Case No.: S.E. 4605

Applicant: Barnabas Road Associates, LLC

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

ORDER OF DENIAL

IT IS HEREBY ORDERED, after review of the administrative record, including the transcripts and exhibits for the District Council's initial consideration of the application and the testimony and evidence after the Council's remand to the Zoning Hearing Examiner, that Application No. S.E. 4605, for a special exception for a concrete recycling facility on property described as approximately 13.17 acres of land in the I-1 Zone, in a larger tract of about 54 acres (in the same or connected corporate ownership with the 13.17-acre property), at the terminus of Clifton Road, about 1,150 feet south of its intersection with St. Barnabas Road, identified as 4763 Clifton Road, Temple Hills, is:

DENIED, for the reasons stated in Attachments A and B, which the District Council hereby adopts as its findings of fact and conclusions of law in this case.

ORDERED this 9th day of May, 2011, by the following vote:

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

Opposed:

Abstained:

Absent:

Vote: 9-0

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

BY: _____
Ingrid M. Turner, Chair

ATTEST:

_____
Redis C. Floyd
Clerk of the Council

ATTACHMENT A

S. E. 4605: PROCEDURAL HISTORY

The administrative record for Application No. S.E. 4605 reflects the following events and proceedings, arranged here by date:

27 May 2009:	Examiner public hearing [1] (evidentiary) commenced
1 June 2009:	Initial technical staff report filed in record
25 June 2009:	Examiner public hearing (evidentiary) completed
14 July 2009:	Technical staff report supplemented
21 October 2009:	Zoning Hearing Examiner report filed
11 January 2010:	District Council oral argument hearing (non-evidentiary)
22 February 2010:	District Council remand order sent to parties
7 April 2010:	Examiner remand hearing (evidentiary)
15 April 2010:	Recycled Aggregates (entity co-owned and operated by owners of applicant Barnabas Road Associates) guilty plea and conviction, District Court of Maryland, on three counts of failure to obtain air quality permits; $50,000 fine imposed and paid.

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[1] Application No. S.E. 4605 was accepted for initial processing by Planning Commission technical staff on 1 October 2007. The public hearing before the Zoning Hearing Examiner did not commence until 27 May 2009 because of the applicants' requests for delays.

In the meantime, while the applicant delayed the processing of its concrete recycling special exception application, S.E. 4605, the applicant or its related partnership or corporate individuals and entities continued to use parts of the 54-acre tract (of which the subject property is a small part) for Class 3 landfill purposes and also – without MDE permits – for stone and rock crushing. The landfill operations were scheduled to end in 2008 but were extended for two years, at the owners' request.

23 April 2010:	Examiner remand hearing report filed
12 July 2010:	District Council oral argument after remand (non-evidentiary)
20 September 2010:	District Council second remand order sent to parties
29 October 2010:	Applicant petition for mandamus filed, Circuit Court for Prince George's County
5 April 2011:	Applicant's dismissal of mandamus petition

ATTACHMENT B

S. E. 4605: ORDER OF DENIAL
FINDINGS AND CONCLUSIONS

Applicant and Application

1. The special exception applicant for S.E. 4605 is Barnabas Road Associates, a partnership (or LLC) including other partnership or corporate entities, as well as individuals who own or are associated with the Driggs Corporation. Some individuals and entities with an interest in the applicant were or are related, in ownership or corporate composition, to owners of the 54-acre tract comprising the larger property that includes the subject 13.17-acre property.

2. This special exception application is for a concrete recycling plant on a two-section property. The subject property, 13.17 acres, is part of a 54-acre tract (as measured by members of the technical staff), a tract used for landfill (Class 3), rock and stone crushing, and related construction-waste processing purposes. The larger tract, in a number of parcels or sections, has for many years been in one ownership, or one or more connected sets of ownership related to the Driggs Corporation, its individual shareholders, and related entities. The tract has been used for sand-and-gravel mining, for landfill (Class 3) activities, and in part for rock and stone crushing; for years, large (ten-ton or twenty-ton) dump trucks have hauled construction waste materials to the 54-acre site and disposed of them there.

