IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

September Term, 2015

No. 02450

COSTCO WHOLESALE CORPORATION,

Appellant

v.

MONTGOMERY COUNTY, MARYLAND, ET AL.,

Appellees

On Appeal from the Circuit Court for Montgomery County, Maryland
(Gary E. Bair, Judge)

BRIEF OF APPELLEE MONTGOMERY COUNTY, MARYLAND

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes and Rules

STATEMENT OF THE CASE

Costco Wholesale Corporation ("Costco" or "Appellant") filed Petition No. S-2863 on November 13, 2012 for a special exception to construct and operate an Automobile Filling Station with 16 gasoline pumps. (E. 4) Technical Staff of the Maryland-National Capital Park and Planning Commission ("Technical Staff") recommended denial of the special exception in a memorandum dated February 28, 2013.[1] (E. 1414-44) On February 29, 2013, the Montgomery County Planning Board voted 3-2 to recommend denial of the special exception. (E. 1449-51) The Board of Appeals for Montgomery County ("Board") referred the petition to the Office of Zoning and Administrative Hearings ("OZAH") to conduct a public hearing, which commenced on April 26, 2013, and, after 37 hearing sessions were held, concluded on September 19, 2014. (E. 7)

On December 12, 2014, the Hearing Examiner for OZAH issued a 262 page Report and Recommendation recommending Costco's petition be denied. (E. 1-262) The Board considered the Hearing Examiner's report at its March 11, 2015 Worksession and adopted the Hearing Examiner's findings in an Opinion effective April 3, 2015. (E. 492-95) Appellant filed for judicial review of the Board's decision with the circuit court on April 30, 2015, and a hearing was held on November 13, 2015. (E. 496-502) By an Opinion and Order dated December 18, 2015, the circuit court affirmed the Board's decision. (E. 504-14) Appellant appealed to this Court on January 15, 2016. (E. 502)

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[1] The original memorandum was dated February 20, 2013 but was amended due to a type on page 15 of the memorandum.

QUESTIONS PRESENTED

1. Was the Board correct in finding that Appellant's application for a special exception failed to meet all requisite criteria for the granting of a special exception?

2. Did the Appellant raise the issue of preemption with the administrative agency?

3. Did Maryland's adoption of the NAAQS preclude or preempt the Board from denying the proposed special exception?

STATUTES, ORDINANCES AND CONSTITUTIONAL PROVISIONS

The full text of all relevant statutes, ordinances and constitutional provisions appears in the appendix to this brief.

STATEMENT OF ADDITIONAL FACTS

A. The Property and Appellant's Proposal.

The subject property is located at 11160 Veirs Mill Road in Silver Spring, also known as Westfield Wheaton Plaza. A ring road with five access points surrounds the Mall parcel. (E. 17, 1418) The site for Appellant's proposed special exception is in the southwest corner of the 75-acre mall property, in a 36,800 square foot portion of the Mall's parking lot, located west of the intersection of Georgia Avenue and Veirs Mill Road (immediately west of the Costco Warehouse). (E. 17, 1418) Vehicular access to the proposed Automobile Filling Station would be through the Mall's southern ring road. (E. 17, 1418)

The Board defined the general neighborhood, based on the Hearing Examiner and Technical Staff's definition, "to include all properties that may be impacted by traffic, noise, glare, vibrations or fumes associated with the proposed use. The defined neighborhood includes the entire Mall property and the first ring of properties adjacent to the south and west of the

Mall." (E. 18, 1418) A depiction of the defined neighborhood was included in the Hearing Examiner's report. (E. 19) There is a residential community with single-family detached houses and some townhouses to the south and west of the Mall property, with the nearest residence, 10812 Melvin Grove Court, located approximately 118 feet south of the proposed site. (E. 19, 1418) The Kenmont Swim and Tennis Club is located approximately 375 feet northwest of the proposed site, and the Stephen Knolls School is located approximately 874 feet to the southwest; both are within the Board's definition of the general neighborhood. (E. 19-20, 1418)

There is a significant grade difference between the Mall property and the residences to the south and the west, with the Mall being approximately nine to thirty feet higher than the surrounding community. (E. 19-20, 1418) There is also a green buffer of vacant land with trees and understory between the ring road and adjacent residences to the south. (E. 20, 1418) Appellant's proposed Automobile Filling Station would have no car wash, convenience store, air pumps, or service bays, and the estimated 12 million in sales yearly would be limited to gasoline only (no diesel or propane). (E. 21) The 16 fueling positions would be located on four islands, each with four gas dispensing hoses. (E. 21)

B. Queuing Automobiles and Air Pollution.

It is undisputed that slow moving or idling cars produce higher levels of harmful pollutants than more rapidly moving cars. (E. 75) Dr. Henry Cole, qualified at the Hearing as an expert in meteorology, air quality, and air modeling, testified that emissions for all of the pollutants of concern in this case go up as the speed of the car goes down. (E. 899-900) The Appellant's air quality expert, David Sullivan, noted a

number of potential sources of air pollution should the special exception be granted. (E. 73) Among those potential sources were: the gas queuing; emissions from the filling of the underground storage tanks; underground tank vent breathing losses; emissions from dispensing of gasoline into vehicles and spillage; and roadway emissions from additional cars. (E. 73, 1375)

C. Methodologies Used to Assess Potential Adverse Health Effects.

During his testimony, Appellant's expert, David Sullivan, conceded he had made a significant mathematical error which resulted in understating the area background levels of nitrogen dioxide ("NO_2") by approximately 350%. (E. 85, 781-85) This error was corrected at the OZAH hearing; therefore, both Technical Staff and the Planning Board evaluations were based on the understated NO_2 numbers. (E. 781-85) Mr. Sullivan revised his calculations several times after the mathematical errors showed his original assumptions in some instances resulted in pollution levels at or exceeding the National Ambient Air Quality Standards ("NAAQS") he asserted should be used to assess adverse health effects. (E. 86-88, 1876-77, 2363)

Mr. Sullivan used the NO_2 and $PM_{2.5}$[2] background levels through a process called "hour-by-hour pairing." (E. 1180-86) EPA advisories do not generally advise using this approach. (E. 2214) Mr. Sullivan's methodologies are examined extensively in the brief of Kensington Heights Civic Association ("KHCA").

[2] $PM_{2.5}$, is a form of particle matter known as "fine particles" with a diameter of less than or equal to 2.5 microns (micrometers).

