

Case No. S.E. 4765  
TCP II-105-90-01  
(Brandywine Fly Ash Storage  
Site)

Applicant: NRG MD Ash  
Management LLC  
c/o GenOn Mid-Atlantic LLC

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

ORDER OF DENIAL

AN ORDINANCE, denying Special Exception 4765 and TCP II-105-90-01, a proposed sanitary landfill (and rock crusher) for fly ash disposal—a by-product created by the combustion of coal during production of electrical energy at coal-burning power stations—in the Open Space Zone, at 11710 North Keys Road, Brandywine, Maryland, in Councilmanic District 9.

FINDINGS OF FACT AND CONCLUSIONS OF LAW<sup>1,2</sup>

---

<sup>1</sup> The District Council sits as an administrative agency when reviewing a zoning matter. *County Council v. Brandywine Enterprise*, 350 Md. 339, 711 A.2d 1346 (1998) (“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 also Cnty. Council of Prince George's Cnty. v. Zimmer Dev. Co.*, 444 Md. 490, 524–26, 120 A.3d 677, 697–99 (2015) (Pursuant to the Regional District Act, the District Council may delegate certain zoning action, such as special exceptions, to a hearing examiner, whose decision *may* be final unless appealed to the District Council *or* taken for decision by the council on its initiative); *County Council v. Curtis Regency Serv. Corp.*, 121 Md. App. 123, 131–33, 708 A.2d 1058, 1062–63 (1998) (Explaining the process through which a special exception passes before reaching the District Council. First, the Technical Staff makes a report and recommendation and forwards it to the Planning Board. The Planning Board decides whether to accept the Staff's recommendation and forwards its own recommendation to the District Council. Before the District Council decides the case, however, the ZHE, an employee of the District Council, files a written decision, with specific recommended findings of facts, conclusions of law, and *a disposition recommendation*. Finally, the District Council decides whether to grant the exception. Although the ZHE has authority under § 27-312(a)(C) of the Prince George's County Code to approve or deny a special exception or variance, *the Zoning Ordinance specifically retained in the District Council the authority, “upon its own motion,” to elect “to make the final decision on the case itself.”*) (Emphasis added).

<sup>2</sup> 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. PGCC § 27-141. The District Council may also 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. *See* District Council Rules of Procedure Rule 6(f).

## A. Introduction

On July 10, 2007, the District Council conditionally approved S.E. 4520—Applicant’s 4<sup>th</sup> temporary special exception request to complete fill of the Brandywine sanitary landfill.<sup>3,4</sup> The District Council imposed a time limit condition, agreed to by Applicant, as follows:

**This special exception shall expire eight years after final District Council approval action, or upon reaching site capacity to accept fly ash rubble, whichever date occurs first.** Applicant shall notify DER and the District Council, in writing, upon cessation of the use. S.E. 4520, Condition 2 (Emphasis added).

On July 10, 2015, S.E. 4520 expired.<sup>5</sup> Yet without an extension of time limit condition, Applicant continued to fill the site. Approximately 5 months after S.E. 4520 expired, Applicant filed an application for a 5<sup>th</sup> temporary special exception. Applicant’s 5<sup>th</sup> request seeks 10 more years to fill the site—despite factual representations by Applicant in 2007, the site would be filled on or before July 10, 2015. ZHE Ex. 1.

On September 17, 2017, more than 2 years after the expiration of S.E. 4520, the Zoning Hearing Examiner recommended approval of S.E. 4765. The Examiner recommends that the District Council impose a time limit condition of 8 more years to allow Applicant to fill the site. ZHE Decision, 9/28/17, p. 36, Condition 1 j.

For the reasons stated below, the District Council will deny S.E. 4765.

---

<sup>3</sup> A Sanitary Landfill (including a Rubble Fill for construction and demolition materials) is a planned, systematic method of refuse disposal where waste material is placed in the earth in layers, compacted, and covered with earth or other approved covering material at the end of each day’s operation, or any method of in-ground disposal of sludge other than for fertilization of crops, horticultural products, or floricultural products in connection with an active agricultural operation or home gardening. PGCC § 27-107.01(a) (205).

<sup>4</sup> Applicant is also requesting a rock crusher, which was not part of the 2007 approval in S.E. 4520. A rock crusher is a piece of machinery or equipment, either stationary or transportable, used to break up materials such as concrete and asphalt into stone. PGCC § 27-107.01(a) (203.1).

<sup>5</sup> After S.E. 4520 expired on July 10, 2015, the Applicant filed a new application on December 14, 2015, requesting 10 more years to fill the site. ZHE Ex. 1. An application is considered filed on the date it is accepted by the Planning Department. ZHE Ex. 1 (Acceptance Date 12/14/15), Zoning Case Summary, Application Filed 12/14/15.

## B. Procedural Background

Since 1971, the Brandywine site has operated, by special exception, as a sanitary landfill.

*See* S.E. 2774, S.E. 3106, S.E. 4002, and S.E. 4520. Staff Report, p. 5.

On July 10, 2007, the District Council took final action in S.E. 4520. Approval of S.E. 4520, in part, was subject to the following conditions:<sup>6</sup>

1. i. All future rubble mounds on the subject property shall be limited to a height of no more than 40 feet above the original grade, as measured from the base of the original barn on the subject site. The Applicant shall maintain all existing mounds at or below their current height.
2. **This special exception shall expire eight years after final District Council approval action, or upon reaching site capacity to accept fly ash rubble, whichever date occurs first.<sup>7</sup> Applicant shall notify DER and the District Council, in writing, upon cessation of the use.** ZHE Ex. 53, Notice of Final Decision, 7/11/07 (Emphasis added).

On July 10, 2015, S.E. 4520 expired. For more than 2 years, the Applicant filled the site with fly ash without an extension of the time. Notice of Final Decision, 7/11/07.

On December 14, 2015—more than 5 months after S.E. 4520 expired—Planning Staff accepted, for review, Applicant's 5<sup>th</sup> request for a temporary special exception (S.E. 4765) to complete fill of the site. The Applicant requested 10 more years to complete fill of the site—despite factual representations by Applicant in 2007, that the site would be filled on or before July 10, 2015. ZHE Ex. 1.

On June 22, 2016, Planning Staff recommended disapproval of S.E. 4765 because the Applicant's site plan did not comply with Condition 1. i., of Council's prior site plan approval in S.E. 4520. ZHE Ex. 28, Notice of Final Decision, 7/11/07.

---

<sup>6</sup> When a special exception is approved, any requirements or conditions deemed necessary to protect adjacent properties and the general neighborhood may be added. PGCC § 27-318.

<sup>7</sup> The District Council determines the validity period for a sanitary landfill. PGCC § 27-406(a)(b).