3. Records of proceedings in the District Court of Maryland reflect that the 54-acre tract was the site of at least three criminal air quality permit violations by a company called Recycled Aggregates. Representatives of Recycled Aggregates in April 2010 pleaded guilty on the company's behalf, in the District Court of Maryland, to three counts of operating rock crushing without MDE air quality permits. The company admitted to violations, was found

guilty, and paid a fine of $50,000. Recycled Aggregates representatives agreed that the company had allowed particulate waste matter discharges without air quality permits and inspections, as required by Maryland law, and that the company was criminally liable for at least three violations.

The District Council thus has evidence – and is informed, by judicial records – that the tract on which the applicant proposes to operate its special exception use, for concrete crushing and recycling, has been the site of criminal violations of Maryland environmental laws, operating rock crushing without permits, criminal violations admitted in open court. The company found by MDE and the District Court of Maryland in violation of Maryland environmental laws, Recycled Aggregates, has the same ownership, or an interlocking ownership, with owners of this special exception applicant, Barnabas Road Associates. The District Council – unlike the Zoning Hearing Examiner, who ignored activities on the 54 acres – must consider prior uses of the subject property and adjacent properties owned or controlled by the individuals or entities that control the applicant.

4. Applicant Barnabas Road Associates proposes installation and operation of a plant for the receiving, breaking down, classifying, and recycling of concrete waste materials. Briefly described, the applicant's operation would involve a steady stream of large dump trucks bringing concrete waste materials from construction sites; the concrete materials would be broken down in size and separated into categories; different types of product would be stored or piled, temporarily; and finally the new "recycled" concrete materials would be hauled to other plants or construction sites, for use in new construction.

5. The proposed plant, with all concrete crushing and recycling operations (except dump truck trips) on site, will be the source of noise, dust, and other concrete particulate matter

generation. Thus the applicant's failure or inability to contain dust, noise, and other recycling waste byproducts on site will result in additional noise, dust, or air pollution on properties in the neighborhood, including residential, retirement, and commercial retail properties.

Subject Property and Neighborhood

6. The subject property, about 13.17 acres (11.87 acres in one section and 1.30 acres in another) in the I-1 Zone, sits at the terminus of Clifton Road, southeast of St. Barnabas Road and just south of the Gordon's Corner residential community. The street address is 4763 Clifton Road, Temple Hills. The 13.17-acre sections are part of a larger tract of about 54 acres used until recently for Class 3 landfill and rock and stone crushing operations. The larger tract is undeveloped but has sizable berms and waste piles where waste materials have been stored or discarded. The waste piles are visible from adjacent properties and from Clifton and St. Barnabas roads.

7. The neighborhood for the applicant's property and this special exception, as defined by the technical staff of the Planning Commission, includes areas of Temple Hills immediately south of the interchange joining St. Barnabas Road and Branch Avenue. Neighborhood boundaries are St. Barnabas Road to the northwest, Branch Avenue to the northeast, the Capital Beltway (I-95/495) to the south, and Temple Hill Road to the west.

8. The neighborhood, by definition the set of properties affecting and affected by the proposed special exception use, is mixed residential and commercial, with some lower-intensity industrial uses (Class 3 fill) on the subject property and along parts of St. Barnabas Road and Branch Avenue. The northern parts of the neighborhood, northeast and northwest of the subject property, have commercial retail and office uses on and near Branch and St. Barnabas; these

highways also have automotive uses (storage and repair) and contractor and warehouse properties.

9. Immediately north of the subject property, along Clifton Road and to its northwest, are several commercial retail stores and the large, established Gordon's Corner residential community. To the west, beyond a berm on the property composed of rock, stone, and construction waste materials, lies the Manor at Victoria Park retirement community, off of Rickey Avenue.

10. The technical staff states that uses immediately surrounding the subject property include contractor and vehicle storage properties to the north and east and "Class 3 fill site[s] in the I-1 Zone." Staff fails to mention, however, that the Class 3 fill sites are simply parts of the large tract of 54 acres, [2] in the same or related ownership or partnership entities. Moreover, Class 3 fill operations on the 54-acre tract have ceased or soon will do so.

