

Case No. S.E. 4515

Applicant: Rockville Fuel & Feed Co.

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, that Application No. S.E. 4515, for a special exception for a concrete batching plant on property described as approximately 9.74 acres of land in the I-2 Zone, in the northerly quadrant of the intersection of D'Arcy Road and the Capital Beltway (I-95/495), where the D'Arcy Road bridge runs over the Beltway, is:

DENIED, for the reasons stated in Attachment A, which are hereby adopted as the findings of fact and conclusions of law of the District Council in this case.

ORDERED this 22 day of September, 2008, by the following vote:

In Favor: Council Members Dean, Bland, Dernoga, Exum, Harrison, Knotts, Olson  
and Turner

Opposed:

Abstained:

Absent: Council Member Campos

Vote: 8-0

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 \_\_\_\_\_  
Samuel H. Dean, Chairman

ATTEST:

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

ATTACHMENT AFINDINGS OF FACT  
AND CONCLUSIONS OF LAWSUBJECT PROPERTY

1. The subject property, legally described as parcels 173, 174, 305, and 324, Tax Map 82 (Grid C2), includes about 9.74 acres of land. It has been zoned I-2 since before 1986, when the Suitland-District Heights and Vicinity Sectional Map Amendment (SMA) "retained the I-2 Zone" for the property. Staff report, Exh. 8, at 2, par. c. The 9.74-acre property, which is not developed, lies just west of the Capital Beltway, at the bridge over the Beltway, and fronts on the north side of D'Arcy Road. To the property's west is an asphalt plant, and to its north lies Ritchie Station, a proposed commercial shopping center in the I-3 Zone. To the northwest is R-T Zone property, some owned by M-NCPPC, and some (not contiguous) developed with single-family attached (townhouse) dwellings.

PROPOSED USE

2. The applicant proposes a concrete batching plant, a use that since 1986 has required a special exception in all zones where it is permitted. At a concrete batching plant, the operator mixes materials to make concrete (sand, gravel, cement, and water) and loads the mixture into trucks. The trucks then deliver the mixture to construction sites, keeping it liquid while in transport.

NEIGHBORHOOD AND SURROUNDING PROPERTIES

3. The neighborhood for this special exception, for analysis purposes, should include those properties that will affect and be affected by the proposed concrete plant on the subject property. There will be substantial truck traffic and other traffic to and from the concrete plant, as well as vehicle and equipment noise, and most of the traffic will travel

over the Capital Beltway from the subject property and go east, and then north or south. The traffic will use D'Arcy Road, Sansbury Road, and Westphalia Road, and then Ritchie-Marlboro Road (to the north) and Pennsylvania Avenue (to the south). Except for Pennsylvania Avenue, which lies too far south, the neighborhood should include those roads. The neighborhood defined by staff, applicant, and examiner uses the Capital Beltway and D'Arcy Road as boundaries. This neighborhood is much too constricted; by defining such a small neighborhood for the case, staff, applicant, and examiner have assumed away the traffic impact problems and most of the Master Plan and General Plan issues that are raised in this case.

4. An appropriate neighborhood for this case is bounded by Ritchie-Marlboro Road to the north; by Ritchie Road to the west; by a line 200 feet south (or southwest) of and parallel to the center line of D'Arcy Road to the south; and by a line 200 feet southeast (or east) of the center line of Westphalia Road, to Ritchie-Marlboro Road, to the east. The truck traffic and other traffic that is one of the major subjects in this case will use all of the major roads in this neighborhood, including D'Arcy Road, Ritchie Road, Ritchie-Marlboro Road, Sansbury Road, and Westphalia Road.

5. The neighborhood has the subject property, the Capital Beltway, and the Little Washington area (off Sansbury Road and D'Arcy Road) at its center. It is developed with an asphalt plant (F. O. Day) west of the subject property and commercial uses south of the property. According to the testimony of residents and the exhibits in the record, the neighborhood since the 1980s has had a large number of Class 3 fills (for non-biodegradable construction material) and substantial industrial and commercial truck traffic. (T. 26 Apr. 2007; Exh. R-37, R-38) Westphalia Road has several Class 3 fill operations.

6. Though the immediate vicinity of the subject property has industrial and commercial uses, the neighborhood is otherwise developed residentially, or is proposed for residential or commercial retail development in the foreseeable future. Immediately to the north of the subject property, fronting on Ritchie-Marlboro Road, is the proposed Ritchie Station retail shopping center, with over 1,000,000 square feet of space, for which clearing and grading have taken place. (The District Council in 2006 approved SP-04080/01 for Ritchie Station.) To the west of Ritchie Station, also north of the subject property and south of Ritchie Marlboro Road, are townhouses in the R-T Zone.

To the east of the subject property, just east of the Capital Beltway, are the Little Washington single-family dwelling community and two proposed (and partly approved) medium-density residential projects, D'Arcy Park North and D'Arcy Park South. These existing and proposed residential communities, east of the Beltway and on both sides of D'Arcy Road and Sansbury Road, are included in the Westphalia Sector Plan and Sectional Map Amendment, approved by the District Council in Council Resolution 2-2007. In fact, D'Arcy Road, going east from Ritchie Road, is considered in the Westphalia Sector Plan as one of the "gateway" roadways from the west, into Westphalia.

7. For purposes of this special exception case, the District Council takes administrative notice of the Westphalia Sector Plan and SMA, approved in CR-2-2007, and also of the pending and approved site plans and preliminary plans for (or adjacent to) the neighborhood.

The neighborhood includes or is immediately adjacent to parts of Westphalia, including D'Arcy Park North, on D'Arcy Road, 72 acres in the R-R Zone (SP-06080); D'Arcy Park South, 56.19 acres in the R-R Zone (SP-06079); the Westphalia Row community on Sansbury Road, 20.67 acres in the M-X-T Zone (CSP-07001); the Smith Home Farm

community on Westphalia Road and Melwood Road, 727 acres in the R-M and L-A-C zones (CDP-0501 and SDP-0506, for infrastructure); the Westphalia Towns community on Westphalia Road, east of D'Arcy Road, 46.39 acres in the R-T Zone (Prel. Plan 4-07060); and Woodside Village on Westphalia Road, 381 acres in the R-M Zone (A-9973 and CDP-0601). These proposed (and partly approved) residential communities will add thousands of high-quality residential units along or off of D'Arcy Road, Sansbury Road, and Westphalia Road, in the foreseeable future, the next five- to ten-year period.