D. Health Risks

Dr. Maria Jison was accepted as an expert physician and as an expert in pulmonary and respiratory medical conditions. (E. 991-93) Dr. Jison testified about the prevalence of asthma in the United States, which affects one in 12 people and one in 11 children. (E. 994) She testified that increased pollution from this proposed large gas station so close to a neighborhood can have adverse effects on asthma. (E. 994-95) She testified that $PM_{2.5}$ is of particular concern to sensitive populations (people with chronic diseases) for a variety of reasons and in particular to children, whose lungs haven't fully developed. (E. 999) She testified that even what studies and the EPA categorize as low levels of $PM_{2.5}$ are associated with increased asthma symptoms, clinically relevant declines in lung function, and increased cardiovascular risk. (E. 1000)

Dr. Jison testified that the Environmental Protection Agency ("EPA") Administrator had cited four studies which supported a short-term one-hour NO_2 standard below 100 parts per billion (ppb) and that an 80 ppb standard was supported by existing evidence. (E. 1091-92, 2245) Several professional medical societies, including the American Medical Association, the American Lung Association, the American College of Chest Physicians, and the American Thoracic Society, all supported a short-term NO_2 standard of less than 80 ppb, some even below 50 ppb, based on a study demonstrating respiratory health effects at around 50 ppb. (E. 1091-92) The EPA Administrator ultimately kept the level at 100 ppb upon concluding that a concentration of 100 ppb at the source would result in a lesser area-wide concentration of NO_2; that is, that the

concentration of NO_2 would be lower/at acceptable levels as one moves away from the source of pollution. (E. 2245)

Dr. Jison testified that, even if the incremental amount of $PM_{2.5}$ being added to the ambient levels was extremely small, adverse effects would still occur based on the data, the sensitivity of the population, and the chronic nature of the exposures. (E. 1104-10) In Dr. Jison's opinion, the proposed gas station will have adverse health effects on residents, workers, and visitors in the area. (E. 1100)

Dr. Jison went on to testify that both Mr. Sullivan and Dr. Cole had testified that there is a correlation between the volume of gasoline pumped and the effects on air quality; the more gas that is pumped, the greater the potential adverse health impacts. (E. 1099) Accordingly, the adverse health effects of this proposed station go above and beyond the effects of other gas stations. (E. 1099) Further, Dr. Jison testified that the adverse health effects are compounded by the proposed location for the station in an area that already has high pollution levels. (E. 1099)

Dr. Patrick Breysse was accepted as an expert in industrial hygiene, epidemiology regarding health issues from vehicular emissions, in the establishment and measurement of air quality standards, in the evaluation of scientific studies and methodologies, and in exposure science. (E. 1012-17) Dr. Breysse testified that the permissible NO_2 and $PM_{2.5}$ levels set by EPA is not a standard that is set to create zero risk. (E. 1029) He testified that the children at the Stephen Knolls School have unique susceptibilities that were perhaps not on EPA's radar, and he did not know of any studies which would allow EPA

to have an evidence base to be able to design a standard to protect kids with the level of disability as those at the Stephen Knolls School. (E. 1030)

Dr. Breysse re-iterated that "one should not treat the one-hour NO_2 standard as 100 parts per billion everywhere because that really just represents the peak value." (E. 1032-35) He noted that the EPA Administrator clearly thinks the one-hour NO_2 threshold is 75 to 85 ppb, and there is pretty good evidence that it is down to 50 ppb. (E. 1033) Based on Mr. Sullivan's reports, Dr. Breysse opined that the one-hour NO_2 levels shown at the Mall, the pool, and the Stephen Knolls School were well within the range that health effects are seen in terms of the literature that the EPA relied on for the previous NO_2 standard. (E. 1038) Again reviewing Mr. Sullivan's refined assumptions, Dr. Breysse testified that Mr. Sullivan's results suggest that persons residing near the site would suffer excess respiratory disease. (E. 1044) He testified that the values are in the range that the EPA Administrator believes are problematic for disease risk. (E. 1044)

Dr. Breysse testified that a mix of pollutants, such as NO_2 and $PM_{2.5}$, can result in health effects even if the individual components are below applicable standards. (E. 1047-49) Dr. Breysse opined that the proposed station will produce pollutants that will put people at greater risk for health effects. (E. 1070) He noted that in making his determination, he is not constrained by EPA standards, because EPA regulations are five to ten years behind. (E. 1070) He testified that he considers EPA standards as well as what the literature suggests. (E. 1070)

Abigail Adelman testified that the World Health Organization ("WHO") Air Quality Guideline for annual $PM_{2.5}$ is 10 micrograms per cubic meter, 2 micrograms

lower than EPA's standard. (E. 2221-26) Ms. Adelman testified that Mr. Sullivan's revised urban annual projections of 10.8 to 10.9 micrograms per cubic meter at the home, school, and pool receptors in the general neighborhood of the proposed station did not conform to the WHO guidelines and barely conformed to EPA's new annual standard of 12 micrograms. (E. 400)

Ms. Adelman testified that the Stephen Knolls School is located 840 feet from the proposed site. (E. 970) The approximately 100 students, ranging in age from three to 21 years, attend school from August through June, and most also enroll in summer programs in July. (E. 970) The students have a variety of medical needs: five students have oxygen tanks or ventilators; eight have private-duty nurses; ten have regularly dispensed medication; and one requires regular suctioning. (E. 970) Around 40 of the students go to Wheaton Mall several times a week to practice life skills as an important part of their educational experience. (E. 971) If the station is built, the increase in slow traffic and idling cars will render the approach to the Mall unsafe for these medically fragile students. (E. 971) These traffic increases will also cause concern for the children playing on the school's playground, located between the school and the Mall's ring road. (E. 971)

Mary Ann Carter, the Stephen Knolls School librarian, testified that Stephen Knolls is not a typical school. (E. 423) The school is composed of two special programs: an early intervention program for three and four year olds who have been identified as special needs, and a program for school-age students up to 21 years old who have multiple severe disabilities and cannot be accommodated by other schools. (E. 423)

Stephen Knolls cares for and educates the County's most fragile children, whereupon on a bad day 9-1-1 is called and on a worst day a child dies. (E. 423) The students are bussed from all over down-county to Stephen Knolls because it is the place the County has created to care for these most special needs children. (E. 423-44) If the station is built, the students' families do not have the option to move to avoid air quality issues because the child will just be bussed back to the Stephen Knolls School. (E. 424) Ms. Carter testified that she did not believe the NAAQS adequately address the health concerns for the school. (E. 424-25)

Susan Campbell, a mother of a Stephen Knolls student, testified that, due to the health issues for the students at the school, air quality is a constant priority and air quality is monitored at the school. (E. 425) If the station is built, the students will exposed to it for six hours each day, including during the summer months, for up to 18 years of their lives. (E. 425) Maria Alvarez testified that her daughter attends Stephen Knolls and that there are only two schools like it in the County; one for residents that live up-county and Stephen Knolls for residents that live down-county. (E. 426) Her daughter, Angela, is very vulnerable to medical conditions associated with elevated levels of air pollution, and if the gas station were built, she would not have the option to move Angela to a different school. (E. 426-7)

ARGUMENT

I. THE BOARD CORRECTLY DENIED APPELLANT'S APPLICATION FOR A SPECIAL EXCEPTION BECAUSE APPELLANT FAILED TO MEET ALL THE REQUISITE CRITERIA.

Standard Of Review

Judicial review of an administrative agency decision is limited to determining whether "there was substantial evidence on the record as a whole to support the agency's findings of fact and whether the agency's conclusions of law were correct." *Motor Vehicle Administration v. Atterbeary*, 368 Md. 480, 490-91, 796 A.2d 75, 81 (2002). Zoning decisions by administrative agencies, unless they are arbitrary and capricious, are "presumptively correct, if based upon substantial evidence, even if substantial evidence to the contrary exists." *White v. Spring*, 109 Md. App. 692, 700, 675 A.2d 1023, 1026 (1996). The task of the reviewing court "is not to substitute its judgment for the expertise of those persons who constitute the administrative agency." *Annapolis Marketplace, LLC v. Parker*, 369 Md. 689, 703, 802 A.2d 1029, 1037 (2002).

Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept to support a conclusion." *Baltimore Lutheran High School Association v. Employment Security Administration*, 302 Md. 649, 662, 490 A.2d 701, 708 (1985). If the record is such as to have permitted a reasoning mind to reasonably have reached the factual conclusion the agency reached, then the decision is "fairly debatable" and, therefore, the Court must uphold it, even though, were it the fact finder, it would have reached a different conclusion. *Eger v. Stone,* 253 Md. 533, 542, 253 A.2d 372, 376-377 (1969). The test is reasonableness, not rightness. *Snowden v. Mayor and City Council of Baltimore*, 224 Md. 443, 448, 168 A.2d 390, 392 (1961).