11. The neighborhood for the special exception use and the properties immediately adjacent to and surrounding it are largely residential or commercial retail in nature. They are not, as the technical staff and hearing examiner reports suggest, industrial or non-residential in character, unless one counts parts of the 54-acre tract as "adjacent" properties. Throughout the administrative record, the applicant's witnesses and documents – abetted in part by staff and examiner – have attempted to portray the neighborhood and the nearby properties as non-

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[2] The technical staff report indicates that the larger tract, of which the subject property is a part, includes 45 acres. Elsewhere in the record it appears that the tract is 54 acres in area. The exact size of the larger tract is immaterial; for consistency it will be referred to as the 54-acre tract or property.

residential, to minimize (by description) the anticipated adverse effects from the proposed concrete recycling and crushing operations. From considerable testimony in the record by area residents and business owners, the District Council finds that the applicant's concrete recycling facilities will directly and adversely affect existing commercial retail properties on Clifton Road and established residential communities at Gordon's Corner and Victoria Manor.

Concrete Recycling Facility Special Exception Requirements

12. Section 27-343.03 of the Zoning Ordinance, Subtitle 27, Pr.Geo.Co. Code (2008 ed., as amended), sets out specific requirements for concrete recycling facility special exceptions. The applicant's witnesses demonstrated compliance (or substantial compliance) with these concrete recycling facility special exception standards.

13. The chief requirements in § 27-343.03 are setback standards. When it added this section to the Zoning Ordinance, the District Council made legislative determinations that concrete recycling generally has "the potential for generating adverse noise, dust, or vibration impacts" on surrounding residential and commercial properties. Zon. Ord., § 27-343.03 (a) (1). The applicant proposes equipment locations within the 13.17-acre subject property that are hundreds of feet from the boundaries of adjacent properties zoned or used commercially or residentially.

The applicant is unable, however, to set up visual screening or dust barriers to adequately protect the Gordon's Corner residential community. Indeed waste piles presently on the property are visible from the Gordon's Corner subdivision, from Victoria Manor, and from Clifton and St. Barnabas roads. Also testimony in the record reflects that vehicle (primarily truck) and materials processing (from crushing machinery) noises emanate from parts of the subject property – even

now, prior to commencement of concrete recycling operations, because of earlier illegal crushing operations and truck traffic – and reach the Gordon's Corner and Victoria Manor communities.

14. The applicant intends to add the proposed concrete recycling facility and operations as permanent parts of the neighborhood. The record does not include plans or proposals by the applicant to discontinue operations at any time. The technical staff also notes MDE air quality permit requirements for this applicant. These are the same requirements that were deliberately violated by Recycled Aggregates on other parts of the 54-acre tract, as determined in April 2010 by the Maryland Department of the Environment and the District Court of Maryland. This present administrative record and other public records indicate that the same ownership or partnership individuals and entities responsible for the criminal air quality permit violations of Recycled Aggregates are responsible for – and direct – the operations of Barnabas Road Associates, the special exception applicant.

15. The technical staff and Zoning Hearing Examiner have recommended a number of conditions for the proposed concrete recycling facility operations, if the special exception is approved. These conditions include:

(a) Stockpile heights are to be "reduced or adequately screened," so that they are not visible from Clifton Road, off of St. Barnabas Road, or Stamp Road, to the south. Tech. staff report, at 17, par. 5.

(b) Truck trips in and out of the subject property, during the morning (AM) and evening (PM) peak hours, are limited by precise number, to maintain acceptable levels of service and general traffic safety at nearby intersections, particularly at Clifton and St. Barnabas roads and at Temple Hill and St. Barnabas roads. Tech. staff report, at 17, par. 9.

(c) The applicant is to use "water" or "chemical suppressants" or both, to control "fugitive dust" emissions from or on the "roads and stockpiles" on the subject property. Examiner (21 Oct. 2009) report, at 15, par. 12; examiner (23 April 2010) report, at 18, par. 12.

16. The applicant's potential compliance with these conditions, as well as MDE permit requirements, should be examined in light of prior management by the same individual and ownership entities responsible for the criminal conduct of Recycled Aggregates on parts of the 54-acre tract that includes the subject property. Neither examiner nor staff considered this issue, the likelihood that this applicant will decide at some point, after special exception approval, *not* to comply with conditions imposed on plant operations. For its part, the applicant offered no assurances, by agreements with the Planning Commission, by independent monitoring, or otherwise that it would comply with District Council conditions.

