

Tax Map/Block/Parcel
No. 59-12-649

Building Permit/Zoning
Certificate No. 96-0285

Case 4085

OFFICIAL DECISION
BOARD OF ZONING APPEALS
CARROLL COUNTY, MARYLAND

APPLICANTS: Carroll County Terminals, Inc.
Norman E. Shipley, President
2601 Emory Road
Finksburg, Maryland 21048

and

Toma Concrete and Materials, Inc.
212 Locust Street
Suite 500
Harrisburg, Pennsylvania 17101

ATTORNEY: David K. Bowersox, Esquire
FOR THE Hoffman, Comfort, Galloway & Offutt
APPLICANTS 24 North Court Street
Westminster, Maryland 21157

ATTORNEY: William R. MacDonald, Esquire
FOR THE MacDonald and Hecker, P.A.
OPPOSITION 43 North Court Street
Westminster, Maryland 21157

REQUESTS: A conditional use for a ready mix concrete plant and a variance to the minimum distance requirements of 600 feet pertaining thereto

LOCATION: 2601 Emory Road (Md. Rt. 91) in Election District 4

BASES: Article 13, Section 13.2(c); Article 12, Sections 12.2(a), 12.3, 12.4, 12.5 and 12.6; Article 15, Section 15.5.4(d); Ordinance 1E (The Carroll County Zoning Ordinance)

HEARING HELD: March 29, 1996; **CONTINUED:** May 6 and 7, 1996

On March 29, May 6 and May 7, 1996, the Board of Zoning Appeals (Board) heard testimony and received evidence concerning the conditional use request for a ready mix concrete plant (plant) on the premises of 2601 Emory Road (Md. Rt. 140) in Election District 4.

At the conclusion of the public hearing, in compliance with the state Open Meetings Act, the Board deliberated orally in public and voted to approve the conditional use, subject to the conditions of authorization expressed below.

Articles and Sections cited below are of Ordinance 1E.

In accordance with the provisions of Sections 17.6 and 17.7, and the Board's long standing policy of visiting sites prior to public hearing, the Board visited the site February 21 and March 25, 1996. The purpose of the visits was for the Board to view the site and adjacent properties so that the Board would be reasonably familiar with the properties to assist in the Board's appraisal of testimony, either pro or con, presented during the public hearing.

An amended site plan, Applicant's Exhibit 2, was introduced, replacing the original plan submitted with the application. The plan indicates that the proposed location of the plant and office trailer comply with the minimum yard and distance requirements specified, respectively, in Sections 12.5 and 4.12.

The application, testimony and evidence comprising the record of this case are hereby included by reference in this decision.

FINDINGS OF FACT

The 12.661 acre tract is located on the southeast side of Md. Rt. 879, and north side of the North Branch of the Patapsco River, west of its conjunction with Liberty Reservoir. A cannery and distillery were operated there years prior to adoption of Ordinance 1E and the Official Zoning Maps August 17, 1965, when the tract was designated "I-G" General Industrial District.

A number of business and industrial uses have been established within the previously existing buildings. More recently, additional buildings have been constructed and uses established. Although most of the uses appear to operate during routine business hours, a trucking business apparently operates beyond those hours.

From the southwesterly property lines paralleling the railroad and the North Branch of the Patapsco, the topography of the tract rises thirty to more than sixty feet along the easterly and northeasterly property lines (Applicant's Exhibit 2). Development of the tract has obviously required extensive excavation and grading, to create suitable construction sites for buildings and parking. As depicted on the revised plan and a photograph portraying a view of the site from adjoining property (Protestants' Exhibit 6S), visibility of the proposed site is significantly reduced by the intervening topography. As portrayed by another photograph (Protestants' Exhibit 6Q), visibility is also reduced to a lesser extent, by what appear to be bushes and trees. The plant will, of course, be visible from points adjacent to the property lines, and from Md. Rt. 91 which overlooks the premises. By establishing landscape screening along the northwest, northeast, and east property lines, the plant will be less visible from adjoining properties and Md. Rt. 91.

