

IN THE CIRCUIT COURT FOR CHARLES COUNTY

Larry BOWIE

Et al,

Petitioners

Case Number 08C09001912

IN RE: DECISION OF THE
BOARD OF APPEALS FOR CHARLES
COUNTY MARYLAND

IN THE CASE OF THE PETITION OF WSG
HOLDINGS, LLC FOR A SPECIAL
EXCEPTION FOR A RESEARCH FACILITY,
DOCKET # 1232 (2009)

Petitioners' Memorandum

COMES NOW all natural person Petitioners in the above referenced matter, by and through their attorney, Kurt W. Wolfgang, and Law Office of Kurt Wolfgang, Chtd., and propound this Memorandum in opposition to the decision of the Charles County Board of Appeals in the above referenced matter, and for cause states:

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I. Statement of the Case

This appeal challenges a decision by the Board of Zoning Appeals for Charles County to grant a Special Exception to WSG Holdings, LLC (“WSG” or “Applicant”) for an 80 acre tract of land in Nanjemoy, Maryland. The tract is zoned AC. WSG, together with its affiliates, is engaged in providing training of a paramilitary nature. One of its affiliates, Washington Security Group, Inc.,¹ is party to a General Services Administration Schedule 69 Authorized Supply Schedule (“GSA Contract”), pursuant to which government agencies procure training services.

The GSA Contract describes both the type of training courses offered by WSG and the facilities at which WSG represents that it will provide the training.² The GSA Contract provides at page 6:

The Washington Security Group’s Training Schedule 69 General Services Administration (GSA) Federal Supply Schedule (FSS) offers Government agencies a streamlined way to procure a wide range of effective solutions to meet increasingly complex **training** challenges. Our insights and understanding of requirements regularly translate into cost savings and performance efficiencies measurable in terms of reduced learning curves, quality of service, and effective leading-edge training methodologies and facilities. Our **Training** Schedule offers your agency/organization quick and easy access to the Washington Security Group’s expert advice and training solutions. (Emphasis added)

With regard to its available training facilities, the GSA Contract states at page 21:

[Dulles Training Center] is augmented by complementary facilities located 35 miles from Washington, D.C. which includes an outdoor private training facility known as Washington Field. WSG’s Washington Field is an 80-acre facility operated exclusively by WSG and includes a FAA-approved private airport with a 2,400-foot runway (FAA Identifier 70MD). This location allows for a CBRNE forensics and biometrics **training** including decontamination **training**, environmental sampling, intermediate, and advanced biomedical sampling, and scenario based exercises including custom target mock-ups. It also serves as a staging area for exercises for participants to prosecute targets throughout Washington, DC; Maryland, Virginia, and West Virginia. Washington Field is a Government-approved Class “R”

¹ Although WSG Holdings is the Applicant, during the proceedings before the Board it referred to itself and its affiliate interchangeably. Unless otherwise specified, the term “WSG” as used herein applies to WSG Holdings and any of its affiliates.

² GSA Contract No. GS-02F-0017V is in the record as part of Opposition Exhibit 4.

Biomedical Research Facility³.

The site described as “Washington Field” in the GSA Contract is the same 80 acre tract that is the subject of the Special Exception that is before this Court.

Although WSG already had a potentially lucrative GSA Contract, and had touted in that contract its ability to conduct training activities at Washington Field, and to use that site “as a staging area for exercises for participants to prosecute targets throughout Washington, DC, Maryland, Virginia, and West Virginia,” it had a problem. The commercial training activities it was offering are not allowed in an area zoned AC, even by Special Exception.

WSG’s response to this problem was creative, if not novel: the wolf decided to disguise itself as a sheep. Research is permitted by Special Exception in an AC zone. Therefore, WSG filed an application for a Special Exception in which it asserted that it was going to operate a “research facility.” This “research facility” was going to include, among other things, three outdoor firing ranges and a driving track that could accommodate four or more vehicles engaged in evasive driving exercises.

Of course, even disguised as a sheep, WSG still had the burden of demonstrating to the Board by a preponderance of the evidence that its activities would not be detrimental to the environment or the surrounding community, and that the site it selected was not otherwise inappropriate for the granting of a Special Exception. It had to address complex issues such as the noise caused by the simultaneous firing of pistols, rifles and shotguns at the three firing ranges, the screeching of engines and tires associated with the rapid acceleration and braking of multiple vehicles on the driving course, and the impact on the environment of noise from its activities and the risk of toxic chemicals leaching into the groundwater. WSG addressed these challenges in a similar manner: it engaged in misdirection. For example, WSG retained an acoustics expert to perform a study of noise impacts. However, the acoustics expert based the study on operational assumptions that were not representative of the activities WSG proposed to undertake at the site. In fact, a WSG witness testified that the basis assumption underling the analysis of noise from the driving track was “impossible.”