It is for the agency to resolve any conflicting evidence, as well as any inconsistent inferences from such evidence. *Gigeous v. Eastern Correctional Institution*, 363 Md. 481, 497, 769 A.2d 912, 922 (2001). When an agency's interpretation of a law or regulation with respect to which the agency has a special expertise is under review, judicial deference is called for. *Angelini v. Harford County*, 144 Md. App. 369, 373, 798 A.2d 26 (2002). Thus, an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts. *Lussier v. Maryland Racing Commission,* 343 Md. 681, 696-697, 684 A.2d 804, 811-812 (1996). Further, reviewing courts should give some degree of deference to the legal conclusions of an administrative agency. *State Ethics Commission v. Antonetti*, 365 Md. 428, 447, 780 A.2d 1154, 1165 (2001).

Granting Of A Special Exception

When local legislatures define zones and identify permitted uses for each zone, the legislature also identifies additional uses which may be conditionally compatible in each zone, but which "should not be allowed unless specific statutory standards assuring compatibility are met by the applicant at the time separate approval of the use is sought." *Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 541, 485 A.2d 469, 541 (2002). In this case, because Appellant's application was filed on November 13, 2012, under § 59-7.7.1.B of the County's current (2014) Zoning Ordinance, the application must be evaluated under the standards in the 2004 Zoning Ordinance. Therefore, all further references are to the 2004 Zoning Ordinance. Under the Zoning Ordinance, the Board must not grant a special exception unless the Board finds that the proposed use complies with all of the general and specific

standards set forth in the Montgomery County Code, Article 59-G. Section 59-G-1.2.1. The burden of proving that these general and specific standards are met is on the Appellant, including the burden of going forward with the evidence and the burden of persuasion on all questions of fact. Section 59-G-1.21(c).

Section 59-G-1.21(a) outlines the general conditions which must exist in order for a special exception to be granted. These general conditions include that the proposed use: (4) will be in harmony with the general character of the neighborhood; (5) will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site; (6) will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site; and (8) will not adversely affect the health, safety, security, morals, or general welfare of residents, visitors, or workers in the area at the subject site. In this case, the Board found that Appellant did not meet their burden to show that all four of these general conditions were met. (E. 494)

In addition, another one of the general conditions requires that the proposed use "[c]omplies with the standards and requirements set forth for the use in Division 59-G-2." Section 59-G-1.21(a)(2). For an Automobile Filling Station, these standards and requirements are found in § 59-G-2.06. Section 59-G-2.06(a)(1) provides that an automobile filling station may be permitted if the Board finds "the use will not constitute a nuisance because of noise, fumes, odors, or physical activity in the location proposed." In this case, the Board found that Appellant did not meet their burden to show that this general condition was met.

Section 59-G-1.2.1 further requires the Board to consider "the inherent and the non-inherent adverse effects of the use on nearby properties and the general neighborhood at the

proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone." Inherent adverse effects are defined as "the physical and operational characteristics necessarily associated with the particular use" and are not alone a sufficient basis to deny a special exception. Non-inherent adverse effects are defined as "physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site" and alone are a sufficient basis to deny a special exception. *Id.* In this case, the Board found that three non-inherent adverse effects were a sufficient reason to deny Appellant's special exception. (E. 493-94)

While a presumption of compatibility generally attaches to special exceptions in the absence of contrary clear legislative intent, Montgomery County's Zoning Ordinance qualifies this presumption, specifically outlining that "[t]he fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted." Section 59-G-1.21(a)(2). In this case, the Board found that the Appellant failed to meet the requirement of this standard as well. (E. 493)

The Board's Findings Concerning Inherent and Non-inherent Risks Is Not Arbitrary And Capricious And Is Supported By Substantial Evidence

Prior to granting a special exception, the Board must consider a number of general and specific standards, as well as the inherent and the non-inherent adverse effects of the use. In this case, the Hearing Examiner's Report, adopted by the Board, made a detailed finding, supported by the evidence, that Appellant's application for a special exception be denied based, among other things, on inherent and non-inherent adverse effects.

First, pursuant to § 59-G-1.2.1, the Board found that the proposed use had six non-inherent characteristics, as identified by Technical Staff. These characteristics were: 1) sales to Costco members only; 2) location along a private road, near houses; 3) size (volume of gasoline sold and number of pumps); 4) queues and traffic volume along the southern ring road; 5) type of gasoline sold; and 6) payment by debit or credit card only. (E. 1426-27) The Board found that three of these non-inherent characteristics - location, size, and queuing - combined with the inherent characteristics of the use (outlined at E. 1426) would have significant adverse effects on the general neighborhood to the south, southwest and southeast of the site. (E. 247-28). Non-inherent adverse effects alone are a sufficient basis to deny a special exception. Section 59-G-1.2.1.

In *Schultz v. Pritts*, 291 Md. 1, 15, 432 A.2d 1319, 1327 (1981), the Court of Appeals found 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 use 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." The Court in *Schultz* explained that the Board's duty is to judge whether the "neighboring properties in the general neighborhood would be adversely affected." *Id.* at 11, 432 A.2d at 1324. Accordingly, to assess the potential for adverse impact, it is necessary to look at the characteristics of the general neighborhood surrounding the proposed special exception. Here, the general neighborhood includes the residence 118 feet from the proposed site, the Kenmont Swim and Tennis Club, and the Stephen Knolls School. (E.

20) The determination of such non-inherent adverse effects is a factual, not a legal, determination made by the Board.

The Court of Appeals in *Schultz* held "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." *Id.* at 22-23, 432 A.2d at 1331. The Board found that the non-inherent characteristics of Appellant's proposal, at this particular location, at the level of usage planned, with the proposed design, and the proximity of residents, including a swimming pool and the Stephen Knolls School, created adverse effects warranting denial of Appellant's special exception. (E. 247) Citing *Montgomery County v. Butler*, 417 Md. 271, 305, 9 A.3d 824, 844 (2010), the Hearing Examiner's report re-iterated it is the job of the Board to determine in each case the adverse effects the proposed use would have on the "*specific, actual* surrounding area." (E. 247)

Based on the extensive record, the Hearing Examiner, and subsequently the Board, found that Appellant's proposed use would have the non-inherent effects originally identified by Technical Staff, and that the non-inherent effects alone, as well as in combination with the inherent characteristics of the use, would have "significant adverse effects" on the neighborhood. (E. 247) The Hearing Examiner found that these adverse effects include the potential health impacts described in Part III.B. of his report (E. 56-166) as well as the traffic congestion, parking congestion, and additional physical activity

described in Part III.C. of his report. (E. 167-207) Because non-inherent effects alone or in conjunction with inherent effects are sufficient to deny a special exception, and the Board's decision to deny Appellant's application based on non-inherent and inherent effects was supported by substantial evidence, the Board's decision should be upheld.