8. In summary, the neighborhood for this special exception is in transition, and it has become mixed residential and retail commercial in character. The subject property – on which a concrete plant is proposed, by special exception – has existing or proposed (and partly approved) residential or commercial retail uses, to its northwest, north, northeast, east, and southeast. The neighborhood proposed by staff and applicant, and adopted by the Zoning Hearing Examiner, is much too small, and does not include affected residential areas: by using the Capital Beltway as a boundary, they ignore the traffic effects from the proposed concrete plant and the substantial transitions occurring in areas very close to the subject property. The District Council has looked – as staff, applicant, and examiner did not – at the effects the proposed use will have on existing and proposed new residential development just east of the subject property, along and near the Capital Beltway and Ritchie-Marlboro, Sansbury, Westphalia and D'Arcy roads. The proposed concrete batching plant, and its associated truck traffic, must be evaluated as to the effects on, and the Master Plan and General Plan recommendations for, the existing and new residential communities to the east of the subject property.

GENERAL PLAN

9. The General Plan for Prince George's County, approved by the District Council in October 2002, in CR-47-2002, includes "goals," "principles," and "priorities" for development in the County. The goals – what to "create, preserve and protect" in County planning – include these as the first three:

Encourage quality economic development.

Make efficient use of ... County infrastructure and investment.

Enhance quality and character of communities and neighborhoods.

(Gen. Plan, at 3, 21)

10. The principles underlying the General Plan, i.e., the precepts for interpreting the plan, include (1) protecting the "public health, safety, and welfare"; (2) "sustainability"; and (3) "quality." (Gen. Plan, at 3, 21-22) The first principle, health-safety-welfare, means this: "The County's primary purpose is to protect the present and long-term health, safety and welfare of all its residents." (Gen. Plan, at 21) The second principle, sustainability, means that development "meets the needs of those present without compromising the ability of future generations to meet their own needs." (Gen. Plan, at 21) The third principle, quality, means:

Each decision made by Prince George's County should be made in the context of enhancing residents' pride in their county and neighborhood. Residents seek enhancements to their quality of life through protection of the natural environment, an emphasis on good design, provision of quality shopping, and the pursuit of high-quality public services. By protecting and reinforcing individuals' investments in their neighborhoods, the county's emphasis on quality will result in ongoing enhancement in all of its neighborhoods and communities.

(Gen. Plan, at 22)

11. The General Plan establishes "priorities," meaning "how objectives should be balanced to make decisions." (Gen. Plan, at 22) General Plan priorities include:

Quality economic development.

Infill and revitalization.

Existing neighborhood integrity.

Adequate public facilities.

High-quality housing.

(Gen. Plan, at 22)

12. The General Plan divides Prince George's County into three tiers, the Developed Tier, the Developing Tier, and the Rural Tier. (Gen. Plan, at 25-26) Each tier is defined by its recommended "intensity of residential and employment development." (Gen. Plan, at 25) The subject property, at D'Arcy Road and the Capital Beltway, is right at the boundary – the Capital Beltway – between the Developed Tier and the Developing Tier. (Gen. Plan, at 26) The subject property is technically within, and at the edge of, the Developed Tier. But to the east, all of the residential areas that will be affected by a concrete batching plant on the subject property are in the Developing Tier. That includes all properties on or along Ritchie-Marlboro Road, Sansbury Road, D'Arcy Road, and Westphalia Road. It includes, in particular, the Little Washington community (on Sansbury Road and D'Arcy Road), the D'Arcy Park North property (SP-06080), the D'Arcy Park South property (SP-06079), the Westphalia Row property (CSP-07001), the Smith Home Farm property (CDP-0501 and SDP-0506), the Westphalia Towns property (4-07020), and the Woodside Village property (A-9973 and CDP-0601).

13. The General Plan states that the Developed Tier is to have "medium to high density quality infill and redevelopment." (Gen. Plan, at 4-5) The goals in the Developed Tier include the encouraging of "appropriate" infill and the monitoring of public infrastructure.



(Gen. Plan, at 31-32) The primary goal is this: "Strengthen existing neighborhoods." (Gen. Plan, at 31)

14. The General Plan states that the Developing Tier should have "compact residential neighborhood design and . . . commercial uses [in] designated Centers." (Gen. Plan, at 5) No "designated Center," as shown on the map (Gen. Plan, at 26), is near the subject property. The main goal in the Developing Tier is to maintain "low- to moderate-density land uses (except in Centers and Corridors)." (Gen. Plan, at 37) Another important goal is this: "Reinforce existing suburban residential neighborhoods." (Gen. Plan, at 37)

15. A major theme running throughout the General Plan is the preservation and enhancement of existing residential neighborhoods. (Gen. Plan, at 3, 4-5, 21, 22, 31, 33, 37, 99) That is, the quality and value of existing neighborhoods should be enhanced and preserved, in decision-making by County government.

#### MASTER PLAN

16. The Suitland-District Heights Master Plan, on which staff, applicant, and examiner rely, was approved 22 years ago, in 1986. The Master Plan recommends that the subject property, never developed, should be left in I-2, the heavy industrial zone.

17. Because the Master Plan is so old and out-of-date, the District Council has determined in this case that it should look instead to the recommendations in the General Plan, approved in 2002, and in the Westphalia Sector Plan, approved in 2007 in CR-2-2007. Those recent plans, with newly stated goals, principles, and priorities, emphasize that in a case like this one, where the vacant subject property is surrounded by existing and proposed residential communities, new development should not detract from the quality and value of those communities.

