

**DISTRICT COUNCIL FOR PRINCE GEORGE'S COUNTY, MARYLAND
OFFICE OF THE ZONING HEARING EXAMINER**

SPECIAL EXCEPTION

4774

VARIANCE

4774

DECISION

Application:	Class III Fill
Applicant:	Palmer Road Landfill, Inc./Palmer Road Landfill Company
Opposition:	Stephen Briggs, et. al.
Hearing Date:	June 21, 2017
Hearing Examiner:	Maurene Epps McNeil
Disposition:	Approval with Conditions

NATURE OF PROCEEDINGS

(1) Special Exception 4774 is a request to continue using approximately 173.584 acres of land in the R-E (Residential-Estate) Zone located on the northern side of Palmer Road, abutting the western side of Tucker Road, and identified as 1500 and 1611 Ferguson Lane, Fort Washington, Maryland, as a Class III Fill. Applicant also requests a variance from the requirement that the use not be located within a three (3) mile radius of properties containing an active or pre-existing approved or nonconforming Class III Fill, sanitary landfill, transfer station, rubble fill, recycling facility, mining facility, processing facility, sand and gravel operation, or wash plant.

(2) The Technical Staff recommended approval with conditions. (Exhibit15). The Planning Board chose not to hold a public hearing on the Application and accepted Staff's recommendation as its own. (Exhibit 17(a))

(3) Stephen Briggs and a few others appeared in opposition to the requested use.

(4) The record was left open at the close of the hearing to allow the submission of additional evidence. The last of the items was received by June 29, 2017, and the record was closed at that time.

Subject Property

(5) The subject property is a large, irregularly shaped area of land that contains approximately 173.584 acres of land consisting of Parcels 10, 12, 14, 19, 20, 23-28, 151, 189, 190, 194, 276-279, 286, 297 and Lot 1 on Tax Map 114. (Exhibit 33) It is improved with a 160 square foot construction trailer used as an office and as an inspection station. No additional construction is proposed.

(6) The Application is not exempt from the requirements of the Woodland and Wildlife Habitat Conservation Ordinance because there is an approved Type II Tree Conservation Plan for the site (TCP II-11-94-04)

(7) The Application is also subject to the Landscape Manual. It must meet the requirements of Sections 4.2 (requirements for landscape strips along street), 4.7 (buffering incompatible uses), and 4.9 (sustaining landscape requirements).

Surrounding Uses/Neighborhood

(8) The property is surrounded by the following uses:

- North - Vacant and wooded land, single-family detached homes, the Tucker Road Community Center
- South - Vacant and wooded land, a retirement community, multifamily units, single-family attached homes, and single-family detached homes
- East - Vacant and wooded land, a former fill site, institutional uses
- West - Vacant and wooded land

(9) The neighborhood is bounded on the north by Henson Creek; on the south by Hunters Mill Branch; on the east by an unnamed branch of Henson Creek; and, on the west by Henson Creed and Indian Head Highway (MD 210).

(10) As described by the Technical Staff, “[t]he neighborhood is suburban in character and comprised of vacant and wooded land, and low-to medium-density residential development.” (Exhibit 15, p. 6)

Master Plan/Sectional Map Amendment

(11) The 2006 Master Plan and Sectional Map Amendment for the Henson Creek- South Potomac Planning Area recommends the subject property for Residential, Low use. The request does not further the Master Plan recommendation, but a five (5) year extension of a use that has operated on site since at least 1989 would not substantially impair the Master Plan, and the passive uses that will be developed upon the termination of the Class III Fill would be compatible with Residential, Low use.

(12) The 2014 General Plan (*Plan 2035*) includes this property in its Established Communities. The Community Planning Division of the Technical Staff noted that the request “is not inconsistent with the Established Communities Growth Policy ... since [t]he vision for Established Communities is a context-sensitive infill and low to medium-density development.” (Exhibit 15, pp. 11 and 110)

APPLICABLE LAW

(1) The Application may only be approved if it meets the requirements of several provisions of County law, discussed below. Before reviewing those sections it is helpful to define the requested use. Section 32-125 of the Prince George’s County Code defines “Class III Fill” as follows:

Common fills proposed for lawns, landscape plantings, or for other nonload-bearing usage.

(2) Section 32-157(b) of the Prince George’s County Code further delineates the type of fill permitted in a Class III Fill:

Class III fills may include the more difficult to combat soils, at other than optimum moisture content; rock and similar irreducible materials without limit as to size provided no detectable voids are formed, into which overlying soils may later be displaced; and top soil, intermittently layered with nonorganic soil. In other than rock gardens, at least (12) inches of top soil must cover all rock or irreducible materials with a maximum dimension greater than eight (8) inches.

