, to preserve the County's heritage, and on the County's ability to preserve the resources listed in its Historic Sites and Districts Plan.

e. Adverse effects on Schmidt Outdoor Education Center. The 450-acre Schmidt Center, or Camp Schmidt, is the County's only outdoor education center for public school students. Camp Schmidt makes the neighborhood surrounding the subject property additionally unique. The applicant did not address effects on Camp Schmidt. The Council accepts the testimony of the witnesses with personal knowledge of its use: Every County fifth-grade student spends a night at Camp Schmidt, as part of the County's environmental education curriculum, and Scouts, teachers, and special-education students attend programs there. Traffic stops on MD 381 on Friday afternoons from 3:30 to 4:00, when parents drop students off at the Center. The applicant's large, rubble-laden trucks would travel the road at that time. The Council finds that the added truck traffic, diesel exhaust, and the deceleration, braking, and gear-shifting noises at and near the Center's entrance would adversely affect the children's environmental studies and experience. The odors of a rubble fill will have a particularly adverse impact on children coming to study the outdoors.

The opposition citizens' landscape expert testified that the rubble fill would be visible from the Schmidt Center building. He stated that Brandywine's sightline exhibit was inaccurate, because it suggested more trees on the subject property than it actually has. The opposition's planning expert testified that Camp Schmidt is unique because it is the County's only environmental education center, and that the rubble fill would impact the Center by changing the viewshed and creating noise impacts, from truck traffic and heavy equipment. The Technical Staff Report stated that the Schmidt Center "will have nearly unobstructed views of the rubble fill upon completion [and] no amount of screening placed on the [subject] site will change the view." The Council accepts this consistent opposition testimony that the view from Camp Schmidt would include the large rubble mounds.



The applicant's planning expert did not know what activities are conducted at Camp Schmidt, whether students use it, or whether there was any similar center in the O-S Zone. Brandywine's noise expert did not address the noise of arriving and departing trucks. Its traffic experts did not address the adverse effect of 200 daily truck trips on the back-ups at the Schmidt Center entrance. The Council finds that the truck traffic, fumes, and noise, and the view and odor of the mounds would have a particularly adverse effect on the capacity of Camp Schmidt to provide thousands of children with safe and meaningful outdoor education and camping experiences. Similar impacts would not occur anywhere in the zone; Camp Schmidt is the only such facility in the County.

The Council finds that the proposed use at this location would result in adverse impacts to the neighborhood and the public and that these adverse effects would outweigh any benefit of the proposed private rubble fill.

f. Erosion and ground coverage. The Council accepts the testimony of the witnesses who explained the location of an unusual concentration of headwaters of streams on the site, and the likely effects of the operations on the off-site waters and wetlands downstream, including the Patuxent River. The contours of the local terrain make such adverse effects especially likely. Those witnesses explained that run-off from the mounds will cause erosion and sediment runoff; that water collected and warmed by the sun in the proposed stormwater ponds will drain into the streams at harmful temperatures; and that the impermeable mounds covering large areas will adversely affect the supply of rainwater to the streams. The Council accepts the testimony of those with personal knowledge of the lands in the neighborhood and in the County, that the area around the site is uniquely wild, that the streams are uniquely pristine, that the topography is steep, and that Brandywine's exhibits did not depict all of the streams. Applicant Brandywine did not introduce evidence about the ecological resources in the neighborhood.

The applicant's witnesses variously admitted these facts: The site contains the headwaters of three streams, and the impact of the rubble fill would have been less elsewhere, without those headwaters. After the rubble mounds are capped, surface water

from the cap will run into ditches and thence to stormwater management ponds. Ponds heat up in warm weather. Pond water will drain into the streams at unknown temperatures. Rubble fill operations will also reduce the amount of rainwaters that recharge the streams.

The applicant's hydrogeologist did not know about the hydrogeological characteristics of other areas in the O-S Zone. He admitted that he could not state with Certainty, or reasonable probability, that the impact of this operation would be the same in other O-S Zone areas. The applicant's stormwater expert stated that the discharges would have no impact, but he had considered neither their temperature nor the impact of temperature changes on the species in question. He had no expertise in assessing impacts on species, and thus provided no comparison on that impact. The applicant offered no evidence to contest the unique topography and the unique configuration, quality, or vulnerabilities of the waters downstream of the site.

