

Case No. S.E. 4792
VSE 4792 (withdrawn)
(Ernest Maier Concrete
Batching Plant)

Applicant: Ernest Maier, Inc.

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

ORDER OF DENIAL

IT IS ORDERED, that Special Exception 4792, a request to co-locate a concrete batching plant with an existing concrete block plant in the I-2 (Heavy Industrial) Zone, located at the intersection of Kenilworth Avenue and Upshur Street, Bladensburg, Maryland, in Councilmanic District 5, is hereby DENIED.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Introduction

Currently, Applicant, Ernest Maier, Inc., operates a concrete block plant at 4100 Kenilworth Avenue. The existing plant makes concrete blocks 20 hours per day, Monday through Friday, and 10 hours on Saturday.¹ To mix things up, Applicant would like to co-locate a concrete batching plant to make ready-mix concrete.

Concrete or cinder blocks are made different than ready-mix concrete. Concrete blocks are made with sand, stone, and light weight aggregate. Trucks deliver cement to a silo, it goes into a mixer, water is added, the air is vibrated out, and the blocks are steamed by a 180-degree steam generator. Fourteen hours later, concrete or cinder blocks are created and placed on the property. Applicant sells about 8 ½ million units of concrete or cinder blocks per year. (8/22/2017, Tr., pp. 6-17).

¹ The 20-hour day runs 5:30 am to 1:00 am the next day. (8/22/2017, Tr., p. 10).

On the other hand, ready-mix concrete will be produced on site but shipped off-site where it will be poured in form on site. Components used to make the concrete or cinder blocks will be used to make the ready-mix concrete, except more cement and more water is required to make ready-mix concrete. Components are placed into barrels attached to trucks, water is added and then the cycle mixer in the barrels are activated to keep the concrete from hardening. Trucks must depart from the site and deliver the ready-mix concrete within 1 ½ hour or the concrete hardens and must be jackhammered out of the barrel. Applicant's goal is to produce ready-mix concrete to accommodate 200 yards a day or 250 yards in peak months. To cement this goal, the proposed batching plant operation will generate 40 additional truck trips between the hours of 6:00 am to 8:00 am, 10:00 am to 12:00 pm, and 1:00 pm to 3:00 pm. Twenty (20) trucks will bring in raw materials to make the concrete and 20 trucks will deliver the concrete off-site. (8/22/2017, Tr., pp. 6-17, 27).

Ready-mix concrete is very different from producing concrete or cinder blocks. Concrete or cinder block trucks leave the site within ½ hour of each other. Ready-mix concrete trucks can only be loaded 1 truck at a time. A truck is required to idle on site to allow the barrel to spin to prevent the concrete from hardening. A truck is also subject to a pre-trip inspection. An outbound trip will take 45 minutes, and an inbound trip will take 45 minutes. When a truck returns to the site, left over ready-mix concrete is removed from the barrel and placed in a recycling pit. The truck is reloaded with ready-mix concrete and the outbound process starts over. (8/22/2017, Tr., pp. 6-17).

For the reasons set forth below, the Examiner's approval of the special exception is REVERSED.^{2,3}

B. Procedural Background

In December 2016, Applicant filed an application for a special exception and an application for variances (the application) to co-locate a concrete batching plant with its existing concrete block plant. The application was accepted for review on or about January 9, 2017. ZHE Ex. 1.

In June 2017, Planning Department's Technical Staff recommended approval of the application. Staff's report was based on Applicant's original application and site plan—not the revised site plan considered by the Zoning Hearing Examiner (Examiner). ZHE Ex. 18, 28(a-f). Planning Board did not hold a hearing on the application. ZHE Ex. 61.

In August and September 2017, the Examiner held hearings on the application. The application was opposed by Port Towns Environmental Action, *et al.* (Opposition). (8/2/2017, Tr.), (8/22/2017, Tr.), and (9/6/2017, Tr.), ZHE Ex. 59.

² 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"); *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).

³ 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. District Council Rules of Procedure Rule 6(f).

On November 9, 2017, the Examiner recommended approval of the application, subject to conditions. ZHE Decision, 11/9/2017.

On December 11, 2017, Opposition filed timely exceptions to the Examiner's recommendation of approval. Opposition Exceptions to Examiner's Decision, 12/11/2017. Applicant filed a written response to Opposition Exceptions on April 11, 2018. Applicant's Response, 4/11/2018.

On April 16, 2018, the District Council held oral arguments on the exceptions filed by Opposition. After the hearing, the District Council took the matter under advisement. (4/16/2018, Tr.).

On May 7, 2018, the District Council remanded the application to the Examiner. The Council ordered the Examiner to do the following:

1. Apply the appropriate standard of review for a special exception;
2. Take additional evidence from Applicant on legal justification for a 100-foot setback variance as opposed to a 300-foot setback variance;
3. Take additional evidence from Applicant on distances from all plant components, including the proposed truck queuing area and loading spaces, to special exception boundary lines adjoining industrial and commercial properties shown on Applicant's revised site plan;
4. Take additional evidence from Applicant on distances from all plant components, including the proposed truck queuing area and loading spaces, to boundary lines of the I-2 Zone property adjoining industrial and commercial properties shown on Applicant's revised site plan;
5. Take additional evidence from Applicant on affiliate ownership of adjoining or adjacent industrial and commercial properties, and the applicability, if any, of zoning merger, which is a doctrine that allows a property owner to merge adjacent, undersized parcels of land to form a tract that conforms to zoning regulations. *Remes v. Montgomery Cnty.*, 387 Md. 52, 874 A.2d 470 (2005), *Friends of the Ridge v. Balt. Gas & Elec. Co.*, 352 Md. 645, 724 A.2d 34 (1999);

6. Take additional evidence from Applicant regarding how the *subject property* is unique and unusual in a manner different from the nature of *surrounding properties* such that the uniqueness and peculiarity of the subject property causes PGCC §§ 27-343.02(a)(1) and 27-474(a)(1) to impact disproportionately upon the subject property; and
7. Take additional evidence from Applicant regarding *practical difficulty* that would result from the disproportionate impact of PGCC §§ 27-343.02(a)(1) and 27-474(a)(1) caused by the subject property's uniqueness. Notice of Decision, Order of Remand, 5/17/2018.

On June 6, 2018, Applicant filed a "revised" application and amended Statement of Justification. ZHE Ex. R. 6-8.