(3) The Zoning Ordinance Section 27-107.01(a)(47.3) defines a Class III Fill as:

Temporary use of land for the spreading or depositing of Class 3 fill materials, including without limitation soils difficult to compact or with other than optimum moisture content; rock and similar irreducible materials, without limit as to size, provided no detectable voids are formed into which overlying soils may later be washed; and topsoil, intermittently layered with nonorganic soil. On properties with Class 3 fill uses, at least twelve (12) inches of soil shall cover all rock or irreducible materials with any linear measurement greater than eight (8) inches.

Class 3 fill materials deposited in a fill or disposal area shall be free of pollutants which may constitute a potential public health hazard, reduce surface or groundwater quality, or cause damage to property or drainage systems. Incidental fill operations associated with the development of subdivisions and other preliminary work of a developing site shall not be considered a Class 3 fill operation.

(4) Sections 27-317 and 27-405.01 of the Zoning Ordinance set forth the specific findings to be met in approving the instant request. Section 27-317 provides as follows:

(a)

A Special Exception may be approved if:

(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; and

(7)

The proposed site plan demonstrates the preservation and/or restoration of the regulated environmental features in a natural state to the fullest extent possible in accordance with the requirement of Subtitle [24-130\(b\)\(5\)](#).

(b)

In addition to the above required findings, in a Chesapeake Bay Critical Area Overlay Zone, a Special Exception shall not be granted:

(1)

where the existing lot coverage in the CBCA exceeds that allowed by this Subtitle, or

(2)

where granting the Special Exception would result in a net increase in the existing lot coverage in the CBCA.

(5) Section 27-405.01(a) provides as follows:

(a)

A Class 3 fill may be permitted as a temporary Special Exception, subject to the following:

(1)

Within one hundred and twenty (120) days after an application for a Class 3 fill is accepted by the Planning Board, the Zoning Hearing Examiner shall conduct a public hearing. The Zoning Hearing Examiner's written decision on an application shall be issued within thirty (30) days after the public hearing. Where the District Council makes the final decision, the Council's final order shall be issued within sixty (60) days of the Examiner's decision.

(2)

Initially, a Special Exception for a new Class 3 fill shall be valid for five (5) years, unless the District Council grants some lesser time period. Extensions of specific periods may be granted not to exceed five (5) years. At least one hundred and eighty (180) days prior to the expiration of a Special Exception for a Class 3 fill, a request for an extension shall be filed with the Zoning Hearing Examiner. The applicant shall also send a copy of the request, in accordance with the informational mailing requirements of [Section 27-125.01](#), to all adjoining property owners and civic associations. The Examiner shall conduct a public hearing in accordance with all requirements and procedures for the initial application. The filing fee for the extension shall be one-half the amount of the fee for a new application.

(3)

If a proposed Class 3 fill includes a rock crusher or other processing equipment, its location shall be shown on the site plan.

(4)

A traffic report, prepared in accordance with the Planning Board's "Guidelines for the Analysis of the Traffic Impact of Development Proposals," shall be submitted with the application and shall include an analysis of haul routes for the truck traffic generated by the use.

(5)

The subject property shall not be located within a three (3) mile radius of properties containing an active or pre-existing approved or non-conforming Class 3 fill, sanitary landfill, transfer station, rubble fill, recycling facility, mining facility, sludge facility, processing facility, sand and gravel operation, or wash plant.

(6)

Fill operations shall not be located within five hundred (500) feet of an existing residence, school, day care center, church, hospital, nursing home/assisted living facility or community center.

(7)

A Class 3 fill shall meet the buffering and screening requirements of the Landscape Manual, shall have a one hundred (100) foot non-disturbance buffer from all property lines, and shall include landscaping or berms sufficient to screen fill operations from adjoining residentially-zoned property, property containing a use listed in Subsection (a)(6), and public streets or highways. All berms and landscaping shall be installed in the initial phase of development, before fill is placed on site.

(8)

The height limitations for the fill operation shall be determined during Special Exception review. No slope grade may exceed 3:1.

(9)

The fill operation shall have a staging area with equipment for cleaning truck wheels and a minimum twenty-two (22) foot paved access road designed to accommodate no more than twenty-five (25) trucks.

(10)

The site entrance shall have a gate which is locked when the fill is not in operation. Hours and days of operation shall be limited as part of the Special Exception review.

(11)

Site or operational personnel shall be on site during hours of operation.