To compound matters, WSG’s acoustic expert failed to appear or testify at the hearing. The study performed by the absent expert was sponsored by a WSG employee, who was not qualified as an acoustics expert.⁴ Notwithstanding the fact that this WSG employee was not qualified as an

³ A class “R” biomedical research facility is a USDA facility designation, allowing the holder to keep animals for research. Obviously, the Applicant (through Washington Security Group, Inc, who holds the Class R permit with Washington, D.C. address for the permit, was holding itself out as doing business on this site before ever applying for the special exception. Applicant has made assertions during the proceedings (at the unrecorded site visit) that is will keep nor use no animals at this site.

⁴ The Board’s rules provide that it “will not recognize or qualify ‘expert witnesses’ but will hear witnesses and give weight to their testimony as the Board deems appropriate” However, this

expert, he testified at length concerning noise related issues.

WSG also offered testimony on the environmental implications of the three firing ranges of an expert on environmental issues associated with outdoor firing ranges.⁵ This witness' testimony, however, failed to address the critical issue of whether the site selected by WSG for the three outdoor firing ranges is suitable from an environmental standpoint.

WSG was aided in its efforts to preserve the multiple layers of disguise it donned to secure a Special Exception by actions of the Board. The Application filed by WSG presented numerous and complex issues involving potential risk to the environmental, excessive noise, and public safety. WSG itself offered four witnesses to address these issues, and was given unlimited time by the Board to make its case. However, when it came to the rights of citizens concerned about the environment, their personal safety and the erosion of their property values and quality of life as a result of WSG's proposed activities, the Board adopted a fundamentally different standard. It ruled that opponents of the Special Exception would be required commence their direct case immediately upon the conclusion of the WSG direct case and that no opposition witness would be allowed more than **three minutes** both for purposes of questioning the four WSG witnesses **and** for presenting his/her answering case. These restrictions imposed by the Board denied fundamental due process to opponents of the requested Special Exception. They also conflicted with the Board's own rules. As will be discussed below, the Board also violated due process when it elected to conduct a site visit that excluded the public at large.

Finally, the Board made fundamentally erroneous legal determinations. According to the Charles County Code, research activities permitted by Special Exception must be conducted in a structure. The code identifies structures as including constructs such as fences. WSG argued, and the Board agreed, that because WSG proposed to surround its three outdoor firing ranges and its driving track with an earthen berm or a fence, the firing ranges and driving track would be "within" a structure. Of course, neither the firing ranges nor the driving track can reasonable construed to be "within" structures. If the Charles County Code could be so construed, every horse or cow pasture or yard surrounded by a fence would be a "structure."

The manner in which the hearing was conducted played such short shrift with due process that the Board's decision cannot be allowed to stand. At a minimum, the matter must be remanded for further proceedings conducted in compliance the law, including the Board's own rules. This would allow reasonable time for opponents to cross examine the WSG witnesses and to prepare and present a case in opposition to the application. However, while the record cannot support a decision to affirm the Board, as will be addressed below, it is sufficient to recognize the wolf for what it is,

Board-created rule cannot stand for the proposition that an Applicant can represent that a complex study was prepared by an expert, and then have a non-expert sponsor it. At best, the opinion of the WSG witness is not more credible from a scientific standpoint than the than the testimony of any of the opposition witnesses on noise issues.

⁵ This witness had no expertise in the construction or safety issues of firing ranges.

and rule that WSG is not entitled to a Special Exception.

II. Statement of the Facts

At the outset of the hearing, the Board announced that witnesses (other than the witnesses for the Applicant) would be limited to three (3) minutes. 1TR4, 12-16.⁶ Although not stated on the record, a total of three minutes was the maximum time any individual would be allowed to conduct questioning of the four WSG witnesses and prepare and present an opposing case. Later, the Board ruled that no person could assign any of the three minute allotment to another person. 1TR134, 10-14.

