

Case No: S.E. 4647 Millville
Quarry/Bardon Inc.

Applicant: Bardon Inc. (Aggregate
Industries, Inc.)

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

ZONING ORDINANCE NO. 4 - 2014

AN ORDINANCE to approve a Special Exception, a Variance for the Removal of Specimen Trees, and a Variance from building setback requirements.

WHEREAS, Application S.E. 4647 was filed to request permission to use approximately 456.75 acres of land in the R-R (Rural Residential) Zone, located on the south side of Accokeek Road (MD 373) and on the east side of McKendree Road, just southeast of the intersection of these roads, and west of Robert S. Crain Highway (US 301), Brandywine, Maryland, for Surface Mining; and

WHEREAS, the application was advertised and the property posted prior to public hearing, in accordance with all requirements of law; and

WHEREAS, the application was reviewed by the Technical Staff and Planning Board, which filed recommendations with the District Council; and

WHEREAS, a public hearing on the application was held before the Zoning Hearing Examiner; and

WHEREAS, the Zoning Hearing Examiner's recommendations were filed with and considered by the District Council; and

WHEREAS, the District Council issued an Order of Remand directing further evidence and testimony be taken by evidentiary hearing before the Zoning Hearing Examiner concerning

the application; and

WHEREAS, after conducting an additional duly advertised public hearing pursuant to the direction of the District Council, the Zoning Hearing Examiner recommended approval of the special exception application, subject to certain conditions; and

WHEREAS, having reviewed the record, the District Council has determined that the application should be approved; and

WHEREAS, pursuant to Section 27-132 of the Zoning Ordinance and Section 25-204 of the Land Use Article, as the basis for this action the District Council adopts the findings of fact, conclusions, and decision of the Zoning Hearing Examiner (ZHE), except as follows:¹

On or about July 17, 2013, the Applicant or Bardon, after the District Council approved S.E. 4647, with conditions, filed a petition for judicial review, in the Circuit Court for Prince George's County, seeking reversal of conditions 12. a. and 17. *See* Applicant's Memorandum of Law, filed in CAL13-18906, at 27.²

The questions presented to the Court were as follows:

- Whether the decision of the District Council limiting SE-4647 to a time period of five (5) years, and precluding any extension of such period, is preempted by the law of the State of Maryland set forth in Maryland Code, Environment, § 15-801, *et seq.*
- Whether the decision of the District Council limiting the permitted hours of the Millville Quarry to 8:00 a.m. to 6:00 p.m. and precluding operations on weekend days is supported by substantial evidence from the record.

¹ The Prince George's County Code, Subtitle 27, Zoning Ordinance, (2011 ed., as amended) will be referred to hereinafter as "§27- ____.

² *See* §27-141 (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). *See also* RULES OF PROCEDURE FOR THE PRINCE GEORGE'S COUNTY DISTRICT COUNCIL (Adopted by CR-5-1993 and Amended by CR-2-1994, CR-2-1995 and CR-74-1995)

Rule 6: Oral Argument and Evidentiary Hearings:

(f) The District Council may take administrative notice of facts of general knowledge, technical or scientific facts, laws, ordinances and regulations. It shall give effect to the rules of privileges recognized by law. The District Council may exclude incompetent, irrelevant, immaterial or unduly repetitious evidence.

- Whether the decision of the District Council requiring Bardon, Inc. to procure a performance bond for the reclamation phase of SE-4647 is preempted by the law of the State of Maryland set forth in Maryland Code, Environment, § 15-823.
- Whether the decision of the District Council requiring Bardon, Inc. limiting the permitted hours of the Millville Quarry to 8:00 a.m. to 6:00 p.m. and precluding operations on weekend days violates the unconstitutional conditions doctrine.

See Applicant's Memorandum of Law, filed in CAL13-18906, at 14.

After oral arguments before the Honorable Melanie Shaw-Geter on March 14, 2014, the Court affirmed the decision of the District Council except as to Condition 12. a. and Condition 17 in S.E. 4647. *See* Zoning Ordinance No. 6-2013, at 7 and 9. The Court ordered that Condition 12. a. of Zoning Ordinance No. 6-2013, the initial ordinance approving S.E. 4647, be stricken and the hours of operation shall be as follows:

Mining operation operations on the site are restricted to the hours of 7:00 a.m. to 7:00 p.m. Monday through Friday and 7:00 a.m. to 4:00 p.m. on Saturdays, excluding federal holidays. There will be no operations on Sundays. Trucks are not permitted to arrive at the site prior to 7:00 a.m.