(12)

The site shall have proper signage showing the name of the operator, the permit number, hours of operation, telephone number of the operator, as well as provide directional signs for internal truck traffic and haul routes. The site plan shall also provide for final reclamation and stabilization of the site at the cessation of the fill operation.

(13)

The Department of Permitting, Inspections, and Enforcement shall conduct semi-annual site inspections for Class 3 fill sites and prepare a written report on the evaluation of the operations on the site, which shall include all indications of noncompliance with all County and State regulations. A copy of the report shall be provided to the County Council and shall also be available for review by the public.

(14)

A haul road permit shall be obtained from the County Department of Permitting, Inspections, and Enforcement prior to issuance of any grading or building permits related to proposed Class 3 fill sites.

(15)

A street construction permit shall be obtained from the County Department of Permitting, Inspections, and Enforcement prior to issuance of any grading or building permits related to proposed Class 3 fill sites.

(6) The Application must also further the purposes of the R-E Zone set forth in Section 27-427 (a) of the Zoning Ordinance:

(a)

Purposes.

(1)

The purposes of the R-E Zone are:

(A)

To provide for and encourage variation in the size, shape, and width of one-family detached residential subdivision lots, in order to better utilize the natural terrain;

(B)

To facilitate the planning of one-family residential developments with large lots and dwellings of various sizes and styles;

(C)

To encourage the preservation of trees and open spaces in order to create an estate-like atmosphere; and

(D)

To prevent soil erosion and stream valley flooding.

Variance

(7) Applicant requests a variance from the requirement that it not be within a 3 mile radius of another Class III Fill, or sand or gravel operation, found in Section 27-405.01(a) of the Zoning Ordinance (*supra*). The request must satisfy Section 27-230 (a) of the Zoning Ordinance, which provides as follows:



(a) A variance may only be granted when the District Council, Zoning Hearing Examiner, Board of Appeals, or the Planning Board as applicable, finds that:

(1) A specific parcel of land has exceptional narrowness, shallowness, or shape, exceptional topographic conditions, or other extraordinary situations or conditions;

(2) The strict application of this Subtitle will result in peculiar and unusual practical difficulties to, or exceptional or undue hardship upon, the owner of the property; and

(3) The variance will not substantially impair the intent, purpose, or integrity of the General Plan or Master Plan.

Special Exception

(8) The Court of Appeals provided the standard to be applied in the review of a Special Exception application in *Schultz v. Pritts*, 291 Md 1, 432 A2d 1319, 1325 (1981):

Whereas, 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 establishing affirmatively that his proposed use would be a benefit to the community. If he shows to the satisfaction of the [administrative body] 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 operation of the comprehensive plan, a denial of an application for a special exception use is arbitrary, capricious, and illegal.

(9) The Court of Appeals recently noted that *Schultz* is “the bellweather case regarding conditional uses and special exceptions in the state of Maryland”, reiterating that

Schultz and its progeny established that if a conditional use applicant demonstrates compliance with the prescribed standards and requirements ..., then there is a presumption that the use is in the interest of the general welfare, a presumption that may only be overcome by probative evidence of unique adverse effects.

(Clarksville Residents Against Mortuary Defense Fund, Inc. v. Donaldson Properties, No. 70 September Term 2016, pp. 18, 22 (June 22, 2017))

Applicant's Proposal

(10) The Applicant wishes to continue operation of a Class III Fill at the subject property for an additional five (5) years. One of the co-owners, Rick Harris, testified that his dad and others acquired the property in 1989 and he became a co-owner in 2007. (T. 17-18) CB-87-2013 required that such uses obtain a Special Exception upon the expiration of a grading permit (not to exceed two renewals). (Exhibit 15, p. 5) Applicant included copies of all of the grading permits for the Class III Fill issued since June, 2000. (Exhibits 45 (a)-(d))

(11) Mr. Rick Harris was also asked, upon cross-examination, whether the residents have ever complained about the truck traffic. He stated that there had been one complaint a few years ago and Applicant immediately responded by taking steps to ensure that trucks leaving its site not make U-turns in the residential development. (T. 36-37)

(12) The subject property is accessed from Palmer Road. Upon cross-examination Applicant was asked whether it ever considered a different entrance/access to the site. Mr. Tony Harris, manager of the Class III Fill, explained that Applicant retained the entrance that was there at the time of its purchase; that the access is roughly in the center of the site making it a convenient location for the trucks to utilize; and that the Department of Permitting, Inspection and Enforcement ("DPIE") did not approve the use of Tucker Road, to the east. (T. 77-78)

(13) The trucks that dump at the site are not owned by Applicant, but are independent contractors who pay a fee to dump at the site. (T. 26, 28) All trucks that enter must stop at a construction trailer with a raised walkway that enables an employee to inspect the load to ensure it has clean fill. (Exhibits 28 and 39; T. 44) Drivers are then directed to different locations on site to drop the fill. At that point materials are separated and processed for final use. Mr. Tony Harris stated that signs are erected directing the trucks to exit the site to the right and away from the housing development. (Exhibit 31, picture 23; T. 63-65) He also employs someone to park near the development to discourage trucks and has erected a camera to assist in identifying the few truckers who disobey. If caught, these individuals are banned from using the site.