WESTPHALIA SECTOR PLAN

18. The District Council approved the Westphalia Sector Plan and SMA on February 6, 2007, in CR-2-2007. The area covered by the Sector Plan, which under the Zoning Ordinance is intended as a Master Plan for an area smaller than a Planning Area, includes all properties between Pennsylvania Avenue, the Capital Beltway, Ritchie-Marlboro Road, and Westphalia Road, an area that encompasses the eastern segment of the neighborhood in this case. The Sector Plan revised and substantially updated the 1994 Melwood-Westphalia Master Plan and SMA, approved in CR-25-1994.

Because the 1986 Master Plan for the area of the subject property is out of date and cannot be followed, the District Council will consider here the General Plan, as outlined above, and the Westphalia Sector Plan, approved one year ago.

19. The District Council in the Westphalia Sector Plan envisioned precisely what the General Plan recommends, for the Developing Tier in Prince George's County: mixed-use, high-quality, suburban-density residential and commercial development, with increased densities near the Pennsylvania Avenue corridor, and with residential properties planned and developed in accordance with stated site design guidelines. The site design guidelines in the Sector Plan are intended to ensure that each residential project becomes a high-quality and sustainable residential community, an integral part of the larger Westphalia community, that will enhance the value of all communities in central Prince George's County.

20. The goals and principles in the Westphalia Sector Plan look toward quality residential and commercial growth, not new industrial development. The Sector Plan Community Vision includes a "network of attractive roads that unifies the [Westphalia] community," and "[a]ttractive and safe residential neighborhoods" of varied densities and housing types. (Sector Plan, at 1) All of the maps in the Sector Plan show that D'Arcy Road

is considered a gateway – a main thoroughfare – from the west, into the Westphalia community.

21. With the Community Vision of the Westphalia Sector Plan in mind, the District Council during the Sector Plan process approved the D'Arcy Park North and D'Arcy Park South residential projects, immediately north and south of D'Arcy Road, just east of the Capital Beltway. These two projects are immediately across the Beltway bridge, just to the east of the subject property. The applicant is proposing a concrete batching plant across the Beltway from two proposed high-quality medium-density residential projects. The Council takes notice that these projects were approved in the Westphalia Sector Plan and that detailed site plans, SP-06080 for D'Arcy Park North, and SP-06079 for D'Arcy Park South, have been approved for these properties.

The District Council also takes notice of the site plans approved or in process for the Westphalia Row property on Sansbury Road, the Smith Home Farm property on Westphalia Road, the Westphalia Towns property on Westphalia Road, and the Woodside Village property, also on Westphalia Road. These properties, as well as the D'Arcy Park North and D'Arcy Park South properties, will be affected by truck traffic from the subject property on D'Arcy and Westphalia roads.

#### APPLICANT'S CASE

22. The applicant, Rockville Fuel and Feed Company, has concrete supply facilities in Howard and Montgomery counties. The applicant submits, through an amended site plan and expert testimony, that a concrete batching plant it proposes on the subject property meets Zoning Ordinance requirements.

23. The concrete batching plant will include a main building of about 4,900 square feet, areas for parking concrete mixer trucks and automobiles, an area of about 30,000 square feet (with stockpiles up to 12 feet high) for storing sand and gravel, a separate mixing area, and associated equipment (storage bins, dumpster, water rack, washout pit, conveyor system, and storage and collection tanks).

The subject property has not been developed, though it has had industrial zoning for over 20 years. The applicant proposes to grade it, install driveways and truck and automobile parking areas, install and fill the materials stockpiles, and construct the building with the equipment. Sand and gravel and mixer (cement) ingredients will be hauled to the site by supplier trucks (from the applicant's supply contractors), concrete will be mixed on the site, and the applicant's trucks will haul the concrete in mixer trucks from the property to the various construction sites.

24. The applicant's vice president, Mr. Ward, testified that the concrete mixer trucks will serve the Prince George's County area. (T. 1 Feb. 2006 at 6) He explained that on the subject property, sand and gravel and cement are mixed together; the mix, with water added, is loaded in the mixer trucks; and the mixer trucks travel up to about 20 miles from the site. (T. 1 Feb. 2006 at 6-7)

25. The applicant's representatives and its traffic and noise expert witnesses, Mr. Mike Staiano and Mr. Osborne George, testified about vehicle use on the property and nearby roadways. There are estimated to be about 10 employees and seven concrete mixer trucks. (T. 1 Feb. 2006 at 11) Besides the concrete mixer trucks, there will be highway dump trucks delivering sand and gravel, highway bulk tanker trucks delivering cement, and employee automobile traffic. (T. 1 Feb. 2006 at 11, 105-06)

26. The applicant's site plan, as amended, shows compliance with setback and dimensional requirements. (Exh. R-24, R-25) The applicant also submitted a tree conservation plan, dated January 25, and the M-NCPPC environmental planning staff has approved a revised plan.

27. The applicant's traffic analysis (Exh. 7, Exh. 41) shows the truck and automobile traffic to be generated by the proposed use. Mr. Osborne George stated that there would be up to 75 truck trips generated, on the busiest days, and this total would be considerably less than that generated by other permitted industrial uses. (T. 1 Feb. 2006, at 80-90)

28. Mr. Staiano, the applicant's expert on noise analysis, testified on remand (T. 9 Apr. 2007) and submitted a noise study (Exh. R-11) for truck traffic. It was his opinion that the changes in noise generated by trucks to and from the proposed concrete batching plant, before and during plant operations, would likely not be perceived. (Exh. R-11; T. 9 Apr. 2007, at 18-19)

29. Mr. Staiano stated for the applicant that the primary truck routes to and from the subject property would be to the east, outside and east of the Capital Beltway. The routes would be along D'Arcy Road, Sansbury Road (between D'Arcy Road and Ritchie-Marlboro Road), and Westphalia Road (between D'Arcy Road and Ritchie-Marlboro Road to the north or Pennsylvania Avenue to the south). Applicant's trucks will not use Washington Avenue or Lincoln Avenue (between Sansbury Road and D'Arcy Road). (Exh. R-11)

#### OPPOSITION CASE

30. Residents in the Little Washington community appeared in opposition to the application. The witnesses included Mr. Alexander Williams, 9400 D'Arcy Road (T. 26 Apr. 2007 at 2); Mr. Mark Lockett, 9347 D'Arcy Road (T. 26 Apr. 2007 at 33); and Ms. Andrea

Brown, 9364 D'Arcy Road (T. 26 Apr 2007 at 48). They and two other witnesses, Mr. Arthur Turner and Ms. Nancy Williams, submitted testimony, written comments (Exh. R-34, Exh. R-7), and photographs (Exh. R-37, Exh. R-38).