On June 19, 2018, the Examiner held a hearing on Council's Order of Remand. (6/19/2018, Tr.). At the hearing, Applicant formally "amended" the "revised" application filed on June 6, 2018. ZHE Ex. R. 13, R. 14. Over the objection of Opposition, the Examiner allowed Applicant to 1) amend its application for special exception to include a portion of the adjoining Lot 3 and 2) withdraw prior applications for variances pursuant to PGCC §§ 27-343.02 and 27-474(a)(1). ZHE Ex. R. 13, R. 14.

After the Examiner's hearing on remand, Applicant and Opposition each filed respective Memoranda of Law. ZHE Ex. R. 20, R. 21 and R. 22.

On August 23, 2018, the Examiner, on remand, recommended approval of the application for special exception. Examiner's Decision on Remand, 8/23/2018.

On September 21, 2018, Opposition filed exceptions to the Examiner's recommendation of approval on remand. Opposition Exceptions to Examiner's Decision on Remand, 9/21/2018. Applicant filed a Reply on February 4, 2019. Applicant's Reply, 2/4/2019.

On February 11, 2019, the District Council held oral arguments on the exceptions filed by Opposition. After the hearing, the District Council took the matter under advisement. (2/11/2019, Tr.).

C. Exceptions to Examiner's Decision on Remand

1. Withdrawal of Application

Opposition contends that, on remand, the applicant withdrew its application for special exception and submitted a materially different application. Opposition contends that because Applicant withdrew its application for special exception, a new application is not permitted under the County Code for the same use on the same land for at least 2 years. Exceptions on Remand, p. 2. Opposition is legally incorrect. Applicant formally withdrew its application for variances not the application for special exception. ZHE Ex. R. 13 (Applicant's June 19, 2018 Letter to Examiner) (...I am formally writing to amend the application for special exception...I am withdrawing the pending applications for variances...); PGCC § § 27-235, 27-230 (A variance may be granted in conjunction with its approval of a special exception or subsequent site plan amendment). Moreover, even if on remand Applicant had withdrawn its application for special exception, the 2-year limitation on filing a new application for special exception for the same use on the same land only applies after final action on a previous application. PGCC § 27-300 (Reapplication) (No new Special Exception application for the same use may be filed on the same land until two (2) years have elapsed after final action (including appellate review) on a previous application...) (Emphasis added). The application for special exception was on remand pursuant to exceptions filed by Opposition. On remand, there had been no final action on the application by the District Council. Exceptions, 2/11/2017, Order of Remand, 5/17/2018, Md. Ann. Code, Land Use Article, § 22-407, (2012, 2018 Supp.) (Final action of the District Council is subject to judicial review).

2. Amendment of Application

Prior to formal amendment of the application on June 19, 2018, previous site plans were based on the total area or configuration of property known as Lot 4. ZHE Ex. 1, 27, 28. Opposition contends that, on remand, it was error for the Examiner to allow Applicant to formally amend the application to include a portion of Lot 3—to change the total area or configuration of a property—after the case had been transmitted to the District Council. Exceptions on Remand, pp. 2-3. Opposition is legally correct.

Amendment of applications shall be subject to the following:

- (1) Amendments concerning an error, omission of fact, or other factual change not mentioned below in this Section shall be permitted at any time.
- (2) Amendments which change the total area or configuration of a property shall be made before the application is transmitted to the Council. If the area is increased, the appropriate additional filing fee shall be paid.
- (3) Amendments concerning a change in the requested use shall be accompanied by a new (revised) justification statement and shall not be permitted after the case is transmitted to the Council.
- (4) Amendments of the site plan shall not be permitted after the case is transmitted to the Council, unless the amendment has been recommended by the Technical Staff, Planning Board, or Zoning Hearing Examiner. PGCC § 27-298 (Emphasis added).

Under PGCC § 27-307, a special exception file must be transmitted to the District Council 30 days prior to the public hearing established by the Examiner under PGCC § 27-302(a), which provides

The Zoning Hearing Examiner shall establish the date of the public hearing to be held in accordance with Part 3 of this Subtitle. Subject to Section 27-303, the public hearing shall be held within one hundred and fifty (150) days of acceptance of the application by the Planning Board set forth in Section 27-296(d) (Emphasis added).

The application was accepted on January 9, 2017. ZHE Ex. 1, Application Form, 12/5/2016. The first hearing established by the Examiner, including any delays, was on August 2,

2017. Examiner's Decision, 11/9/2017, (8/2/2017, Tr.). For purposes of this application, it was deemed transmitted to the District Council 30 days prior to August 2, 2017. PGCC §§ 27-307, PGCC § 27-302(a). The Examiner held a hearing on remand in June 2018—almost a year after the case was transmitted to the Council. Before the hearing on remand, Applicant filed a “revised” and “amended” application in May 2018 and June 2018, respectively. Neither the revised or amended application was accepted by Planning Board. ZHE Ex. R. 6, R. 7, R. 8, R. 13, R. 14. Under the County Code, for each application for a special exception, the record shall include a report by the Technical Staff, which shall include Staff's recommendation. PGCC § 27-311. The record only contains a report by Technical Staff based on the original application filed in December 2016. Technical Staff Report, 6/14/2017. The record does not contain a Technical Staff report for applications filed in May or June 2018.

The District Council did not elect to review and make the final decision in this special exception.⁴ Review of this application was subject to timely exceptions filed by Opposition.⁵ After a hearing on those exceptions, the District Council found that the record lacked evidence to resolve the exceptions. The application was remanded to the Examiner, to reopen the record, for clarification and additional testimony based on the exceptions filed by Opposition. PGCC § 27-133(a)(1), Order of Remand, p. 2. The Council did not remand this application for a *de novo* proceeding.⁶

⁴ PGCC § 27-312(a)(2)(C) (In any case where, within thirty (30) days after receipt of the Zoning Hearing Examiner's decision, the District Council, upon its own motion and by a majority vote of the full Council, elects to make the final decision on the case itself).

⁵ PGCC § 27-312(a)(2)(A) (The Zoning Hearing Examiner's decision on an application for Special Exception shall be final thirty (30) days after filing the written decision, except where a timely appeal has been made to the District Council).

⁶ The Council may also remand any ... special exception for a *de novo* proceeding where there is good cause. PGCC § 27-133(a)(1). On a remand *de novo* proceeding, the application shall be remanded to the Planning Board, a new technical staff report is required, and unless amendments or procedures are limited by the order of the District Council remanding the application, it shall be treated as a new application. PGCC § 27-133(c)(1)-(3).