Truck Traffic Issues

17. Aside from the environmental and general land use issues presented in this case, a major concern – one addressed by the applicant, the technical staff, the hearing examiner, and opposition citizens – is truck traffic, existing and anticipated, to and from the subject property. On this issue, the applicant bore a heavy burden to establish that truck traffic to and from the property will not exceed levels that raise safety or congestion problems, particularly along St. Barnabas Road and on Clifton Road, and that truck traffic effects from the special exception use will be no worse at this site than elsewhere in the I-1 Zone, for this special exception use..

18. By memorandum dated 7 April 2009, the transportation planning section of the Planning Commission technical staff reviewed and found acceptable the applicant's traffic study. Transportation planning staff recommended the following condition, which the technical staff report and hearing examiner report included in their recommendations:

> The proposed development on this site shall be limited to uses generating no more than 92 total trips (46 trips in/46 trips out) during the AM peak hour, and 72 total trips (36 trips in/36 trips out) during the PM peak hour. Any development generating a traffic impact greater than that identified herein above requires new findings for the transportation infrastructure.

19. The District Council accepts the recommendations of the technical staff that additional truck traffic from the proposed concrete recycling facility will not create traffic congestion or capacity issues at nearby intersections, if the applicant complies with the quoted condition. That finding is supported by the applicant's 2008 traffic study.

20. The applicant's and technical staff's proofs and arguments are not convincing, however, as to the likely adverse effects of truck traffic on nearby roadways, residential and retirement home development, and commercial retail and office areas. The community planning south division of the Planning Commission's technical staff noted that new truck traffic for the concrete recycling facility will adversely affect the character of the area.

In its justification statement, the applicant argued that its proposed concrete recycling "will prevent the overcrowding of land." In response, the technical staff stated:

> The [site] plan [for the special exception] does *not* indicate how safe circulation by vehicles and pedestrians will be accomplished. Nor does it indicate how the trucks will be stacked if several are waiting to be serviced.

Tech. staff report, at 11 (emphasis added). Staff continued that the applicant's safety plan is not "definitive," as the applicant merely gave "an estimate of the time it will take for each truck to enter and exit the facility." *Id.* That is, even if the applicant's traffic study suggests no adverse capacity effects from added truck traffic, the applicant produced no stacking plan, parking plan, or safety plan for trucks on or adjacent to the subject site.

Even beyond safety considerations, the technical staff suggested adverse noise and air

quality effects from new truck traffic generated by the concrete recycling facility. Staff stated:

> The applicant is not considering the impact of noise and air quality on surrounding properties derived from truck traffic [en] route to the recycling facility. Plans to redevelop St. Barnabas Road have been included in the Branch Avenue Sector Plan and Sectional Map Amendment. Truck traffic traveling along that route could discourage reinvestment in the area.

Tech. staff report, at 11. Staff also noted, in its discussion of the Master Plan: "Truck traffic and other heavy equipment that would support a concrete recycling facility would negatively impact the residential, office and retail uses that are proposed for S. Barnabas Road." *Id*., at 12.

From these staff observations and findings, the District Council must conclude, as stated below, that the applicant's proofs do not sufficiently demonstrate that truck traffic to be generated by the proposed concrete recycling facility will not adversely affect the health or safety of residents or workers in the area and will not be detrimental to the development and use of adjacent and neighborhood properties. As staff found, the applicant argues incorrectly that Class 3 landfill truck traffic will be substantially the same as concrete recycling truck traffic. Staff determined, and the District Council agrees, that the two types of truck traffic are not comparable, and the latter presents far worse effects than the former:

> One of the obvious differences between the [landfill and recycling] uses is their overall lifespan. While a permit for a landfill has a limited lifespan, there is no such limitation on a concrete recycling facility. *It is allowed to continue indefinitely*. Review of the applicant's site plan and statement of justification also suggest the proposed concrete recycling use is a *more intensive use* than the Class 3 fill. Instead of only arriving full and leaving empty (as in the case of a fill operation), trucks will also be arriving empty and leaving full. Dust is a concern, especially with the anticipated truck traffic and stockpiles up to 64 feet high. The applicant indicates that Clifton Road will be cleaned twice a day but does not address how dust will be minimized within the site. Cleaning Clifton Road twice a day, particularly in the summer when it is especially dry, will most likely not be sufficient.