(14) Mr. Rick Harris noted that approximately 250 customers bring dirt and Class III Fill for deposit: a third haul from Prince George's County and the remainder from other local jurisdictions. (Exhibits 11 and 27; T. 18-20) He also described the operations on site and the need for the instant request:

On average over the last three years we've averaged just over 400 loads in a nine-hour day, on average that breaks down to about 46 loads per hour. And in 2017 so far we're a little lower than that....

We estimate [the site will be at capacity in] three to five years The estimate is based on our projection for the number of, the amount of capacity that we have remaining till we finish, and the average number of trucks that we're currently getting....

[Once the fill is complete it will be developed with] a passive use, and options include open space, a tree farm, park, or maybe a combination of these items.

(T. 21-22)

(15) Mr. Tony Harris described the equipment used on site - a bull dozer, a front-end loader, a steel wheel compacter, off road trucks to carry dirt to the slopes, and a water truck. (T. 58-59) The haul roads are watered to ensure that dust is kept to a minimum. (T. 60-61)

(16) The balloon tests performed at the site indicate that the top of the fill mounds will not be visible from several locations on or near the site, and barely visible in areas to the south and the north of the site. (Exhibits 44 (a)-(h))

(17) Mr. Paul Woodburn, accepted as an expert in civil engineering, provided the following testimony in support of the Application:

[T]he property ...front[s] on Palmer Road, it's an improved road, ...Tucker Road, and then there's a paver street, because it's not improved, which was referred to earlier as Mildred Lane, a private drive which is called Foxes Drive, that would be on the west side, Tucker being on the east. The site's accessed via Palmer Road....

The property has been a Class 3 Fill for quite some time ... and it did come in different phases.... It wasn't always this size, over the years there [were] parts added on [I]t's been filled and developed primarily from the storm water management pond from the north and the east and going in a south and west direction....

There are parts of the facility that are complete, which are mostly on the eastern side, which would be Tucker Road, and these are tree preservation areas currently, so they're not to be disturbed, and then hence we would not be coming up on Tucker ... So again, the eastern side is then filled. There's also a stream valley which runs along the east side of the property, and bypasses the eastern

side of the existing storm water management facility. This facility has been approved by Prince George's County, DPIE, it's been as-built and as-built approved, as well, and is used as the storm water management for construction, for construction and the ultimate management for the site after construction.

The Class 3 fill along I would say the northern side is part of the project, and then you see those pictures, much of it's been completed, filled, but it's still being stabilized....

On the western side of the property towards the residential there's a very large tree preservation area which will remain undisturbed, which is good, because that's towards the residential part of the property, and it wraps all the way around to where the paver street goes by to Mildred Lane. Along this side of the property, as well, is where more of the current operations are working, and along Foxes Drive, the private drive we have some existing forested areas which are screening areas for the road and the residential, and then as part of the proposed development, or Special Exception plan, I should say, there will be additional landscape buffering added along that whole eastern, or excuse me, western developed property line. And then there are a few other periodic buffering tree areas, landscape areas will be added along the west and the south.

The rock crusher ... is more in the central, sort of south central portion of the property. The access off of Tucker comes in a paved access road, which has a gate, it also has a sign, many signs, ... one of which talks about the facility and what the facility is, and the purpose for the facility. As you come in the facility through the gate, which is actually beamed on both side[s] which ties into the existing wooded screening area along Palmer Road. So, as you come in you go to the trailer, which sits in the center of a drive island east side, both east and west sides, you go through the drive lane, you go to the trailer, get your ticket, you go up, you dump, as you come out, now, as they dump, and they can ... pull out brick and concrete, they will stockpile that in an area over here to the southwest primarily for a crushing operation. Now, that's, it comes periodic as they get a large mound of concrete, or an area of concrete that makes it work to crush they'll come in and temporary crush it. Primarily that stone is used ... to do stabilization of the, mainly the work at the top of the property. So, it comes in handy, and it definitely gets reused, it's a good use of recycled material....