The formal amendment of the application on June 19, 2018—to include a portion of Lot 3—changed the total area or configuration of the special exception property almost 1 year after the application was transmitted to the District Council. PGCC §§ 27-298, 27-307, ZHE Ex. R. 13, R. 14, R. 18a-f, R. 19a-e. The Examiner erred by allowing Applicant to formally amend its application almost 1 year after the case was transmitted to the District Council. PGCC § 27-298(a)(2).⁷

3. Variance

A variance “permits a use [that] is prohibited and presumed in conflict with [an] ordinance.” *North v. St. Mary’s Cnty.*, 99 Md. App. 502, 510 (1994).⁸ The burden rests on the Applicant to overcome the presumption of conflict with the ordinance. *Id.* Opposition contends that, on remand, the Examiner erroneously concluded that the application is in accordance with all the applicable requirements and regulations of the Zoning Ordinance including all setback requirements. Exceptions on Remand, pp. 3-19. Opposition is legally correct.

A. Concrete Batching Plant

Approval of a special exception for a concrete batching or mixing plant is subject to criteria in PGCC § 27-343.02. Among other things, the following criteria must be satisfied:

Mixing plant components and other parts of the operation having the potential for generating adverse impacts (including conveying systems, concrete mixers, weighing hoppers, batching equipment, aggregate bins, truck mixing areas, truck wash-out facilities, and truck parking areas)⁹ shall be located at least three hundred

⁷ Deference is given to the Council’s interpretation of its *own* regulations. *People’s Counsel for Balt. Cnty. v. Surina*, 400 Md. 662, 682 (2007) (“When determining the validity of those legal conclusions reached by the zoning body ... ‘a degree of deference should often be accorded the position of the administrative agency’ whose task it is to interpret the ordinances and regulations the agency itself promulgated.”) (quoting *Marzullo v. Kahl*, 366 Md. 158, 172 (2001)).

⁸ The Land Use Article defines “variance” as modification only of density, bulk, dimensional, or area requirements in the zoning law that is not contrary to the public interest, and where, owing to conditions peculiar to the property and not because of any action taken by the applicant, a literal enforcement of the zoning law would result in unnecessary hardship or practical difficulty, as specified in the zoning law. Md. Ann. Code, Land Use Article, § 1-101(s) (2012, 2018 Supp).

⁹ The words “including” and “such as” do not limit a term to the specified examples but are intended to extend its meaning to all other instances or circumstances of like kind or character. PGCC § 27-108.01(a)(15).

(300) feet from the boundary lines of the subject property adjoining any land in any Residential or Commercial Zone (or land proposed to be used for residential or commercial purposes in a Comprehensive Design, Mixed Use, or Planned Community Zone), and one hundred (100) feet from the boundaries of the subject property adjoining any land in any Industrial Zone (or land proposed to be used for industrial purposes in a Comprehensive Design, Mixed Use, or Planned Community Zone). Other fixed installations (including automobile parking, settling ponds, and office uses) shall be located at least one hundred (100) feet from the boundaries of the subject property adjoining any land in any Residential Zone (or land proposed to be used for residential purposes in a Comprehensive Design, Mixed Use, or Planned Community Zone). PGCC § 27-343.02(a)(1) (Emphasis added).

On land which is located within a Chesapeake Bay Critical Area Overlay Zone, development is subject to Subtitle 5B. PGCC § 27-343.02(c). (Emphasis added).

Prior to formal amendment of the application on June 19, 2018, approval of the special exception was conditioned on separate approval of a 100-foot setback variance because, mixing plant components and other parts of the operation having the potential for generating adverse impacts were not at least one hundred (100) feet from the boundaries of Lot 4 and adjoining Lot 3. Examiner's Decision, 11/9/2017, ZHE Ex. 27a-b, 28a-f. Having determined the Examiner erred by allowing an amendment of the application almost 1 year after the case was transmitted to the District Council, it was also erroneous for the Examiner to find that no variances were needed because all components of the proposed plant are not in compliance with the 100-foot setback requirement in PGCC § 27-343.02(a)(1). Examiner's Decision on Remand, p. 20. Applicant's withdrawal of its application for the 100-foot setback variance on remand was fatal to the Examiner's approval of the special exception without a variance because all components of the proposed plant are not in compliance with the 100-foot setback requirement in PGCC § 27-343.02(a)(1). ZHE Ex. R. 13, R. 14, R. 18a-f, R. 19a-e.

Assuming *arguendo*, that the formal amendment of the application on June 19, 2018, was not prohibited under PGCC § 27-298, it was legally incorrect for the Examiner to recommend approval of the special exception. First, the formal amendment of the application did not obviate

the legal requirement for setback variances in PGCC § 27-343.02(a)(1). Second, development of the project is subject to Subtitle 5B of the Code because Lot 3 is located within a Chesapeake Bay Critical Area Zone. Examiner's Decision on Remand, pp. 1-23, PGCC § 27-343.02(c), ZHE Ex. R. 13, R. 14, R. 18a-f, R. 19a-e.

i) Lot 3

- Zoning Merger

On remand, the Examiner was ordered to take additional evidence from Applicant on affiliate ownership of adjoining properties, and the applicability, if any, of zoning merger. Order of Remand, p. 6. Opposition contends, on remand, that the Examiner erred by approving Applicant's use of a portion of Lot 3 without any findings and conclusions on the doctrine of zoning merger. Opposition also contends that Applicant's reliance on the doctrine of zoning merger is misplaced.¹⁰ Exceptions on Remand, p. 13. Opposition is legally correct.

Zoning merger allows a property owner to merge adjacent, undersized parcels of land to form a tract that conforms to zoning regulations. For two or more parcels to merge for zoning purposes, the following elements must be satisfied: (1) the parcels must be under common ownership; (2) the parcels must be contiguous; and (3) there must be some evidence of intent by the owner to merge. *Friends of the Ridge v. Balt. Gas & Elec. Co.*, 352 Md. 645, 653-62 (1999) (“[Zoning merger is] a doctrine that seeks to prevent the proliferation or use of nonconforming, undersized lots by holding that they have been combined or merged into a larger parcel.”). The Maryland cases that permit zoning merger all arose in situations in which the applicant owned the

¹⁰ Applicant conceded this point at oral argument. On remand, the Applicant argued that, through zoning merger, the I-2 zone portion of Lot 3 was merged with Lot 4, to achieve compliance with the setback requirement in PGCC § 27-343.02(a)(1). ZHE Ex. R. 20, pp. 4-5. However, at oral argument, the Applicant, through counsel, abandoned the doctrine of zoning merger. Counsel indicated the doctrine of zoning merger is moot because the owner of Lot 3 is now a co-applicant to the application obviating the need for a variance. (2/11/2019, Tr.)

properties in fee simple. *Remes v. Montgomery Cnty.*, 387 Md. 52, 87 (2005); *Friends of the Ridge*, 352 Md. at 658 (holding that the “landowner” may exercise zoning merger).