Tech staff report, at 13 (emphasis added).

21. Staff concluded as follows, for its traffic safety and truck capacity findings:

> While the Transportation Planning Section has concluded that the increase in truck traffic will not have an adverse impact upon the transportation network from a capacity perspective, it *will* affect the safety, health and welfare of workers in the area. Increased traffic increases the risk of vehicular conflicts, and more trucks will result in more noise and dust.

Tech. staff report, at 13. The applicant thus did not meet its burden to prove that truck traffic to and from the concrete recycling facility will not adversely affect the health or safety of residents and workers and not be detrimental to properties near the special exception property.

Master Plan Issues

22. In a memorandum dated 19 March 2008, the community planning south division of the Planning Commission's technical staff found a number of discrepancies and inconsistencies in the applicant's arguments and proofs, as they concern the Master Plan. Staff's findings show the applicant's failure to demonstrate that its proposed concrete recycling facility will not impair the Master Plan's integrity.

23. Community planning south staff described the subject property as follows:

> The property is located in the Silver Hill Industrial Area approximately 1,150 feet south of St. Barnabas Road. The majority of the property is being used for a landfill which will be permanently closed in April 2008. [The closing date was later changed to April 2010.] The existing landfill site is an enormous mound of dirt that towers over the community and can be seen from a great distance on St. Barnabas Road. The owner plans to level the mound to a small degree. However, it will still be highly visible in the community. Consideration should be given to further leveling the landfill to mitigate its impact on the surrounding residential and commercial neighbors. A portion of the site that the landfill does not occupy is proposed to handle solid waste consisting of concrete demolition material. Currently, concrete is being stockpiled on the proposed recycling facility site at a height that is visible from the street.

Tech. staff report, at 10-11. Staff's description is intended to show – by direct evidence, from

views of the subject property from nearby roads – that the applicant's property has not been maintained or used (for decades) in a way that enhances neighborhood (or sector plan or planning area) development, or encourages new land uses and development that upgrade the quality or value of area and neighborhood properties. In a number of ways, community planning south division staff demonstrated clearly how the applicant's proposal is antithetical to Master Plan recommendations.

24. Staff first noted, as is clear from their submissions in the record, that the Master Plan for this project consists of a number of documents. The 2002 General Plan has general recommendations; it defines the Developed Tier, of which the subject property and neighborhood are a part. Within the Developed Tier of Prince George's County, the County's vision, as approved by the Planning Board and District Council, is to create "a network of sustainable, transit-supporting, mixed-use, pedestrian-oriented, medium- to high-density neighborhoods." Community planning south division memo., 19 March 2008. The proposed concrete recycling facility does not promote realization of this vision.

25. The adopted and approved "Area Master Plan" for the subject property and its neighborhood is the 2000 Heights and Vicinity Master Plan (Planning Area 76A). The Heights Master Plan states:

> Future development of reuse of sites in the employment area should be as light industrial. *Uses that require special exceptions and exhibit a more industrial type use should be carefully considered for the impact on the nearby residential area and roads*. In addition, any development of these properties should b designed to enhance the appearance of the site through attractive building facades and adequate landscaping.

Community planning south division memo., 19 March 2008 (emphasis added).

26. Community planning south staff found that the applicant did not show conformance with Master Plan recommendations. Several staff findings are noted above. In summary, the staff comments and observations show that the applicant's Master Plan case, its evidence and arguments, would not support a favorable District Council finding as to Master Plan non-impairment. As with traffic safety and general compatibility, the District Council cannot conclude from this record that the applicant met its burden of proof, to support its special exception application adequately.

27. Community planning south staff also noted that this special exception application was not consistent with the then-pending Branch Avenue Corridor Sector Plan and Sectional Map Amendment. [3] The subject property and its neighborhood are very close to but not within Branch Avenue Corridor Sector Plan boundaries. Staff indicated:

> The [Sector Plan] vision for St. Barnabas Road is to create a safe, vibrant, and attractive community that encourages residents to walk, shop and socialize at the upgraded commercial areas. Attractive landscaping and streetscape will link the residential neighborhoods to the shopping, recreation, and transit.