WSG Witnesses

The first WSG witness, Mr. Scott Burroughs, is an environmental planner. 1TR10, 17-19. Mr. Burroughs sponsored WSG Exhibit 1, copies of which were provided to the Board. Copies were not available for distribution to the public, and a projected image of the Exhibit was not legible to the audience. See 1TR12, 12-16. Mr. Burroughs described the site as environmentally sensitive in that it is bordered on two sides by Beaver Dam Creek, which feeds non-tidal wetlands that contain federally protected species. 1TR13, 2-17. However, Mr. Burroughs' testimony did not address the environmental risks of the WSG planned operations to a property that he acknowledged was environmentally sensitive. Instead, he merely represented that if the special exception were granted, WSG would work with other regulatory agencies that might have jurisdiction. See 1TR14, 2-1TR15, 18.

The second WSG witness was Mr. Sean Miller, who testified about the activities that would occur at the proposed facility. Mr. Miller's testimony made it abundantly clear that the facility proposed by WSG is, in reality, a training facility, with the term "research" salted throughout the application and testimony to camouflage activities that are not allowed in an AC zone as an activity – research – that is permitted by special exception.

For example, with regard to the forensic aspects of the facility operations, Mr. Miller stated at 1TR23, 15-21:

What we do on the forensic side is research, and by research, I do not mean basic research in terms of working with chemicals, in terms of conducting actual laboratory research, I mean applied research, and by that, I specifically mean that we look at techniques, procedures and protocols that government individuals can use to collect forensic evidence.

Mr. Miller also testified at some length with regard to the driving course, which he candidly described as designed to simulate an inner city driving environment where training in "force

⁶ Transcript references identify the day of the hearing first, followed by the page number and line numbers. Hence, 1TR4, 12-16 refers to the transcript for first day of the hearing, at page 4, lines 12-16.

protection and personal security” for Americans traveling abroad. 1TR24, 21-1TR25, 7. Mr. Miller described this facility as a “driver training research facility.” Id. According to Mr. Miller, four or more vehicles could be on the track simultaneously where training would be given on evasive maneuvers in the event of simulated conditions such as a car-jacking. See 1TR27, 6-13.

Mr. Miller next proceeded to discuss the three proposed firing ranges, where 74 percent of the firing activity would involve pistols, 24% would involve rifles and 1% would involve shotguns. 1TR31, 18-1TR32, 1. Again, Mr. Miller basically describes a training scenario with lip service given to research. 1TR29, 4-1TR30, 3. For example, Mr. Miller testifies:

A gas mask just, in general, will decrease your peripheral vision, which means that your [sic] unloading or reloading or tactical loading procedures might have to be changed. When you look at other equipment that you’re wearing and using, we have to go ahead and research that and make sure that the tactics work.

Mr. Miller also addressed both safety and environmental concerns when he addressed the design of the firing range, which he described as a “state-of-the-art” system that would preclude bullets leaving the range and falling in environmentally sensitive wetlands. 1TR30, 9-1TR31, 8. Specific reference was made to US Air Force standards, and that the proposed firing range would exceed the standards set by Air Force firing range standards. 1TR46, 5-19. However, opposition witnesses testified and submitted evidence that the Air Force Engineering Standards for Firing Ranges (check official name of AF document) no longer permits construction of the range design proposed by WSG. The Air Force Engineering Standards were submitted into evidence by opposition witnesses. See Opposition Exhibit 8. .

Finally, Mr. Miller testified regarding the duration of training events (the average “research projects” lasted five days 1TR36, 17) and the lodging and feeding of the trainees he referred to as “students” 1TR36, 21-1TR37, 19. He also testified that the “research” facilities would meet the requirement that they be within a “structure” because they would be surrounded by a fence or a berm. 1TR42, 2-10.

WSG next offered the testimony of Don Wentzle, an employee of the company. 1TR52, 11-13. Although not qualified as an expert witness on noise related issues, Mr. Wentzle sponsored an exhibit represented to have been prepared by an acoustics expert, and then Mr. Wentzle proceeded to offer opinion testimony on noise issues. See, e.g., 1TR56, 1-6. In addition to the fact that Mr. Wentzle was not qualified to offer expert testimony in this area, the record shows that the study prepared by the absent expert was not representative of the proposed operation of the facility. For example, the study analyzed the sound created by the firing of a single pistol, whereas Mr. Miller testified that 24% of the time rifles would be fired. Also, the fact that facility will include three firing ranges indicates multiple and simultaneous weapons firing.