There is no common ownership of Lot 3 (I-2/C-S-C Zones) and Lot 4 (I-2 Zone). Lot 3 is owned by Maier Retail, LLC and Lot 4 is owned by Ernest Maier, Inc. ZHE Ex. 1, 30a-b, 32a-c, ZHE Ex. R. 7, 14-15, (6/19/2018, Tr., pp. 10-16). In Maryland, “a corporation is a distinct legal entity, separate and apart from its stockholders. Thus, where a corporation takes title to real property, it holds that property in its own name and right, and a stockholder, as such, does not.” *Gosain v. County Council*, 420 Md. 197, 211, 22 A.3d 825, 833 (2011) quoting *Dean v. Pinder*, 312 Md. 154, 164, 538 A.2d 1184, 1189 (1988)). Therefore, zoning merger does not apply for conformance to the setback requirements in PGCC § 27-343.02(a)(1).

The Examiner’s decision on remand was premised upon an erroneous conclusion of law because the application could not have been approved without satisfying setback requirements in PGCC § 27-343.02(a)(1).

- Co-Applicant

Amendment of the application to allow the owner of Lot 3 to become a co-applicant did not obviate setback requirements in PGCC § 27-343.02(a)(1). ZHE Ex. R. 20, p. 5.

Mixing plant components and other parts of the operation having the potential for generating adverse impacts (including conveying systems, concrete mixers, weighing hoppers, batching equipment, aggregate bins, truck mixing areas, truck wash-out facilities, and truck parking areas) shall be located at least three hundred (300) feet from the boundary lines of the subject property adjoining any land in any Residential or Commercial Zone ... and one hundred (100) feet from the boundaries of the subject property adjoining any land in any Industrial Zone. PGCC § 27-343.02(a)(1) (Emphasis added).

Mixing plant components are located at the boundary lines of Lots 4 and 3. Moreover, the portion of Lot 3 that is zoned Industrial adjoins the portion of Lot 3 that zoned Commercial. ZHE Ex. R. 13, R. 14, R. 18a-f, R. 19a-e. Having determined that there is no common ownership between Lots 4 and 3 and that zoning merger does not apply to satisfy the setbacks requirements in PGCC § 27-343.02(a)(1), Applicant's formal amendment to include a portion of Lot 3 through co-application did not obviate the need for either the 100 or 300-foot setback variances in PGCC § 27-343.02(a)(1). The formal amendment of the application show that mixing plant components and other parts of the operation having the potential for generating adverse impacts (including conveying systems, concrete mixers, weighing hoppers, batching equipment, aggregate bins, truck mixing areas, truck wash-out facilities, and truck parking areas) are not located at least 100 feet from the boundary lines of Lot 4 that adjoins Lot 3 and 300 feet from the boundary lines of the portion of Lot 3 that is zoned Commercial. ZHE Ex. R. 13, R. 14, R. 18a-f, R. 19a-e, PGCC § 27-343.02(a)(1).

The Examiner's decision on remand that no variances were needed was premised upon an erroneous conclusion of law because all components of the proposed plant are not located at least 100 feet from the boundary lines of Lot 4 that adjoins Lot 3 and 300 feet from the boundary lines of the portion of Lot 3 that is zoned Commercial. PGCC § 27-343.02(a)(1), ZHE Ex. R. 13, R. 14, R. 18a-f, R. 19a-e, ZHE Ex. 18, 28(a-f).

- Chesapeake Bay Critical Area Zone

Development of a concrete batching plant within a Chesapeake Bay Critical Area Overlay Zone is subject to Subtitle 5B. PGCC § 27-343.02(c). The Examiner's decision on remand found that the subject property was not located in the Chesapeake Bay Critical Area. Examiner's Decision on Remand, p. 20. But the amended application changed the boundary lines of the special exception property to include Lot 3. Lot 3 is on land within the Chesapeake Bay Critical Area

Overlay Zone. Therefore, pursuant to PGCC § 27-343.02(c), development of the project is subject to Subtitle 5B of the Code.

The Examiner's decision on remand was premised upon an erroneous conclusion of law because development of the concrete batching plan is subject to Subtitle 5B of the Code. Examiner's Decision on Remand, p. 20, PGCC § 27-343.02(c), ZHE Ex. R. 13, R. 14, R. 18a-f, R. 19a-e, ZHE Ex. 18, 28(a-f).

4. Special Exception

On remand, the Examiner was directed to apply the appropriate standard of review to resolve the contested nature of this special exception application. Order of Remand, pp. 7-9. Opposition contends that, on remand, the Examiner erred by failing to apply the correct or complete standard of review for a special exception. Exceptions on Remand, pp. 16-18. Opposition is legally correct.

A. Standard of Review for Special Exception

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.¹¹ *Zimmer Dev. Co.*, 444 Md. 490, 514–515; 120 A.3d 677, 690–691 (2015) (citations and footnotes omitted).

¹¹ 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.).

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 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 zoning body 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).

In Prince George's County, 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.

For the reasons stated above, and incorporated as if fully restated here, the Examiner's approval of the special exception on remand was premised upon an erroneous conclusion of law because the application and plans were not in conformance with all the applicable requirements and regulations of Subtitle 27.

B. Adverse Effects

Opposition contends that it was error for the Examiner to conclude that a proposed co-location of a concrete batching plant, 40 additional truck trips per day, to a site already supporting a concrete block plant known to be non-conforming and detrimental to surrounding properties *would not result in cumulative impacts* above and beyond those inherently associated with proposed use. Exceptions on Remand, pp. 16-18. Opposition is legally correct.

The Examiner erred by concluding that 1) “the proposed Concrete Batching Plant co-located with an existing Concrete Block Plant has not been shown to create a detriment to the neighborhood or adjoining properties above that already occurring with the existing Concrete Block Plant,” 2) “evidence was not adduced that the proposed Concrete Batching Plant co-located on property with an existing Concrete Block Plant at this location would have any adverse effects above those inherently associated with a Concrete Batching Plant irrespective of its location within the I-2 Zone,” and 3) “evidence supports the conclusion that since the two uses would share certain facilities and infrastructure, the proposed use Concrete Batching Plant will actually have fewer adverse effects at the subject location than at another 1-2 Zoned location.” Examiner's Decision on Remand, pp. 10-11. The *Shultz* comparison for special exception does not entail a comparative geographical analysis which weighs the impact at the proposed site against the impact the proposed

use would have at all other sites within the zone. *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.