The Board's Findings Concerning Health And Safety Is Not Arbitrary And Capricious And Is Supported By Substantial Evidence

The Board further found that the proposed use did not satisfy all of the general conditions outlined in § 59-G-1.21 in order to grant a special exception. First, the Board found that the Appellant did not meet § 59-G-1.21(a)(2) because the fumes produced by the proposed use would be a nuisance, in violation of § 59-G-2.06.[3] (E. 248) The Hearing Examiner's Report notes two pollutants which were the focus of the hearing. The first, NO_2, is, as described by the Hearing Examiner, "a highly reactive gas that forms when fuel is burned at high temperatures, and comes principally from motor vehicle exhaust and stationary sources such as electric utilities and industrial boilers." (E. 60) The second is $PM_{2.5}$. (E. 60-61)

Appellant argues the undisputed evidence showed the proposed station's contribution of NO_2 and $PM_{2.5}$ would be *de minimus*, and that $PM_{2.5}$ and NO_2.would be generated by any new development to the mall. Yet the Hearing Examiner outlined in detail the concerns associated with both NO_2 and $PM_{2.5}$ in this case. (E. 162-66) There was substantial evidence in the record that the fumes generated by cars queuing at the

[3] For automobile filling stations, § 59-G-2.06(a)(1) allows the Board to permit the station only upon a finding that "the use will not constitute a nuisance because of noise, fumes, odors, or physical activity in the location proposed."

proposed gas station would be a nuisance because of their potential effect on air quality and subsequently on the health of local residents, workers, and visitors. These health effects are discussed extensively in Costco Gas Coalition's brief. For the reasons set forth in Part III.B. of the Hearing Examiner's Report, the Hearing Examiner concluded that the proposed gas station would cause objectionable fumes and that Appellant failed to prove, by a preponderance of the evidence, that these fumes would not be a nuisance. (E. 56-166)

The record in this case is full of evidence regarding the health effects of NO_2 and $PM_{2.5}$, and Appellant has the burden of producing the evidence as well as persuading the hearing authority of the weight of the evidence. *See Angelini*, 144 Md. App. 369, 798 A.2d 26. In Dr. Jison's opinion, the proposed case station will have adverse health effects on residents, workers, and visitors in the area. (E. 100) As Dr. Jison opined, "[f]or this particular station, it's my opinion that it will cause adverse health effects on people based on this unique aspect of the whole scenario. This station's unique. It brings a very high concentration of a large volume of cars that are that are going to be idling for an extended period of time, is very close to homes, the school for sensitive kids, a pool where various teens come to train, and it's in the middle of a shopping mall where people will spend considerable amounts of time..." (E. 1099)

Further, the Hearing Examiner's finding, adopted by the Board, was due in part to the fact that Appellant's air quality, health, and traffic experts undermined their own credibility and the weight given their evidence by revising their projections and testimony to correct errors. (E. 13-14) The changing testimony of Appellant's air quality expert, Mr.

Sullivan, raised credibility issues as to the expert's testimony as well as to whether Appellant would even meet acceptable NAAQS standards. Mr. Sullivan's changing testimony is examined extensively in KHCA's brief. The Hearing Examiner stated, "an expert witness's continual retreat from his previous projections when the results turn out to be problematic for his client do raise credibility concerns." (E. 88)

Even if the NAAQS standard did apply, Appellant did not provide concrete evidence that it would meet that standard. (E. 115-119) The Hearing Examiner found that early modeling results in evidence in this case, including those from Appellant's experts, and Dr. Henry Cole's testimony (the Opposition's witness), indicated that exceedances may occur. (E. 119) Further, also admitted by Appellant's expert, there is an uncertainty in the modeling and error typically occurs. (E. 1257-62) Thus, the Hearing Examiner found that "Mr. Sullivan's repeated retreats from earlier conservative assumptions, in conjunction with the admitted uncertainty factor, has undermined Petitioner's efforts to prove that the expected levels of one-hour NO_2 will not reach levels that will have adverse health effects within the general neighborhood." (E. 120) Mr. Sullivan's repeated revisions, coupled with the uncertainties inherent in the modeling process, left a prediction of the NO_2 and $PM_{2.5}$ likely levels that were close enough to the impactful level to make the health effects issue debatable. (E. 162-3)

When the Hearing Examiner weighed Appellant's evidence against that of the Opposition's health experts, Dr. Jison and Dr. Breysse, he found that Appellant failed to meet their burden by a preponderance of the evidence. (E. 160-66) There was evidence of a well-documented case regarding the potential adverse health effects of the projected NO_2

and $PM_{2.5}$ from car exhaust. (E. 2497) There was also testimony and a broad range of scientific studies showing adverse effects from NO_2 levels less than the NAAQS's 100 ppb. (E. 1032-35) There was further testimony and evidence about the stable toxicity and harmful effects for $PM_{2.5}$ and that the WHO had set a guideline for $PM_{2.5}$ lower than the NAAQS standard and lower than the level's Appellant's experts anticipate at the proposed gas station. (E. 2221-26) Finally, there was evidence that the EPA Administrator did not intend for the NAAQS standards to be interpreted and used in the manner suggested by Appellant. (E. 1033, 2229-52)

In addition, as noted by the circuit court, the Board's inquiry in granting a special exception involves more than an analysis of emissions standards. (E. 511) "Given the nature of the inquiry and the need for highly specific findings, the Board's failure to apply a cognizable emissions standard does not represent reversible error." (E. 511) For example, the NAAQS may be designed to protect sensitive populations, but they are not designed to protect the medically fragile children who attend the Stephen Knolls School. Appellant has the burden to prove that it met the general and specific standards to be granted a special exception, and, as the circuit court noted, compliance with national or state regulations is insufficient to meet that burden. (E. 512)

The Board further found that the Appellant did not meet the general conditions for the proposed use outlined in §§ 59-G-1.21(a)(6) and (a)(8). The Hearing Examiner's Report outlines the considerable physical activity issues, in terms of increased traffic, parking lot congestion, and excessive gas-line queuing, as well as the objectionable fumes, outlined above, all of which combined in a finding that Appellant failed to meet their

burden to satisfy§ 59-G-1.21.(a)(6).[4] (E. 189-92) The Board also found that Appellant failed to meet the general conditions of § 59-G-1.21(a)(8), which requires the proposed use to not adversely affect the health, safety, or general welfare of residents, visitors, or workers in the area. (E. 251) This decision was based on an evaluation, of all the evidence discussed in great detail, that Appellant's particular proposal, at this particular location, at the level of usage, with the proposed design, and the proximity of residences, a community swimming pool, and the Stephen Knolls School serving medically fragile children, was too much of a health risk to warrant approval at the proposed location. (E. 166) After a detailed examination and analysis, the Hearing Examiner, and the Board, found that Appellant did not meet their burden of proving either of these general conditions by a preponderance of the evidence. (E. 128-66)

The Board's Finding Of Incompatibility Is Not Erroneous

Pursuant to §§ 59-G-1.21(a)(4) and (5), the Board must also consider the possible impact of the special exception on compatibility with the general neighborhood. Specifically, (a)(4) requires the specific use to be in harmony with the general character of the neighborhood and (a)(5) requires the use will not be detrimental to the use or peaceful enjoyment of the surrounding properties or general neighborhood. The Hearing Examiner found that the additional cars and congestion in the southwest parking lot and on/near ring road would undisputedly lead to some additional interactions between

[4] As outlined previously, § 59-G-1.21(a)(6) requires a Board finding that the use "[w]ill cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone."

vehicles and pedestrians, some additional delays, and some additional inconvenience in the neighborhood, adding to the incompatibility of the use in the location. (E. 184) The Hearing Examiner, and subsequently the Board, found the proposed station incompatible due to potential adverse health impacts combined with traffic congestion, parking congestion, and physical activity (E. 206-7).