The Court also struck the following provisions from Condition 17 of Zoning Ordinance No. 6-2013:

The Applicant, its successors or assigns, shall not request and shall not be eligible for any extension of the mining of sand and gravel beyond a term of five (5) years from the date of commencement of mining on the site. Reclamation of the site shall be completed by the applicant in a maximum of five (5) years after the expiration of the 5-year period of this Special Exception, which shall be set forth in a Reclamation Plan submitted by the Applicant and approved administratively by the M-NCPPC staff prior to the issuance of permits. Reclamation of the site, as set forth in the Reclamation Plan, shall return the property to commercially viable use for either agricultural purposes or development substantially similar to the property's pre-existing condition. Reclamation shall be secured by a performance bond, as a condition of and prior to the issuance of permits, submitted by the applicant to the Department of Environmental Resources in an amount equivalent to the estimated cost of reclamation (the estimated cost of reclamation shall be

included in the applicant's proposed Reclamation Plan), which shall not be released to the Applicant until the Department of Environmental Resources and M-NCPPC staff determine in writing that the property has been successfully restored to commercially viable use substantially similar to the property's pre-existing condition for either agricultural purposes or development.

The Court remanded S.E. 4647 to the District Council, without permission to remand to the Office of the Zoning Hearing Examiner or the Maryland National Capital Park and Planning Commission, to schedule S.E.4647 on an Agenda in April, 2014, and for a final decision relative to the validity period contained in the first sentence of Condition 17 of Zoning Ordinance No. 6-2013 in light of the Court of Special Appeals decision in *East Star, LLC v. County Comm'r of Queen Anne's County*, 203 Md. App. 477, A.3d 523 (2012). *See* Order of Court, March 27, 2014, Judge Shaw-Geter.

District Council's Findings and Conclusions in light of Court of Special Appeals decision in *East Star, LLC v. County Comm'r of Queen Anne's County*, 203 Md. App. 477, A.3d 523 (2012)

The final decision in any zoning case shall be based only on the evidence in the record. *See* §27-141. We have reviewed the decision of the Court of Special Appeals in *East Star* relative to the validity period contained in the first sentence of Condition 17 of our initial decision of approval in Zoning Ordinance No. 6-2013. The record demonstrates the following as it relates to the validity period contained in the first sentence of Condition 17 of our approval of S.E. 4647:³

Statement of Justification, AR Ex. 2, Revised Statement of Justification, AR Ex. 40:

Comment: The site plan submitted with this application includes a schedule (General Note No.:22; BDAI Drawing No.: 47.004-Z) that estimates the time required for the extraction and removal of material from the site will be five (5) years. As state previously, only 391.98 acres of the total 576.29 acres of the Subject Property are proposed to be actively mined. (p.6, p. 6)

³

Citations to the administrative record will be referred to as "AR Ex. ____."

Comment: This proposal will not overcrowd the land. There are no building proposed on the site and the use is only temporary, estimated to conclude in (5) years time. (p.14, p.17)

Comment: The proposed sand and gravel mine is in harmony with the implementation of the 1993 Master Plan by adhering to the strategy of extracting finite aggregate resource prior to the future development of the site. The approval of this special exception will help to ensure that there will be an adequate supply of land and gravel for the metropolitan area for the next five (5) years. (p.19, p.12, p.23, p.38)

Comment: As demonstrated previously by the SOJ, the accompanying Site Plan, and other documents filed herein, the proposed use is in conformance with all applicable requirements and regulations in accordance with Sections 27-317, 27-410, 27-4445.02, and 27-625 of the Zoning Ordinance. The Site Plan is designed to reflect the recommendations and conclusions of various environmentally related studies performed by outside professional consultants tasked to assess the potential impact of this proposed surface mining operation. Based on the influences of those studies and reports, the Special Exception Site Plan and application has been refined so to assure that it is in conformance with applicable Federal, State, and County laws and regulations relative to surface mining operations and potential adverse effects on adjacent land uses resulting from dust, noise, vibration, traffic, and unsightly storage. (p. 20, pp.14-15, p.25, p.38)

Comment: Under State Law, an Environmental Impact Report must be prepared by the M-NCPPC whenever a request is made for a Special Exception to the zoning regulations for the mining of sand and gravel in Prince George's County. The law requires that the report evaluate such a zoning request comprehensively by determining the impact of the proposed mining activities on: on Noise, Watershed and Water Quality, Airshed and Air Quality, Traffic and Traffic Safety, Biological Resources including wetlands, woodlands and Tree Conservation Plan, and any other environmental facts relating to the health, safety and welfare of the residents and workers of the affected area. Based on the influences of those studies and reports, the Special Exception Site Plan and application has been refined so to assure that it is in conformance with applicable Federal, State, and County laws and regulations relative to surface mining operations. (p.21, pp.14-15, p.25, p.38)

See AR Ex. 2, Statement of Justification, AR Ex. 40, Revised Statement of Justification.