(T. 95-99)

(18) Mr. Michael Lenhart, accepted as an expert in the area of transportation planning, prepared the Traffic Impact Analysis for the Application which was reviewed by the Technical Staff, as discussed below. (Exhibit 12) Mr. Lenhart provided testimony in support of the Application from a traffic perspective, reasoning in pertinent part as follows:

We conducted traffic counts in the morning and afternoon peak hour[s] on Maryland 210 at Palmer Road, Palmer Road at the site access, and at Palmer Road and Tucker Road. We looked at the existing, plus any approved background developments in the area, plus the site, which was generating traffic on that day. [I]n order to establish background traffic conditions without the site we backed the

traffic out of the network from what was being generated that day, and then we added it back in to establish the total traffic conditions. And we conducted traffic analysis according to the guidelines, and we also, as required by the Zoning Ordinance, looked at the haul road to the site from Maryland 210....

Everything operates at acceptable levels of service, except for the intersection of Maryland 210 at Palmer Road, which has long-standing capacity issues. State Highway Administration has interchange projects along Route 210. The next intersection up from Palmer Road is Livingston at [Kirby] Hill, that's currently under construction for a grade separated interchange. Over the years they plan on continuing south of 210, and ultimately the ... Palmer intersection would be replaced with an interchange.

For the purposes of this study we looked at terms of sight impacts, and health, safety, welfare. And we looked [at] queuing for the southbound left turn on Route 210 to ensure that there was sufficient queuing to stack the vehicles as they made that left turn, and that left turn lane is extremely long, it's well over 1,000 feet. Our queue analysis showed that there is more than enough queuing area in there to handle the existing and projected queues, and in fact, since the site is existing today, it's generating traffic today, we have the benefit of knowing that it's operating, and that there are no queuing issues at that location. The other two intersections at Palmer Road at the site ... or at Tucker Road both operate acceptably.

(T. 112-114)

(19) Mr. Lenhart also opined that the existing entrance to the site is best:

Mr. Horne: There's been some discussion just now regarding the site entrance into the class 3 fill, can you, I believe you mentioned a little earlier about the accel and decel lane at that site?

Mr. Lenhart: Yes. There is an existing acceleration lane that the Applicant encourages the use of that acceleration lane through the placement of traffic cones along the edge line of westbound Palmer Road, so that the trucks can't just come out and jump right out into traffic, they actually use the acceleration lane to get up to speed and then merge in with traffic.... And for the eastbound entering vehicles, again there's a, the bypass lane that allows people to get around any potential waiting left turn vehicles to turn into the site. But our observations were ... any queue there is minimal, and does not last long. When I say minimal it's, you know, one vehicle and they turn in....

Mr. Brown: And explain to the community why point two ... is the logical access point for this property as it relates to the natural features surrounding the property or on the property.

Mr. Lenhart: [T]here are ... floodplains and wetlands through that area. There are also very steep slopes, and that would be very impactful access point environmentally, and it would be difficult to get permits when you can show that you have an otherwise adequate access that does not have those environmental

impacts. The existing site access on Palmer Road has adequate sight distance, you know, accel lanes and bypass lanes.... [I]t's a safe access, it's designed to meet normal standards and guidelines for access points. And it not only does it meet those, but it also serves the site better, it's an existing access, it's been serving the site for many years, and to move the access to that other location would not only be very impactful to the environment, but to the site itself in terms of layout, the onsite circulation, and what has been an established pattern for many, many years....

(T. 114-116)

Variance

(20) The subject property is located within 1.5 miles of a fill that is closing and undergoing stabilization and planting (Ft. Washington), adjacent to a closed fill (Panorama) and within 2.5 miles of a sand and gravel operation that is in the reclamation stage (Hyde Field). (Exhibit 25) As such, Applicant is requesting a variance from the requirement that it not be within a 3-mile radius of such uses.

(21) Mr. Francis Silberholz, accepted as an expert in the area of land use planning, provided the following support for Applicant's request:

There's three basic standards... under Section 27-230 the criteria for granting an appeal involving variances, and it says a variance may only be granted when [there is a finding] that ... a specific parcel of land has exceptional narrowness, shallowness, or shape, or exceptional topographic condition or other extraordinary situation or condition under this situation. We argue that this site is a unique situation; this is an operational site that has been in existence for 22 years prior to the enactment of [CB-87-2003], and it's an extreme hardship to retroactively, hardship placed upon the site....

[T]his strict application ... will result in a particular unusual hardship and difficulty to retroactively say that it can't be within three miles of the ... three properties that fall within that parameter....