31. Mr. Alexander Williams, 9400 D'Arcy Road, spoke at length about the cumulative efforts of industrial and fill operations in the neighborhood. He stated:

[M]any undesirable industrial type businesses have developed inclusively and to the neighboring residential communities, which include Class 3 fills, mining operations, etc., legally permitted with approval [of] Special Exception and rezoning.

(T. 26 Apr. 2007, at 7.) He added:

We have an over inundation of trucks exceeding 10 tons in weight. Currently we have operations which initially stated moderate operating hours and are now operating excessively outside the stated permit hours of operation – as early as 3:00 a.m., and as late as 10:00 p.m. – or later including weekends.

Numerous complaints have been made but no efforts to enforce or to cause stop of such operations. Why, then, should the County and the regulatory agencies add another entity to be regulated to an already overtaxed system?

(T. 26 Apr. 2007, at 7) Mr. Williams criticized the applicant's noise analysis:

The question must also be asked, why was there no sound measurement of an existing Rockville Fuel and Feed plant of operations performed to give some relative date for actual comparison.

(T. 26 Apr. 2007, at 6) Mr. Williams is correct that Mr. Staiano for the applicant did not take actual noise measurements of truck or machine operations, as the basis for his opinion that noise impacts would not be significant or noticeable.

Mr. Williams summarized his view of neighborhood impacts:

At what point will the straw break the camel's back? Actually, I believe the camel's back is already broken. Roads are severely deteriorated, shoulders are eroded, and the new Beltway interchange and intersection [at Ritchie-Marlboro Road] have an average of four or more accidents or incidents per week.

(T. 26 Apr. 20067, at 8) Mr. Williams also noted that in the neighborhood, east of the Beltway, many "additional residential developments" have been approved. (T. 26 Apr. 2007, at 8)

32. Mr. Mark Lockett, 9347 D'Arcy Road, testified that he has 35 years' experience as a building contractor, and that his wife (with cancer) and daughter (asthma) are ill. (T. 26 Apr. 2007, at 33-34) He questioned the noise measurements of Mr. Staiano:

[T]he decibel levels – have been a main stickler at the last few [hearings]. The thought here is that – at the first [hearing] it was 60 feet [from roadway to residence] and the decibel levels were 62/63. The second [hearing] when Mr. Staiano [testified], it was brought down to 50 feet [from roadway to residence]. I noticed that the decibel levels didn't increase in his statement. That's why I asked him at the last [hearing] – what if it was closer, would the decibel level increase, and he said it would.

We have residents that live on D'Arcy Road – their front – the entrance to their home – is less than 35 feet [from the roadway]. We're sure then at this point – less than 35 feet – the decibel levels will be beyond – way beyond – what is the legal standard.

\* \* \* \*

We don't live on a highway where the highways have these barriers that protect the communities from the decibel levels – from the noise. . . . Barriers will not be put up on D'Arcy Road to protect the residents from the noise levels.

(T. 26 Apr. 2007, at 34-35) He also stated that Mr. George, the applicant's traffic engineer, does not live in the neighborhood, is not familiar with it, and does not know that industrial

trucks on the road frequently exceed posted speed limits. (T. 26 Apr. 2007, at 35-36)

He added, as to D'Arcy Road, in front of his house:

We have a horrible situation right in front of my house. The curve is extremely dangerous – extremely. We're talking about many accidents. Just the other day, I had to pull over a semi that was supplying material to F. O. Day [the asphalt plant on D'Arcy Road] for speeding around this curve. The residents of the community have to put – as we will direct your attention to the photographs here – we have to create our own barrier systems to stop the vehicles from coming into our yards, such as illustrated here.

(T. 26 Apr. 2007, at 36) Mr. Lockett referred to Exh. R-37 and Exh. R-38, photograph displays prepared by Ms. Andrea Brown. He stated that D'Arcy Road where he lives is very dangerous, because of road conditions and truck traffic, as illustrated in Exh. R-37, and that "people have died at this location." (T. 26 Apr. 2007, at 37)

Mr. Lockett testified that Exh. R-37 showed photographs of the Proctor residence, 9020 D'Arcy Road, that sits just across the Beltway from the subject property. He testified that the front of the house was just 26 feet from the roadway, and that the applicant's representative and experts "know [that] it would exceed the [permitted] decibel levels." (T. 26 Apr. 2007, at 38)

Mr. Lockett testified about existing truck traffic noise that disturbs him and his neighbors on D'Arcy Road but that cannot be regulated. He stated that his neighborhood is constantly disturbed by existing truck traffic. He summarized: "It's just that this particular site for Rockville Fuel and Feed is not appropriate," because of existing truck traffic noise, existing truck speeding on D'Arcy Road, and the narrowness and conditions on D'Arcy Road where he lives. (T. 26 Apr. 2007, at 39) Mr. Lockett explained how the photographs in Exh. R-37 showed what he was talking about, the road conditions and nearness of the pictured residence to D'Arcy Road. He said that his neighborhood already has "too many poisonous businesses." (T. 26 Apr. 2007, at 40)



Mr. Lockett also testified that the F.O. Day asphalt plant, adjacent to the subject property, is an existing business whose supply and delivery trucks disturb the neighborhood. (T. 26 Apr. 2007, at 41-42) Mr. Lockett stated that the Chaney plants "are not in residential neighborhoods" but that the F. O. Day asphalt plant exists in his neighborhood, and the subject property is also in the neighborhood. (T. 26 Apr. 2007, at 46)

33. Ms. Andrea Brown, 9364 D'Arcy Road, submitted the photographic displays, Exh. R-37 and Exh. R-38. (T. 26 Apr. 2007, at 48) The photographs show the Proctor home, at 9020 D'Arcy Road, a property that will be passed by the great majority of trucks that travel to and from the subject property, and they show other properties on D'Arcy Road in the vicinity of the subject property. The photographs also show trucks on D'Arcy Road, and they show residents taking measurements of the road where the Proctor property has frontage.