While the Hearing Examiner found that the additional cars that the proposed use would generate would not amount to a "hazard" or "nuisance" *per se*, he found the aforementioned elements of traffic congestion added to the incompatibility of the proposed use at this particular location, and must be considered in connection with the other impacts of the station, outlined above. (E. 184-85) The increased traffic, parking lot congestion, and queuing at the gas pumps, while not creating a legal nuisance, would adversely affect compatibility. (E. 169-89) This physical activity was not only considered in determining whether the proposed station met § 59-G-1.21(a)(4) and (5) but also (a)(6), that the proposed use would cause no objectionable physical activity. (E. 251)

In addition, while the Hearing Examiner noted that parking in the parking lot is already very crowed, and additional crowding or inconvenience to Mall customers was not alone a reason to deny the station, these factors were also considered in assessing overall compatibility. (E. 187-88) Appellant argues that their traffic expert argued that traffic increases would not be noticeable. As the Hearing Examiner found, issues of compatibility arose in this case not because the proposal was for a gas station, but because it was for this particular type of gas station (a very large one with lines of idling

cars) located in this particular neighborhood. (E. 56)

Appellant also argues that the circuit court noted there was ambiguity in the record regarding the potential impact of traffic congestion and physical activity. (E. 513) Yet as the circuit court explained, the Board relied on the findings of the Hearing Examiner, who conducted 37 days of hearing over 17 months and prepared a 262 page opinion. Given the thoroughness of the examination, the circuit court found that there was sufficient evidence to support the Board's findings. (E. 513)

Appellant argues that the Board's findings of incompatibility based on traffic congestion, parking congestion, and physical activity are not supported by substantial evidence. First, citing *Mossburg v. Montgomery County*, 107 Md. App. 1, 666 A.2d 1253 (1995), Appellant argues that the Opposition presented no expert testimony concerning traffic and that generic traffic concerns do not constitute substantial judgment. In *Mossburg*, this Court reversed a denial of a special exception based on the fact that there was no evidence of adverse impacts at the site. *Id.* at 27, 666 A.2d at 1267-68. Here, as outlined extensively above, the Technical Staff outlined three specific adverse impacts, which the Hearing Examiner and Board agreed with.

Appellant further cites to *Anderson v. Sawyer*, 23 Md. App. 612, 329 A.2d 716 (1974), wherein this Court found that the denial of a special exception to a funeral home based, in part, on traffic concerns by the neighbors was lacking in probative value. The *Anderson* court emphasized what a special exception applicant has the burden of showing: "[i]f he shows to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely

affect the public interest, he has met his burden...[i]f the evidence makes the question of harm or disturbance...fairly debatable, the matter is one for the Board to decide." *Id.* at 617, 329 A.2d at 720. The Board had substantial evidence to find real detriment to this particular neighborhood, and accordingly the denial of the special exception should be upheld.

In sum, the Hearing Examiner found a compatibility issue not because of the gas station but because of the type of gas station, that is, one that is very large with idling cars, located in this particular neighborhood. (E. 205) Under § 59-G-1.21(a)(2), as the Court of Appeals outlined in *Montgomery County v. Butler*, 417 Md. 271, 291, 9 A.3d 824, 835-36 (2010), even if an applicant presents a *prima facie* case meeting the County Code standards for a special exception does not ensure a grant of the special exception. There is no presumption that the use is compatible with nearby properties. The Court stated that "each applicant must prove actually, to the satisfaction of the administrative decision-maker, that his/her/its application will be compatible with the uses on (or future permitted use of) other properties in the neighborhood." *Id.* at 295, 9 A.3d at 838. It is the job of the Board to ascertain, in each specific case, the adverse effects that the proposed use would have on the specific, actual surrounding area. *Id.* at 305, 9 A.3d at 844.

II. THE ISSUE OF PREEMPTION WAS NOT PRESERVED.

As noted by the circuit court, an issue must be raised before an administrative agency, such as the Board, in order to properly preserve that issue on appeal. The administrative agency must have an opportunity to decide the issue prior to appellate

review, and issues may not be raised for the first time upon judicial review of an administrative agency decision; "to do so would allow the court to resolve matters *ab initio* that have been committed to the jurisdiction and expertise of the agency." *Delmarva Power & Light Company v. Public Service Commission*, 370 Md. 1, 32, 803 A.2d 460, 478 (2002). Appellant argues that, throughout the administrative process, Appellant argued that the Board must apply the NAAQS. Appellant argues that the issue of preemption was preserved at the administrative agency, citing to arguments Appellant's counsel made during closing argument before the Hearing Examiner, wherein Appellant's counsel stated that the NAAQS "are the standards that must be applied" and "have the force of law." (E. 1366-67) The specific language utilized by Appellant during the hearing is discussed in detail in Costco Gas Coalition's brief, which notes the term "preempt" does not appear in the 9500 pages of hearing transcripts.

While Appellant argued during the course of the hearings that the NAAQS should be used to evaluate the health effects of the pollution levels attributable to the proposed station, at no time did Appellant assert that the Hearing Examiner or the Board were preempted from using a different standard, such as the requisite standard set out in the Zoning Ordinance, to conduct this evaluation. Appellant's counsel never mentioned preemption; as the circuit court noted, the issue was not properly preserved on appeal. (E. 509) The Board did not consider the issue; thus, the Board did not have the opportunity to decide the issue first. *Id.*

Appellant argues that the law is not so literal as to require actual mention of the word preemption and, citing *Concerned Citizens of Great Falls, Maryland v.*

Constellation-Potomac, LLC, 122 Md. App. 700, 749, 716 A.2d 353, 377-78 (1998), argues that waiver only occurs when a party fails to raise an issue in any way or at any time during the administrative procedure. Yet Appellant never raised the issue of preemption at all, in any way. Appellant first raised preemption in the circuit court, and accordingly failed to preserve this argument. It is well-established that the Appellant, the party challenging the decision of the Board, bears the burden of preserving the bases for their challenge. Because courts review decisions of administrative agencies "solely on the grounds relied upon by the agency," a reviewing court "may not pass upon issues presented to it for the first time on judicial review and that are not encompassed in the final decision of the administrative agency." *Brodie v. Motor Vehicle Administration*, 367 Md. 1, 4, 785 A.2d 747, 749 (2001).

Appellant further argues that the Hearing Examiner repeatedly recognized that whether he was required to apply NAAQS was a threshold issue and that he was required to do so. (E. 1051) Thus, Appellant argues, the issue of preemption was preserved when the Hearing Examiner raised it. *Singletary v. Maryland State Department of Public Safety and Correctional*, 87 Md. App. 405, 589 A.2d 1311 (1991) The record clearly shows that the Hearing Examiner never recognized that he was required to apply the NAAQS as a threshold. In fact, as the Hearing Examiner noted in his report, the NAAQS standards are the best standard available in estimating potential health impacts of the gas station, "[b]ut they are just that – a tool to be used." (E. 68) The Hearing Examiner specifically noted that the NAAQS are "a yardstick to help us to determine whether Petitioner has met its burden of proving that the proposed gas station will not cause adverse health effects, but

they are not themselves the standard." (E. 68) Appellant's arguments concerning preemption, as found by the circuit court, accordingly fail.