(T.130-132)

(22) Mr. Silberholz also noted that the closest residence to the Class III Fill, on Foxes Drive Lane, is 500 feet away, and no street access permit is required for the Fill since it's been in operation since 1981. (T. 127, 130) He provided a written analysis that explains how the request complies with all of the applicable provisions of the Zoning Ordinance. (Exhibit 38)

Opposition's Concerns

(23) Although some individuals indicated that they were opposed to the request no one testified in opposition.

(24) However, through cross-examination and a conversation with People's Zoning Counsel that he put on the record, it appears that a major concern was the location of the site access. (T.77-78, 85, and 147)

Agency Comments

(25) The Technical Staff recommended that the Application be approved with conditions. In doing so, it reviewed whether all criteria set forth in applicable sections of the Zoning Ordinance, *supra*, had been met.

(26) Staff reviewed the traffic analysis prepared by Applicant's consultant and opined that the special exception meets the requirements of the Zoning Ordinance from the standpoint of vehicular circulation, transportation and non-motorized transportation, reasoning as follows:

Based on existing traffic counts the site generates 117 AM and 13 PM peak hour trips....

Under existing conditions, which included the operating Class 3 land fill site, the signalized intersection of MD 210 and Palmer Road/Livingston Road exceeds the critical lane volume (CLV) of 1,450 and LOS D during the AM and PM peak hours....

Under background conditions the signalized intersection at MD 210 and Palmer Road/Livingston Road exceeds the *Guidelines* thresholds as under existing conditions. Total traffic conditions are the same as background conditions since no new trips are expected at the site. It should be noted that the failing intersection operates at LOS F with or without traffic from the Class 3 land fill site. MD 210 carries a large amount of regional through traffic....

On site access is provided from Palmer Road. There is an existing eastbound bypass lane at the site entrance that allows motorists to avoid left turning trucks. Most of the AM and PM peak hour trips to the site come from MD 210 via Palmer Road. A small percentage of trips approach the site from the east. The southbound left turn lane on MD 210 to Palmer Road is 1,500 feet long, the maximum number of left turns is about 140 vehicles per hour which will result in 200 feet of queuing, far below the length or capacity of the left turn lane....

The applicant's traffic consultant demonstrated the routes used by patrons and employees of the site by counting existing traffic to and from the site. It was noted that Palmer Road has both open and closed sections with one 11-foot to 12-foot lane in each direction. The pavement includes six to ten foot shoulders on both sides. In addition the truck hauling routes have been in existence since the 1980s. No changes in existing truck routes are being proposed. Based on the traffic count at the site entrance most trucks will come from MD 210 and return to it on Palmer Road....

(Exhibit 15, pp. 113-115)

(27) The Environmental Planning Section provided a Natural Resource Inventory (“NRI”) Equivalency Letter for most of the site which included the following comment:

The request for an NRI Equivalency Letter for a specific development activity has been reviewed and is hereby approved for the project area and location identified above. The property is zoned R-E and totals 117.56 acres in size. The proposed development activity is continuing operation of the Class 3 fill site.... If the scope of the proposed development changes significantly or if the limits of disturbance change significantly, a full NRI may be required and this NRI Equivalency Letter shall be declared null and void. This letter is valid for five years from the date of issuance....

The site has a previously approved Type II Tree Conservation Plan (TCP II-111-94) that has been implemented on the subject site. The current application does not indicate the proposed development activity for the subject site will result in any significant changes to the limits of disturbances of the previously approved TCP II or create any additional impacts to any regulated environmental features....

(Exhibit 8 (c))

(28) This approval was also addressed in the Staff Report:

The Environmental Planning Section signed a Natural Resource Inventory-Equivalency Letter.... NRI-238-15, for this project area on December 3, 2015. This letter stated that the site was in compliance with the previously approved Type 2 tree Conservation Plan TCP2-111-94, and that no new impacts were proposed. This NRI did not cover the entire area that is being reviewed with the special exception. There are two parcels (Parcel 10 and part of Parcel 10/Parcel 286) that were not included in this ... review. Currently, Parcel 10 and part of Parcel 10 are wooded and will remain wooded, and Parcel 286 is part of the existing impacted and completed fill site operations. An RI-EL review was performed as part of the ROSP-4467-03 case on Part of Parcel 10. These two parcels will not be impacted by this application. No additional information is required with regard to the existing conditions of this site.