Community planning south division memo., 19 March 2008. This additional staff comment and finding is consistent with the District Council's conclusion that, as to Master Plan non-impairment, the applicant did not meet its burden of proof.

General Land Use Compatibility

28. Besides adverse truck traffic effects and impairment of the Master Plan, the applicant was required to address the issue of general land use compatibility. It was the

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[3] The Branch Avenue Corridor Sector Plan and SMA, pending at the time of the staff report, was approved by the District Council in Council Resolution 86-2008, adopted on 30 September 2008.

applicant's burden to show that its proposed concrete recycling facility and operations would create adverse effects on adjacent properties and the neighborhood no worse than those to be anticipated from concrete recycling operations elsewhere in the I-1 Zone. This the applicant failed to do; indeed the applicant did not even offer evidence, let alone prove, that its facilities would have effects no more adverse than other concrete recycling facilities at other I-1 locations.

29. It was the applicant's burden to compare its property in its neighborhood with other I-1 properties. The subject property, at the end of Clifton Road, is a part of a 54-acre tract with a history of sand-and-gravel mining, Class 3 landfill operations, illegal rock and stone crushing, and similar activities that have been there for decades. The record reflects that use by the applicant's predecessors – related corporations and partnerships, including the Driggs Corporation and Recycled Aggregates – of various sections of the 54-acre property have adversely affected area residents and businesses, along Clifton Road and in the Gordon's Corner and Victoria Manor communities. These untoward effects have been caused in major part by large dump trucks travelling on and off and around the 54-acre property. The applicant might have proffered that uses (like Class 3 fill operations) would cease on other parts of the 54 acres when concrete recycling operations commenced. The applicant might also have offered proof that the location of the proposed concrete recycling operations was better screened or separated from residential and commercial retail areas than other I-1 properties. But it made no such proffers or proofs.

30. At the public hearing on remand, opposition witnesses from Gordon's Corner, from Victoria Manor, and from retail properties on Clifton Road offered substantial evidence of past problems on their properties caused by activities on the 54-acre tract. The problems brought

out in the testimony of opposition witnesses included noise and dust from the 54 acres, primarily from the trucks and their dumping operations. The applicant did not refute any of this testimony or argue that it was not credible. For her part, the examiner ignored all this testimony; she thought it irrelevant.

31. The applicant did not prove that other I-1 properties have the same proximity to residential, retirement, and retail properties as does the subject property. On this record, the applicant failed to answer opposition evidence and failed to demonstrate that all I-1 properties are as close to residential and retail development as its own, or that adverse effects from its concrete recycling facility and operations will be no worse than they would be at other locations in the I-1 Zone.

General Special Exception Requirements

32. Section 27-317 (a) of the Zoning Ordinance sets out the proofs all special exception applicants must make. It provides that a special exception may not be approved unless the District Council finds, from the evidence:

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

(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.

33. In the present case, as will be explained, the applicant did not produce evidence sufficient to meet its burden as to the third requirement, non-impairment of the Master Plan; the fourth requirement, adverse effects on the health or safety of residents or workers in the area; and the fifth requirement, detriment to the use or development of adjacent properties or the general neighborhood. The applicant did not demonstrate in its proofs that the General Plan, the Area Master Plan, and the Branch Avenue Corridor Sector Plan would not be impaired. The applicant did not prove that adverse effects on the health or safety of area residents and workers would be no worse at this location than at other I-1 properties. And the applicant did not prove that the detriment to the use of nearby residential, retirement, and commercial retail properties would not be greater than at other I-1 sites.

Technical Staff and Hearing Examiner Error

34. Both technical staff and examiner made a number of errors, in their evaluation of the applicant's evidence and their overall approach to this special exception case. Taken together, these errors are sufficient in size and number to eviscerate their recommendations that the special exception application should be approved.

35. Staff and examiner both assumed, incorrectly, that the applicant simply had the burden to prove, through expert opinion testimony, that nearby highway intersections will operate adequately, that noise and dust controls are reasonable and within industry standards, and that the site plan showed compliance with setback and dimensional requirements in § 27-343.03.