Timothy Bevard, a land manager for the Environmental and Land Services Department of Bardon, testified before the ZHE on May 23, 2012, that if the site is approved it would be for five (5) years. (5/23/2012, Tr.31-34)

Bardon's planner, Francis Silberholz, also testified based on his expertise, before the ZHE on May 23, 2013, that S.E. 4647 complies with §27-410 of the County's Zoning Ordinance. (5/23/2012, Tr.149, 150, 151, 152, 160)

Similarly in extensive submittals to the ZHE and the District Council, after the *East Star* decision, Bardon re-confirms its request and commitment to mine the site in five (5) years. *See* R Ex. 6(a) and May 8, 2013 Response to Appeal by Dion Zanfordino and Shakia Barnes.

For the reasons that follow, we find that *East Star* is distinguishable from the facts and law that govern S.E. 4647.

- **Bardon Failed To Preserve The Issue Of Preemption By Conflict And Implication**

Bardon claims that "At the ZHE Hearing, Daniel F. Lynch, Esq. specifically requested that a time limitation not be included in the conditions of approval of SE 4647. (1/8/2013, Tr., 182). The ZHE Decision, and its subsequent Remand Decision, also made note of the Court of Special Appeals holding in *East Star LLC v. County Commissioners of Queen Anne's County*, 203 Md. App. 477 A.3d 523 (2012), in which the Court explicitly preempted local ordinances such as §27-410 of the Zoning Ordinance, which restricts mining operations to five (5) years." *See* Applicant's Memorandum of Law, footnote 6, pp. 13-14.

The record for S.E. 4647 is lengthy and comprehensive. It is well established that courts do not allow an issue to be raised for the first time in actions for judicial review of administrative orders. *Bulluck v. Pelham Wood Apartments*, 283 Md. 505, 518-19, 390 A.2d 1119 (1978) (noting that "[a] reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for

its action.”) (quoting *Unemployment Compensation Commission v. Aragon*, 329 U.S. 143, 155, 91 L. Ed. 136, 11 Alaska 236, 67 S. Ct. 245 (1946)).

In a Rule 700 case the Court reviews a petitioner’s legal claims against the administrative record, to see whether the agency violated the petitioner’s rights. In such circumstances a petitioner who chooses not to raise an issue in the administrative case should not be allowed to complain later, in judicial proceedings. *Bulluck* 283 Md. 505, 518, 390 A.2d 1119 (1978). This rule of administrative law has been followed in Maryland for decades. It was restated in *Cicala v. Disability Review Board*, 288 Md. 254, 261-62, 418 A.2d 205 (1980):

A party who knows or should have known that an administrative agency has committed an error and who, despite an opportunity to do so, fails to object in any way or at any time during the course of the administrative proceeding, may not raise an objection for the first time in a judicial review proceeding.

The rule is founded on basic principles of administrative law, set out in *Unemployment Compensation Comm’n v. Aragon*, 329 U.S. 143, 155 (1946), *quoted in Bulluck*, 283 Md. at 518-19, 390 A.2d 1119:

A reviewing court usurps the agency’s function when it sets aside the administrative determination upon a ground not therefore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action.

The rule of *Bulluck* and *Cicala* has been consistently followed. The Court in *Heft v. Maryland Racing Comm’n*, 323 Md. 257, 273-74, 592 A.2d 1110 (1991), said it was one of the “principles of administrative law” in Maryland that “a person may not obtain judicial review of a matter when he or she failed to properly raise the matter before the administrative agency;” in such a case, the “person is not entitled to have a court consider the issue.” In *Bd. of Physician Quality Assurance v. Levitsky*, 353 Md. 188, 207-08, 725 A.2d 1027 (1999), the Court stated that “questions, including Constitutional issues, that could have but were not presented to the administrative agency may not ordinarily be raised for the first time in an action for judicial

review.” More recently, the Court dismissed the appeal in *Brodie v. Motor Vehicle Administration*, 367 Md. 1, 4, 785 A.2d 747 (2001), on the ground that “Brodie’s entire challenge to the administrative decision was based on an issue not raised before the agency.” *See also Motor Vehicle Administration v. Weller*, 390 Md. 115, 128-30, 887 A.2d 1042 (2005) (reviewing cases).

On remand, we find that Bardon did not raise or preserve the issue of whether §27-410 was preempted by implication or preempted by conflict before the ZHE. Nor was the issue raised before us at oral argument. The record reveals the following exchange between counsel for Bardon and the ZHE:

MR. LYNCH: ... Also, Madame Examiner, one of the conditions normally associated with this case **with regard to a time limit, my understanding is it’s not completely in the Examiner’s control,** but what I’d like to do is (inaudible) the Examiner when she’s coming up with the condition of approvals associated with this, not place a condition of approval relative to a time limit on this case.