The WSG noise study is also flawed on its face with regard to the driving track. The model assumed four vehicles, one at each of the four corners of the track, traveling at a constant 50 MPH (1TR62, 8-14). This base assumption is absolutely inconsistent with the type of activity planned by

WSG. The planned activities involve evasive driving exercises that would be characterized by screeching tires and rapid acceleration and deceleration. Common experience discloses that the sound created by four vehicles engaged in that type of activity is greater than the sound created by four vehicles traveling a steady 50 MPH. In fact, common experience also discloses that vehicles are designed to be relatively quiet at cruising speed. WSG's own witness testified that it would be "impossible" for vehicles to operate at the proposed track in the manner modeled by the study. 1TR62, 8-14.

WSG's last witness was Mr. Richard Pedicord who testified that he had 22 years experience in the environmental assessment and management of outdoor firing ranges. 1TR68, 17-22. However, Mr. Pedicord testified that he did not conduct an environmental assessment of the ranges that are the subject of this Special Exception. Instead, Mr. Pedicord testified at 1TR69, 9-16:

. . . I was asked to do an independent evaluation of the site if it were to be developed and used as a shooting range as has been described here this evening. Should that have appeared to be an acceptable operation from an environmental perspective, I was asked to develop an environmental stewardship plan to guide the management of that -- of the shooting associated activities at that site. [Emphasis supplied]

Thus, Mr. Pedicord began with the **assumption** that there were no environmental factors that would make this site unacceptable from an environmental standpoint, and went on from that point to develop an environmental stewardship plan. The issue critical to the determination of site suitability was never addressed by WSG's witness.

The failure of WSG to task its expert with the responsibility to examine and opine on the real environmental issues related to WSG's proposed operations is hardly surprising. Mr. Pedicord testified that he based his proposed environmental stewardship plan on an EPA document, "Best Management Practices for Outdoor Firing Ranges." This document states that a firing range should not be placed where the soil does not perc, due to the propensity and danger of poisonous heavy metals contamination being transported more readily to nearby streams. (Opposition exhibit 5, Sections 2.1-2.3) The record demonstrates that there is a known problem at this site and its ability to perc. 1TR72, 20-1TR75, 4. Commissioner Cross raised this issue during the hearing, made reference to a staff report noting concern with the results of perc testing conducted at the site in 2008 and recommending additional testing. Mr. Cross asked if the perc issue had been resolved. 1TR72, 20-1TR73, 20. WSG witness Burroughs acknowledged that there was a problem in 2008 and that WSG "opted not to test at that time."

Consequently, the record is clear that not only has the crucial issue of site suitability for an outdoor firing range not addressed by Mr. Pedicord, the record evidence reveals that there in fact is a problem at the site, and when faced with this problem WSG elected not to perform a test and instead attempt to obtain a Special Exception to construct and operate three firing ranges without offering any evidence of absence of environmental risk.

Because the testimony of Mr. Pedicord does not even go the issue of whether the location and operation of an outdoor firing range would be environmentally detrimental at this site, it certainly cannot support WSG's assertion that its activities will not be environmentally damaging.

A. Opposition Witnesses

Upon the conclusion of WSG's direct case, opposition witnesses, without the benefit of prior cross-examination, attempted to make their case within the three minutes deadline dictated by the Board. However, in spite of this unreasonable restriction, not all witnesses who signed up to testify could be accommodated on February 24, 2009, and the hearing was carried over to March 10, 2009. In addition to the witnesses who gave live testimony in opposition to the special exception, the board was presented with a petition in opposition signed by over 300 citizens⁷, several letters and affidavit testimony. We will not burden the court with an extensive summary of this opposition testimony, but several witnesses made particularly relevant points to which we invite the Court's attention.

First, and assuming for the sake of argument that the operation of three outdoor firing ranges and an evasive driver training course were in fact permitted special exceptions within an AC zone, there remains the question of whether the chosen location is nevertheless unsuitable. Several witnesses testified that Nanjemoy is a uniquely inappropriate site for such activities. For example, Mr. Tom Saxton testified:

I come to you as a previous member of the Planning Commission for eight years and also being on the development of other initial comprehensive plan and two updates. And, gentlemen, this was never conceived or even -- this is so out of line with what we were doing for the comprehensive plan that it just doesn't fit into the plan, even under special exception. I don't know how you would control this. I don't know how you would govern this. I don't know how you would put restrictions on this to keep it safe. [1TR102, 12-22.]