Once the applicant did that, in the view of staff and examiner, the burden of proof shifted to the opposition, to show adverse effects sufficient to justify denial. But special exception law generally and the Prince George's Zoning Ordinance rules in § 27-317 do not work that way.

36. The technical staff, it should be noted, has a disadvantage in all special exception cases. The staff must complete its review and file its report, with its recommendation for or against approval of the application, *before* evidence is presented at the public hearing, held by the examiner. Staff, that is, gets the story ex parte, all from one side: the *applicant* files the special exception request, the a*pplicant* submits the expert witness reports, the *applicant* files – and then amends, several times – the special exception site plan, and the a*pplicant* constantly talks to and works with the staff personnel who review the application and write the technical staff report. It is hardly surprising, then, that most staff reports, like the one for S.E. 4605, contain findings and recommendations favorable to the applicant.

The technical staff does not have the benefit of the opposition's testimony and exhibits, before it writes the staff report. The opposition's case is not presented until the examiner's hearing. From staff's viewpoint, the case it reviews is 100% pro-applicant; the opposition, through no one's fault, cannot make a meaningful case to the technical staff.

37. The Zoning Hearing Examiner has no such excuse, however. It is the examiner's duty to hear and review all evidence at the public hearing and to apply the law – including the law as to burden of proof – fairly and correctly. If the examiner makes the applicant's burden of proof too easy, or if the examiner ignores probative evidence or fails to ask the applicant to prove its case completely, then errors occur. And that is what happened in this case.

38. Contrary to settled legal principles in Maryland, the examiner in this case, S.E. 4605, Barnabas Road Associates, did not require the applicant to meet its burden of proof fully,

ignored probative evidence from opposition witnesses, and then incorrectly assigned the burden of proof to the opposition. The District Council could not accept the examiner's recommendation even if no opposition witnesses had testified at the public hearing.

39. To begin, the applicant did not offer and the examiner did not ask about the special exception requirements in *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981), *People's Counsel v. Loyola College*, 406 Md. 54, 956 A.2d 156 (2008), and other special exception cases. *Loyola*, *Schultz*, and other Maryland cases say that the special exception applicant, to be entitled to an approval order, must demonstrate that its proposed use at its proposed location will cause adverse effects no worse than would reasonably be anticipated, regardless of the location of the use in the zone. For a concrete recycling facility in the I-1 Zone, it was incumbent on this applicant to prove that its facility on Clifton Road, as shown in its site plan, expert reports, and direct testimony, would create effects no more adverse than on other I-1 properties. The applicant did not do that, did not make such proof, and the examiner did not require it to do so.

40. Moreover, the examiner incorrectly decided that she should confine her review to the 13.17-acre subject property and ignore activities – past, present, future – on the larger 54-acre tract. That view is plainly wrong, under the Maryland cases, including *County Council v. Brandywine Sand and Gravel Co.*, 117 Md.App. 525, 700 A.2d 1216 (1997), where it was held that a new rubblefill facility should be evaluated differently because it was situated adjacent to an existing facility causing the same adverse effects. The examiner here committed substantial error by focusing her review solely on the subject property, ignoring the larger tract, and holding irrelevant all opposition testimony.

Summary: District Council's Conclusions

41. For the reasons stated above, restated and summarized here, the District Council

must deny Application No. S.E. 4605, Barnabas Road Associates, a special exception application for a concrete recycling facility at the terminus of Clifton Road in Temple Hills.

42. The applicant's problem in this proceeding – errors made also by technical staff and hearing examiner – concern required proofs and the burden of proof under the Prince George's Zoning Ordinance, particularly the burden of persuasion. The applicant, even when aided by staff and examiner, did not prove by sufficient evidence that its proposed concrete recycling facility and operations will not substantially impair the Master Plan; will not adversely affect the health and safety of residents and workers in the vicinity and the neighborhood; and will not constitute a detriment to the use and development of adjacent and neighborhood properties. Because of its failures of proof, and because it did not meet the requirements of *Schultz, Loyola*, and other cases, to show that its proposed use at its proposed location would cause adverse effects no worse than those to be anticipated from such a use regardless of its location in the zone, the applicant is not entitled to approval of its application.