There is substantial evidence in the record that co-location of the concrete batching plant with the existing concrete block plant would “adversely affect the health, safety, or welfare of residents or workers in the area;” or “be detrimental to the use or development of adjacent properties or the general neighborhood.” PGCC § 27-317(a) (4) and (5). Moreover, there is substantial evidence in the record that co-location of the concrete batching plant with the existing concrete block plant would not promote the most beneficial relationship between the uses of land and buildings and protect landowners from adverse impacts of adjoining development, or “lessen the danger and congestion of traffic on the streets”, or “protect against undue noise, and air and water pollution.” PGCC § 27-102(a) (6), (11) and (13).¹²

Summary Testimony of Reverend Charles Dockett:

Reverend Dockett is a pastor at Kingdom Missionary Baptist Church, which is located approximately 35 feet from the proposed use. The dirt accumulation and sand accumulation is a problem. Dirt and a lot of dust accumulates on the street, on the building, on the ground, and on the sidewalk. The dust is visible, you can't measure it, but the dust is white, and it gets on the grass, it turns it, and if you park outside, the dust is noticeable on your car, enough to need a car wash. It is what we are tracking into the building and being, you know, sucking through the ventilation system, the air conditioning system, we don't know what it is, and we don't know how it's going to impact us in the long run. It could be fine now, but who knows, 10, 15 years from now how that's going to impact us. If we could, if we -- if I knew for sure that the dust would be eliminated I wouldn't have a problem, but I'm sure that there is no one here in this room who can assure me of that. And so, that's the reason why I stand today to oppose the project. The Church shares the street with all the industry, and during the week it's pretty much their street, ... so, even if we're going to have a funeral or something we, we probably have it someplace else instead of having it at the church, because we don't want to interfere with what they do because I think it's almost impossible. Funeral services were possible until the last I guess 15 years, now we know it's not even possible so we don't even try.

¹² The District Council excluded incompetent, irrelevant, immaterial or unduly repetitious evidence from consideration. District Council Rules of Procedure, 6(f).

47th Street is too occupied, too congested. A lot of traffic, truck traffic. 47th Street is used to load and unload a lot of the trucks that they have, so we, you know, we don't, we have something after, after their hours, but maybe after 6 o'clock or something like that we'll have something, but we don't try to have it during the day. (8/22/2017, Tr., pp. 159-164).

Summary Testimony of Steven Weitz:

Mr. Weitz resides at 5407 Tilden Road, Bladensburg, approximately 3 blocks from the proposed use. The proposed concrete plant is in the center of an historical area and is surrounded by the Peace Cross, and the historic Bladensburg Waterfront Park, and many historical buildings, and historical memorial monuments. A heavy industrial concrete plant with heavy cement trucks going into and out of the plant every day will ruin this historical area and damage the foundations of the historical buildings. The waste water from the cement plant will run into the Anacostia River and cause environmental damage.

The proposed concrete plant is next to our downtown stores and businesses. The heavy cement trucks and dump trucks will cause major traffic problems for our local stores and businesses. The proposed concrete plant is in the center of the Peace Cross area, which already has very heavy rush hour traffic going into and out of Washington, D.C. In this area where the plant is, the Kenilworth Avenue, Route 1, Baltimore Avenue, Annapolis Road, and Landover Road all merge into this area with very heavy traffic in the morning rush hour and the evening rush hour. Every year pedestrians are killed by vehicles on Kenilworth Avenue near this proposed concrete plant site. Dump trucks and 50 big 70,000 pound cement trucks going into and out of the proposed concrete plant will make this very congested high traffic area much worse and much more dangerous. Within one block of the proposed concrete plant there is a Bladensburg Public Library, and also the Bladensburg Elementary School, with children walking to the elementary school and the Bladensburg Library. These heavy cement trucks and dump trucks will be very dangerous to our school children who are walking to the school and the library, also pedestrians in the area and vehicles in this busy downtown area. I am asking not allow the concrete plant to be built in order to protect our pedestrians, school children, and traffic vehicles, and to preserve our historical area, and downtown stores and businesses.

This is a very busy section of Upshur Street because you have Tilden Road coming down by the Town Hall, it crosses Kenilworth Avenue at a traffic light and goes straight into Upshur Street, and it cuts over to Route 1, the Peace Cross area. So, there's a lot of traffic going through there, you know, people going into and out of D.C., there's a lot of businesses along there, people are parking there, and walking there, and it's already a dangerous area. There's no sidewalk there, and it's already a very dangerous area. So, many people drive through, I drive through there every, every day, and these heavy cement trucks going into and out of that area

could just really increase it, the danger there to our Town and residents and Town, that's why I'm opposing this. (8/22/2017, Tr., pp. 128-136).

Summary Testimony of Jim Foster:

Mr. Foster is the President of the Anacostia Watershed Society. His issues are with the Anacostia River for the most part and cleaning it up. He sees this proposed use as an opportunity to improve an existing business, and extract, shall we say, some benefits for the river in particular. He is in a historic building, has been, and I have a staff of 20 in the building, has been struck six times in the last 15 years by cars at that intersection, and I'm just sort of at war with State Highways about that. I've asked them for machine gun turrets, and rumble strips, and I get neither, but some of that is because of the traffic coming out of Upshur Street, the most recent being somebody ran the stop sign there, hit the car, it spun around, knocked out my front porch.

Bladensburg got its industrial start because it was a port, and it was a port that was bigger in Baltimore in Colonial Times. Today, the river is silted in because of poor land practices, management, and such, and we really have, that's where Bladensburg got its industrial start, and we really have to embrace that. Recently the community was designated as an eco-district, and to me that means maybe some things that are different from other people in the room, but really it means how can we embrace our industrial heritage and, you know, do the things we do. We have community forklift that recycles building materials, and that's just a fabulous place; we have D.C. Materials that recycle concrete, asphalt; we have Salvation Army; we have a series of car recycling places, and believe me, they all add up to a problem for the river, but at some point if we can work in the board room with those folks and achieve some level of improvement it will be to the betterment of the river and to our communities.