The Examiner held contested hearings on the application on November 16, 2016, January 25, 2017, and July 19, 2017. Opposition included Patuxent River Keeper, represented by the University of Maryland Environmental Law Clinic, Greater Baden Aquasco Civic Association, and several others. ZHE Decision, 9/28/17, p. 1, (11/16/16, Tr.), (1/25/17, Tr.), (7/19/17, Tr.).

On September 28, 2017, the Zoning Hearing Examiner recommended that the District Council approve S.E. 4765. The Examiner disagreed with Planning Staff's recommendation of disapproval and over the objection of Opposition, recommended approval of S.E. 4765—subject to an 8-year validity period or upon the site reaching capacity to accept fly ash rubble. ZHE Decision, 9/28/17, p. 36, Condition 1 j.

Condition 1, subparts i., and j., of the Examiner's recommendation provides:

1. i. The maximum height of fill mounds for Phase I, including capping and grading shall not exceed 291 feet and for Phase II 265.5 feet. Any increase in height shall require a new special exception approval by the District Council. Note 15 on the Site Plan shall be revised to expressly state these maximum heights.
- j. This Special Exception shall expire 8 years after final approval action or upon reaching site capacity to accept fly ash rubble. Applicant shall notify DER and the District Council, in writing, upon cessation of the use. ZHE Decision, 9/28/17, p. 36, Conditions 1. i, and j.

The Clerk of the Council, before placing the Examiner's decision on a Zoning Agenda for District Council consideration, returned the application file in S.E. 4765 (including the Examiner's decision) to the Office of the Examiner for compliance with certain public ethics affidavits. *See* MD. State Ethics Commission Letter to the Clerk of the Council, 6/18/15. Upon compliance, the application file was retransmitted to the Clerk of the Council for District Council's consideration.

On November 6, 2017, the District Council elected to make the final decision in S.E. 4765. Zoning Agenda, 2/26/2018.

On January 25, 2017, notice of oral argument was mailed to persons of record. Notice, 1/25/2017.

On February 26, 2018, the District Council held oral argument. Opposition included, but was not limited to, Patuxent River Keeper and Greater Baden Aquasco Civic Association. (2/26/17, Tr.). After oral argument, Council took the matter under advisement. Zoning Agenda, 2/26/2018, (2/26/18, Tr.).

Additional background will be provided, *infra*, to the extent relevant.

### C. Jurisdiction

Applicant claims that the District Council lacked jurisdiction to review S.E. 4765. The Applicant contends that the Council had 30 days from September 28, 2017 (the date of the Examiner's decision), to elect to review S.E. 4765—i.e., on or before October 28. The Council elected to review S.E. 4765 on November 6, 2017—i.e., 9 days past October 28. In accordance with law, the District Council is not authorized to consider a special exception application unless the Applicant has complied with certain provisions of Part V of the Public Ethics Law. Md. Code Ann., Gen. Prov. (GP) §§5-833–5-839 (2014, 2017 Supp.), MD. State Ethics Commission Letter to Clerk of the Council, 6/18/15, 100 Md. Op. Atty. Gen 55 (2015). The Applicant must file a signed original of the appropriate public ethics affidavit with the Clerk of the Council no later than 30 days prior to the District Council's consideration of the application. ZHE Ex. 70, Business Entity & Corporate Applicant Affidavit, GP §5-835. When the application file was initially transmitted to the Clerk of the Council, it contained an undated affidavit completed on an outdated affidavit form (Corporate Applicant Affidavit)—no longer authorized by the State Ethics Commission. ZHE Ex. 70. The application file also contained an affidavit completed on a current form (Business Entity Affidavit) and dated September 26, 2017 and filed September 27, 2017. ZHE Ex. 70. At the direction of the State Ethics Commission, when the Clerk of the Council receives an application which does not contain a timely-filed affidavit, the file must be returned to the appropriate entity (here the Office of the Examiner) with direction to retransmit the application

file 30 days after the appropriate affidavit has been filed. By operation of law, the Office of the Examiner could not have retransmitted the application file to the Clerk of the Council on or before October 27, 2017, for District Council consideration.

The District Council had jurisdiction to review S.E. 4765 because it elected to review the case on November 6, 2017—within 30 days from when the application file complied with Part V of the Public Ethics Law. GP §5-835, MD. State Ethics Commission Letter to Clerk of the Council, 6/18/15, 100 Md. Op. Atty. Gen 55 (2015).

D. Special Exception — Sanitary Landfill

The District Council is required to make certain findings before approving any special exception. A special exception may be approved if

- (1) The proposed use and site plan are in harmony with the purpose of this Subtitle;

The purposes of Subtitle 27 or the Zoning Ordinance are

- To protect and promote the health, safety, morals comfort, convenience, and welfare of the present and future inhabitants of the County;
- To implement the General Plan, Area Master Plans, and Functional Master Plans;
- To promote the conservation, creation, and expansion of communities that will be developed with adequate public facilities and services;
- To guide the orderly growth and development of the County, while recognizing the needs of agriculture, housing, industry, and business;
- To provide adequate light, air, and privacy;
- To promote the most beneficial relationship between the uses of land and buildings and protect landowners from adverse impacts of adjoining development;
- To protect the County from fire, flood, panic, and other dangers;
- To provide sound, sanitary housing in a suitable and healthy living environment within the economic reach of all County residents;
- To encourage economic development activities that provide desirable employment and a broad, protected tax base;
- To prevent the overcrowding of land;

- To lessen the danger and congestion of traffic on the streets, and to insure the continued usefulness of all elements of the transportation system for their planned functions;
  - To insure the social and economic stability of all parts of the County;
  - To protect against undue noise, and air and water pollution, and to encourage the preservation of stream valleys, steep slopes, lands of natural beauty, dense forests, scenic vistas, and other similar features;
  - To provide open space to protect scenic beauty and natural features of the County, as well as to provide recreational space; and
  - To protect and conserve the agricultural industry and natural resources. PGCC § 27-102(a).
- (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 Type 2 Tree Conservation Plan; and
- (7) The proposed site plan demonstrates the preservation and/or restoration of the regulated environmental features in a natural state to the fullest extent possible in accordance with the requirement of Subtitle 24-130(b)(5). PGCC § 27-317.<sup>8</sup>

In the Open Space Zone, a sanitary landfill or rubble fill use may be permitted as a temporary special exception. Among other things, when reviewing a sanitary landfill application for compliance with the required findings set forth in PGCC § 27-317(a)(4)(5), the District Council shall consider a current, Countywide inventory of the locations, dates of approval, and conditions of approval concerning haul routes and estimated loads per day for all approved, nonconforming,

---

<sup>8</sup> § 27-317(b) is inapplicable because the site is not in the Chesapeake Bay Critical Area Overlay Zone.

and pending Special Exceptions for sand and gravel wet-processing, sanitary landfills and rubble fills, and surface mining, as indicated by the record in the case. PGCC §§ 27-406 (a)(b), 27-441(b).