III. EVEN IF PREEMPTION WAS PRESERVED, THE COUNTY ZONING LAWS ARE NOT PREEMPTED BY THE STATE'S ADOPTION OF THE NAAQS.

State law may preempt local law in one of three ways: preemption by conflict, express preemption, or implied preemption. *Altadis U.S.A., Inc. v. Prince George's County*, 431 Md. 307, 311, 65 A.3d 118, 120 (2013). In determining whether preemption has occurred, "the focus is on whether the General Assembly has manifested a purpose to occupy exclusively a particular field." *Ad + Soil, Inc. v. County Commissioners of Queen Anne's County*, 307 Md. 307, 324, 513 A.2d 893, 902 (1986). Appellant's argues in this case that the Board's decision regarding air quality standards is preempted by conflict and by implication.

The Clean Air Act ("CAA") requires the EPA to set NAAQS, the purpose of which is to protect the public health with an adequate margin of safety as to the degree of purity of the air. *See* 42 U.S.C. § 7409 (2016). Costco Gas Coalition's brief provides a detailed analysis of NAAQS, including their history and purpose. The CAA further requires states to comply with NAAQS. 42 U.S.C. § 7410(a); 42 U.S.C. § 7416. Maryland adopts and applies the federal standards as State law. Md. Code. Ann., Envir. § 2-103(b)(1). Appellant's argument is that Maryland's adoption of NAAQS standards is preemptive and precludes the Board from denying the special exception, based on fears of air quality, that complies with those NAAQS.

Preemption By Conflict

Preemption by conflict exists when a local law "prohibits an activity which is intended to be permitted by state law, or permits an activity which is intended to be prohibited by state law." *Talbot County v. Skipper*, 329 Md. 481, 487 n. 4, 620 A.2d 880 (1993). Appellant argues that the Board's rejection of NAAQS standards prohibits an activity which State law permits; that is, State law permits levels of $PM_{2.5}$ and NO_2 not permitted by the Board. In support of this argument, Appellant cites *Perdue Farms v. Hadder*, 109 Md. App. 582, 590-91, 675 A.2d 577, 581 (1996), where this Court found that a zoning board condition was preempted by State law because the zoning board placed a limit on nitrogen in groundwater which differed from the State limitation.

The basis of the Court's decision in *Perdue Farms* was that the Board's conditions would prohibit spraying irrigate with water in situations where the State wanted to encourage such spraying. *Id.* Yet here the Board did not impose a limit below the State standard. The Board was not preempted from denying Appellant's special exception application despite the State's adoption of NAAQS. As the Hearing Examiner noted, while the NAAQS standards are the best tool, they are not the only tool to estimate the potential health effects of the proposed station. (E. 160) The Hearing Examiner correctly considered the testimony of health experts on both sides as well as the nature of the specific community, including the proximity to single-family residences (118 feet), a community swimming pool (374 feet), and one of two County schools for severely handicapped children (874 feet). (E. 160)

Further, the NAAQS regulate air quality, while the Zoning Ordinance regulates

land use, including special exceptions, based on a specific grant from the State. The Board conducted a compatibility analysis, outlined above. The State's adoption of NAAQS may be a tool to help assess compatibility, as outlined by the Hearing Examiner and the circuit court, but does not change the Board's authority and inquiry when determining whether to grant Appellant's special exception. The Board, in exercising its zoning authority, looks to the proposed use and determines whether, at the specific site, in the specific neighborhood, the use would have non-inherent adverse effects. The NAAQS were not adopted to conform to a specific neighborhood or use; thus, compliance with the NAAQS does not automatically establish that the Appellant's use would not adversely affect the health and safety of the neighborhood's residents and visitors. The Board's zoning analysis is not preempted by conflict and should be affirmed.

Preemption By Implication

Appellant further argues that the Board's decision was preempted by implication. Implied preemption occurs when the intent to preclude local legislation in the field is inferred; that is, a local law regulates an area where the General Assembly has acted with such force that an intent to occupy the field must be implied. *Skipper*, 329 Md. at 488, 620 A.2d at 883. According to Appellant, Maryland regulates ambient air quality and sources of air pollution, and has adopted the NAAQS as part of this regulation. Per Appellant, Montgomery County does not regulate these areas, and therefore Maryland's comprehensive control over air regulation preempts by implication the Board's actions.

Looking to three cases cited by Appellant which applied state preemption to reverse zoning actions,[5] the circuit court explained "[i]n each of these cases, it was found that the comprehensive nature of state regulations regarding landfills, mining, and sewage preempted administrative agencies from applying or enacting alternative standards." (E. 509). In *Skipper*, the Court of Appeals explained that "the primary indicia of a legislative purpose to preempt an entire field of law is the comprehensiveness with which the General Assembly has legislated the field." *Id.* at 488, 620 A.2d at 883 (*citing Howard County v. Pepco*, 319 Md. 511, 523, 573 A.2d 821, 828 (1990)). In this case, the Md. Code. Ann., Envir. Art., Title 2, which regulates ambient air quality control, is not as comprehensive as the laws applicable in the cases cited by Appellant and analyzed by the circuit court. As noted by the circuit court, the Md. Code. Ann., Envir. §§ 2-104 and 2-301(b), make specific reference to local zoning authority and explicitly allow the County to adopt its own ordinances, rules, or regulations setting emissions or ambient air quality standards. (E. 510) Further, before accepting application permits for construction of a new source, the State requires the applicant submit documentation "(i) [t]hat demonstrate that the proposal has been approved by the local jurisdiction for all zoning and land use requirements; or (2) [t]hat the source meets all applicable zoning and land use requirements." Md. Code. Ann., Envir. § 2-404(b). Thus, State law evidences not only that the State purpose in enacting

[5] *Days Cove Reclamation Co. v. Queen Anne's County*, 146 Md. App. 469, 807 A.2d 156 (2002); *Skipper*, 329 Md. 481, 620 A.2d 880 (1993); *East Star, LLC v. County Commissioners of Queen Anne's County*, 203 Md. App. 477, 38 A.3d 524 (2012).

ambient air quality legislation was not to keep exclusive control over air quality with the State, but also recognizes the role of local government and the zoning controls.

The circuit court correctly relied on *Ad+Soil, Inc. v. County Commissioners of Queen Anne's County*, 307 Md. 307, 513 A.2d 893(1986) in finding no implied preemption in this case. In *Ad + Soil, Inc.*, the Court of Appeals found that State's sewage utilization statute did not preempt local zoning laws. Instead, the Court found that Title 9 of the Health Environmental Article, which contained most of the State law governing sewage management, referenced concurrent legislative authority with local jurisdictions. *Id.* at 326-7, 513 A.2d at 903. For example, as with the ambient air quality standards at issue, sewage management plans must be consistent with all local zoning regulations. *Id.* (*citing* Md. Code. Ann., Envir. § 9-505(a)).

Likewise, in *Maryland Reclamation Associates, Inc. v. Harford County*, 414 Md. 1, 994 A.2d 842 (2010), the Court of Appeals held that State law regulating the permitting of rubble landfills did not preempt Harford County's local zoning process. In that case, like here, the Applicant for a State permit to operate a rubble landfill was required to attest compliance with the County zoning laws. *Id.* at 37, 994 A.2d at 863. Specifically, the Court noted that when the County enacted their zoning law, they did so "for classic zoning considerations: the impact of the use on the neighboring properties due to emissions from the site, increase in noise, increase in traffic, danger to children, impairment of landscape and visual concerns, etc." *Id.* at 40, 994 A.2d at 865. Thus, as here, the County zoning law was not preempted.

Appellant argues that the circuit court did not account for the comprehensive nature of air regulation by the Maryland Department of the Environment ("MDE"), as well as the fact that permitting and emissions controls are still regulated by MDE even if the County enacted a local air quality standard. Appellant does not consider, as the circuit court pointed out, that "it is clear that the State's purpose was not to exercise exclusive control over air quality, but rather to establish clear mechanisms for local administrative control." (E. 510) As outlined in Md. Code. Ann., Land Use § 4-101(a)(2), "[i]t is the policy of the State that planning and zoning controls shall be implemented by local government."