(29) The Countywide Planning Division noted that approval of the request “will have no impact on public facilities.” (Exhibit 15, p. 124)

(30) The Health Department completed a health impact assessment review and only commented that the Applicant should continue to comply with existing applicable County and State regulations. (Exhibit 15. P. 128)

(31) The Maryland Department of the Environment noted that it does not regulate Class III Fills (“clean fills”) and its various departments had no negative comment on the request. (Exhibit 15, p. 129-131)

(32) The Department of Permitting, Inspections and Enforcement (“DPIE”) has regularly inspected the site and copies of its reports from 2009 until 2016 were introduced as exhibits at the hearing held by this Examiner. (Exhibits 9(a)-(yyyy))

(33) The State Highway Administration (“SHA”) had no comments on the Application. (Exhibit 15, p. 132)

CONCLUSIONS OF LAW

(1) The requests for the continuation of a Class III Fill and variance from a setback provision may be approved if in compliance with Sections 27-230(a), 317, 405.01 and 427(a). I find that all of the aforementioned provisions of the Zoning Ordinance have been satisfied, for the reasons noted below.

(2) The purposes of the R-E Zone are furthered since the Fill has been developed and operates in a manner that encourages the preservation of trees on the site and prevents any soil erosion. (Section 27-427 (a))

(3) Once the variance is addressed, the Fill will operate in conformance with all of the specific requirements for the use. A note will be added to indicate that a movable rock crusher will be utilized from time to time pursuant to 6-month permits issued by MDE. (Section 27-405.01(a)(3)) A traffic impact analysis was prepared by Applicant’s consultant and staff agreed with its findings. (Section 27-405.01(a)(4)) The property is within a 3 mile radius of two active or pre-existing Class III Fills and a sand and gravel operation and a variance has been requested. (Section 27-405.01(a)(5)) The Fill operation is not within 500 feet of an existing residence, school, day care center, church, hospital, nursing home/assisted living facility or community center. (Section 27-405.01(a)(6)) The Site Plan and Landscape Plan shows a 100 foot buffer from all property lines and sufficient landscaping and berming to screen fill operations from adjoining residentially-zoned land. (Sections 27-405.01(a)(7)) The maximum height of the Class III Fill shall be 332 feet and no slope grade shall exceed 3:1. (Section 27-405.01(a)(8)) A staging area is provided on the Special Exception Site Plan; the access road is 30 feet wide for approximately 230 feet and there is a milled asphalt road utilized by the trucks to gain speed and remove all dirt prior to exiting the site. (Section 27-405.01(a)(9)) The site detail depicts the gated entrance for the site and a note indicates the hours of operation. (Section 27-405.01(a)(10)) A note indicates that personnel shall be on the site during hours of operation. (Section 27-405.01(a)(11)) The site detail depicts a sign to be located within the entrance and it shows the name of the operator, hours of operation and the Permit Number; the Site Plan notes that there shall be directional signs for internal truck traffic and haul routes, and a note addressing reclamation and stabilization of the site at the cessation of the Fill was added. (Section 27-405.01(a)(12)) A note will be added to require Applicant to submit all reports conducted by DPIE resulting from its site

inspections. (Section 27-405.01(a)(13)) A note was added to require a haul road permit prior to the issuance of any grading or building permit; and to receive a street construction permit prior to operations. (Section 27-405.01(a)(14) and (15))

(4) As amended, the use meets Section 27-317(a)(1) since it is in harmony with the following purposes of the Zoning Ordinance:

- *To protect and promote the health, safety, morals, comfort, convenience, and welfare of the present and future inhabitants of the County*

The proposed use has existed on site and operated by Applicant for nearly 30 years, without violations. Approval will require setbacks and landscaping that will further insure that it is well-buffered from adjacent properties. Moreover, the use serves development in the County by providing a place to deposit clean fill.

- *To implement the General Plan, Area Master Plans, and Functional Master Plans*

The approval of the Application to allow the Class III Fill to operate for an additional five years will not substantially impair the recommendation of Residential Low Density Use of the property, especially after closure and development of passive uses, and is a use that pre-existed the Plan. Accordingly, this purpose is furthered by the Application.

- *To provide adequate light, air, and privacy*

The proposal will provide buffers and will preserve trees in a manner that will protect the privacy and private enjoyment of the neighboring properties, thereby satisfying this purpose.

- *To encourage economic development activities that provide desirable employment and a broad, protected tax base*

The proposal will provide employment opportunities since there are a certain number of jobs associated with the use. It will also indirectly create employment opportunities by its support of the construction industry. Thus, this purpose is furthered.

- *To lessen the danger and congestion of traffic on the streets, and to insure the continued usefulness of all elements of the transportation system for their planned functions*

The proposal routes its truck traffic away from the nearby residential development and will not increase the truck traffic at impacted intersections in a manner greater than that which has existed during its nearly 30 year existence.