In general, I support this because it is an existing member of our community, I don't receive anything from Ernest Maier, contrary to some of the rumors that other folks have said. He's given us some blocks, the impervious pavers that we've used in our property, but other than that, nothing. And I have certainly fought against other development in our watershed, which extends up into Montgomery and down into D.C., such as CSX trying to build an intermodal facility in Indian Creek, cutting down 125 acres of trees. This is an existing business that is basically changing the kind of means and methods of what they're doing, and that place has been, frankly, less than perfect with regards to housekeeping for the last 50 years, and now we have an opportunity to fix a lot of that stuff, and I support that wholeheartedly. (8/22/2017, Tr., pp. 141-145).

Summary Testimony of John Carlson:

Mr. Carlson resides at 4902 Taylor Street in Bladensburg. I would like to say something about what I know about the Ernest Maier company and the property, and then I'd like to say something positive about what I would like to see happen for the future of Bladensburg, of the Port Town area, and our whole area. I live within 1,000 feet of this, of this property. I also live downwind of this property, the prevailing winds come from the west towards the east, and that covers not only my buildings, my house, but also the, the cleaning businesses that are right nearer to Peace Cross. And this is from personal observation. Covers them with dust, ask them. There's no, there has not been any dust suppression here. Now, I have attended the town meetings when Mr. Quinn has presented his case for this Special Exception. I've read many of the materials, I'm very interested in the outcome. My training is as a physicist and mathematician. I came to this area literally 50 years ago, it was 1967, and I came to the University of Maryland College Park where I have worked for 50 years. I am a professor there, and I got two of my degrees there.

I lived for 10 years in College Park, and then I moved to Bladensburg. So, literally, I've been in Bladensburg for 40 years, so I've seen a lot of change, and I certainly know the Ernest Maier company, not just the retail part, but the concrete batching plant. What I see at the Ernest Maier company is a business that's been there since 1920s with basically no environmental controls whatsoever. I haven't seen any evidence of trying to keep the property clean, or investing in the old decrepit equipment that's inside of your block plant. I've been on every inch of your property, and I have photographic documentation, so I'm talking about what I've seen with my own eyes, it is a filthy, dirty business. I've watched the workers who don't wear hardhats, who don't have masks, breathing all of this concrete dust that whenever the winds come up it blows all over the place. I've watched the clouds of this blow; I see the old corrugated iron roofs on your buildings, and the vapor coming out of that at night and at day as you're running these buildings; I see the trucks lining up blocking Upshur Street during rush hours. I see all this, and it gives me a certain kind of shame.

So, I -- all the rainwater that comes down on this property goes one of two places, it takes all the concrete dust and it runs off into Moss Run and runs directly into the Anacostia River, and yes, I do think I know where the boundaries of, not an expert where the Anacostia Critical Watershed Areas is, and this is in that area, it flows right in there. And I have looked at it, I have seen what the sediment looks like, it's years and years and years of sediment that has rolled off this property, and then there's the pit, you have to go -- have you been on this property?

In the center of it is this pit...The water from all these piles of aggregate and crunched up cement blocks, and sand, and other things, all the water either flows off the side into Moss Run directly into the Anacostia, or it goes down this hole in the center of it, down into the ground water.

This property is located just blocks away from the harbor, our historic harbor, it's right next to the National Capital Planning Park and Planning Commission park area right there, it's next to historic buildings, the Baptist Church, Magruder House, Indian Queen Tavern, and so, it's a core area for us...

Prince George's County has voted to build a new regional library system, it is about one block and a half away from this... (8/22/2017, Tr., pp. 204-223).

Summary Testimony of Garrine Laney:

Mr. Garrine Laney resides at 5425 Varnum Street, Bladensburg. His home is approximately 1 block from the proposed use. First, my major concern is health. I shared the concerns that have been expressed about the congestion, and the amount of traffic, and the danger, and all of that, but I went over to that plant when I heard about, right after the first meeting I went over to the grounds to look around, and frankly, the shape of that plant was deplorable. And anyone talking about somebody cares, put your employees in that kind of work environment is really sad.

Secondly, I would think that -- and for that reason, promises don't have much credibility where I'm concerned with this crowd because it's clear the Code, town Codes weren't enforced, and County environmental laws or whatever were not enforced, there's no way that that place could have operated with any kind of enforcement, period. Now, they claim somebody complained, and they had someone from OSHA come out and they were shocked at what they had seen. So, and I, my concern to health, I haven't seen any independent studies, or presentation, or evidence that would suggest that we will be safe in that town with this plant expanding in the way that they are proposing. We've heard testimony from people that Ernest Maier hired, but I have no interest in that. I wanted an independent voice on this issue, and I never got it.

I want a safe place to live, and I personally have developed some health problems that is making more sense to me in light of what I saw when I went over to this plant. I oppose this. (8/22/2017, Tr., pp. 165-171).

Summary Testimony of Arlene Snadja:

Ms. Snadja manages rental properties in Bladensburg. She has signed contracts with nearly 1,000 residents of the Town of Bladensburg who have, to whom I have promised by contract to provide quality housing, safe, comfortable, quality housing.

Ernest Maier's proposed heavy industrial activity would add to our streets a procession of nearly 70,000 pound concrete mixing trucks too heavy to keep up with the speed of traffic, spewing pollutants into our air at all hours of the day. According to Ernest Maier's plans their trucks would carry concrete via whichever

roads take them to their construction sites fastest. Their trucks would take Edmonston Road, as well as Annapolis Road north and south, they would take Kenilworth Avenue east and west at their discretion at all times of the day, including the critical rush hours.

Prince George's County already has one of the highest rates in the country of nitrogen dioxide air pollution, which is linked to heart disease, stroke, and asthma, and is already in violation of National Air Quality Standards. Each Ernest Maier concrete mixing truck would contribute exponentially to the pollution in our air. The concrete batching plant itself would also contribute to our carbon dioxide emissions. Ernest Maier claims that they would participate in programs to mitigate their carbon footprint, but these programs do nothing on a local level to counteract the toxic emissions that they would produce right here in our home community. Ernest Maier has not conducted a health impact assessment, so any statements that their proposed expansion will not have adverse health impacts is baseless.

I understand that Ernest Maier has been located in Bladensburg for a long time now. I also understand that Bladensburg created this Industrial Zone, and encouraged industrial activities to set up shop there because they needed an expeditious way to make ends meet during a difficult economy. However, the existence of Industrial Zones in the midst of residential neighborhoods is one of the greatest burdens on a community that wants to maintain a good quality of life for its residents, and that wants to welcome other businesses to town.