#### E. Standard of Review

A special exception allows the local legislature to set some uses as *prima facie* compatible for a given zone, subject to a case-by-case evaluation to determine whether the use would result in an adverse effect on the neighborhood (other than any adverse effect inherent in that use within the zone), such that would make the use actually incompatible. Because special exceptions are created legislatively, they are presumed to be correct and an appropriate exercise of the police power absent *any* fact or circumstance negating the presumption.<sup>9</sup> *Zimmer Dev. Co.*, 444 Md. 490, 514–515; 120 A.3d 677, 690–691 (2015) (citations and footnotes omitted).

In *Schultz v. Pritts*, 291 Md. 1, 15, 432 A.2d 1319, 1327 (1981), the Court of Appeals described the required analysis for special exceptions as follows:

These cases establish that a special exception use has an adverse effect and must be denied when it is determined from the facts and circumstances that the grant of the requested special exception would result in an adverse effect upon adjoining and surrounding properties unique and different from the adverse effect that would otherwise result from the development of such a special exception use located anywhere within the zone. Thus, these cases establish that the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effect above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.

In subsequent cases, the Court of Appeals has explained that the *Schultz* comparison for special exception does not entail a comparative geographical analysis which weighs the impact at

---

<sup>9</sup> The Land Use Article defines a special exception as a specific use that 1) would not be appropriate generally or without restriction; and 2) shall be based on a finding that i) the requirements of the zoning law governing the special exception on the subject property are satisfied; and ii) the use on the subject property is consistent with the plan and is compatible with the existing neighborhood. Md. Ann. Code, Land Use Article, § 1-101(p) (2012, 2015 Supp.).



the proposed site against the impact the proposed use would have at all other sites within the zone. *People's Counsel for Balt. Cnty. v. Loyola Coll. in Md.*, 406 Md. 54, 100, 956 A.2d 166, 194 (2008). Rather, this comparison “is focused entirely on the neighborhood involved in each case.” *Id.* at 102. Accordingly, even though a special exception use may have some adverse effects on the surrounding area, “the legislative determination necessarily is that the use conceptually are compatible in the particular zone with otherwise permitted uses and with surrounding zones and uses already in place, provided that, at a given location, adduced evidence does not convince the [zoning agency] that actual incompatibility would occur.” *Id.* at 106.

In *Loyola*, the Court of Appeals concluded its analysis of the *Schultz* test as follows:

With this understanding of the legislative process (the “presumptive finding”) in mind, the otherwise problematic language in *Schultz* makes perfect sense. The language is a backwards-looking reference to the legislative “presumptive finding” in the first instance made when the particular use was made a special exception use in the zoning ordinance. It is not a part of the required analysis to be made in the review process for each special exception application. It is a point of reference explication only.

*Id.* at 106-07.

The applicant satisfies its burden if it shows that the proposed use would be conducted without real detriment to the neighborhood. Once the applicant meets this threshold, the local zoning board will ascertain in each case the adverse effects that the proposed use would have on the specific, actual surrounding area. *Montgomery County v. Butler*, 417 Md. 271, 305 (2010). The District Council must address, on a case-by-case basis, whether the presumption that the special exception use is in the interest of the general welfare is rebutted. A presumption does not necessarily shift the burden of persuasion. Rather, it merely satisfies the burden of going forward on a fact presumed and *may* satisfy the burden of persuasion *if no* rebuttal evidence is introduced by the other side. Stated differently, the applicant (the party favored by the presumption), is not relieved of the requirement of presenting evidence to establish a *prima facie* case as to those issues

for which he bears the burden of proof if the adverse party sufficiently rebuts the presumption. In such instances, the presumption merely enhances the probative value of other evidence adduced.

Therefore, the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be *denied* is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have *any* adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone. *Attar v. DMS Tollgate, LLC*, 451 Md. 272, 285-87, 152 A.3d 765, 772-74 (2017) (internal citations and quotations omitted).

#### F. Neighborhood

In 2007, the neighborhood description included:

North	—	Mataponi Creek, and electrical power generation switchyard, a forest buffer, and a forested stream buffer with an adjacent rubble landfill.
South	—	An active sand and gravel operation and wet processing facility.
East	—	Agricultural land.
West	—	A PEPCO high-voltage power line right-of-way and property used for fly ash disposal owned by the Applicant. S.E. 4520, ZHE disposition recommendation, 2/5/07, p. 5.

In 2017, the neighborhood description included:

North	—	The property adjoins the Mataponi Creek and Potomac Electric Power Company (PEPCO) power transmission line corridor and substation; and mixed large acreage wooded parcels developed with single-family dwellings in the O-S Zone.
East	—	The property is partially adjoined by unnamed tributaries of the Mataponi Creek as well as two (2) forested Parcels (one of which contains a single-family home south of its shared boundary with the site) and a closed Class 3 landfill now owned by GenOn Ash Management, LLC.

- |       |   |  |
|-------|---|--|
| South | — | The Brandywine North Keys Community Park—former Special Exception (S.E. 3561) site for sand and gravel mining operation and wet processing facility.   |
| West  | — | A PEPCO high-voltage power line right-of-way and other property owned by the Applicant previously used for fly ash disposal in the O-S Zone. S.E. 4765, ZHE disposition recommendation, 9/28/17, pp. 2-3, ZHE Ex. 29, pp. 2-3. |

There is also other evidence in the record describing the neighborhood, which will be discussed *infra*.

#### G. Burden of Proof

The District Council is not persuaded that the Applicant satisfied its burden of proof to approve S.E. 4765 because the application and plans are 1) not in harmony with the purposes of Subtitle 27, and 2) not in conformance with all the applicable requirements and regulations of Subtitle 27. Therefore, the District Council is not persuaded by the evidence that the proposed sanitary landfill would be conducted without real detriment to the neighborhood.

- Site Plan Approval in S.E. 4520

The Applicant failed to comply with the site plan in Condition 1. i., of S.E. 4520. When the site plan was approved in 2007 for the use in S.E. 4520, the District Council concluded that “the existing and proposed ash mounds at the site are (or will be) unacceptably high, distracting from views of the site on nearby roads and properties.” ZHE Ex. 53, p. 1. Conditions 1. i., provided:

1. i. All future rubble mounds on the subject property shall be limited to a height of no more than 40 feet above the original grade, as measured from the base of the original barn on the subject site. The Applicant shall maintain all existing mounds at or below their current height. ZHE Ex. 53, p. 1.