34. The Andrea Brown photographs, Exh. R-37 and Exh. R-38, and the testimony of Ms. Brown and Mr. Lockett indicate that D'Arcy Road in the vicinity of Little Washington residential properties (particularly at 9020, 9347, 9364, and 9400 D'Arcy Road) does not have paved shoulders, and the paved roadway comes close to the front yards of the residences. The photographs and the testimony of Mr. Lockett show that the front of the Proctor residence is less than 30 feet from the edge of the D'Arcy Road pavement. (T. 26 Apr. 2007, at 38-40) The testimony of Ms. Brown indicates that brick barriers and mailboxes and parked vehicles in front of D'Arcy Road residences are damaged by passing truck traffic. (T. 26 Apr. 2007, at 49-50; Exh. R-39)

RESIDENTIAL PROJECTS  
(D'ARCY ROAD, WESTPHALIA ROAD)

35. The District Council takes administrative notice of the following residential

projects, all shown in the record of the Westphalia Sector Plan and SMA, approved in CR-2-2007. These residential projects are in the neighborhood of this special exception case.

- (a) D'Arcy Park North, on the north side of D'Arcy Road (DSP-06080) (72 acres, R-R Zone; 497 dwelling units; approved in CR-2-2007; DSP-06080 approved by Planning Board);
- (b) D'Arcy Park South, on the south side of D'Arcy Road (DSP-06079) (56.19 acres, R-R Zone; 526 dwelling units; approved in CR-2-2007; DSP-06079 approved by Planning Board);
- (c) Westphalia Row, on Beall property on Sansbury Road, north of D'Arcy Road (20.67 acres, M-X-T Zone; 500 dwelling units; CSP-07001 approved by Planning Board);
- (d) Smith Home Farm, on the south side of Westphalia Road, near the intersection with D'Arcy Road (CDP-0501) (757 acres, R-M Zone and L-A-C Zone; 3,648 dwelling units; SDP-0506/01 (for infrastructure) approved by Planning Board);
- (e) Westphalia Towns, on the north side of Westphalia Road, just west and south of D'Arcy Road (46.39 acres, R-T Zone (with revised conditions); 200 townhouse units; recognized and included in CR-2-2007);
- (f) Woodside Village, south and east of Westphalia Road, just east of D'Arcy Road (A-9973) (381 acres, R-M Zone; 1,496 dwelling units (single-family detached, townhouse, and multifamily units); CDP-0601 filed and pending before Planning Board).

36. These substantial residential projects were all recognized and approved in the Sector Plan, CR-2-2007. They show that the eastern part of the neighborhood in this case, the part covered by the Westphalia Sector Plan and SMA, is in the process of permanent

transformation to a high-quality (as defined in the General Plan), mixed-density residential and commercial center. In this special exception case, the District Council cannot ignore these approved and pending residential projects, which will add hundreds of units to the Westphalia area, in the foreseeable future.

CUMULATIVE IMPACTS AND  
ENVIRONMENTAL JUSTICE ISSUES

37. Little Washington neighborhood residents have testified in public hearing that they are beset by, or "inundated" by, noise and hazards from heavy truck traffic, especially on D'Arcy Road. (T. 26 Apr. 2007; testimony of Williams, T. 7-8, 19-21, Exh. R-34; testimony of Lockett, T. 36-42; testimony of Brown, T. 48-51, Exh. R-39) The record shows that at the present time, even without the concrete mixer trucks, cement tanker trucks, and supplier contractor trucks associated with a concrete batching plant, the Little Washington residential areas on D'Arcy and Sansbury roads have substantially more industrial truck traffic than comparable residential areas. Most residential streets, even collector streets, do not regularly carry the dump truck and industrial traffic that D'Arcy and Sansbury roads carry.

38. Mr. Lockett offered credible testimony that the section of D'Arcy Road where he lives is not safe. Mr. Lockett and Ms. Brown, in their testimony and their photographic exhibits, showed that the section of D'Arcy Road near 9020 (the Proctor property) is narrow for trucks and close to the front of a residence.

39. Mr. Williams, Mr. Lockett, and Ms. Brown offered credible evidence that their section of D'Arcy Road, and the section with the Proctor residence, regularly have excessive industrial truck traffic and noise. These are existing conditions – a road that is unsafe and too noisy because of industrial trucks now using the roadway. The evidence shows that the

existing truck traffic goes on all day long, from as early as 3:00 a.m. to as late as 10:00 p.m., and sometimes on weekends; that the truck traffic presents safety problems for residents, because of highway conditions and speeding trucks; and that the truck traffic is excessively noisy, in comparison to other vehicles.

40. Mr. Lockett explained, and the District Council agrees, that the noise analysis of Mr. Staiano is incomplete. First, if the decibel level for trucks on D'Arcy Road is at the limit of an acceptable range (under a "day-night average sound level" analysis, expressed as "Ldn," or a "peak-low equivalent sound level, " expressed as "Laeq1hrPk"), at a distance of 50 feet, then the sound will be louder if the distance is less than 30 feet. (Mr. Staiano apparently conceded that.) Second, Mr. Staiano used mathematical models and publications and did not actually measure existing truck noise, or noise from applicant trucks at other locations; he therefore could not give an opinion, to a reasonable degree of certainty in the field of noise analysis, that applicant truck traffic noise on D'Arcy Road would not be unacceptably high, for residents. Third, neither the day-night average (Ldn) or the peak-hour equivalent (Laeq1hrPk) that Mr. Staiano calculated can be translated, reasonably, into understandable figures for purposes of comparison with actual residential noise experience. The Staiano calculations and opinion on noise analysis, as criticized by Mr. Lockett, does not give the District Council a sufficient evidentiary basis for concluding that sound levels from the applicant's trucks will be better or worse than (or the same as) they would be, in other residential areas.