Mr. Saxton's concerns about the inappropriateness of the requested activities in Nanjemoy were echoed by Bonnie Bick, who testified for the Sierra Club, and Ms Vivian Mills on behalf of the Conservancy for Charles County. Ms. Bick testified:

We would like to request that this special exception request be denied. . . . It's really an insult, actually, to what we have along the shoreline in Charles County and Maryland to even propose this kind of special exception. It's a resource conservation area and it's very, very highly valued. [Nanjemoy is] the longest undeveloped shoreline in the Mid-Atlantic region. So, it's extremely valuable and it's going to do nothing but continue to increase in value if we protect and conserve it. [1TR80, 16-1TR81, 5.]

⁷ Opposition Exhibit 1.

Ms. Mills testified:

The Nanjemoy area is endowed with one of the finest remaining contiguous forests in the entire Mid-Atlantic region. We cannot afford to begin disturbing it for uses that are better located elsewhere. And by the way, in reference to a passing comment made earlier this evening, that the forest there does not support FIDS or forest interior dwelling species, I say nonsense. Anybody who knows about this knows about such birds needs a contiguous, unbroken forest in order -- in which to nest and raise their young.

With regard to the comprehensive plan, we remind the Board respectfully that it is not confined --the plan is not confined merely to goals of economic growth and development, but also gives an entire section for natural resource protection, that's its title. Well, economic development has its place. It should not occur at the peril of destroying or damaging irreplaceable natural resources. [1TR123, 6-1TR124, 1]

Opposition witnesses also included individuals with relevant professional qualifications to comment on WSG's Application. For example, Ms. Molly Tominack, a resident born and raised in Charles County and trained as a scientist, gave evidence of why the site chosen by WSG for its three firing ranges is uniquely unsuitable:

I worked in an environmental office, specifically the Ordinance Environmental Office for the Navy . . . for 18 years. [I]n 18 years in an Ordinance Environmental Support Office, you tend to pick up a few things about the environment. One of the jobs we do is we look at the Navy's small arms outdoor ranges. One thing that wasn't mentioned you need to look at the geology and the hydrology of this area because near the Potomac, there's probably a very thick impervious clay layer underneath the soil. And when you have contaminants leaching from a range and they hit that clay layer, they start traveling sideways. And they travel sideways sometimes for miles with water. That run-off goes way past the run-off that's being controlled by the range and it can end up in shallow wells and in the Mattawoman.

1TR117, 5-22. Ms. Tominack's testimony, based on professional experience related to small arms firing ranges, raises serious issue related to the adverse environmental impact of WSG's three firing ranges that nowhere are addressed by the WSG evidence.

Opposition testimony also included the opinions of other highly experienced and highly educated individuals who saw through the sham presentation of WSG. For example, Dr. Chad Stoltz, testified: "I have a Ph.D. in chemistry. I am very well versed in many forms of forensic science and forensic chemistry. And, frankly, for what they're describing as research, which is really training with the word "research" tacked to it, I'm quite insulted." 2TR13, 1-6. The roster of opposition witnesses also included individuals who, while not formally trained as scientists, possess relevant expertise by virtue of their experiences. Mr. Mike Bowie, who lives adjacent to the WSG

site, testified in opposition, expressing concern about the impact on his quality of life:

If you look at the overhead [of the WSG site] I'm the next gravel driveway on the left, and I don't need a . . . computer model telling me what I hear and what I don't need to hear and I refuse to stay inside. I've heard the nines, I've heard the .223s, you know, just straight right on across the Board. . . . Anyway, I cordially invite each of you to my residence to sit outside in the evening and enjoy the firing of weapons, the screeching of tires from the driving range and I will give you the beverage of your choice as you desire. Thank you for your time. [1TR108, 13-1TR110, 21.]

Other witnesses expressed concern for safety. Mr. Ronnie Scott spoke in opposition, giving his address as "8870 Jacksontown Road, 2100 feet due north of a proposed firing range." 1TR118, 13-14. Mr. Scott also testified with regard to noise:

I can sit in my house, I can tell you when a plane starts up over there. I can tell you when a shot is fired. On the aerial views, to the right of the field, which would be in the east, that's a swamp. Sound travels through that swamp at an unbelievable rate of speed. Number three on the -- if you look on the whole sound chart and they had decibel levels that were taken from different places. Number three was about as far away that you could get at that distance and the maximum tree cover. My house is a direct line to that airport. It's a direct line to that. . . . I'm asking you to do what I can't do. I can't stop this. [1TR119, 7-19.]

B. WSG Rebuttal Case

WSG offered no rebuttal evidence.