(5) The Application is in conformance with all applicable requirements of the Zoning Ordinance once the variance is approved. (Section 27-317(a)(2))

(6) A Class III Fill is permitted as a temporary use in the R-E Zone and will, therefore, not substantially impair the integrity of the Master Plan which recommends residential, low density use of the site. Moreover the passive uses that can be developed upon completion of the fill conform with the Master Plan's recommendation of Residential, Low use. (Section 27-317(a)(3))

(7) If operated in accordance with applicable State and County regulations, the use should not adversely impact the health, safety, or welfare of residents or workers in the area, nor be detrimental to the use or development of adjacent properties, as it has existed at the location for over 30 years and has not been the subject of any violation notices during this period. (Section 27-317(a)(4) and (5))

(8) The proposal is subject to an approved Type II Tree Conservation Plan (TCPII – 111-94-04). (Section 27-317 (a)(6))

(9) The Site Plan indicates no further impact to regulated environmental features beyond that which may have resulted under previous grading permits. (Section 27-317(a)(7))

(10) The property does not lie within a Chesapeake Bay Critical Area Overlay Zone. (Section 27-317(b))

(11) The variance requested by Applicant is one that results from the "extraordinary situation" of being required to meet a setback requirement after nearly 20 years of existence at the location. If the variance is not granted the Applicant will experience the undue hardship of having to shut down its business – one which has apparently operated without violation throughout the years. Finally, the requested variance does not substantially impair the Master Plan or Plan 2035, both adopted many years after the use first existed on site, given the Class III Fill's compliance with all of the other requirements of Section 27-405.01(a). (Section 27-230(a))

DISPOSITION

Special Exception and Variance 4774 are Approved, subject to the following conditions:

1. Revise Note 32 on the Special Exception Site Plan to indicate a temporary Portable rock crusher may be located on-site in accordance with

- necessary air quality permits from the Maryland Department of the Environment.
2. Revise Note 26 on the Special Exception Site Plan to indicate that the hours of operation for the use are Monday-Friday 7:00 a.m. – 4:00 p.m. and Saturday 7:00 a.m. – noon, and that the Fill shall be closed on Sundays and holidays.
 3. Consistent with the sediment control plan (SCD #111-01) and the approved tree conservation plan (TCPII-111-94-04), Applicant shall limit the maximum slope to 3:1 and the maximum height to 332 feet for the Class III fill facility. Revise Note 24 on the Special Exception Site Plan accordingly.
 4. All installed practices for erosion and sediment control shall be maintained by the Applicant in accordance with the sediment control plan (SCD #111-01) and the tree conservation plan (TCPII-111-94-04).
 5. Documentation of operations and maintenance activities shall be conducted and retained by the applicant for the life of the sediment basin and stormwater management pond facility, and are subject to periodic inspection by various regulatory entities with authority over same.
 6. An as-built document shall be prepared and submitted by the applicant to the Prince George's Soil Conservation District for review and approval within thirty (30) days of construction completion in accordance with County regulations for sediment basin #2 and stormwater management pond #2, as applicable.
 7. Any future changes or proposed improvements to this project conform to the Maryland Department of the Environment's Standards and Specifications for Erosion and Sediment Control, as applicable. (This condition does not preclude the requirement that certain revisions may also require Special Exception approval)
 8. Applicant shall install all proposed landscaping as shown on the Special Exception Site and Landscape Plan and detail.
 9. Applicant shall secure new a new grading permit and post requisite bonds from the Prince George's County Department of Permitting, Inspections and Enforcement.
 10. Applicant shall maintain an active Haul Road Permit issued by the Prince George's County Department of Permitting, Inspections, and Enforcement for the life of the project.

11. Applicant and/or DPIE shall submit all copies of DPIE's written reports on the operation of the site to the County Council, as mandated in Section 27-405.01(a)(13) of the Zoning Ordinance.
12. Left turns from the site onto Palmer Road eastbound are prohibited for all vehicles over three quarter tons. Applicant shall maintain a sign on the interior site road within 100 to 200 feet of the site exit that indicates left turns from the site are prohibited for vehicles over three-quarter tons.
13. The applicant shall use a water truck and/or sweeper truck, as needed, on its property and nearby roads in order to minimize dust generated by its operations and to keep the public roads clear of debris from the hauling operations.
14. The Class III fill use is approved for a period not to exceed five years.
15. Prior to the issuance of permits, the revised Special Exception Site Plan shall be submitted to the Office of the Zoning Hearing Examiner for review, approval and inclusion in the record.

[Note: The Special Exception Site Plan and The Landscape Plan is Exhibit 33, and the detail sheet for each is Exhibit 34.]