Finally, Appellant argues that all of the *Allied Vending* secondary factors exist here, specifically noting factors one, two, three, and seven, proving implied preemption.[6] Yet many of these factors, contrary to Appellant's argument, actually go against a finding of preemption. For example, the County's Zoning Ordinance requiring that a proposed special exception not adversely effect the health and safety of residents or workers in the area and not be detrimental to the use or development of adjacent properties or the neighborhood has been a County law since at least 1960, long before enactment of the CAA

[6] The factors are: 1) whether local laws existed prior to the enactment of the state laws governing the same subject matter; 2) whether the state laws provide for pervasive administrative regulation; 3) whether the local ordinance regulates an area in which some local control has traditionally been allowed; 4) whether the state law expressly provides for concurrent legislative authority to local jurisdictions or requires compliance with local ordinances; 5) whether a state agency responsible for administering and enforcing the state law has recognized local authority to act in the field; 6) whether the particular aspect of the field sought to be regulated by the local government has been addressed by the state legislation; and 7) whether a two-tiered regulatory process existing if local laws were not preempted would engender chaos and confusion. *Allied Vending v. Bowie*, 332 Md. 279, 299, 631 A.2d 77 (1993).

or Maryland's adoption of the NAAQS. Further, the State has delegated zoning authority to the County for the areas of Montgomery County within the Regional District. Md. Code. Ann., Land Use § 22-104. In addition, no confusion would result from any two-tiered regulatory approach that may result from the application of the NAAQS and the County's Zoning Ordinance because the Zoning Ordinance applies to a broad range of land uses while the NAAQS are standards established by the EPA that apply to outdoor air throughout the country.

As both the Board and the circuit court found, while the NAAQS may be a tool for the Board to use, they were not adopted for the Board's ultimate purpose in looking at a specific proposed use at a particular site and determining any adverse effects. Further, the NAAQS were not adopted with a specific neighborhood or a specific use in mind. The circuit court found "compliance with the NAAQS is not equivalent to an affirmative establishment that no adverse health effects would arise from a proposed use." (E. 510) The Board was not required to employ the NAAQS under implied preemption, and the Board's decision to deny the Appellant's special exception should be upheld.

CONCLUSION

Appellee Montgomery County, Maryland respectfully request this Court uphold the Board's and the trial court's denial of the special exception.

Respectfully submitted,

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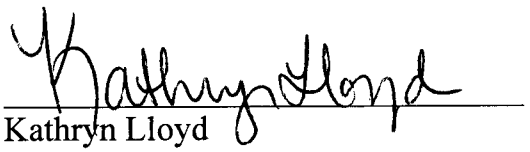
Dated: August 9, 2016

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 9,073 words, excluding the parts of the brief exempted from the word count by Rule 8-503.
2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.



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APPENDIX

42 U.S.C. § 7416 (2016). Retention of State authority

Except as otherwise provided in sections 1857c-10(c), (e), and (f) (as in effect before August 7, 1977), 7543, 7545(c)(4), and 7573 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

Md. Code Ann., Envir. § 2-404(b) (2016). Construction permits

* * * * *

(b)(1) Before accepting an application for a permit subject to subsection (c) of this section, the Department shall require the applicant to submit documentation:
(i) That demonstrates that the proposal has been approved by the local jurisdiction for all zoning and land use requirements; or
(ii) That the source meets all applicable zoning and land use requirements.
(2) Paragraph (1) of this subsection does not apply to any application for a permit to construct at an existing source unless the existing source is a nonconforming use.
* * * * *

Md Code Ann., Envir., § 9-505(a)(2016). Contents of plan; regional plans

(a) In addition to the other requirements of this subtitle, each county plan shall:
(1) Provide for the orderly expansion and extension of the following systems in a manner consistent with all county and local comprehensive plans prepared under Title 1, Subtitle 4, Title 3, or Title 21 of the Land Use Article and § 10-324 of the Local Government Article:
(i) Community water supply systems and multiuse water supply systems;
(ii) Community sewerage systems and multiuse sewerage systems; and
(iii) Solid waste disposal systems and solid waste acceptance facilities;
(2) Provide for the sizing and staging of facilities construction that is consistent with the county plan;
(3) Show compliance with items (1) and (2) of this subsection by using graphic and tabular information;

(4) Provide:

(i) For sewage treatment facilities that are adequate to prevent the discharge of any inadequately treated sewage or other liquid waste into any waters; or

(ii) Otherwise for safe and sanitary treatment of sewage and other liquid waste;

(5) Provide for facilities that are adequate to treat, recover, or dispose of solid waste in a manner that is consistent with the laws of this State that relate to air pollution, water pollution, and land use;

(6) Contain adequate information about:

(i) The existing sewage treatment capacity in each drainage basin or sewage treatment plant service area in the county;

(ii) The present level of use of sewage treatment plants in each drainage basin; and

(iii) Projections for use of sewage treatment plant capacity based on:

1. Outstanding building permits and subdivision plats if the county has subdivision authority; or

2. Zoning commitments if the county does not have subdivision authority;

(7) Taking into account all relevant planning, zoning, population, engineering, and economic information and all State, regional, municipal, and local plans, describe, with all practical precision, those parts of the county that reasonably may be expected to be served in the next 10 years by any:

(i) Community water supply system;

(ii) Multiuse water supply system;

(iii) Community sewerage system;

(iv) Multiuse sewerage system;

(v) Solid waste disposal system; and

(vi) Solid waste acceptance facility;

(8) Set procedures for identifying and acquiring, on a time schedule that conforms to the time requirement in item (7) of this subsection, any rights-of-way or easements that are necessary for any:

(i) Community water supply system;

(ii) Multiuse water supply system;

(iii) Community sewerage system;

(iv) Solid waste disposal system; or

(v) Solid waste acceptance facility;

(9) Taking into account all relevant planning, zoning, population, engineering, and economic information and all State, regional, municipal, and local plans, describe, with all practical precision, any parts of the county in which it is not reasonably foreseeable to have service in the next 10 years by any:

(i) Community water supply system;

(ii) Multiuse water supply system;

(iii) Community sewerage system;

(iv) Multiuse sewerage system;

(v) Solid waste disposal system; and

(vi) Solid waste acceptance facility;

(10) Set a time schedule and a proposed method for financing the construction and operation of each planned:

(i) Community water supply system;

(ii) Multiuse water supply system;

(iii) Community sewerage system;

(iv) Solid waste disposal system; and

(v) Solid waste acceptance facility;

(11) Set forth the estimated cost of constructing and operating each planned:

(i) Community water supply system;

(ii) Multiuse water supply system;

(iii) Community sewerage system;

(iv) Solid waste disposal system; and

(v) Solid waste acceptance facility;

(12) Indicate:

(i) Any source of supply from the waters of this State;

(ii) The approximate amount of water to be withdrawn from the waters of this State; and

(iii) The quantity and quality of waste to be discharged into the waters of this State;

(13) Describe, in accordance with the provisions of this subtitle, each area in the county where:

(i) A community water supply system must be provided;

(ii) A multiuse water supply system may be installed and used;

(iii) An individual water supply system may be installed and used for an interim period until a planned community water supply system is available;

(iv) An individual water supply system may be installed and used indefinitely;

(v) A community sewerage system must be provided;