HEARING EXAMINER: Because of Queen Anne?

MR. LYNCH: Because of the Queen Anne case, that’s correct.

(1/8/2013, Tr., 188, lines 2-12) (Emphasis added).

We do not view this exchange as a challenge to §27-410 based on preemption by implication or preemption by conflict. As a matter of fact, the ZHE did not resolve in her decision whether §27-410 is preempted by implication or preempted by conflict. It should be emphasized that Maryland . . . administrative agencies are fully competent to resolve issues of constitutionality and the validity of statutes or ordinances in adjudicatory administrative proceedings which are subject to judicial review. *Prince George’s County v. Ray’s Used Cars*, 398 Md. 632, 922 A.2d 495 (2007) citing *Montgomery County v. Broadcast Equities, Inc.*, 360 Md. 438, 451 n.8, 758 A.2d 995, 1002 n.8 (2000). This includes the constitutionality of an

enactment as applied, as well as the constitutionality of an enactment as a whole. *Insurance Commissioner v. Equitable*, 339 Md. 596, 622, 664 A.2d 862, 875 (1995). Furthermore, the Court of Appeals has held that, if a restriction under a zoning ordinance cannot constitutionally or validly be applied, this is a proper ground for the administrative zoning agency to grant an exception or a variance. *Holiday v. Anne Arundel*, 349 Md. 190, 199, 707 A.2d 829, 834 (1998). Our review of the record before us demonstrates that Bardon failed to preserve, before the ZHE and us, the issue of whether §27-410 was preempted by implication or preempted by conflict. *See* §27-141 (The final decision in any zoning case shall be based only on the evidence in the record).

- **Bardon Waived Claims Of Preemption By Implication And Conflict**

Alternatively, even if §27-410(a)(4) was preempted by implication or conflict, relative to the validity period contained in the first sentence of Condition 17 of Zoning Ordinance No. 6-2013, we are mindful that our decision shall be based only on the evidence in the record. *See* §27-141. We find, based on the record, that Bardon waived the issue of whether §27-410(a)(4) is preempted by State law. A waiver is the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, and may result from an express agreement or be inferred from circumstances. *Bargale Industries, Inc. v. Robert Realty Co.*, 275 Md. 638, 343 A.2d 529 (1975); *One Twenty Realty Co. v. Baer*, 260 Md. 400, 408, 272 A.2d 377 (1971). Every aspect of the record for S.E. 4647 demonstrate that Bardon, prior to the close of the record, had direct knowledge of the *East Star* decision but limited its application submittals and evidence to an approval for 5 years. *See* §27-142 (The burden of proof in any zoning case shall be the applicant's). The record before us contains the following:

Statement of Justification, AR Ex. 2, Revised Statement of Justification, AR Ex. 40:

Comment: The site plan submitted with this application includes a schedule (General Note No.:22; BDAI Drawing No.: 47.004-Z) that estimates the time required for the extraction and removal of material from the site will be five (5) years. As state previously, only 391.98 acres of the total 576.29 acres of the Subject Property are proposed to be actively mined. (p.6, p. 6)

Comment: This proposal will not overcrowd the land. There are no building proposed on the site and the use is only temporary, estimated to conclude in (5) years time. (p.14, p.17)

Comment: The proposed sand and gravel mine is in harmony with the implementation of the 1993 Master Plan by adhering to the strategy of extracting finite aggregate resource prior to the future development of the site. The approval of this special exception will help to ensure that there will be an adequate supply of land and gravel for the metropolitan area for the next five (5) years. (p.19, p.12, p.23, p.38)

Comment: As demonstrated previously by the SOJ, the accompanying Site Plan, and other documents filed herein, the proposed use is in conformance with all applicable requirements and regulations in accordance with Sections 27-317, 27-410, 27-4445.02, and 27-625 of the Zoning Ordinance. The Site Plan is designed to reflect the recommendations and conclusions of various environmentally related studies performed by outside professional consultants tasked to assess the potential impact of this proposed surface mining operation. Based on the influences of those studies and reports, the Special Exception Site Plan and application has been refined so to assure that it is in conformance with applicable Federal, State, and County laws and regulations relative to surface mining operations and potential adverse effects on adjacent land uses resulting from dust, noise, vibration, traffic, and unsightly storage. (p. 20, pp.14-15, p.25, p.38)

Comment: Under State Law, an Environmental Impact Report must be prepared by the M-NCPPC whenever a request is made for a Special Exception to the zoning regulations for the mining of sand and gravel in Prince George's County. The law requires that the report evaluate such a zoning request comprehensively by determining the impact of the proposed mining activities on: on Noise, Watershed and Water Quality, Airshed and Air Quality, Traffic and Traffic Safety, Biological Resources including wetlands, woodlands and Tree Conservation Plan, and any other environmental facts relating to the health, safety and welfare of the residents and workers of the affected area. Based on the influences of those studies and reports, the Special Exception Site Plan and application has been refined so to assure that it is in conformance with applicable Federal, State, and County laws and regulations relative to surface mining operations. (p.21, pp.14-15, p.25, p.38)

See AR Ex. 2, Statement of Justification, AR Ex. 40, Revised Statement of Justification.