The plant will consist of a silo for storage of cement, aggregate storage bins, a water storage tank, a transfer conveyor, a hopper, and an office trailer. The system combines the dry cement and aggregate by weight in a batcher. The cement and aggregate mixture is then transferred to the mixing bowl of the truck where water is added and the mixture becomes concrete to be immediately delivered by the truck. Dust emission control devices are incorporated in system to effectively minimize escape of particulate

from the system. Preventive practices include spraying water on the aggregate and covering sand stored in bins with tarpaulins when dictated by weather conditions.

Cement will be transported to the plant by trucks, and transferred to the silo for use. Aggregate will be transported by dump trucks from the sand and gravel operation located on the north side of Mr. Rt. 91, using a private road to be constructed by Maryland Midland Railway, Inc. adjoining the railroad. The aggregate will be stored for use in bins between the silo and water storage tank.

Three or four concrete mixing trucks will be parked on the premises and used to transport the product to construction sites. Trucks are expected to make three to five deliveries each day, Monday through Friday, but may be able to perform more deliveries depending on the particular construction involved and the travel time to and from the site. Additional trucks are available from other plants and may be directed to this plant when jobs dictate the need. If additional trucks are assigned to this plant, the total number of daily trips to and from the plant may be more than the projected average of fifty trips. At a properly prepared site, each truck will be sprayed with water as a precaution to remove dust and aggregate prior to their leaving the premises to make deliveries.

Excess concrete may be used to manufacture concrete products on the premises, as fill where appropriate, or disposed of at an approved site.

Three employees are required to operate the plant. From five to twelve employees are expected to be hired to fill various positions. There is adequate space on the premises to provide for parking of employees' vehicles in compliance with the provisions of the zoning ordinance.

As new uses and buildings have been established on the premises, it appears that the existing driveway connection to Md. Rt. 879 complies with the standards of the Engineering Access Permits Division of the State Highway Administration. However, the driveway connection will be included in the review of the site development plan pursuant to Section 4.26.

A professional engineer appeared on behalf of the applicants and testified that based on an estimated total of fifty trips a day--twenty-five trips to and from the plant--and the existing state roads, the additional vehicular traffic, consisting of primarily of concrete mixer trucks, would not adversely affect existing vehicular traffic in the area.

A real estate appraiser, accepted as an expert, testified on behalf of the applicants that in his opinion, based on facts and circumstances in this case, establishment of the plant would not cause adverse effects, including depreciation of property values in the area. The appraiser noted that the site had been zoned "I-G" General Industrial District since adoption of the zoning plan, that the land uses established on the premises are allowed, and that development of the properties in the neighborhood have been in accordance with the land uses permitted in the respective zoning districts. Dwellings in the neighborhood have been constructed, sold and resold with knowledge that this tract and other properties in the area are used for business and industrial purposes. Thus, any affects that the business or industrial land uses may have on neighboring properties existed when the transactions occurred, and that the

mixed concrete plants.

Section 4.12, Distance Requirements, reads:

Any uses or buildings subject to compliance with this section shall be located at least 200 feet from:

- (a) any lot in an "R" District; or,
- (b) any lot of less than 3 acres occupied or intended to be occupied by a dwelling not located on the same lot as the said use or buildings; or,
- (c) any lot occupied by a school, church or institution for human care; or,
- (d) the curtilage area within a lot of 3 or more acres improved by a dwelling.

Additional regulations governing the use include a maximum height of 50 feet (Section 12.4)¹; and, a front yard of 50 feet, side yards of 30 feet, and a rear yard of 30 feet (Section 12.5). The use is also subject to the provisions of Section 4.26 pertaining to submission and approval of a site development plan. In the interests of brevity, the regulations will not be quoted.

As defined in Article 20, conditional uses are the same as special exceptions.

Article 17, Board of Appeals; Section 17.7, Limitations, Guides and Standards governs the Board in considering conditional uses and specifies:

Where in these regulations certain powers are conferred upon the Board or the approval of the Board is required before a conditional use may be issued, the Board shall study the specific property involved, as well as the neighborhood, and consider all testimony and data submitted. The application for a conditional use shall not be approved where the Board finds the proposed use would adversely affect the public health, safety, security, morals or general welfare, or would result in dangerous traffic conditions, or would jeopardize the lives or property of people living in the neighborhood.