Since 1991, the fly ash fill mounds were capped at 260 feet as shown in drawings 88-407-F-2, F-4, F-7, and F-8 of S.E. 4002. The same drawings were used in 2007 by the Applicant to falsely persuade the Council to approve S.E. 4520. Phase I area elevations ranged from 204 to 260 feet with the top most bench slope at approximately 250 feet. Phase II fill area elevations range

from approximately 200 to 260 feet, with the top bench slope at 253 feet. In the instant application (S.E. 4765), site plan drawings for Phase I show that the ultimate maximum grading and capping at completion will be 31 feet higher or 291 feet. Phase I fill area (including new grading and capping) has an illegal elevation of 31 feet. This illegal height increase has caused steep slope and new grading to occur around Phase I. The site plan shows 265.5 feet for Phase II. The maximum height for Phase II has already been achieved, which is directly adjacent to the Brandywine-North Keys Community Park. Both proposed height elevations for Phase I and II violate Condition 1. i., of S.E. 4520. ZHE Ex. 28, pp. 8-9. The Applicant's Civil Engineer testified that the approved site plan in S.E. 4520 was not for 291 feet. (11/16/16, Tr., pp. 56, 57, 62-65).

The District Council is not persuaded by the Applicant's explanation that Phase I had already exceeded 260 feet prior to approval of S.E. 4520.<sup>10</sup> After the District Council approved the site plan in S.E. 4520, "development and use of the property shall be in accordance with the approved site plan," except as provided for in Subtitle 27. PGCC § 27-319. The site plan approved in S.E. 4520 took precedence over any other site plan (none exists) that would apply to the property. *Id.* See also PGCC § 27-322 (No use allowed as a Special Exception, and no building or structure used in connection with that use, shall be erected, enlarged, altered, or extended **beyond the limits authorized in the approval of the Special Exception**) (Emphasis added). After the District Council took final action to approve S.E. 4520 in 2007, the Applicant knowingly violated

---

<sup>10</sup> The ZHE reviewed this application subject to PGCC § 27-323, which requires that "All alterations, enlargements, extensions or revisions of Special Exception uses (including enlargements in land area and area of improvements, revisions of a site plan and in the configuration of land area, and extensions of time) shall require the filing and approval of a new application for the applicable Special Exception use. PGCC § 27-323(a). A new application must include the entire land area covered by the original application. PGCC § 27-323(b). Moreover, the Applicant did not challenge any of the conditions imposed as part of S.E. 4520. *Exxon Co., U.S.A v. State Highway Admin.*, 354 Md. 530, 731 A.2d 948 (1999) (any challenge to a condition imposed as part of a special exception must be to the action imposing the condition by seeking judicial review at the time exception is approved).

the express terms, it agreed to, in Condition 1. i., of S.E. 4520, and other applicable requirements and regulations of Subtitle 27. *See* PGCC §§ 27-102, 27-135, 27-322, 27-324, 27-327.

S.E. 4520 was also subject to a time limit condition for the use, which provided as follows:

2. **This special exception shall expire eight years after final District Council approval action, or upon reaching site capacity to accept fly ash rubble, whichever date occurs first.**<sup>11</sup> **Applicant shall notify DER and the District Council, in writing, upon cessation of the use.** ZHE Ex. 53, Condition 2, Notice of Final Decision, 7/11/07 (Emphasis added).

By operation of law, the sanitary landfill use, as approved in S.E. 4520, ceased on July 10, 2015. Despite cessation of the use pursuant to S.E. 4520, the Applicant did not (in violation of Condition 2) provide written notification to DER and the District Council. For more than 2 years, the Applicant continued to fill the site with fly ash in violation of the express terms, it agreed to, in Condition 2 of S.E. 4520, and other applicable requirements and regulations of Subtitle 27. PGCC § 27-102, 27-319, 27-322. *See also* PGCC § 27-114 (No land, building, or structure shall be used in any manner which is not allowed by this Subtitle).

For these reasons, the application and plans are also not in harmony with the purposes of Subtitle 27, because they 1) do not protect and promote the health, safety, morals comfort, convenience, and welfare of the present and future inhabitants of the County, 2) do not protect against undue noise, and air and water pollution, and to encourage the preservation of stream valleys, steep slopes, lands of natural beauty, dense forests, scenic vistas, and other similar features, 3) do not provide open space to protect scenic beauty and natural features of the County, as well as to provide recreational space, and 4) do not lessen the danger and congestion of traffic on the streets, and to insure the continued usefulness of all elements of the transportation system for the planned functions. PGCC § 27-102(a).

---

<sup>11</sup> By County Code, the District Council shall determine the validity period for a sanitary landfill. PGCC § 27-406(a)(b).

Assuming, *arguendo*, the District Council was persuaded by the Applicant's explanation of why Phase I and II exceeded the height elevations of the approved site plan in S.E. 4520, the Council is still not persuaded (for the same reasons above) that the Applicant satisfied its burden of proof to approve S.E. 4765. Regardless of which site plan takes precedence, the height increase (not authorized by the Council) has caused steep slope and new grading to occur around Phase I, and when the use ceased pursuant to the express terms and conditions of S.E. 4520, the Applicant failed to provide written notification to DER and the District Council. Moreover, even accepting, *arguendo*, the Applicant's version of the site plan, for more than 2 years, the Applicant continued to fill the site with fly ash in violation of the express terms, it agreed to, in Condition 2 of S.E. 4520, and other applicable requirements and regulations of Subtitle 27.

- 2013 Subregion 6 Master Plan

A special exception for a proposed sanitary landfill *may* be approved if the District Council finds that the proposed use will not substantially impair the integrity of the 2013 Subregion 6 Master Plan. PGCC § 27-317(a)(3). When statutes link planning and zoning, Master Plans are elevated to the level of true regulatory devices. *HNS Dev., LLC v. People's Counsel for Balt. County*, 425 Md. 436, 42 A.3d 12 (2012), affirming *HNS Development, LLC v. People's Counsel for Baltimore County, et al.*, 200 Md. App. 1, 24 A.3d 167 (2011), citing *Mayor & City Council of Rockville v. Rylyns Enters., Inc.*, 372 Md. 514, 814 A.2d 469, (2002). Plans that do not conform to the Master Plan must be rejected, and nonconformance may serve as an independent basis of denial. *Id.*, citing *Maryland-National Capital Park & Planning Commission v. Greater Baden-Aquasco Citizens Association*, 412 Md. 73, 985 A.2d 1160 (2009), *Coffey v. Maryland-National Capital Park & Planning Commission*, 293 Md. 24, 441 A.2d 1041 (1982). When S.E. 4520 was approved in 2007, the property was subject to the land use designations in the 1993 Subregion 6 Master Plan (1993 Plan). The 1993 Plan retained the property in the Open Space Zone and

designated land use as Low-Rural residential (*i.e.*, up to .2 dwelling units per acre). The 1993 Plan was replaced in May 2013, by the Subregion 6 Master Plan. In the 2013 Subregion 6 Master Plan, the District Council retained the property in the Open Space Zone but changed the *future* land use designation from Low-Rural residential to Rural. 2013 Subregion 6 Master Plan, p. 40. The future land use designation for the property provides as follows:

<u>Land Use Designation</u>	<u>Intent/Types of Land Uses</u>
Rural	Agricultural land (cropland, pasture, farm fields) forest, very low-density residential. The county's intent is for these areas to remain rural and to conserve these areas' natural resources, primarily forest and forest resources, for future generations. New residential development is permitted at a maximum density of one dwelling unit per five acres. 2013 Subregion 6 Master Plan, Table 7: Future Land Use Map Designations, p. 40.