III. Statement of Questions Presented

1. Whether the Board of Appeals' failure to adhere to applicable statutes and its own rules, its failure to permit cross-examination, its limitation of opposition witnesses to three minutes of testimony while allowing the Applicant unlimited time, and its conduct of a "site visit" at which the public at large was excluded, individually and collectively constituted a denial of due process to opponents of the Special Exception such that the decision of the Board of Appeals must be vacated.
2. Whether a reasonable mind can construe the evidence of record as supporting the Board's determination that the WSG proposed facility is a permitted research facility and is not a prohibited training facility.
3. Whether a reasonable mind can construe the evidence of record as supporting the Board's determination that the activities proposed by WSG would not have adverse

environmental impacts.

4. Whether the Board properly interpreted the Charles County Code requirement that research permitted by special exception be conducted in a “structure” when it held that an open area surrounded by a fence or a berm is a structure.

IV. Standard of Review

In *People’s Counsel v. Loyola*, 406 Md. 54; 956 A.2d 166; 2008 Md. LEXIS 509 (2008), the court articulated standard of review applicable to administrative actions such as the granting of special exceptions:

When we review the final decision of an administrative agency, such as the Board of Appeals, we look "through the circuit court's and intermediate appellate court's decisions, although applying the same standards of review, and evaluate[] the decision of the agency." *People's Counsel for Balt. County v. Surina*, 400 Md. 662, 681, 929 A.2d 899, 910 (2007). "Judicial review of administrative agency action is narrow. The court's task on review is not to substitute its judgment for the expertise of those persons who constitute the administrative agency" *United Parcel Serv., Inc. v. People's Counsel for Balt. County*, 336 Md. 569, 576-77, 650 A.2d 226, 230 (1994) (quotation omitted). In our review, "we inquire whether the zoning body's determination was supported by 'such evidence as a reasonable mind might accept as adequate to support a conclusion'" *Surina*, 400 Md. at 681, 929 A.2d at 910 (quoting *Mayor of Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 398, 396 A.2d 1080, 1089 (1979)). "As we have frequently indicated, the order of an administrative agency, such as a county zoning board, must be upheld on review if it is not premised upon an error of law and if the agency's conclusions reasonably may be based upon the facts proven." *Ad + Soil, Inc. v. County Comm'rs of Queen Anne's County*, 307 Md. 307, 338, 513 A.2d 893, 909 (1986) (internal quotation omitted).¹⁷

With specific regard to special exception cases, the court stated:

It may be helpful to restate the rules of engagement in special exception litigation Although it is of no real consequence whether we say that an applicant "is entitled to a special exception, *provided that*," or that an applicant "is *not* entitled to a special exception, *unless*," the applicant for a special exception bears both the burden of production and the burden of persuasion on the issue of whether the special exception should be granted. If the zoning authority is presented with evidence that generates a genuine question of fact as to whether the grant of a special exception would violate the applicable legislation and/or the requirements of *Schultz*, the applicant must persuade the zoning authority by a preponderance of the evidence that the special exception will conform to all applicable requirements.

V. Argument

The decision of the Board of Appeals should be vacated because it is irrevocably tainted by the Board's denial of due process, violation of relevant state and county laws, failure to adhere to its own rules, and the absence of substantial evidentiary support.

A. The Board Denied Opponents of the Special Exception Due Process

1. Applicable Laws and Regulations

State law, Article 66B, sets out some of the ground rules for the conduct of the Board of Appeals.

- Section 4.07 (c)(1) states: "A board of appeals shall adopt rules in accordance with the provisions of any ordinance adopted under this article."
- Section 4.07 (c)(4) states: "All meetings of a board of appeals shall be open to the public."

The Charles County Code makes it clear that Board of Appeals hearings must be conducted in a manner that achieves basic due process and fundamental fairness. Code §297-412 provides in pertinent part as follows:

- [A]ll people aggrieved by the outcome of the appeal or application shall be given an opportunity to present testimony and evidence and to cross-examine persons who testify.
- The Board may place reasonable and equitable limitations on the presentation of testimony and evidence, arguments and the cross-examination of witnesses . . . so that all relevant issues may be heard and decided without undue delay.