In deciding such matters, the Board shall give consideration, among other things, to the following:

- (a) The number of people residing or working in the immediate area concerned.
- (b) The orderly growth of a community.
- (c) Traffic conditions and facilities.
- (d) The effect of the proposed use upon the peaceful enjoyment of people in their homes.
- (e) The conservation of property values.

¹See Article 15, Exceptions and Modifications; Section 15.4 Height

plant will have no additional adverse effects on neighboring residential properties.

As depicted on various exhibits, three lots adjoin the property to the east and northeast. A railroad and one lot, identified as P. 39, which are zoned "I-G" General Industrial District abut the southwest property lines. To the northwest, the tract fronts on the service road, Md. Rt. 879 paralleling Md. Rt. 91, providing vehicular access to the tract. Properties zoned "I-R" Restricted Industrial District and "I-G" General Industrial District are located to the northwest of Md. Rt. 91. Continuing on the northerly side of Md. Rt. 91, the zoning is "C" Conservation District. Further to the north and northeast on both sides of Md. Rt. 91, the zoning is "R-40,000" Residence District and residential subdivisions known as Emory Hills and Berrywood Village have been developed since the adoption of zoning in 1965. Additional lots, created by deed as off-conveyances and presumedly improved with dwellings, are also located to the east and north of the site.

Owners and residents of many of these properties oppose authorization of the plant as a conditional use on the grounds of:

- noise from operation of trucks and the plant
- dust and particulate pollution of the air and adjacent streams
- vehicular truck traffic to and from the plant
- vehicular traffic safety
- exhaust emissions from diesel truck engines
- the proximity of homes to the tract and proposed site of the plant
- the height of the silo and water storage tank and their likely visibility from adjacent properties and Md. Rt. 91

A real estate appraiser and consultant, Mr. Bernard F. Semon was accepted as an expert, on behalf of the opponents. Mr. Semon submitted comments relative to the factors that the Board must consider as specified in Section 17.7, and testified on behalf of the opposition. In Mr. Semon's opinion, the plant is not compatible with the existing businesses operating on premises and would adversely affect those businesses, as well as nearby residential properties. However, the Board finds no probative evidence substantiating his conclusion.

APPLICABLE LAW

The tract is zoned "I-G" General Industrial District as depicted on zoning map 59B. Section 13.2, Conditional Uses (requiring Board authorization), paragraph (c) states, "Any conditional use set forth and as regulated in the "I-R" District." (Added 9/22/77).

Section 12.2, Conditional Uses, paragraph (a) specifies in relevant part:

The following uses when the location of such use shall have been authorized by the Board, provided such use shall be subject to three (3) times the distance requirements specified in Section 4.12:

Concrete and ceramic products manufacture, including ready-

- (f) The effect of odors, dust, gas, smoke, fumes, vibrations, glare and noise upon the use of surrounding property values.
- (g) The most appropriate use of land and structures.
- (h) The purpose of this ordinance as set forth herein.
- (i) Type and kind of structures in the vicinity where public gatherings may be held, such as schools, churches, and the like.

The Board is also governed by decisions of the courts. The petition submitted objecting to authorizing the plant indicates the opinion of the individuals signing the statement. The petition is not probative evidence presented during the public hearing of the case. The Board must consider and weigh the testimony and evidence presented during the public hearing, and decide the issue fairly and impartially, based on what the Board finds to be probative evidence. The petitions submitted either in favor of, or opposed to, a conditional use are not evidence that the Board can properly consider in rendering its decision.

In the case of *Turner v. Hammond*, 270 Md. 41, 55 (1973), the decision reads:

While the applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements he does not have the burden of showing affirmatively that his proposed use accords with the general welfare. If 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. The extent of any harm or disturbance to the neighboring area and uses is, of course, material but if there is no *probative* evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the functioning of the comprehensive plan, a denial of an application for a special exception is arbitrary, capricious and illegal. (Citation omitted.)

In *Steuart Petroleum Company v. Board of County Commissioners of Saint Mary's County, Md.*, 276 Md. 435, 445 (1975) the Court wrote:

In the context of zoning law, a "plebiscite of the neighbors" or "of the neighborhood" refers to instances where the action of an administrative body which effects a change in zoning and deprives an individual of a property right is predicated on the pleasure of the owners of nearby property rather than on a comprehensive plan, which imposes mutual restrictions and confers mutual benefits on all,.... (Citations omitted.)