In May 2014, the County adopted Plan Prince George's 2035 General Plan (2014 General Plan). In the 2014 General Plan, the future land use designation for the property provides as follows:

<u>Designation</u>	<u>Description</u>
Rural and Agricultural	Low-density residential uses with areas of agricultural and forestry production. Agricultural land (cropland, pasture, farm fields), forest, and very low-density residential. 2014 General Plan, Table 14, p. 100.

The proposed sanitary landfill and rock crusher for the subject property, for 8 or 10 years (or perhaps more),<sup>12</sup> will substantially impair the integrity of the 2013 Subregion 6 Master Plan. The 2013 Plan expressly designated this subject property as Rural, with an express intent for the type of land uses to be, agricultural land (cropland, pasture, farm fields) forest, and very low-density residential. The county's intent is for these areas to remain rural and to conserve these areas' natural resources, primarily forest and forest resources, for future generations. New residential development is permitted at a maximum density of 1 dwelling unit per 5 acres. 2013 Subregion 6 Master Plan, Table 7: Future Land Use Map Designations, p. 40. The 2014 General Plan also designates the property as Rural. 2014 General Plan, Table 14, p. 100. A proposed sanitary landfill and rock crusher, for 8 or 10 years (or perhaps more), substantially impairs the integrity of the 2013 Master Plan because the proposed use does not conform to the Plans' express future land use designation, intent and types of land uses for the subject property.

Moreover, a proposed sanitary landfill and rock crusher for the subject property, for 8 to 10 years (or perhaps more), are not in harmony with the purpose of Subtitle 27, because it 1) does not implement the 2013 Master Plan and the 2014 General Plan as described above, and 2) does not protect against undue noise, and air and water pollution, and to encourage the preservation of stream valleys, steep slopes, lands of natural beauty, dense forests, scenic vistas, and other similar features intended for the subject property in the 2013 Master Plan and 2014 General Plan.

Furthermore, implementation of the 2013 Master Plan has occurred at this neighborhood's location in the Open Space Zone. The adjoining Brandywine-North Keys Community Park, includes recreational amenities such as a football field, softball field, soccer field, little league baseball field, a playground, a loop trail and picnic shelter, some of which were added after

---

<sup>12</sup> The record indicates that the Applicant intends to seek another extension in 10 years if the instant request is approved. (11/16/16 Tr., p. 96).



approval of S.E. 4520, therefore, actual incompatibility would occur by granting approval of a sanitary landfill and rock crusher because it would adversely affect the health, safety, and welfare of the residents in this area and would be detrimental to the use and/or development of adjacent properties and the general neighborhood in a manner unique and different from the adverse impact which would otherwise result if the proposed use were located elsewhere within the Open Space Zone.

#### H. Adverse Effects

Assuming, *arguendo*, that the application and site plans for the proposed sanitary landfill and rock crusher conformed to all applicable requirements and regulations of Subtitle 27, facts and circumstances show that the proposed sanitary landfill and rock crusher should be denied because if approved, the proposed use would result in an adverse effect upon this neighborhood unique and different from the adverse effect that would otherwise result from such a use located elsewhere within the Open Space Zone. *Schultz*, 291 Md. 1, 15, 432 A.2d 1319, 1327. *See also* PGCC §§ 27-102, 27-317(a)(4)(5), 27-406 (i).

The proposed sanitary landfill and rock crusher for the subject property is adjoined by, among other things, Mataponi creek, mixed large acreage wooded parcels developed with single-family dwellings, unnamed tributaries of the Mataponi Creek, 2 forested parcels (one of which contains a single-family home south of its shared boundary with the site), a closed Class 3 landfill, a rubble fill, the Brandywine-North Keys Community Park<sup>13</sup> and former sand and gravel mining operation and wet processing facility. The site is also adjoined by the Spirit of Faith Christian Center and dozens of homes are within a half-mile radius of the site. ZHE S.E. 4520, p. 5 and S.E.

---

<sup>13</sup> Brandywine-North Keys Park consists of a softball field, a football/soccer field, a loop trail and a picnic shelter. A playground and a little league baseball field were added after approval of S.E. 4520. (11/16/16, Tr., pp. 69, 74-76).

4765, pp. 2-3, ZHE Ex. 28, Planning Department Slides 1-8, Attachment 1-Staff's Inventory list for Mining, Landfill, Rubble fill, and Wash Plant sites, ZHE Ex. 29, pp. 2-3, ZHE Ex. 28, ZHE Ex. 72, Assessment of Drinking Water Wells, Table 3-1).

In 2011, approximately halfway through the 8 year validity period of S.E. 4520, the State of Maryland, Department of the Environment (MDE), filed a Complaint for Injunctive Relief and Civil Penalties against the Applicant in the United States District Court for the District of Maryland relating to the Brandywine site, alleging violations of the Clean Water Act, 33 U.S.C. § 1311 and Title 9, Subtitle 9, of the Environment Article and regulations promulgated under those laws due to alleged discharge of pollutants to waters of the State. ZHE Ex. 55, p. 13. The Complaint, in part, was based on a review of the quarterly Discharge Monitoring Reports submitted to MDE and other quarterly and annual monitoring reports submitted by the Applicant. MDE determined that wastewater discharges from monitoring points at the Brandywine site have at times exceeded ambient surface water quality standards for cadmium and/or selenium. MDE also determined that leachate has entered groundwater and is causing the MCL for cadmium to be exceeded at times at certain groundwater monitoring points, as were federally recommended secondary standards for manganese, sulfate, iron, TDS, aluminum and chloride. ZHE Ex. 55, pp. 12-13, (11/16/16, Tr., pp. 129-138). MDE and the Applicant signed a Consent Decree in 2013,<sup>14</sup> “regarding the disposal of coal combustion byproducts and the control of water pollution” at the Brandywine site. ZHE Ex. 55. Water pollution occurs when liquid such as rain water passes through the disposal areas because it can then flow out as leachate<sup>15</sup> containing pollutants, and enters nearby surface and

---

<sup>14</sup> The scope of the Consent Decree was for 48 months (May 2013 to May 2017). The Consent Decree did not relieve the Applicant from local law, regulations or permits. ZHE Ex. 55, pp. 20-21. During the scope of the Consent Decree, the Applicant filled the site with fly ash for more than 2 years without a valid Special Exception from the County and in violation of site plan approval in S.E. 4520.