The Board's own regulations also are informative of the manner in which the Board is to conduct its business, and provide, inter alia:

- [A]ll hearings shall be held in open public session and no evidence, argument, or other matter shall be received by the Board in a closed session, and no party in interest shall be heard by the Board of Appeals in a closed session. All evidence shall be presented to the Board of Appeals in hearings open to the public. The hearings will be electronically recorded.
- The Board will conduct hearings in a manner best calculated to afford all parties an opportunity to present their positions and to serve the ends of justice and fairness.
- The burden of proof is one of a preponderance of the evidence, and it is on the Applicant to show, by competent, material and substantial evidence, that the request meets all prescribed

and required standards and that the use would be conducted without detriment to the neighborhood or public interest

- In addition to these statutory mandates, the Board of Appeals must also be constrained by traditional concepts of due process, emanating from Maryland and U.S. constitutional law.

B. The Record Demonstrates that the Board Denied Due Process

1. The Board improperly restricted the ability of Protestants to develop their case

The Board of Appeals procedural rules call for an order of presentation, including opening statements. (cite Charles County Board of Appeals Rules (unpublished), Rule Number XVI. The applicant was allowed an opening statement, but no others were afforded this opportunity in contravention of the Board of Appeals Rules.⁸

The Board Rules, as well as applicable case law, provide that disputed issues of fact will be decided based upon a “preponderance of the evidence.” However, the record is clear that the Applicant had not constraints imposed on its ability to make its case, while opponents were limited to 3 minutes by the Board of Appeals. The Board effectively gave the Applicant a free ride while hamstringing the opposition. Furthermore, the rules of the Board require that if opposition input at the hearing is restricted, then the record must be left open for an adequate period of time to allow input in writing.(cite, CCBOA Rules (unpublished, Rule No XVI) The Board closed the record on March 10th and did not allow subsequent written input.

The order of procedure specified in the rules is: Opening Statements, then Applicant’s direct examination of each witness *ad seriatim*, then cross examination, also *ad seriatim* by opponents, then re-direct by applicant, then re-cross by opponents.(cite CCBOA Rules (unpublished) Rule Number XVI. While the applicant was allowed direct examination, opponents were not afforded an opportunity to cross examine, nor was there re-direct, nor re-cross.⁹ Protestants attempted to ask questions of the applicant in their allotted three minutes, but no response to their questions was ever

⁸ In addition, these rules, presumably promulgated to fulfill the dictates of Article 66B, Section 4.07(c)(1), were not published or otherwise made available to the public. They are not in the County Law Library and they are not on the County website. Undersigned counsel was originally told by Assistant County Attorney Buchanan that the Board Rules were to be found in the County Code. This is not so. After further discussion, Mr. Buchanan remembered a set of rules carried in his Board of Appeals notebook. He copied his set of rules for undersigned counsel.

⁹ Protestants requested the ability to question the witnesses, but was told to do so in her 3 minutes. While several Protestants posed questions during their “direct examination” (of themselves) three minutes, none were ever answered. These requests do not appear in the transcript, and were apparently made by one or some of the 5 opposition speakers whose testimony was left out of the official transcript at 1TR77.

had. [cite] The lack of an opportunity to engage in cross examination violates the County ordinance 297-412(b), and the Board of Appeals own rules. The Board of Appeals rules were additionally violated by failing to allow an opening statement of Protestants, failing to allow cross examination after the direct examination of each applicant witness, and failing to allow re-direct and re-cross for each applicant witness. Also, Protestants, other than Robert O'Neil, were not allowed a summation or closing argument.

2. The Board improperly convened a meeting closed to the public at which the merits of the case were addressed.

At 1TR4, 8-12, the Chair made the following statement regarding the conduct of proceedings before the Board:

Each member of the Board of Appeals is required by law to be and remain impartial to both sides and can only base its decision on the evidence presented at the hearing. Consequently, any verbal communication with a Board member outside of the hearing room pertaining to any pending case is strictly prohibited under the ethics of all independent boards. The Board appreciates your anticipated respect for this process. [Emphasis added.]

However, on March 17th, the Board of Appeals conducted a site review. While it is commendable of the chair and the Board to attempt to gather onsite information, the meeting was not in keeping with statute or rule, or proper procedure.

Article 66B, section 4.07 requires all meetings of Board of Appeals to be open to the public, without exception. The manner in which the site visit meeting was conducted required it to be a public meeting. The site visit was not conducted in a fashion to simply allow the Board to view the site. It was a forum in which the Applicant was allowed to volunteer information, make legal arguments and submit additional evidence. The applicant was allowed to respond to questions of the Board that were outside of simple site orientation questions. All of this evidence was taken after the public record of the case was closed, so there was no way for any protestant to rebut the statements made and evidence presented at the site visit. In fact, most Protestants had no way of even knowing what new evidence was introduced at the site visit, because almost all Protestants were barred from attending the site visit. Needless to say, there was no cross examination at the site visit.