Timothy Bevard, a land manager for the Environmental and Land Services Department of Bardon, testified before the ZHE on May 23, 2012, that if the site is approved it would be for five (5) years. (5/23/2012, Tr.31-34)

Bardon's planner, Francis Silberholz, also testified based on his expertise, before the ZHE on May 23, 2013, that S.E. 4647 complies with §27-410 of the County's Zoning Ordinance. (5/23/2012, Tr.149, 150, 151, 152, 160)

Similarly in extensive submittals to the ZHE and the District Council, after the *East Star* decision, Bardon re-confirms its request and commitment to mine the site in five (5) years. *See* R Ex. 6(a) and May 8, 2013 Response to Appeal by Dion Zanfordino and Shakia Barnes.

In adopting the findings and Decision of the ZHE in Zoning Ordinance No. 6- 2013, we took administrative notice of the change in law regarding local regulation of surface mining.⁴ Our decisions in this matter are based on the record and we detrimentally relied on the evidence in the record above, including but not limited to Bardon's testimony and proffers to Staff of the M-NCPPC Environmental Impact Report and Citizen Opposition, that S.E. 4647 would be mined for five (5) years.

Accordingly, we find on remand that Condition 17 relative to the validity period is supported by substantial evidence in the record, and therefore *East Star* is inapplicable to the facts or law of this case.

• Bardon Is Estopped From Claiming Preemption By Conflict And Implication

Even if we assume for argument that §27-410(a)(4) is preempted by implication or conflict, our final decision on remand shall be based only on the evidence in the record. Equitable estoppel has been described as “. . . the effect of the voluntary conduct of a party

⁴ *See Templeton v. County Council of Prince George's County*, 23 Md. App. 596, 329 A.2d 428 (1974) (holding that 'where the County Council has delegated the duty of making findings of fact and recommendations to a zoning hearing examiner the Council may adopt examiner's findings in lieu of setting forth their own').

whereby he is absolutely precluded both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse and who on his part acquires some corresponding right, either of property, of contract, or of remedy.” *Knill v. Knill*, 306 Md. 527, 534, 510 A.2d 546 (1986) (quoting 3 J. Pomeroy, *Equity Jurisprudence*, § 804 (5th ed. 1941)). Some sixty years later, the Court of Appeals reiterated the validity of the doctrine of equitable estoppel. Equitable estoppel occurs when a party voluntarily acts in a way that later precludes that party from asserting rights against another party who has, in good faith, relied on the party’s actions and changed position for the worse. Equitable estoppel, which may be asserted as a defense to a cause of action or used to avoid a defense, consists of three elements: voluntary conduct, reliance, and detriment. A party may assert equitable estoppel to counter a statutory defense. *Flora Lipitz, et al. v. William A. Hurwitz*, 435 Md. 273, 77 A.3d 1088 (2013). As mentioned above, we took administrative notice of the change in law regarding local regulation of surface mining when we adopted the decision of the ZHE. We also detrimentally relied, in good faith, on Bardon’s voluntary conduct throughout the proceedings that S.E. 4647 was a request to mine the subject site for 5 years when we exercised our discretion, pursuant to §27-410, to approve S.E. 4647. We find, based on the record, that Condition 17 was imposed as a condition of approval based on Bardon’s voluntary conduct, and is precluded both in law and equity, from claiming that §27-410(a)(4) is preempted by State law.