<sup>15</sup> Leachate is the liquid that drains or leaches from a landfill.

groundwater. ZHE Ex. 62. MDE's approval of the Applicants' plans and specifications pursuant to the Consent Decree did not warrant that the plans and specifications will be successful in controlling water pollution or reducing permit violations. ZHE Ex. 55, p. 21. EarthReports, Inc., d/b/a Patuxent Riverkeeper, a party of record in S.E. 4765, was a Plaintiff Intervenor in the federal action brought by MDE against the Applicant. Patuxent Riverkeeper was also an intervenor in the Consent Decree. ZHE Ex. 62, (11/16/16, Tr., pp. 129-138).

Dr. Henry Cole, an expert of environmental and atmospheric science,<sup>16</sup> testified in opposition. He visited the site on December 7, 2010 and prepared a video of the ash blowing around the surface of the site and in the air beyond the site. ZHE Ex. 65, (11/16/16, Tr., pp. 141-142). Dr. Cole indicated it was a windy day with wind speeds over 20 mph and after reviewing 30 years of weather data he determined that similar wind gusts occur "approximately 300-500 hours per year." (11/16/16, Tr., pp. 144).

Dr. Cole further testified as follows:

As you can see the site which we've documented releases of ash from is ... directly adjacent within several hundred feet of a little league baseball field and just south of the baseball field is a playground area where little kids ... [play] baseball and [play] in the playground there. There is another baseball field further to the south near North [Keys] Road and also the soccer field is labeled....

Every time I've been there, there have been kids playing.... [P]art of my concern from a zoning standpoint is not just the playgrounds ... [b]ut the fact that this particular area has a very dense assortment of either operating or planned energy units all of which are potential, which are polluters such as the existing Cedarville Road power plant ... and [t]he North [Keys] Energy Center, which is just a mile to the South, I guess ... of this site ... [and] is now under construction.

Then you have another facility being built in Brandywine. The Brandywine Mattawoman Power Plant within a mile of the North [Keys] plant. So there is a cluster of polluting facilities and the kind of pollution that comes from the power plants, oxides of nitrogen, have an effect on surface water, on wetlands. The deposition occurs and any ash that's released will have another effect not only on any people who are exposed or properties who are exposed, but also the wetlands and the surface water that's been talked about previously....

---

<sup>16</sup> ZHE Ex. 64 (Resume of Dr. Henry S. Cole).

[F]ly ash is very fine particles.... [T]he majority of particles are in the 10 micrometer[,] 2.5 micrometer, and less, and those are respirable particulates. Those go deep into the respiratory system, a number of them contain ... metals.... Things like arsenic, lead, chromium, cranium, barium, concentrated and in fact were detected by NRG's laboratory in the fly ash.... [These particles] would be either inhaled[,] and under certain conditions[,] or deposited.... [T]hese metals don't break down over time. This landfill has been operating for 40 – something plus years and we have seen the evidence ... that the materials ... can be blown off the coal ash surface and ... because these materials are probably deposited over many, many years, they build up in the soil, they build up on the wetlands, they build up in perhaps residential gardens in the area and I'm very concerned about another 10 years of adding more to that. (11/16/16, Tr., pp. 147-150).

Pursuant to the Applicant's Fugitive Dust Plan, employees at the site are responsible for wetting the fly ash piles in the event of winds above 10 miles per hour. (11/16/16 Tr., p. 47). However, employees are only on site weekdays from 7 AM to 5 PM. *Id.* at 34, 44. In the event of high winds outside these hours, the Applicant's site manager, instructs employees to travel to the site and wet the ash. *Id.* at 47. The site manager admitted it takes at least 1 hour to respond to windy conditions—30 minutes for employees to reach the site and 30 minutes to fill the water truck. (1/25/17 Tr., p. 57). Four days after Dr. Cole's testimony, the site manager took his own video of the site to duplicate wind conditions. (1/25/17 Tr., pp. 51-51), ZHE Ex. 78. The video does not represent a random observation of the site because the site manager, before manufacturing the video, directed employees to wet the coal ash to control the dust. (1/25/17 Tr., p. 55).

Dr. Sacoby McGale Wilson, an expert in environmental health science,<sup>17</sup> testified about the adverse impact the use has on those in the area from an environmental justice perspective.<sup>18</sup> Dr. Wilson defined "environmental justice" as both a social and scientific movement that addresses

---

<sup>17</sup> ZHE Ex. 67 (Resume of Dr. Sacoby McGale Wilson). Recognizing that the definition of environmental justice may not necessarily be an adverse impact inherently associated with a sanitary landfill use, Dr. Wilson's expert testimony is probative and relevant concerning multiple pollution sources and the cumulative impact on public health, air quality and water quality. (11/16/16 Tr., pp. 153-202), ZHE Ex. 56, pp. 7-9.

<sup>18</sup> In Maryland, there is an Environmental Justice Commission, which consists of 20 members. Md. Ann. Code, Envir., § 1-701 (2013 Repl. Vol., 2017 Supp.).

the exposure profile for marginalized communities (poorer, or those on well and septic, or minority, etc.) to uses such as the one at issue. Dr. Wilson agreed with Dr. Cole that the particulate matter associated with the fly ash fill could negatively impact the health of those that reside in the area, especially children. Dr. Wilson expressed his concern with the cumulative impact of other similar uses such as the Panda facility and the planned Mattawoman facility and the proposed fill. Dr. Wilson concluded that when you have multiple pollution sources, those sources have a cumulative impact on public health, air quality and water quality. (11/16/16, Tr., pp. 170-174), ZHE Ex. 56, pp. 7-9.

Mr. Harry Roth, an expert in community planning (area of emphasis being the development of comprehensive plans and zoning ordinances),<sup>19</sup> testified that Applicant has not met its burden of proof. Mr. Roth has a Master's Degree from Penn State in urban and regional planning. He is a member of the American Institute of Certified Planners and he has worked for the Maryland National Capital Park and Planning Commission. He has been a government planner for 7 years and a private consultant for the last 30 years. Mr. Roth reviewed the application for S.E. 4765, Staff Report, excerpts of Subtitle 27, the consent decree, the nature and extent of contamination study, the scope of work, various aerials, plans and maps and he visited the site in September 2016.