41. On the issue of environmental justice – i.e. whether this particular residential area (regardless of racial composition) has been made to carry an unwarranted share of the burden of high-impact land uses – the applicant offered no evidence. The opposition offered

the testimony and report of Dr. Eileen McGurty of Johns Hopkins University. (T. 26 Apr. 2007, at 79-120; Exh. R-6, Exh. R-45)

42. Dr. McGurty is associate chair of the graduate program in environmental sciences and policy at Johns Hopkins University. (T. 26 Apr. 2007, at 81) She has a Ph.D. in urban planning from the University of Illinois (1995), a master's degree in environmental conservation from New York University (1987), and a bachelor's degree in natural resources management from the University of Michigan (1983). (T. 26 Apr. 2007, at 82, 83) She has published articles and books in the field of urban planning. (T. 26 Apr. 2007, at 82) She serves on the State Commission on Environmental Justice, and she stated emphatically that she has extensive expertise in environmental justice. (T. 26 Apr. 2007, at 84) The Zoning Hearing Examiner should have qualified Dr. McGurty as an expert witness – entitled to give opinion testimony and entitled to rely on publications in her field – in the field of urban planning and environmental justice, but the examiner did not do so. That examiner ruling was not correct.

To give opinion testimony and rely on materials not in evidence, an expert witness in Maryland need show only a reasonable degree of familiarity with her subject matter, beyond that of a lay witness. Dr. McGurty has a Ph.D. in urban planning, has published a book and articles on urban planning and environmental justice, serves on the State Commission on Environmental Justice, gave the examiner a definition of environmental justice, and described her main "expertise" as "Environmental Justice." The examiner should have qualified Dr. McGurty as an expert witness in the field of urban planning and environmental justice.

43. It was Dr. McGurty's opinion, in her testimony and in a letter she submitted in the record after the hearing of 26 Apr. 2007, that approval of a concrete batching plant on the subject property would not be warranted – required "significant precaution" – because of documented intense land uses (about 10 Class 3 fills, over 25 heavy-truck sites, and about 2,000 loaded trucks per day (Exh. R-6 (a)) and health uncertainties. (Exh. R-6 (a), Exh. R-6 (b), Exh. 44, Exh. R-48 (c)) There are Class 3 fills near the Little Washington area, on Westphalia Road. In her closing letter, Dr. McGurty recommended against approval of the special exception. (Exh. R-48 (c)) Dr. McGurty could not state with certainty that the Little Washington residential area has been subject to an unsafe level of industrial impacts (air pollution or noise), but she did give the opinion that the subject property, in the middle of central Prince George's County, is not an appropriate site for another intensive industrial land use. (Exh. R-48 (a))

44. Dr. McGurty also offered the analysis of a Johns Hopkins University colleague, Andrew Sawyers, as background to her testimony and opinion. (Exh. R-45)

45. In summary, on the issue of cumulative impacts, neighborhood residents on D'Arcy Road stated that the road is used daily by a large number of industrial trucks. They testified that existing truck traffic on D'Arcy Road creates excessive and unhealthful noise and also makes the road unsafe for residents and motorists. This testimony by D'Arcy Road residents was not contradicted by applicant witnesses who took actual noise measurements or gathered other road safety or noise data or evidence on D'Arcy Road.

46. In summary, on the issue of environmental justice, Dr. Eileen McGurty, an expert in the field of urban planning and environmental justice, gave the opinion that "significant precaution" was called for, in evaluating the proposed concrete batching plant. In her letter in the record, Exh. 48 (c), Dr. McGurty recommended that the special exception

not be approved. Her evidence, in her testimony and in the reports she submitted, Exh. R-6, Exh. R-44, Exh. R-45, support her position that significant precaution is called for, in reviewing this special exception application. That is, Dr. McGurty found that significant health and quality-of-life issues are presented in this case, for central Prince George's County and particularly for the Little Washington area, and her position was that there should be evidence, from the applicant or others, that the lives and health of neighborhood residents will not be adversely affected. But the applicant did not offer such evidence.

47. For its part, the applicant – and also M-NCPPC staff – did not consider whether the location of the subject property, next to Little Washington, D'Arcy Park North, D'Arcy Park South, and Westphalia Row, was better or worse than other I-2 Zone properties, as to cumulative adverse effects (truck noise and road safety) or environmental justice (health and quality of life). The applicant and the staff stated in essence that the applicant met all technical Zoning Ordinance requirements, as to setbacks and other dimensional requirements, and that because the property is zoned I-2, the special exception should be approved. The applicant took the position that present D'Arcy Road traffic and highway safety conditions are not relevant; that in any event the amount of traffic the proposed plant will add would be insignificant, as to noise or congestion; and that environmental justice issues – concerning the health and quality of living experience, in the neighborhood – are not relevant. The applicant did not offer proof that D'Arcy Road is as safe or quiet as any other I-2 Zone road, for purposes of resident health and safety. The applicant did not offer proof that the subject property with the concrete plant, in the evaluation of adverse road safety and truck noise effects from the plant, will be as harmless as (or no worse than) a typical plant, with its anticipated effects on other I-2 Zone neighborhoods. The applicant did not offer to prove that the health and quality-of-life concerns raised by Dr. McGurty were factually

unfounded, as to central Prince George's County, the Little Washington residential area, or the special exception neighborhood (including Little Washington).

In summary, the applicant did not respond with evidence to the photographs and testimony of D'Arcy Road residents or the testimony and evidence of Dr. McGurty. As to the issues of cumulative adverse effects (truck noise and road safety) and environmental justice (resident health and quality of life), the applicant gave no evidence, in response to the opposition.

#### APPLICANT'S BURDEN OF PROOF

48. In this special exception case, the applicant must meet the specific requirements of § 27-343.02 for concrete batching plants, and the applicant must also satisfy the requirements of § 27-317, which applies to all special exception cases.