- **S.E. 4647 Approval Subject To Condition 17 Relative To The Validity Period of 5 Years Is Not Preempted By Implication Or Conflict Under *East Star***

Bardon’s reliance on *East Star* is misplaced. In that case, the court granted *declaratory and injunctive relief* to an excavation operator in Queen Anne’s County by declaring invalid the

enactment of zoning text amendment legislation by the County Commissioners. *East Star*, 203 Md. App. at 493-94, 477 A.3d at 533-34; (Emphasis added.) noting *County Council v. Offen*, 334 Md. 499, 507, 639 A.2d 1070 (1994) (review of legislation by a local government is “limited to assessing whether the [governing body] was acting within its legal boundaries”), *Governor of Md. v. Exxon Corp.*, 279 Md. 410, 370 A.2d 1102 (1997) *aff’d*, 437 U.S. 117, 98 S.Ct. 2207, 57 L. Ed. 2d. 91 (1978) (“We will not strike down a legislative act unless the exercise of power is shown to be “arbitrary, oppressive, or unreasonable.”). After the approval of S.E. 4647, Bardon filed a petition for judicial review. Judicial review of an administrative record is based on the substantial evidence test. Substantial evidence, generally, is evidence that a reasoning person would consider sufficient to support a conclusion. *Motor Vehicle Admin v. Delawter*, 403 Md. 243, 256-57, 941 A.2d 1067 (2008), *quoting Md. Aviation Admin. v. Noland*, 386 Md. 556, 873 A.2d 1145 (2005). “In judicial review of zoning matters, including special exceptions. . . ‘the correct test to be applied is whether the issue before the administrative body is “fairly debatable,” that is, whether its determination is based upon evidence from which reasonable persons could come to different conclusions.’” *Alviani v. Dixon*, 365 Md. 95, 107, 775 A.2d 1234 (2001), *White v. North*, 356 Md. 31, 44, 736 A.2d 1072 (1999) (*quoting Sembly v. County Bd. of Appeals*, 269 Md. 177, 304 A.2d 814 (1973)). *See also Board of County Commissioners v. Holbrook*, 314 Md. 210, 218, 550 A.2d 664 (1988) (fairly debatable test “accords with the general standard for judicial review of the ruling of an administrative agency, which [is] defined as ‘whether a reasoning mind reasonably could have reached the factual conclusion the agency reached; this need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment.’”) The substantial evidence test is especially important in administrative cases with contested factual issues. In such cases a reviewing court will not substitute its judgment for that of the fact finder, even if the court exercising its independent

judgment might have reached a different result on the same record. *Young v. Anne Arundel County*, 146 Md.App. 526, 567, 807 A.2d 651 (2002).

The facts in *East Star* are distinguishable from the present case for the following reasons: (1) Queen Anne’s County and Prince George’s County have distinctly different zoning powers under the Maryland Code; (2) unlike Queen Anne’s County, the State of Maryland empowered Prince George’s County to regulate sand and gravel mining through the special exception process under Md. Code Ann, Land Use §§ 22-301 & 25-209; and (3) the District Council’s lawful exercise of its zoning authority pursuant to the Regional District Act did not trigger any conflict between state and local law that would require a preemption.⁵

Unlike the Queen Anne’s County, the Regional District Act, Maryland Code (1957, 1997 Repl.Vol., 1997 Supp.), Art. 28, §§ 1-101 through 8-127, now codified under Md. Code Ann., Land Use § 22-101 *et seq.*, is the exclusive source of zoning authority in Prince George’s County. *See Prince George’s County v. Maryland-Nat’l Capital Park and Planning Comm’n*, 269 Md. 202, 225-236, *cert. denied*, 414 U.S. 1068 (1973), *see also*

⁵ The District Council notes — as did the Court of Special Appeals in *East Star* — that there is a presumption against preemption, which should be considered when reviewing Bardon’s claims. In *East Star*, the Court opined:

In Swift & Co. v. Wickham, 382 U.S. 111, 120, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965), the United States Supreme Court noted that a federal-state preemption issue is not a constitutional question, but “inevitably one of comparing two statutes.” Under federal preemption analysis, a presumption against preemption is accorded both state statutes and local ordinances. *See Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713-15, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985). Maryland case law has not expressly mentioned a presumption against State preemption of local ordinances. However, when challenged on constitutional grounds, a county or municipal ordinance, including a local zoning law, is presumed valid. *Gino’s of Maryland, Inc. v. Baltimore*, 250 Md. 621, 636, 244 A.2d 218 (1968); *Walker v. Board of County Comm’rs*, 208 Md. 72, 93, 116 A.2d 393 (1955).

East Star, 203 Md. App. at 485 fn. 5.

Montgomery County v. Revere, 341 Md. 366, 383-384 (1996); *Mossburg v. Montgomery County*, 329 Md. 494, 502 (1993). The Regional District Act authorizes the County Council to sit as a District Council in zoning matters, and, when it does so, it is acting as an administrative agency. *See Montgomery County v. Revere, supra*, 341 Md. at 384. In Prince George's County, pursuant to Md. Code Ann., Land Use § 22- 301 *et seq.*, a zoning hearing examiner initially decides applications for special exceptions. (A.002218-002221). Appeals are heard by the District Council, under Md. Code Ann., Land Use § 22- 310. Crucially, Prince George's County is expressly given the authority to review special exception applications for sand and gravel mining, under § 25-209 of the Land Use Article, which reads:

Required report- (a) The Commission shall prepare a report in accordance with this section before a zoning hearing examiner or the district council may conduct a hearing on a request for a special exception to mine sand or gravel.

