

Case No.: S.E. 4618

Applicant: Try It Again, Inc.
t/a Kenilworth Foreign
Car Parts

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. 4618, for a special exception for a vehicle salvage yard on property described as approximately 3.15 acres of land in the I-1 Zone, located on the north side of Oates Place at the terminus of Fairmont Heights Drive, approximately 350 feet north of Sheriff Road, identified as 1301 and 1309 Oates Place, Capitol Heights, is:

DENIED, based on consideration of the entire record, for the reasons stated in the decision of the Zoning Hearing Examiner, and for the following reasons, all of whose findings of fact and conclusions of law are adopted as the findings and conclusions of the District Council in this case:

A. The District Council fully agrees with the Examiner that this use, as presented by the applicant, a vehicle salvage yard at the terminus of Fairmont Heights Drive, just outside the Town of Fairmount Heights, does not meet the standards of § 27-317 of the Zoning Ordinance. The corporate applicant has not met its burden of proving harmony with the purposes of the I-1 Zone, harmony with the general purposes of the Zoning Ordinance, compliance with all County ordinances and regulations, non-impairment of the integrity of both the applicable Master Plan and the 2002 General Plan, non-adverse effects on the health and safety and welfare of

area residents, and non-detriment to the use and development of adjacent properties and the general neighborhood. The applicant has also not met the burden imposed on special exception applicants by *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981), *County Comm'rs v. Holbrook*, 314 Md. 210, 550 A.2d 664 (1988), and later Maryland decisions.

B. The Council cannot accept the recommendation of the Technical Staff, whose report was made before testimony was given at a public hearing. Without the benefit of testimony from area residents and workers, staff was unable to evaluate the applicant's claims or proofs.

Staff suggests that the application demonstrates harmony with Zoning Ordinance purposes, lack of impairment of the Master Plan, and no adverse effects on residents or on the use or development of adjacent properties or the neighborhood. But these staff findings show a failure to consider the correct neighborhood, a lack of understanding of the use of adjacent properties and others near the applicant's land, and an overly generous appraisal of the present uses and future intentions of the operators of the proposed salvage yard, the individual owners of the corporate applicant.

The record is clear that this applicant – or rather the corporation's owners – has operated another salvage facility in Fairmount Heights in violation of County ordinances and regulations. The record developed at both the Planning Board and the District Council (Zoning Hearing Examiner) hearings show beyond fair debate that the owners have operated illegally at both the Fairmount Heights property and the subject site, the property for which the special exception use is proposed. Moreover, the

record shows, as the Examiner notes, that the owners started illegal vehicle salvage yard operations on the subject property months before they filed the present application. Staff should have picked up and reported some of this information, prior to filing the staff report in the record.

These illegal activities by the owners of the corporate special exception applicant show that the owners have a history of noncompliance with County regulations, and their testimony before the Examiner that they would operate in a certain way and comply with conditions cannot be deemed credible.

C. Although the Planning Board recommended denial of the application, after hearing from residents and neighbors who would be affected by the proposed (and, in the recent past, illegally operating) vehicle salvage yard, the Board's decision also tends to show leniency toward the applicant and its owners, where no evidence supports such a treatment of the application.

For example, Planning Board and staff ignored, or too readily excused, the illegal subdivision of part of the subject property, Parcel 40, which was sold in part to a separate entity (a towing business) that is not an applicant in the present case. At a minimum, the failure to meet Subdivision Regulations requirements shows noncompliance with County regulations and with State law, in the Regional District Act, § 7-101, et seq., Art. 28, Md. Code Ann. The Planning Board also recommends a favorable finding as to harmony with the purposes of the Zoning Ordinance, under § 27-317 (a) (1), when the applicant failed to demonstrate that even a bare majority of the stated Ordinance purposes, in § 27-102 (a), were met.

The Planning Board also recommends extensive revisions to the special exception site plan, on pages 5 and 6 of PGCPB No. 09-105, when it ultimately recommends disapproval of the application. The Board's resolution also makes equivocal or incomplete findings and conclusions as to Master Plan integrity, adverse effects on residents' health and safety, and detriment to the use or development of adjacent properties or the general neighborhood, when the record made at the hearing before the Examiner clearly indicates that the applicant did not meet these central requirements in § 27-317 (a). Thus both Board and staff were not able to review this application completely, to make the findings required in §§ 27-317 and 27-417.03.

D. The neighborhood adopted by the Examiner, bounded on the north by Englewood Drive and Reed Street, on the east by Marblewood Avenue, on the south by Sheriff Road, and on the west by Addison Road, is largely zoned for residential uses, and over half of the residential lots and parcels have single-family residential dwelling units. Properties in the R-55 Zone lie across the street from the subject property, to the west and south.

E. As the Examiner notes, the subject property in 1988 was conditionally rezoned, from R-55 to I-1, in A-9555-C. The condition attached to the zoning provides:

The subject property shall be maintained in a clean and orderly fashion with the immediate removal of all litter, trash, junk or debris.

Both the staff report and the Planning Board resolution, as well as substantial testimony from residents and eyewitnesses in the area, confirm that this condition has not been complied with. The owners appear to be in violation to the present day.

F. Without considering the Preliminary Subregion 4 Master Plan and Proposed Sectional Map Amendment, whose processing is now ongoing, the District Council

agrees with the Examiner that the applicant cannot show that its use does not substantially impair the Master Plan and General Plan. As the Examiner explains, the existing illegal salvage yard operations and the proposed salvage yard shown in the special exception application do not meet the goals and vision in either the existing Master Plan or the 2002 General Plan.