49. The M-NCPPC staff has determined, and the opposition does not dispute, that the applicant submitted plans and other evidence sufficient to meet the standards in § 27-343.02. The staff report states those standards. (Exh. 5)

50. Section 27-317 (a) of the Zoning Ordinance requires these proofs of each special exception applicant:

- (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.

51. Maryland courts require a special exception applicant to show that its proposed use at its proposed location will have adverse effects that are no worse than those to be anticipated from such a use, regardless of its location in the zone. *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981). The burden is on the applicant to make such proof; the opposition does not have a corresponding burden to generate a fairly debatable doubt. *B. P. Oil, Inc. v Board of Appeals*, 42 Md.App. 576, 401 A.2d 1054 (1979).

#### ZONING HEARING EXAMINER DECISION

52. The District Council has concluded that the Zoning Hearing Examiner made a number of errors in this case.

(a) The examiner defined the neighborhood as bounded by D'Arcy Road to the south and the Capital Beltway to the east. (First ZHE decision, at 2) This neighborhood excludes the Little Washington residential area and all properties east of the Capital Beltway. Yet it is not disputed – even the applicant agrees – that the proposed plant will affect residential properties east of the Beltway.

(b) The examiner uncritically accepted the position that the only planning document to consider was the 1986 Suitland-District Heights Plan. The examiner did not consider the General Plan of 2002 or the Westphalia Sector Plan of 2007, even though both had been approved before the remand hearing, and the General Plan had been approved long before the S.E. 4515 application was filed.

(c) The examiner did not accept Dr. Eileen McGurty as an expert witness in urban planning and environmental justice, did not accept her opinions about environmental justice, and did not consider that Dr. McGurty's evidence raised significant points about the

health and quality-of-life issues presented in this case. Dr. McGurty was clearly qualified, by training, education, and experience, as well as by her publications and appointments, to be an expert witness in urban planning and environmental justice. Dr. McGurty raised factual issues that the applicant – and the examiner – did not address, as to residents' health and living standards, in central Prince George's County, including Little Washington.

(d) The examiner accepted at face value – without question or criticism – all evidence and argument presented by the applicant. Her first decision (dated 14 August 2006) and her second decision, after remand (dated 28 September 2007), could have been drafted and signed by the applicant. The examiner raised no significant questions about the applicant's presentation. Where the applicant's site plan or other material was unclear, the examiner simply required that another be filed.

(e) The examiner gave no credit whatever to the testimony of residents, the only witnesses with personal experience on D'Arcy Road and in the neighborhood. The examiner accepted the mathematical model of Mr. Staiano – who took no actual noise measurements – and rejected the noise experience testimony of neighborhood residents, including Mr. Williams, Mr. Lockett, and Ms. Brown. The examiner also does not mention road safety or existing truck noise, in her first decision or her remand decision.

(f) Most important, the examiner does not correctly state the burden of proof. The examiner quotes *Schultz v. Pritts* as if it assigns the burden of proof to the opposition. No Maryland case places the burden of proof on the opposition, and the *B. P. Oil* decision specifically rejects that theory.

(g) The examiner did not require of the applicant specifically what *Schultz v. Pritts* calls for: proof that the applicant's proposed use, on the subject property, in the

correctly defined neighborhood, would create adverse effects – truck traffic, road safety, truck noise, health and quality-of-life concerns – no worse than those to be anticipated from a concrete batching plant anywhere in the I-2 Zone. The *Schultz* decision and later cases require that proof, but the applicant did not provide it, and the examiner did not ask for it.

(h) The examiner also misapplied the purposes section of the Zoning Ordinance, § 27-102, as will be explained.

### CONCLUSIONS

53. On this record, the District Council concludes that the S.E. 4515 application must be denied.

(a) First, the applicant did not show that this special exception application meets the purposes of the Zoning Ordinance, as provided in § 27-102. Paragraph (a) (1) of § 27-317 requires each special exception applicant to show "harmony" with Zoning Ordinance purposes.

§ 27-102 (a) (1) The proposed use will not protect or promote the health, safety, comfort, convenience, or welfare of County residents, as the examiner concludes. (ZHE remand decision, at 7) The testimony of Little Washington residents and Dr. McGurty, and their exhibits, show that the applicant did not meet the burden of proof on this issue. Also, the proposed use will be detrimental to D'Arcy Park North, D'Arcy Park South, Westphalia Row, and other proposed Westphalia area residential development.

§ 27-102 (a) (2) Contrary to the examiner's conclusion, the proposed use will not implement the General Plan, and it is inconsistent with the Westphalia Sector Plan (ZHE Remand decision, at 7) These issues were addressed above. Specifically, the proposed concrete batching plant will be detrimental to an existing residential neighborhood, Little

Washington, and will not promote high-quality residential and commercial development in the Westphalia Sector Plan area. The plant will adversely affect conditions at D'Arcy Park North, D'Arcy Park South, and other Westphalia residential development.

§ 27-102 (a) (3) Contrary to the examiner's conclusion, the proposed use will not "promote the conservation, creation, and expansion of communities." (ZHE remand decision, at 7-8) Specifically it will be adverse to the existing Little Washington community, and it will not promote new residential development in Westphalia, at D'Arcy Park North, D'Arcy Park South, Westphalia Row, or other Westphalia sites.

§ 27-102 (a) (6) The proposed use will not "promote the most beneficial relationship between the uses of land and buildings," and it will not "protect landowners from adverse impacts," as the examiner concludes. (ZHE remand decision, at 8) Again, the testimony and exhibits of neighborhood residents and Dr. McGurty, and the proposed residential development in Westphalia, show that the applicant did not sustain the burden of proof on this issue.

§ 27-102 (a) (11) Contrary to the examiner's conclusion, the proposed use will not "lessen the danger . . . of traffic on the streets," and it will not "insure the continued usefulness of all elements of the transportation system." (ZHE remand decision, at 8) As the neighborhood residents – the only witnesses with actual experience on neighborhood streets – stated in testimony, existing truck traffic, to which the applicant will add up to 75 trips per day, creates significant noise and road safety problems.