Master Plan

43. As stated, the Master Plan in the present case, for purposes of § 27-317 (a) (3) of the Zoning Ordinance, is embodied in three documents. They are the General Plan (for all of Prince George's County), adopted and approved in 2002; the Heights and Vicinity Master Plan, adopted and approved in 2000; and the Branch Avenue Corridor Sector Plan, adopted and approved in 2008.

The vision of the General Plan for the area of the subject property, referred to as the County's Developed Tier, calls for careful and controlled revitalization, redevelopment, and new infill development in established County neighborhoods, especially inside the Capital Beltway. The General Plan envisions a "network" of neighborhoods, medium-density and high-density,

that are mixed-use and pedestrian-oriented (commercial and residential uses near one another) and that support mass transit (bus and rail stops in residential and commercial areas). The applicant did not show conformance with this vision, and the community planning south division of the technical staff found that the proposed concrete recycling facility would not enhance the development of the neighborhood.

The Heights and Vicinity Master Plan includes the subject property and its neighborhood. The plan specifically cautions, for the review and approval of special exception and industrial uses:

> Uses that require special exceptions and exhibit a more industrial type use should be carefully considered for the impact on the nearby residential area and roads.

The Heights and Vicinity Master Plan thus recognizes that the neighborhoods covered by the plan, including the neighborhood of the subject property, will include "industrial type" uses and residential uses in close proximity – "nearby" – each other. The applicant shows no inclination toward or sensitivity for the Gordon's Corner community, or the Victoria Manor retirement complex, or commercial retail businesses on Clifton Road.

As noted by staff, the subject property and its neighborhood are situated near but not within the development district [4] covered by the Branch Avenue Corridor Sector Plan. Staff stated, and the applicant offered no response, that the Sector Plan's vision for St. Barnabas Road involves "a safe, vibrant, and attractive community that encourages residents to walk, shop and

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[4] Under Zoning Ordinance terminology, a sector plan defines and controls a development district.

socialize at upgraded commercial areas." Again, the applicant does not demonstrate how its proposed concrete recycling facility and operations will not impair the Sector Plan's vision.

Health and Safety of Area Residents and Workers;
Development and Use of Area and Neighborhood Properties

44. Finally, the District Council must conclude from this record that the applicant did not meet its burden as to the fourth and fifth requirements in § 27-317, as to the health and safety of area workers and the development and use of area and neighborhood properties. For both requirements, the applicant did not present evidence to meet the test set out in *Schultz*, *Loyola*, and other special exception cases. Moreover, the applicant did not refute substantial opposition testimony regarding the impact of concrete crushing and recycling activities on nearby residential, retirement, and commercial retail areas.

As to health and safety of area residents and workers, the applicant was required to show how its operations would not create undue adverse effects. Those effects, from noise, vibrations, and dust and airborne particulate matter, are anticipated at all concrete recycling facilities, but this applicant did not prove – or even attempt to prove – that its facility at its location would cause no more adverse effects than would be anticipated at other facilities elsewhere in the I-1 Zone. The adverse effects from noise, vibrations, and particulate matter are in part health and safety concerns, as susceptible persons may suffer from these effects in their daily living and working.

Even more to the point, however, to connect the facts in this case to the requirements in § 27-317, the applicant's proofs did not address the problem of "the use or development of adjacent properties or the general neighborhood," as provided in § 27-317 (a) (5). If the adverse

noise, vibration, and particulate matter effects from concrete recycling – the transporting, sorting, crushing, resorting, and retransporting of concrete waste materials to and from a recycling site – can cause health and safety problems for area residents and workers, they will certainly create undesirable neighborhood conditions for the future use and development of other properties. In the present case, those other properties include the Gordon's Corner community, just north of the 54-acre tract and the subject property; the Victoria Manor retirement home off Rickey Avenue, west of the 54 acres; and the commercial retail stores on Clifton Road, past which dump trucks travel every day, to and from the 54-acre tract. The applicant did not meet its burden, under § 27-317 and the Maryland cases, to prove that the S.E. 4605 concrete recycling facility and operations will be no more detrimental to the use and development of area and neighborhood properties than would other concrete recycling facilities elsewhere in the I-1 Zone.