County zoning laws and the State stormwater laws grant County government – and the District Council - specific powers and duties with respect to the control of erosion and stormwater, as well as prevention of damage to the environment. The Council concludes that the placement of a rubble fill on a tract of land containing several streams' headwaters is not inherent to the use, but is a factor at this site. The Council finds that the proposed rubble fill will likely have a detrimental effect on the waters in the neighborhood, that it will have a greater adverse effect on this neighborhood than a similar use would have if located on a property with fewer (or no) headwaters, and that the damage will be more severe to the very clean downstream waters in this neighborhood than it would be to waters elsewhere, that are already impaired.

The Court of Special Appeals instructed the Council not to consider facts concerning the effect of leachate from the mounds on the neighborhood. However, while not basing its denial of the application on the issue of leachate, the Council does not agree that State zoning and environmental laws prevent the council from considering the issue. The Council reads State law to permit the various counties to impose stricter environmental requirements than the State requires. For instance, the County has powers

regarding the prevention of nuisances, including activities which make waters unsafe. The Council interprets its special exception powers under the Regional District Act to permit the Council to deny a special exception to any applicant whose use will pollute the County's waters and damage a unique resource. One important purpose of the Zoning Ordinance is to protect County lands from water pollution.

The applicant did not prove that its use would be safe at this site. Its expert based his opinion that the rubble fill would not measurably pollute the ground water on his assumption that the liner would not tear, but another Brandywine witness was aware of liner systems where liners have been torn by operators. The Council accepts this testimony, that liners are or may be torn during operations.

The record shows that the level of copper at Brandywine's Cross Road landfill is about 44 times MDE's acute level. The applicant's hydrogeologist did not analyze pollution from copper for this site, and he could not compare that pollution impact. The Council concludes that the adverse effects of a torn liner will be particularly severe at this site because of the number of streams and stream headwaters there, and the pristine condition of downstream waters.

g. Cumulative adverse effects: As to the neighborhood, St. Thomas' Church, Camp Schmidt, and Mrs. Jenkins's property, the District Council concludes that each of the various adverse effects found above and in the September 2001 order, Exhibit B, as to truck traffic, noise, visual effects, and environmental effects, are sufficient to support denial of the application. The Council further finds that the combination of those adverse effects supports this action.

The residents of the neighborhood would face increasingly dangerous traffic conditions, at the site entrance and on MD 381, a road that already poses risks to substantial school bus traffic. Camp Schmidt would suffer dangerous, noisy, and congested traffic at its entrance, odors, and an unavoidable view of large rubble mounds for children coming to the facility to experience the outdoors. The historic rural setting of St. Thomas' Church would be permanently damaged by the unavoidable sight of the mounds, the excess noise from the operations and truck traffic, and the odor, and these

impacts would create an industrial atmosphere that will impair its members' ability to raise funding for its preservation. Pristine off-site waters would likely be damaged by the effects of runoff. Mrs. Jenkins testified credibly that she would have difficulty using her property because there would be no buffer between her property and the rubble fill. These adverse impacts outweigh any benefit that might accrue from the operation of this rubble fill. Located in this particular neighborhood, with its unique concentration of historic, natural, and educational resources, this rubble fill conflicts with the purpose of the Zoning Ordinance and applicable plans to preserve those resources.

7. Issues not reached here: As noted more generally in the September 2001 order, Exhibit B, the proposed operation of a rubble fill at this particular location violates a number of planning goals: the assurance of safe roads; the maintenance of historic resources; the preservation of wilderness and natural features; the protection of private property; the prevention of erosion; the promotion of health; the maintenance of adequate facilities. Given the many adverse impacts articulated above, the Council did not reach in the September 2001 order the other concerns raised by opposition citizens. Those concerns, most notably the difficulty of fighting fires at the site, and also the effect of the operation on the neighbors with asthma and the truck traffic's interference with access to health care facilities, were raised in opposition testimony. The Council does not reach those concerns here.

Given its resolution of the case on the basis of the facts in the S.E. 4355 record, the Council also finds it unnecessary to address the questions whether the applicant established a necessity for this rubble fill, whether, under § 27-406, the proposed fill is "necessary to serve the projected growth" in the County, and whether the Zoning Ordinance authorizes the approval of a special exception for a private rubble fill in the O-S Zone.

The Council, after reviewing the record, weighing the testimony, and resolving the conflicts, has made findings which do not permit the conclusion that the applicant has met the requirements for a special exception, as stated in § 27-317 of the Zoning Ordinance. Therefore, this application must be denied.