(b) The applicant did not show that the proposed use will not substantially impair the General Plan or the Westphalia Sector Plan, as provided in § 27-317 (a) (3). The 1986 Suitland-District Heights Master Plan, on which staff, applicant, and examiner rely, is 22 years old and is not a reliable guide to neighborhood development. (Section 27-221

indicates that master plans and sectional map amendments should be updated much more frequently, at least every 10 years; in this case, the 2002 General Plan and 2007 Sector Plan effectively update and supersede the 1986 Master Plan.) Development trends in and adjacent to the Westphalia Sector Plan area are moving toward high-quality residential and commercial development, and heavy truck traffic from the subject property will not be consistent with these trends. Nor will heavy truck traffic conserve or protect the Little Washington residential community, or the future and partially approved communities at D'Arcy Park North, D'Arcy Park South, Westphalia Row, or the other Westphalia communities discussed above.

(c) The applicant did not show that the proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area, as provided in § 27-317 (a) (4). The applicant submitted the required traffic analysis, as explained by Mr. Osborne George, but his analysis concerned congestion at affected intersections, not road safety on D'Arcy Road or the other roads, Sansbury and Westphalia, that will be affected by the proposed concrete batching plant. The applicant submitted a noise analysis from Mr. Mike Staiano, but the analysis did not include actual equipment measurements or actual noise data from existing truck traffic on D'Arcy Road, Sansbury Road, or Westphalia Road.

As detailed above, neighborhood residents, including Mr. Williams, Mr. Lockett, and Ms. Brown, testified from personal experience about existing road conditions and existing truck traffic in the neighborhood, near the subject property. Their testimony and exhibits, not refuted by the applicant, showed that existing truck noise conditions are not tolerable and that D'Arcy Road where they live is not safe. The applicant should have responded to this evidence.

As noted above, the opposition included Dr. Eileen McGurty, who should have been qualified as an expert witness in urban planning and environmental justice. It was Dr. McGurty's opinion that "significant precaution" was called for, in approving an intense and potentially harmful industrial use on the subject property, given that central Prince George's County has many industrial and heavy-truck land uses. Dr. McGurty ultimately recommended disapproval of the special exception. To this evidence, the applicant did not respond; its position was that the McGurty evidence, testimony, and argument were not relevant.

At a minimum, the evidence from neighborhood residents and Dr. McGurty required a showing by the applicant that noise, road safety, and health effects from the proposed plant would not be excessive – would not, under *Schultz*, be any worse than would be anticipated from a concrete plant anywhere in the I-2 Zone. The applicant did not make this showing.

(d) The applicant did not show that the proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood, as provided in § 27-317 (a) (5). The applicant's position was simply that all setback and other dimensional requirements in § 27-343.02 had been satisfied, that the "neighborhood" (bounded by D'Arcy Road to the south and the Capital Beltway to the east) would not be affected, that all opposition testimony and evidence were insubstantial or irrelevant, and that the proposed concrete batching plant would not be adverse to any neighborhood land uses. But the applicant overlooked the pending Westphalia Sector Plan properties, as well as the Little Washington properties, adjacent or close to the subject property.

As explained above, the subject property sits just west of the D'Arcy Road bridge over the Capital Beltway. The greater part of the supplier and concrete mixer truck traffic to and from the subject property will pass over that bridge; that is up to 75 new industrial truck trips per day, on top of existing traffic.

Just east of the D'Arcy Road bridge, and just east of the subject property, across the Beltway, sits the Little Washington community, described in the testimony of Mr. Williams, Mr. Lockett, Ms. Brown and others. Even closer than Little Washington are the D'Arcy Park North and D'Arcy Park South properties, north and south of D'Arcy Road and west of Sansbury Road, between Sansbury and the Beltway. Also along Sansbury Road is the Westphalia Row property, a new and partially approved residential community.

Farther to the east, down D'Arcy Road to Westphalia Road, and south on Westphalia to Pennsylvania Avenue, are the Westphalia Towns and Smith Home Farm properties, on either side of Westphalia Road. And to the east and north, from D'Arcy Road at the Westphalia Road intersection toward Ritchie-Marlboro Road, lies the Woodside Village property.

These are all existing or proposed (and partly approved, and foreseeable for development in the next five to ten years) residential communities within or immediately adjoining the neighborhood for this special exception. As noted above, the Westphalia Sector Plan treats D'Arcy Road where it crosses the Capital Beltway – the location of the subject property – as a gateway to the Westphalia Sector Plan area.

Given all of those factors, as to existing and proposed residential land uses in the neighborhood, the applicant was required to show that its I-2 Zone concrete batching plant would have adverse effects on neighborhood properties that are no worse than a plant elsewhere in the I-2 Zone. This the applicant did not do. At best, the applicant showed technical compliance with Zoning Ordinance dimensional requirements. The applicant did not show – and did not attempt to show – that existing truck traffic in the neighborhood was not at an intolerable level, as to noise and road safety and health effects. The applicant also did not show that the industrial truck traffic it proposes to add to the neighborhood will not

exacerbate already unacceptable levels of noise or particulate matter (in Dr. McGurty's evidence) and will not worsen road safety conditions.

54. In summary, the District Council concludes that the administrative record demonstrates the applicant's failure to meet the *Schultz v. Pritts* standards. In comparison with other I-2 Zone properties, the applicant did not prove that its concrete batching plant on the subject property:

- (a) Would be as much in harmony with Zoning Ordinance purposes as a typical plant on other I-2 Zone properties;
- (b) Would not substantially impair the Master Plan, as updated by the 2002 General Plan and the 2007 Sector Plan;
- (c) Would not adversely affect the health, safety, or welfare of residents or workers in the area, more than a typical plant would, regardless of its location in the I-2 Zone; and
- (d) Would not be more detrimental to the use or development of adjacent properties or the general neighborhood, any more than a typical concrete plant would, regardless of its location in the zone.