On direct examination, Mr. Roth testified, in part, as follows:

**Peters:** Are you familiar with the Zoning Ordinance of Prince George's County?

**Roth:** Yes.

**Peters:** Specifically, are you familiar with the requirements for approval of a special exception under the Prince George's County Zoning Ordinance?

**Roth:** Yes.

**Peters:** Who has the burden of proof in a special exception hearing?

**Roth:** The ordinance requires that the applicant demonstrate compliance with the Zoning Ordinance.

---

<sup>19</sup> ZHE Ex. 68 (Resume of Harry Roth).

**Peters:** Based on the documents you have reviewed and listening to previous testimony, what opinion, if any, do you have about whether or not the applicant has demonstrated a practical ability to comply with the requirements under the Prince George's County Zoning Code?

**Roth:** I don't believe they have demonstrated it.

**Peters:** And based on the documents you have reviewed and listening to previous testimony, what opinion if any, do you have about whether the applicant has addressed the public health and safety impacts from their past noncompliance?

**Roth:** Again, I don't believe they have.

**Peters:** Based on your professional experience and expertise in this field, do you have an opinion on whether this special exception should be granted today?

**Roth:** I believe it should be denied today.

**Peters:** Why is that?

**Roth:** The applicant must comply with what's called the general criteria. As someone who has written many Zoning Ordinances, I know what the purpose of those criteria are. They are an ability to allow very broad discretion by a governing body in ruling on a land use case. Language like health, safety and welfare, general public welfare, compatibility with adjoining properties, compliance with statutes, conformance with planning concepts and plans. These are all techniques that are used to give very broad discretion to a Zoning Hearing Examiner and to a governing body in regulating that particular land use. Section 27-317 of the Zoning Ordinance lists those general criteria and the applicant must comply with every one of them.

Well, in looking at them, let's start with the first one. The proposed use in the site plan be in harmony with the purpose of this subtitle. When you look at the purposes of the subtitle, which is Section 27-102, there are several that are very relevant in this particular case. The first is to protect and promote the health, safety, moral, comfort, convenience, and welfare of present and future inhabitants of the county. Health and safety. We've heard evidence today, documented evidence and concern about water pollution and air pollution. We have declarations by MDE that this site causes water pollution. We have an admission by the applicant in their nature of contamination study that there is water pollution. There is ground water pollution, there's surface water pollution. So we are not necessarily protecting the health and safety of the present and further inhabitants of the county.

Number 6, to promote the most beneficial relationship between uses of land and buildings and protect land owners from adverse impacts of adjoining development. The nature and extent of the contamination study has direct evidence that adjoining property owners are being adversely affected as a result of water pollution.

Number 13, to protect against undue noise and air and water pollution and to encourage the preservation of stream valleys, steep slopes, lands of nature beauty, dense forest, scenic vistas and other similar features. Again, I would emphasize air and water pollution.

We've presented testimony today that there are some real concerns about these environmental impacts. The Maryland Department of Environment has entered into this agreement with the applicant because of past practices, which have caused pollution. We have an admission by the applicant that this pollution exists. (11/16/16 Tr., pp. 205-210).

Ms. Joanne Flynn, the Vice President of the Greater Bay and Aquasco Citizens Association, testified that the area is rural and everyone is on well-water. She also indicated that she's been involved with the Association since 2000 and is very familiar with rubble fills that are in the Brandywine area, including rubble fills located off North Keys Road. The Association is very concerned about contamination of the water table and the watershed. (11/16/16 Tr., pp. 73-78).

Ms. Ann Wearmouth, Applicant's senior environmental engineer, described the components of the ash on site (which are byproducts of burning the bituminous coal) as "essentially silica, aluminum and iron, followed by various minerals, calcium, magnesium, sulphate and then the trace metals, the arsenic, selenium, cambium and such." (11/16/16 Tr., pp. 216-217). Ms. Wearmouth indicated that the key for managing this product is to keep water from percolating through the ash and leaching out metals and other constituents. Active cells are also lined so that any water that percolates through is captured in ponds and that water is treated and then released when we're sure it meets our discharge limits. Applicant is in the process of putting in a new treatment system to meet the more stringent limits on metals in the NPDES permit that we just received ... [f]rom MDE. (11/16/16 Tr., p. 217) (Emphasis added). However, Ms. Wearmouth indicated that the "nature and extent" study required by the Consent Decree has not been completed and one well on Phase 2 appears to be experiencing leakage under the liner. Ms. Wearmouth believes the water is traveling from the unlined capped area of the site (historic Phase 1), but admits no final analysis has been done. (1/25/17 Tr., pp. 27-28, 40-41).

The Applicant's Spring 2016 Nature and Extent of Contamination Study indicated as follows:

- 1) The "[p]reliminary results of groundwater monitoring indicate the presence of CCB-related<sup>20</sup> constituents in groundwater beneath the site and at the property boundaries to the northeast, south, and east" and "all groundwater beneath the site discharges to the immediately adjacent water bodies." ZHE Ex. 72, pp. 4-8.
- 2) All five surface monitoring stations had concentrations of boron, lithium, molybdenum, and potassium "more than ten times greater than the upgradient background location." *Id.* at 4-9.
- 3) Concentrations of "[b]arium, calcium, magnesium, nickel, and sodium were also greater than the background concentrations at all stations." *Id.*
- 4) One of the five off-site surface water monitoring stations detected concentrations of dissolved cadmium and selenium exceeding MDE freshwater criteria. *Id.*
- 5) The same surface water monitoring stations had the highest detected concentrations of hardness, chloride, sulfate, and total dissolved solids, *id.*, which "appear to be good indicators of CCB-related constituents" present in surface or groundwater. *Id.* at 4-6.

The Spring 2016 Study concluded that "Kevin's Creek...is likely receiving groundwater discharge beneath Phase I" and "groundwater with CCB-related constituents from beneath Phase I and Historical Areas 1 and 2 is also likely discharging to the Mataponi [sic] Creek." *Id.* at 4-10.

The Applicant's traffic study analyzed the impact of S.E. 4765, on the following intersections:

- North Keys Road/Gibbons Church Road;
- Brandywine Road (MD 381)/ Gibbons Church Road;
- Brandywine Road (MD 381)/North Keys Road;
- Crain Highway (US 301)/Brandywine Road (MD 381);
- Brandywine Road (MD 381)/Cedarville Road;
- Brandywine Road (MD 381)/Baden Westwood Road; and
- Brandywine Road (MD 381)/Croom Road (MD 382). ZHE Ex. 17.