In *Entzian v. Prince George's County, Md.*, 32 Md. App., 256, 262-263 (1976) the decision quotes from the opinion of the Circuit Court for Prince George's County quoting *Rockville Fuel and Feed Company v. Board of Zoning Appeals of the City of Gaithersburg, Md.*, 257 Md. 183 and 193 (1970):

"Zoning is not a plebiscite'" and therefore testimony in opposition restricted solely to lay witnesses, petitions of objection to the proposal by residents, and testimony amounting to unsupported dislike and fear of (a) project, "...amounted to no evidence at all." (Citation omitted.)

In the case of *Mossburg v. Montgomery County*, 107 Md. App. 1, 7-8 (1995) the Court stated:

...a special exception/conditional use in a zoning ordinance recognizes that the legislative body of a representative government has made a policy decision for all inhabitants of the particular governmental jurisdiction, and that the exception or use is desirable and necessary in its zoning planning provided certain standards are met.

In the case of *Schultz v. Pritts*, 291 Md. 1, 22 (1981) the court wrote:

We now hold that the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone. (Citations omitted.)

REASONING

The "I-G" General Industrial District is the least restrictive zoning district provided by the zoning ordinance. Land uses first permitted as either principal permitted or conditional uses in the business districts and the next least restrictive zone, the "I-R" Restrictive Industrial District, have been designated as appropriate land uses in the "I-G" General Industrial District, as conditional uses.

These provisions are legislatively enacted by the County Commissioners of Carroll County and may not amended, except by the County Commissioners as provided by law.

The fact that the characteristics of the majority of businesses operating on the premises are of land uses allowed in the more restrictive "I-R" Restricted Industrial District may be of concern to Mr. Shipley as owner of the property, however that fact does not affect the land uses allowed as either principal permitted, conditional or accessory uses specified in Article 13. Principal permitted and accessory uses do not require authorization by this Board, and may be established there without public hearing, subject to compliance with applicable law.

The grounds cited by the owners and residents of nearby properties opposing the conditional use are reasonable and may prove to be characteristic of the plant's operation at this location. However, these characteristics are typical of such plants,

and the Board finds no probative evidence that establishment and operation of the plant at this location will have any greater adverse effects at the proposed location than elsewhere in an "I-G" General Industrial District.

This Board must adhere to the provisions of the zoning ordinance and decisions of the courts, and may not arbitrarily, capriciously or illegally approve or deny this, or any other application.

Therefore, in considering the testimony and evidence in light of the provisions of Section 17.7 and decisions of the courts, the Board is convinced that the applicant has met his burden of proof, and that establishment and operation of the plant, in accordance with the conditions of authorization imposed below, will not unduly affect the owners and residents of adjacent properties, the values of those properties, or public interests.

CONCLUSION

Based on the findings of fact, applicable law, and reasoning expressed above, the Board hereby authorizes the conditional use, subject to the following conditions of authorization, which are imposed to promote the intent and purpose of the zoning ordinance:

1. A landscape screening plan prepared and recommended by a professional landscape architect to maximize landscape screening of the northwest, northeast, and east sides of the tract shall be included as an element of the site development plan. Trees shall be 1½ to 2 inches caliber, and a minimum of 6 feet in height. In order to maximize landscape screening of the tract, the applicants are directed to investigate planting and maintenance of trees within the state highway administration's rights of way of Md. Rts. 91 and 879.
2. The hours of operation of the ready mix concrete plant shall be limited to: 6:00 a.m. to 6:00 p.m. Mondays through Fridays; 6:00 a.m. to 12:00 noon Saturdays; and closed Sundays.
3. An up-to-date dust collection cartridge system shall be installed with establishment of the ready mix concrete plant.
4. Electric blower motors shall be used to transfer cement from delivery trucks to the silo. No use of truck engine systems to transfer cement from trucks to the silo shall be permitted. The electric motors should be quieter than truck motors in transferring the cement from trucks to the silo.
5. Reclamation procedures shall be established, including on-site use of surplus concrete to produce concrete products, and an approved off-site location to dispose of surplus concrete and wastes from cleaning truck mixing bowls.

6/4/96

Date

Karl V. Reichlin

Karl V. Reichlin, Chairman