(vi) A multiuse sewerage system may be installed and used;

(vii) Except as provided in § 9-517 of this subtitle, an individual sewerage system may be installed and used for an interim period until a planned community sewerage system is available;

(viii) An individual sewerage system may be installed and used indefinitely;

(ix) A community solid waste disposal system must be provided; or

(x) A community solid waste acceptance facility must be provided for use by residents of the described area during an interim period until a planned community solid waste disposal system is available;

(14) Except as provided in § 9-515 of this subtitle, provide for amendment or revision of the county plan at least once every 2 years in accordance with a schedule adopted by the Department;

(15) Designate an appropriate agency of the county to be responsible for creating a workable plan:

(i) To keep the environment of the county free of solid waste, including litter; and

(ii) To prevent scenic pollution of both public and private property in the county;

(16) By July 1, 1987, treat each publicly owned community sewerage system as a separate entity for fiscal purposes within the local operating agency;

(17) Document compliance with and report on actions taken and plans to enforce §§ 12-605 and 12-606 of the Business Occupations and Professions Article;

(18) For a county with a population greater than 150,000 according to the latest Department of Planning projections, include a recycling plan by July 1, 2014 that:

(i) Provides for a reduction through recycling of at least 35% of the county's solid waste stream by weight or submits adequate justification, including economic and other specific factors, as to why the 35% reduction cannot be met;

(ii) Provides for recycling of the solid waste stream to the extent practical and economically feasible, but in no event may less than a 15% reduction be submitted; and

(iii) Requires full implementation of the recycling plan by December 31, 2015; and

(19) For a county with a population less than 150,000 according to the latest Department of Planning projections, include a recycling plan by July 1, 2014 that:

(i) Provides for a reduction through recycling of at least 20% of the county's solid waste stream or submits adequate justification, including economic and other specific factors, as to why the 20% reduction cannot be met;

(ii) Provides for recycling of the solid waste stream to the extent practical and economically feasible, but in no event may less than a 10% reduction be submitted; and

(iii) Requires full implementation of the recycling plan by December 31, 2015.

* * * * *

Md. Code Ann., Land Use, § 4-101 (2016). Statement of policy

Planning and zoning controls

(a) It is the policy of the State that:

(1) the orderly development and use of land and structures requires comprehensive regulation through the implementation of planning and zoning controls; and

(2) planning and zoning controls shall be implemented by local government.

Limitation of economic competition

(b) To achieve the public purposes of this regulatory scheme, it is the policy of the General Assembly and the State that local government action will displace or limit economic competition by owners and users of property through the planning and zoning

controls set forth in this division and elsewhere in the public general and public local laws.

Md. Code Ann., Land Use, § 22-104 (2016). Authority to adopt and amend zoning law

In general

(a) The Montgomery County district council or the Prince George's County district council, in accordance with the requirements of this division as to the portion of the regional district located in the respective county, may:
(1) by local law adopt and amend the text of the zoning law for that county; and
(2) by local law adopt and amend any map accompanying the text of the zoning law for that county.

Purposes

(b) The local law may regulate:
(1)(i) the location, height, bulk, and size of each building or other structure, and any unit in the building or structure;
(ii) building lines;
(iii) minimum frontage;
(iv) the depth and area of each lot; and
(v) the percentage of a lot that may be occupied;
(2) the size of lots, yards, courts, and other open spaces;
(3) the construction of temporary stands and structures;
(4) the density and distribution of population;
(5) the location and uses of buildings and structures and any units in those buildings and structures for:
(i) trade;
(ii) industry;
(iii) residential purposes;
(iv) recreation;
(v) agriculture;
(vi) public activities; and
(vii) other purposes; and
(6) the uses of land, including surface, subsurface, and air rights for the land, for building or for any of the purposes described in item (5) of this subsection.

Limitation

(c) The exercise of authority by a district council under this section is limited by §§ 17-402 and 25-211 of this article.

Montgomery County Code, Section 7.7.1. (2014) Exemptions

* * * * *

B. Application Approved or Filed for Approval before October 30, 2014

1. Application in Progress before October 30, 2014

Any development plan, schematic development plan, diagrammatic plan, concept plan, project plan, sketch plan, preliminary plan, record plat, site plan, special exception, variance, or building permit filed or approved before October 30, 2014 must be reviewed under the standards and procedures of the property's zoning on October 29, 2014, unless an applicant elects to be reviewed under the property's current zoning. Any complete Local Map Amendment application submitted to the Hearing Examiner by May 1, 2014 must be reviewed under the standards and procedures of the property's zoning on October 29, 2014. If the District Council approves such an application after October 30, 2014 for a zone that is not retained in Chapter 59, then the zoning will automatically convert to the equivalent zone as translated under DMA G-956 when the Local Map Amendment is approved. The approval of any of these applications or amendments to these applications under Section 7.7.1.B.1 will allow the applicant to proceed through any other required application or step in the process within the time allowed by law or plan approval, under the standards and procedures of the Zoning Ordinance in effect on October 29, 2014. The gross tract area of an application allowed under Section 7.7.1.B.1 may not be increased.

2. Application Approved before October 30, 2014

Any structure or site design approved before October 30, 2014 may be implemented by the property owner under the terms of the applicable plan.

3. Amendment of an Approved Plan or Modification of an Application Pending before October 30, 2014

a. Until October 30, 2039, an applicant may apply to amend any previously approved plan or modify an application pending before October 30, 2014 (listed in Section 7.7.1.B.1 or Section 7.7.1.B.2) under the development standards and procedures of the property's zoning on October 29, 2014, if the amendment:

i. does not increase the approved density or building height, unless allowed under Section 7.7.1.C; and

ii. either:

(a) retains at least the approved setback from property in a Residential Detached zone that is vacant or improved with a Single-Unit Living use; or

(b) satisfies the setback required by its zoning on the date the amendment or the permit is submitted; and

iii. does not increase the tract area.

b. An applicant may apply to amend the parking requirements of a previously approved application (listed in Section 7.7.1.B.1 or 7.7.1.B.2) in a manner that satisfies the parking requirements of Section 6.2.3 and Section 6.2.4.

4. Repair, Renovation, and Rebuilding Rights under Section 7.7.1.B

Any structure or site design implemented under Section 7.7.1.B is conforming and may be continued, renovated, repaired, or reconstructed.

5. Development with a Development Plan or Schematic Development Plan Approved before October 30, 2014

a. Any development allowed on property where the zoning classification on October 29, 2014 was the result of a Local Map Amendment must satisfy any binding elements until:

i. the property is subject to a Sectional Map Amendment that implements a master plan approved after October 30, 2014 and obtains approval for development under the SMA-approved zoning;

ii. the property is rezoned by Local Map Amendment; or

iii. the binding element is revised by a development plan amendment under the procedures in effect on October 29, 2014.

b. Any development on a property that was zoned H-M on October 29, 2014 must include 45% green area, under the zoning in effect on October 29, 2014, until the property is subject to a Sectional Map Amendment or rezoned by Local Map Amendment. The green area required under this provision satisfies, and is not in addition to, any open space requirement of the property's zoning on October 30, 2014.

6. Density Transfers Approved before October 30, 2014

On a property that is subject to an effective density transfer easement and density transfer deed, the total density or density associated with a commercial or residential use, including any density approved by an amendment of a previously approved application listed in Section 7.7.1.B.1, may exceed that allowed by the existing zoning as long as the total density or density associated with a commercial or residential use does not exceed that allowed by the density transfer easement and density transfer deed.

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