Contents-(b) The report shall comprehensively evaluate the request by analyzing the impact of the proposed mining activities on the surrounding area, considering only:

- (1) noise;
- (2) watershed and water quality;
- (3) airshed and air quality;
- (4) traffic and traffic safety; and
- (5) other environmental factors relating to the health, safety, and welfare of the residents in the affected area.

Cost-(c) In addition to the initial filing fee, the applicant shall pay a fee not to exceed \$8,000 for the services of the Commission to prepare the report.

See Md. Code Ann., Land Use § 25-209; *see also County Council of Prince George's County v. E.L. Gardner, Inc.*, 293 Md. 259, 261 (1982) (The Court of Appeals addressed the question of whether "the owner of a nonconforming surface mining sand and gravel operation [could] obtain a special exception to operate a sand and gravel wet-processing facility at the same location."). Inasmuch, Prince George's County has been empowered by the State of Maryland to address sand and gravel mining land use issues through the special exception process under

Md. Code Ann, Land Use §§ 22-301 & 25-209.

Bardon confuses the State's permitting, inspection, and licensure duties *with* the local land use authority expressly delegated to Prince George's County by the State. *Compare* Md. Code Ann, Environment §§ 15-801 through 15-834 *with* Md. Code Ann., Land Use §§ 22-301, 22-310 and 25-209. Unlike the facts in this case, *East Star* turns on whether the regulations imposed statutorily by Queen Anne's County unreasonably interfered with the State's jurisdiction over permitting and the reasonableness as to the time periods for that permit. 203 Md. App. at 492-493.

Simply put, the District Council was merely exercising the zoning authority delegated to it by the State when it imposed Condition 17, which was based on substantial evidence in the record. *See* §27-318 (When a Special Exception is approved, any requirements or conditions deemed necessary to protect adjacent properties and the general neighbourhood may be added to those of this Subtitle).

NOW, THEREFORE, BE IT ORDAINED AND ENACTED:

SECTION 1. Special Exception 4647, the Variance for the Removal of Specimen Trees, and the Variance from the building setback requirements are approved, subject to the following conditions:

1. Prior to certification of the Special Exception, the Mining Site Plan shall be revised to show proposed paving on the haul road at its entrance point onto Accokeek Road, for a distance of no less than 200 feet. Details for the paving shall also be provided on the Mining Site Plan and shall include, at a minimum, the following information: length and width of pavement (minimum of 200 feet long and 22 feet wide), type of paving material, and timing (prior to the commencement of mining).
2. A Conservation Easement shall be recorded in the Land Records in accordance with Section 25-122(d)(1)(B). The Easement shall describe, by bearings and distances, the areas of Woodland Conservation shown on the TCP2 as approved. The Easement shall

be reviewed by the Environmental Planning Section prior to recordation.

3. The Applicant shall notify the M-NCPPC, Environmental Planning Section, prior to the start of reforestation for each phase of this mining operation and schedule a meeting to address reforestation and Woodland Conservation issues.
4. Prior to the start of work any phase or portion thereof, the limits of disturbance for that phase or portion thereof shall be staked on the ground or flagged on the existing trees. The Applicant or their representative shall walk the limits of disturbance with a representative of the M-NPPC, Environmental Planning Section, prior to the installation of sediment/erosion control measures and tree protective devices.
5. Prior to certification of the Special Exception, the Type II Tree Conservation Plan shall be revised as follows:
 - a. Clearly show all proposed phase lines.
 - b. Revise the worksheet as follows:
 - i. Ensure that the area of existing wooded floodplain in the tree conservation work sheet does not exceed the area of existing floodplain for any phase;
 - ii. Ensure that proposed clearing on the net tract does not exceed the existing woodland on the net tract for any phase.
 - c. Provide the symbol for regeneration in the legend.
 - d. Revise the LOD to show the preservation of all regulated Application.
 - e. Ensure that the minimum required dimensions are met for those areas counted as woodland conservation.
 - f. Have the qualified professional who prepared the plan sign and date it and update the revision box with a summary of the revisions made.
6. Prior to certification of the Special Exception, the Tree Canopy Coverage schedule shown on the Plat of Special Exception Site and Landscape Plan shall be revised to show the tree canopy requirement based on the gross tract area of the site and to

demonstrate how the resulting requirement will be met.