G. The District Council fully concurs with the Examiner in her conclusions that the proposed special exception use is not in harmony with the purposes of the I-1 Zone or the Zoning Ordinance generally.

As to the I-1 Zone, the salvage yard is not a light industrial use that is labor-intensive, does not present an attractive, conventional light industrial environment, does not create a distinct light industrial character on the subject property, and does not provide for a land-use mix that is designed to sustain a light industrial character. § 27-469 (a) (1).

As to the general purposes of the Zoning Ordinance in § 27-102 (a), the salvage yard at this location will not protect the health, safety, morals, comfort, convenience and welfare of present and future County inhabitants; will not implement the General Plan or the Master Plan; will not promote the conservation or expansion of communities; will not serve to guide the County's orderly growth and development; will not tend to provide adequate light or air or privacy; will not promote the most beneficial relationship between uses of land and buildings, and will not protect landowners from adverse effects from adjoining development; will not protect the County from dangers, as emergency services are not adequate for the property's

vicinity and salvage yard operations are reasonably likely to affect the water quality in Lower Beaverdam Creek and the Anacostia River; will not promote the providing of sound, sanitary housing in a suitable and healthy living environment; will not encourage economic development activities that offer desirable employment and a broad, protected tax base; will not have access by standard, paved, and maintained streets; will not insure the social and economic stability of the County, anywhere; will not protect against undue noise or air or water pollution, and will not encourage or promote the preservation of stream valleys, as the applicant's noise expert could not demonstrate that the applicant's machinery and noise abatement measures on the subject property would hold down noise levels for adjacent properties, nor did the applicant have sufficient testimony from qualified witnesses that the salvage yard operations would not place an undue burden on and would not impair the quality of water in Lower Beaverdam Creek and the Anacostia River; and will not tend to promote or protect open space, or protect the scenic beauty and natural features of the County.

The Examiner's analysis of these issues and concerns, as provided in § 27-102 (a) of the Zoning Ordinance, is fully adopted by the District Council.

H. The Examiner also explains how the proposed use will impair the integrity of the 1993 Master Plan and the 2002 General Plan. The Master Plan has goals, visions, and guidelines that the applicant cannot meet, and the 2002 General Plan has a vision for the Developed Tier of the County that the proposed salvage yard is not consistent with.

I. The record shows very well, through the extensive testimony of area residents and eyewitnesses, how the proposed salvage yard (which recently has had

illegal salvage yard operations) and its associated trucks and machinery will adversely affect residents and workers in the area, even well beyond the neighborhood.

Residents gave persuasive testimony about current unacceptable noise levels in and near the neighborhood, and they explained in detail how adding another high-level noise generator at the subject site will make a difficult situation worse. That is, the proposed special exception use will be situated at a location where the use will exacerbate and add cumulatively to neighborhood conditions that already include undue noise levels. Moreover, truck traffic to and from the subject site over inadequate and incomplete roads will continue to create safety hazards and visual and noise effects for residents of the neighborhood.

J. Under subsection (a) (4) of § 27-317, the proposed salvage yard will be detrimental to the health and safety of area residents, and under subsection (a) (5), the proposed use will be detrimental to the use or development of properties that are adjacent or in the neighborhood. At a minimum, the applicant's proofs in the record for this special exception do not show that the salvage yard will *not* adversely affect the health and safety of area residents, and will *not* be detrimental to the use or development of adjacent properties and the general neighborhood. The burden is on the applicant in special exception cases to meet all Zoning Ordinance standards; it is not on the opposition. § 27-142; *see B.P. Oil Co. v. Board of Appeals*, 42 Md.App. 576, 401 A.2d 1054 (1979).

K. The applicant has not met its burden under the Zoning Ordinance, and also under the Maryland cases. The *Schultz* decision, cited above, states that a special exception use may be denied where the proposed use at the proposed location will cause adverse effects greater than those normally to be expected, regardless of the

location of the property (and the use) in the zone. Here, at the subject property, this corporate applicant and its individual owners will likely cause substantial adverse noise effects, as well as unsafe traffic and access conditions, together with smells and visual effects and groundwater contamination, that are above and beyond those normally to be anticipated from salvage yard operations, regardless of their location in the I-1 Zone.

L. Even at the most elemental level, when the individual owners of the corporate applicant were given an opportunity to explain their proposed special exception use, they could not do so in a candid, straightforward manner. The Examiner, who actually observed the demeanor of the witnesses at the public hearing, found that Mr. Lee, the main individual owner, “was less than forthcoming or reliable” in his testimony, and that his statements about past activities and future plans for the special exception use were colored by a noticeable “lack of candor.” Moreover, continued past zoning violations by the owners, at a property in Fairmount Heights and at the subject property, detracted considerably from their credibility as witnesses, when they offered their testimony before the Examiner. Both the Examiner and the People’s Zoning Counsel demonstrated on the record that the claims and testimony of the individual owners in this case were generally not worthy of trust or belief.

Ordered this 22nd day of February, 2010, by the following vote:

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

Opposed:

Abstained:

Absent:

Vote: 9-0

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

BY: _____
Thomas E. Dernoga, Chairman

ATTEST:

Redis C. Floyd
Clerk of the Council