The trucks used for hauling the 200 daily trips are either tri-axles or tractor-trailers. A bulldozer is used to spread the ash in the active Phase 2 cell, a 12-ton vibratory roller is used to

---

<sup>20</sup> Coal combustion byproducts (CCBs) are created by burning coal to produce electricity at coal-fired power plants. ZHE Ex. 29, p. 6. CCBs "contain arsenic, cadmium, lead, mercury, copper, selenium, zinc, and other pollutants that can be toxic to humans, aquatic life, and wildlife." ZHE Ex. 55, ¶ 11).



compact it, and a water truck is used for compaction and for dust control. A temporary, movable rock crusher will be utilized as necessary. (11/16/16 Tr., p. 35). Trucks are loaded with fly ash at one of the two generating facilities and hauled to the site in marked trucks owned by Applicant's contractors. The trucks coming from Chalk Point and Morgantown would use the following haul route: Eagle Harbor Road toward Brandywine Road (MD 381); right on MD 381 to North Keys Road; right on North Keys Road to Gibbons Church Road; left into the site. (11/16/16 Tr., p. 57).

The Applicant's traffic study indicates that 35% of the ash will come from the Chalk Point Plant in Aquasco, Maryland and 65% would come from the Morgantown Plant in Newburg, Maryland (Charles County), and that the haul route would continue to be north along Brandywine Road and east on North Keys Road to the site. ZHE Ex. 17, pp. 1, 18. The traffic study indicated that truck trips were 30-35% below the 100 truckloads projected (from January 2014 to March 2015) but that was due to maintenance activity at the Morgantown site when the Applicant's enhanced power production/processing equipment had to be shut down. The traffic study also assumed that there could be a 20% growth in both site traffic and in prevailing through traffic on the study area roadways over the eight-to ten-year life of the proposed sanitary landfill use. The capacity analysis shows that traffic operations at all study area intersections would meet the County's planning standards except for US 301 (Crain Highway) at MD 381 (Brandywine Road) during the morning peak hour only. *Id.* at 20.

The record indicates that the Applicant intends to seek another extension in 10 years from this approval. (11/16/16 Tr., p. 96). The Applicant states that while there are no other fly ash sites in the County to accommodate ash from Chalk Point and Morgantown Generating Stations, the only need for the County's site is because "tipping fees" would double to utilize a site outside of the County, which would result in high power costs to customers. ZHE Ex. 29, Applicant's Amended Statement of Justification, p. 26.

In reviewing the application for compliance with the required findings set forth in PGCC § 27-317(a) (4) (the proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area) and (5) (the proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood), the District Council shall consider the Countywide inventory of the locations, dates of approval, and conditions of approval concerning haul routes and estimated loads per day for all approved, nonconforming, and pending Special Exceptions for sand and gravel wet-processing, sanitary landfills and rubble fills, and surface mining, as indicated by the record in the case.<sup>21</sup> PGCC § 27-406(i). As of June 12, 2016, approximately 26 known mining, landfill, rubble fill, and wash plant sites surround the proposed sanitary landfill and rock crusher. Surface Mining is the extraction of natural materials or deposits from the earth (such as sand, gravel, clay, rock, stone, earth, or topsoil). PGCC § 27-107.01(a) (230). Several of these known uses on the County Inventory Map have existing or projected haul routes ranging from 100 to 200.<sup>22</sup> ZHE Ex. 28, Staff Attachment 1 – County Inventory & Map. In addition, 5 large fossil fuel-fired power plants are planned for construction within a 13-mile radius of the proposed sanitary landfill and rock crusher. ZHE Ex. 56(a), p. 8.

Based upon the facts and circumstances described above, the District Council finds:

1. That, although there is some testimony that lacked adequate relevancy or probative value, there is substantial relevant, competent, and probative evidence that granting the proposed sanitary landfill and rock crusher would adversely impact the surrounding properties in a manner unique and different from the adverse impact which would otherwise result if the proposed use were located elsewhere within the Open Space Zone.
2. That, given the existence of surrounding/adjoining mining (active and pending), landfill, rubble fill, and wash plant sites with existing haul routes (and other

---

<sup>21</sup> The ZHE's recommendation of approval was erroneous as a matter of law because it failed to consider the Countywide inventory when reviewing the application for compliance with the required findings set forth in PGCC § 27-317(a) (4) and (5). ZHE Decision, 9/28/17. Because the District Council is not approving the application, it need not address § 27-406 (j) and (k).

<sup>22</sup> Some of the mining sites are pending. ZHE Ex. 28.

fossil fuel-fired power plants), granting the proposed sanitary landfill and rock crusher would have a cumulative impact on this rural neighborhood because of an increase of heavy truck traffic, dust, and noise and would adversely affect the health, safety, and welfare of the residents in this area and would be detrimental to the use and/or development of adjacent properties and the general neighborhood in a manner unique and different from the adverse impact which would otherwise result if the proposed use were located elsewhere within the Open Space Zone.

3. That, expert testimony and other documents show water pollution pose a risk to the rural community because it relies on well-water and liners installed by the Applicant have leaked and contaminated surrounding ground water because of the configuration of this particular site, therefore granting the proposed use would adversely affect the health, safety, and welfare of the residents in this area and would be detrimental to the use and/or development of adjacent properties and the general neighborhood in a manner unique and different from the adverse impact which would otherwise result if the proposed use were located elsewhere within the Open Space Zone.
4. That, given the adjoining Brandywine-North Keys Community Park, including recreational amenities such as a football field, softball field, soccer field, little league baseball field, a playground, a loop trail and picnic shelter, some of which were added after approval of S.E. 4520, actual incompatibility would occur by granting the proposed use because it would adversely affect the health, safety, and welfare of the residents in this area and would be detrimental to the use and/or development of adjacent properties and the general neighborhood in a manner unique and different from the adverse impact which would otherwise result if the proposed use were located elsewhere within the Open Space Zone.
5. That, under the facts in the record, including Applicant's violation of prior conditions of approval, conditional approval of the proposed sanitary landfill and rock crusher would not adequately protect the health, safety and welfare of the residents in this area.

NOW, THEREFORE, BE IT ORDAINED AND ENACTED:

SECTION 1: As expressly authorized by the Regional District Act within Titles 22 and 25 of the Land Use Article of the Annotated Code of Maryland, and Subtitle 27 of the Prince George's County Code, the application requesting approval of a special exception for a sanitary land fill and rock crusher, located in the Open Space Zone, at 11710 North Keys Road, Brandywine, Maryland, in Councilmanic District 9, is hereby, DENIED.

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

ENACTED this 26<sup>th</sup> day of March, 2018, by the following vote:

In Favor: Council Members Davis, Franklin, Glaros, Harrison, Lehman, Patterson, Taveras,  
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: \_\_\_\_\_  
Dannielle M. Glaros, Chair

ATTEST:

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