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Md.App.1997

RUBBLE-FILL LOSES EXTENSION APPROVAL TO NIMBY FEARS

A Prince Georges County, Maryland, operator of an approved 177-acre rubble-fill applied to the District Council in April 1993 for a special exception to extend its operation onto 274-acres of its adjacent owned land after the existing rubble fill was completed. The 177-acre tract included a closed fill section and the then-operating fill section.

The application for extension was analyzed by the technical staff of the Maryland-National Capitol Park and Planning Commission (M-NCPCC), which issued its report in July 1993 recommending denial on the basis that the operator-applicant had failed to meet various issues, and expressed concern about the impact on neighboring residential properties which would be "surrounded" by the proposed extension. In response to the impact concern, the applicant reduced its applied-for acreage from 274 to 118-acres. A new M-NCPCC technical report was issued in January 1994 recommending approval, subject to certain conditions.

One of the 'conditions' was "this use shall not commence until the existing rubble-fill has been completed and closed out in accordance with all applicable State and County laws". The Prince Georges' County Planning Board adopted the technical staff's recommendation. Local hearings were then held in March by the zoning examiner. Testimony indicated that the "closed" portion of the fill had not yet been capped and closed in accordance with State and County requirements. Testimony from the public

also indicated that 'odors' continued to emanate from the closed (*uncapped*) section. The hearing examiner issued his decision on April 1, 1994, denying the application for extension. His decision was based on the unique impact of "odor, noise, dust, and views on adjacent residential properties" in addition to an inadequate showing of "need" based on projected growth in the County. The operator appealed and the District Council remanded the application to the hearing examiner to take additional evidence, to include the necessity of mounding of the fill and the impact of mounding on the storm water management system.

It should be noted that the rubble fill operator owned about 450-acres of land that had been mined for sand and gravel prior to its first special exception use as a rubble fill in 1977. Its first use as a rubble fill was reportedly approved until 1982 and extended until 1988. Its current special exception use as a rubble fill is valid until November 24, 1998.

After taking additional testimony and holding further hearings, the hearing examiner issued another decision in April 1995, partially refuting the former decision by stating that the evidence could support a finding of "need" for the extended rubble-fill, but still denying the application because of the adverse impact on the adjacent properties. After a final Council denial in October 1995, the operator brought suit in Circuit Court which affirmed the denial in July 1996. The appeal followed with the Mattaponi Basin Citizens Association and several individuals as opponents.

The rubble fill operator contended that the District Council's findings based on public testimonies was founded on generalized fears and unsubstantiated allegations rather than on probative evidence. (See comments at end.)

In *Brandywine Enterprises, Inc. v Prince Georges County*, 700 A.2d 1216 (Md.App.1997), the court determined that : (1) "where the facts and circumstances indicate that for a particular special exception use and location proposed would cause an adverse effect upon adjoining and surrounding properties unique and different, in kind or degree, from those inherently associated with such use, regardless of its location within the zone, applications should be denied., and (2) "Evidence supported the District Council's denial of special exception to allow the operation of a rubble-fill next to an adjacent closed fill; four single-family residences would have been surrounded on three sides by 'mountains' of rubble, there was a history of problems incident to the existing fill ; a landscape architect-expert testified that the proposed mound would create an industrial landscape; the scenic tree road canopy leading to the fill had already been damaged by heavy truck traffic ; and there was considerable speculation as to the need for additional fill space."

The denial for extension of the rubble fill was upheld by the Court of Special Appeals of Maryland.

Aston's Legal Comment :

It should be noted that an unfair part of the "public hearing" system used in the U.S., to determine land uses where zoning regulations are in effect, is that public testimony may be given freely, without basis of substantiated fact or evidence. Citizens may make frivolous and unfounded statements before hearing boards as to bothersome and annoying dust, noise, pollution of water, in streams and wells, bad odors, heavy traffic endangering lives (usually employed in regard to endangering school children's lives on school buses), damaging the scenery and environment, and even creating unsafe road conditions for joggers.

Since public inquiry hearings for zoning uses are not judicial in nature, the misapplied description of "testimony" of unsubstantiated and unfounded statements, which are in reality sentiments, fears, or hysteria of the public, are allowed. These 'testimonies' more typically represent 'sentiments' that underlie the neighborhood NIMBY (not in my back yard) syndrome than truth or factual evidence.

Still, the testimony is allowed and generally defeats proposals of sites for new landfills, prisons or correctional institutions, airports, mineral mining, and a host of other necessary businesses, without which the public would be even more vocal.

Regulations for testifying before zoning hearing boards should require sworn testimony based on factual matter, not hearsay, and provide penalties for perjury as in any court of law.

One of the ironies of zoning is that even when the siting of an undesirable, but necessary, business operation is approved and placed far away in a rural setting, the public will flock to be the undesirable business site to be its neighbors, and then, eventually, after "coming to the nuisance", will complain about its presence.

With reference to the above law case, it has been generally established in geological engineering that sand and gravel pits are considered safe depositories for accepting demolished construction materials (rubble), being free of organic wastes, and that the materials will not contaminate the associated aquifers. Without organic materials being deposited in a rubble fill, it is difficult to imagine "odors" and harmful leachate escaping from a rubble fill.

Readers' comments on odors and leachate from rubble fills, and effects of construction debris in rubble fills on the associated aquifers of sand and gravel deposits would be welcomed.

***** (1,041 words)

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