If you approve Ernest Maier's request today you will in essence be cutting us off from the possibility of attracting other community friendly businesses that would offer true promise for healthy, smart urban growth, there would be no turning back. Once Ernest Maier's expansion is in operation they would be working hard to add more and more demand for their nearly 70,000 pound concrete shipments, and just as it has proven over the years with its current operations it will be too busy filling orders to be concerned with the filth and debris that it leaves in its wake. We should be welcoming businesses that will promote smart sustainable growth within Bladensburg, not heavy industrial businesses that will to is traffic, pollution, and blight.

My business would be one of the many that would be severely impacted by this expansion, my financial interests. (8/22/2017, Tr., pp. 175-204).

Summary Testimony of Jack Higgs:

Mr. Jack Higgs owns and operates an elevator contracting business directly across from the proposed site. I've been there for 36 years. I'm also a Bladensburg High School graduate, so I've been in the community for a long, long while, know a little bit about it. And I try to give back to the community, too. My main two concerns are traffic and dust, those two things. In the last 36 years, and especially since they have put the railroad overpass in I've noticed a big increase in the traffic,

much bigger trucks, we also got 100 school buses right on Barnum Street behind me, we got Bates, which is a commercial trash disposal company, and we also have a United Rental tools, which brings in big flatbeds to put and load heavy equipment on. There is a tremendous amount of equipment.

I'm concerned, like I said with, that the dust and the traffic. Now, I have a personal trainer come in our facility twice a week for people who want to work out, and they go for a walk sometimes over to the park. Well, in the summertime it's pretty rough, the dust and the dirt and the traffic it's really, really sort of hazardous you might as well say, because there's no sidewalks, there's no nothing, and it's gotten worse and worse.

The other concern is that it is going to impose more traffic with that plant in there making it because you've got to bring product in, and those trucks come in, and those trucks leave, and then you've got the trucks to load up with the concrete and they're going to come in and they're going to leave. It is going to produce more traffic. (9/6/2017, Tr., pp. 192-199).

Summary Testimony of Dr. Sacoby Wilson:

Dr. Sacoby Wilson is a professor at the University of Maryland College Park School of Public Health, Maryland Institute for Applied Environmental Health. Dr. Wilson testified as an expert in the field of environmental justice and public health related to air pollutants. Dr. Wilson is trained as an environmental health scientist and primarily does exposure assessment to understand exposure of populations that live near different facilities, primarily looking at air quality, also water quality.

Dr. Wilson's testimony is adopted and incorporated as if fully restated herein. (9/6/2017, Tr., pp. 199-256).

Among other things, Dr. Wilson testified that:

The facility will be classified as a stationary source, and based on Maryland Department of Environment sort of criteria, it'll be, it wouldn't be a major source of pollution. But I think when you look at -- and then go back to that point. It wouldn't be classified as a major source of pollution, but you take into the context of the other mobile sources, that's where the concern is. So, you have to look at what we basically talk about cumulative exposure assessment, so you want to take an account not just of stationary sources, but you want to talk about the contribution of mobile sources to the degradation of air quality. And so, that's why it's important to not just, don't, we shouldn't discount the trucks that are bringing materials to the facility, and the trucks that are taking product out of the facility. You need to take in account both stationary and mobile at the same time. So, I think it's projected to have 40 additional trips per day in the immediate sort of zone of impact, again, for the workers, for the folks that go to church, and for the customers, they're going to be exposed to a higher concentration, potentially higher concentration of particulate matter and other compounds that are constituents of exhaust because of the mobile

emissions, and also the stationary emissions, and then also, again, related to the fugitive dust. And one thing about the fugitive dust, too, that I didn't mention, there's also silica, right, so the workers, for example, could get silicosis, so their potential damage and health effects for folks who have more, when we think about exposure we think about frequency of exposure, duration of exposure, and the magnitude of exposure, right, and so they are having higher frequency, higher magnitude, and then, you know, what the concentrations may be higher because of all those trucks that are moving product on and off the facility.

In the final analysis, Dr. Wilson opined as follows:

Mr. Blitzer: At this location is a combination of the mobile sources associated with the existing blocking plant, together with the additional sources associated with the proposed use more harmful, in your opinion, more impactful on the neighborhood, or neighboring uses, and the people who live and work there, than just the sources associated with the batching plant in and of itself?

Dr. Wilson: Yes.

Mr. Blitzer: ...Assume, Professor Wilson, that there is a church similarly situated on another property that does not have an existing block plant operation and the mobile sources associated with it, would the siting of the batching plant in your opinion on that property have less of an impact on, for example, the congregation of that church?

Dr. Wilson: Yes, it would be less compared to, with that scenario, than what the impacts will be with this concrete block plant and the –

Mr. Blitzer: And is that because the –

Dr. Wilson: -- proposed concrete block plant.

Mr. Blitzer: -- pollutants associated with each would be combined at the subject property, and therefore the impact would be elevated, as opposed to just the pollutants associated with a concrete batching plant at another similarly situated property?

Dr. Wilson: So, the aggregate impacts will be higher at that combo concrete lot and concrete batching for that church, compared to a church that only had a concrete batching facility.

Mr. Blitzer: And would that opinion, is it -- so, it's your opinion that that would have a considerable role here in determining adverse effects, the aggregate of the two uses?

Dr. Wilson: Yes, you will have high exposure to particulate matter, I used this as an example, you have higher exposure for PM, in this case with the block and batching plant compared to PM exposure just with the batching plant. (9/6/2017, Tr., pp. 230-233).

Summary Testimony of Carlyncia Peck:

Ms. Peck resides at 4921 Tilden Road, 1342, Bladensburg. She testified about traffic in the neighborhood. When it comes to the roads themselves, like I said, the rush hour is terrible back there because you've got the school buses, you've got the Bates Trucking, Waste Management, you've got Long Fence back there, you've got Metropolitan back there, you've got Al Gleason back there, and tons of other things that are back there, not only is it the traffic that's dealt with by the buses and so forth that are, you know, and the trucks that are for the Waste Management, but there are people that need to get to work in order to drive the truck or drive the bus, so it's all that traffic in there. You've got school traffic that's going through there, whether it be pedestrian or commercial vehicle, you know, whatever they're using to get to school. You've got our Public Works that sits on the other side of the street for Quality Elevator, so they've got trucks going in and out. It's a mess back there...already. (9/6/2017, Tr., pp. 256-277).