7. Prior to certification of the Special Exception, a copy of the Sediment and Erosion Control Plan shall be submitted to M-NCPPC. The Applicant shall submit copies of the approved Sediment Control Plans to M-NCPPC for each phase of mining prior to commencement of mining in each respective phase.
8. Prior to commencement of the mining operation, a Special Permit shall be obtained from the Prince George's County Department of Public Works and Transportation. A reforestation bond shall be posted at the time issuance of the Special Permit.
9. The area to be mined shall be reclaimed in accordance with a Reclamation Plan by filling with acceptable materials as described in Prince George's County Building Code or as required by the Maryland Department of the Environment.
10. A Conservation Easement shall be recorded in the Land Records that describes the primary management area (PMA) by bearings and distances. The Conservation Easement shall contain the entirety of the PMS as shown on the approved Natural Resource Inventory except for the areas of approved impacts as shown on the approved TCP2. The conservation easement shall be reviewed by the Environmental Planning Section prior to recordation. The recorded easement document shall include the following text:

“These conservation easements are areas where the installation of structures and roads and the removal of vegetation are prohibited without prior written consent from the M-NCPPC Planning Director or designee. The removal of hazardous trees, limbs, branches, or trunks is allowed.”
11. Prior to certification of the Special Exception, the Plat of Special Exception Site and Landscape Plan shall be revised in conformance with Section 4.6 of the Landscape Manual.
12. Noise mitigation shall be provided on-site by implementation of the following:
 - a. Mining operations on the site are restricted to the hours of 7:00 a.m. to 7:00 p.m. Monday through Friday and 7:00 a.m. to 4:00 p.m. on Saturdays, excluding federal holidays. There will be no operations on Sundays. Trucks are not permitted to arrive at the site prior to 7:00 a.m.

- b. The 12 to 18-foot-high noise mitigation berms shall be located as shown on the plans submitted to protect nearby residential buildings and properties.
 - c. Trucks shall not use compression or “Jake” brakes both on-site and on the roadway.
 - d. Speeds on-site shall be restricted to 15 mph for all heavy vehicles.
 - e. All machinery shall be kept in good working order, especially mufflers to insure quiet operation.
 - f. The volume of backup warning devices shall be minimized while still meeting OSHA (Occupational Safety and Health Administration) standards.
- 13. Prior to certification of the Special Exception, the Air Quality Report shall be revised as follows:
 - a. Provide written justification for running the dispersion model using the smallest area at the center of the site or provide the results of revised modeling to reflect the actual area of each phase with respect to the closest receptor to demonstrate that the air quality of the surrounding properties will not be adversely impacted.
 - b. Provide additional information to indicate that the five (5) receptors in the vicinity of the proposed mining, used in the dispersion model, are sufficient to represent the expected air quality impacts surrounding the entire property. Provide the results of revised modeling including additional receptor locations if warranted.
- 14. Mitigation of particulate matter emissions shall be accomplished by implementation of the following:
 - a. The haul roads shall be maintained with a water truck or other approved dust control methods.
 - b. Sweeping of the paved roads with road sweeper will occur as needed.

- c. Open-bodied vehicles transporting materials off-site shall be covered at all times when in motion, in accordance with COMAR regulations.
 - d. The site shall have a 15 mph speed limit to reduce dust generation from travel on the unpaved portions of the proposed haul road.
 - e. All mobile equipment to be used on-site shall use ultra-low sulfur diesel fuel. The fuel supplier certification of the sulfur content of each fuel delivery shall be kept on-site for the duration of the Special Exception approval period.
15. Equipment fueling on-site shall be done in accordance with NFPA 30 (National Fire Protection Association), Flammable and Combustible Liquids Code, Chapters 2 and 3. The mobile fueling trucks shall be operated by trained personnel holding valid oil vehicle operator's certificates as required by COMAR 26.10.01.17. Care shall be taken to minimize spillage. Refueling shall take place as far from streams and wetlands as possible.
 16. If the operation of the subject sand and gravel mine impacts the water level in any wells within 1,000 feet of the subject mining site as verified by MDE, corrective action shall be immediately taken by the Applicant, including but not limited to, the drilling of a new well to replace the adversely affected well.
 17. This Special Exception shall be valid for a period not to exceed five (5) years from the date of final approval.
 18. The subject property shall not be utilized as a Rubble Fill.

SECTION 2. This Ordinance shall take effect on the date of its enactment.

Enacted this 12th day of May, 2014 by the following vote:

In Favor: Council Members Campos, Davis, Franklin, Harrison, Lehman, Olson, Patterson, Toles and Turner.

Opposed:

Abstained:

Absent:

Vote: 9-0

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

By: _____
Mel Franklin, Chairman

ATTEST:

Redis C. Floyd
Clerk of the Council