Summary Testimony of Denise Hamler:

Ms. Hamler resides at 3714 37th Avenue, Cottage City. I want to start out with saying that we are a very active community, and we are very concerned about where we live, where we work, and where we recreate. We have been very supportive of many of our businesses, in fact, we have had grants where we encourage businesses come there, like Community Forklift, we've done façade improvements, we have respected that Ernest Maier has been there for many years, and so we have accepted that he's there, but the issue is that we really don't believe that this is the right place to add another whole entire operation on top of what's happening there.

So, recently I retired, so I'm in the community every day, several times a day, and I have been walking by there, reviewing what's going on there, and I just can't imagine that adding another entire operation there would not affect our health, safety, and welfare of our residents, the workers, or our property values in the area. In fact, I've been quite shocked by what I've seen there. On a recent visit there we parked the car in front of the church, and we were standing on the church, and there were as many as four semis that were queued up back to Annapolis Road, we could not get out. The forklift drivers were yelling at each other. One of the managers came out. It was quite a scene. This happens on a fairly regular basis, we just cannot understand how they're going to continue to operate this very, very successful business there, a multi-million dollar business, and then add another whole operation to that, whatever it is, 3.42 acres, or 4.12 acres.

I also wanted to reiterate what Reverend Dockett said, I thought it was incredibly unjust that he is not using his facility during the week, and he hasn't for 15 years. I just find that just unconscionable that a church cannot use their own facility. Also, he did share with us at a community meeting in June that he did have to shovel, he often uses a shovel to clear the sidewalk of dust on Sunday mornings before his congregation arrives in their Sunday best, that was a direct quote.

In the industrial park that uses 47th and 46th and Upshur, there's the recently built Bates Trash facility, which is 50 to 100 truck trips a day; there's also the Prince George's Public School bus lot there, those are 92 buses that come and go four times a day, they go out, they come in, ...as well as all the people that are driving those trucks in and back out.

The other thing that we're concerned about is that the large concrete trucks going under that overpass, because that overpass was not built to have that much traffic going underneath it, so there are some issues about do we need to do some kind of structural analysis of that railroad overpass. It was built on that, over Bladensburg Road, Annapolis Road to handle that kind of traffic, but not on that Upshur Street section, because it goes over both of those overpasses, so we were concerned about that, as well. (9/6/2017, Tr., pp. 281-294).

Collectively, the testimony of these witnesses illuminates a factor that is a constant with both the current use and the proposed use—heavily laden trucks will enter and leave the site whenever the batching plant is in operation just as they currently do for the block plant operation.

The existing plant makes concrete blocks 20 hours per day, Monday through Friday, and 10 hours on Saturday.¹³ Concrete or cinder blocks are made different than ready-mix concrete. Concrete blocks are made with sand, stone, and light weight aggregate. Trucks deliver cement to a silo, it goes into a mixer, water is added, the air is vibrated out, and the blocks are steamed by a 180-degree steam generator. Fourteen hours later, concrete or cinder blocks are created and placed on the property. Applicant sells about 8 ½ million units of concrete or cinder blocks per year. (8/22/2017, Tr., pp. 6-17).

¹³ The 20-hour day runs 5:30 am to 1:00 am the next day. (8/22/2017, Tr., p. 10).

Below are site conditions of the existing 20-hour concrete block plant operation—



Ready-mix concrete will also be produced on these site conditions for the concrete block plant. Ready-mix concrete is very different from producing concrete or cinder blocks. Concrete or cinder block trucks leave the site within ½ hour of each other. Ready-mix concrete trucks can only be loaded 1 truck at a time. A truck is required to idle on site to allow the barrel to spin to prevent the concrete from hardening. A truck is also subject to a pre-trip inspection. An outbound trip will take 45 minutes, and an inbound trip will take 45 minutes. When a truck returns to the site, left over ready-mix concrete is removed from the barrel and placed in a recycling pit. The truck is reloaded with ready-mix concrete and the outbound process starts over. (8/22/2017, Tr., pp. 6-17).



Below are site conditions for some components used for the existing concrete block plant—



Operations for the concrete batching plant will also utilize the components used to make the concrete or cinder blocks shown above, except more cement and more water is required to make ready-mix concrete. The components will be placed into barrels attached to trucks, water is added and then the cycle mixer in the barrels are activated to keep the concrete from hardening—all on the same site.

Below are some road conditions for the existing concrete block plant—



Trucks for the proposed concrete batching plant must also depart on existing roads shared by trucks for the existing concrete block plant. Ready-mix concrete must be delivered within 1 ½ hour or the concrete hardens and must be jackhammered out of the barrel. Applicant's goal is to produce ready-mix concrete to accommodate 200 yards a day or 250 yards in peak months. To cement this goal, the proposed batching plant operation will generate 40 additional truck trips between the hours of 6:00 am to 8:00 am, 10:00 am to 12:00 pm, and 1:00 pm to 3:00 pm. Twenty (20) trucks will bring in raw materials to make the concrete and 20 trucks will deliver the concrete off-site. (8/22/2017, Tr., pp. 6-17, 27).

In the final analysis, among other things, facts and circumstances show:

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 concrete batching plant to co-locate with an existing concrete block plant would result in *cumulative impacts* on surrounding properties above and beyond those inherently associated with the proposed use if the proposed use were located elsewhere within the I-2 Zone.
2. That, given the existence of surrounding/adjoining industrial uses, granting the proposed concrete batching plant to co-locate with an existing concrete block plant would result in *cumulative impacts* on this neighborhood because of an increase in heavy truck traffic, dust, and noise and 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 I-2 Zone.
3. That, expert testimony of air and dust pollution pose a risk to the community because co-location of a concrete batching plant with an existing concrete block plant would result in *cumulative impacts* that 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 I-2 Zone.
4. That, given the adjacent Church and its historical characteristics, actual incompatibility would occur by granting co-location of a concrete batching plant with an existing concrete block plant 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 I-2 Zone.

As expressly authorized by the Regional District Act of the Land Use Article and Subtitle 27 of the Prince George's County Code, the application for a special exception, to co-locate a concrete batching plant with an existing concrete block plant in the I-2 (Heavy Industrial) Zone, located at the intersection of Kenilworth Avenue and Upshur Street, Bladensburg, Maryland, in Councilmanic District 5, is hereby DENIED.

ORDERED this 26th day of March, 2019, by the following vote:

In Favor: Council Members Anderson-Walker, Davis, Dernoga, Franklin, Glaros, Harrison,
Hawkins, Streeter, Taveras, and Turner.

Opposed:

Abstained:

Absent: Council Member Ivey

Vote: 10-0

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: _____
Todd M. Turner, Chair

ATTEST:

Redis C. Floyd
Clerk of the Council