The Board allowed undersigned counsel and one person chosen from the Protestants to attend the site visit. However, this does not a public proceeding make. During the course of the site visit, a number of Protestants attempted to attend, but were barred from attending the proceeding.

The Board of Appeals own rules also call for all meetings of the Board of Appeals to be open meetings, and the rules specifically prohibit the presence of the applicant at a meeting that is closed to the public. They further prohibit the taking of testimony or legal argument at a meeting that is not open to the public. The rules also require that all meetings be recorded. The site meeting

violated all of these requirements. Because no record was made of the meeting, the following constitutes a representation of counsel to the court based upon personal knowledge.

At the beginning of the site visit, Mr. Buchanan, counsel to the Board, stated that the Board would not allow the production of testimony or new evidence, but would allow the applicant and his counsel to answer questions of the Board. Of course, questions posed by the Board would be for the purpose of adducing evidence. Mr. Buchanan further stated that the role of undersigned counsel and the citizen allowed to attend (Dr. Chad Stoltz) was to listen and observe.

Mr. Buchanan stressed that because the site visit was a meeting of the Board of Appeals, and all Board members needed to see and hear the same things, it was necessary for all Board members stay together in one group during the visit. However, staying together was not to be. The members of the Board did not stay together; as the site visit progressed, some members took a walking tour as the applicant described the location of the driving area and then the firing range, while others viewed the property boundary and Beaver Dam Creek, which runs along the boundary line. Because the property was extremely wet and muddy, Mr. Buchanan and one of the Board Members elected to remain on high ground while the property tours took place. Consequently, the Board members did not hear the same presentations or observe the same views at the same time.¹⁰ In addition, no transcript or other written record was made of the event for the purpose of complying with the dictates of Article 66B, Section 4.07.

An abutting property owner, Mr. Parmley, and his two sons attempted to participate in the meeting but were excluded.¹¹ The violations, inadvertent as they may have been on the part of the Board, resulted in a significant boon to the applicant in its ability to introduce evidence, testimony, and argument outside the scrutiny or cross-examination of the majority of the Protestants, and also outside of the closing of the record, which occurred on March 10th. The testimony and evidence presented at the March 17th site visit was subject to no cross examination, no re-direct examination, and no re-cross examination as required by the Board's rules.

3. The Board improperly excluded evidence

On February 24, 2009, an undisclosed number of written opposition documents were stricken from the record. The stated justification was that the applicant objected to inclusion of the documents in the record due to inability to cross-examine the authors. 1TR8, 5-1TR9, 2. It is unclear as to whether these documents were comprised of letters, faxes, e-mails, or any combination thereof. Although these documents were given by the Board to Applicant's counsel, were read by him, and were objected to by him (Id.), there now is no record of these documents.

The Board Rules are silent on whether input will be received by e-mail, although the Board

¹⁰ The introduction of additional evidence and argument was in the form of oral comments by the applicant and his counsel elaborating on the application during the tour.

¹¹ The Parmleys were treated with courtesy, but the fact remains that they were excluded from a site visit that Board Counsel characterized as a Board meeting.

of Appeals has an e-mail address. It is our understanding that E-mails have been received by the Board of Appeals in other proceedings, and made a part of the record. Completely contrary to all concepts of justice and due process, the Board itself never ruled to exclude the said documents. Instead, Assistant County Attorney Buchanan made his own ruling to exclude the subject missing documents. *Id.* However, at the March 10, 2009 Hearing the Board did reveal that it recently had received several letters regarding the Application. Although the authors were not present, the Board allowed each of the letters to be admitted into evidence. Each of the letters supported the Application. 2TR26, 5-2TR28, 22. This differing treatment of written submissions was blatantly discriminatory.

In addition, on March 10th, three individuals asked for their letters to be received into the record in person. Two were permitted: Evelyn Merit and Mildred Hamman. See 2TR5, 4-8; (cite to xscript) A third person was not permitted: Roy Squires.¹² **However, Hamman's and Merit's letters do not appear in the record that the Board of Appeals filed with this Court.** This amounts to a denial of due process to Hamman and Merit, as it is obvious that their input was not considered by the Board.

As for Squires, at the February 24 meeting the Chair represented to the audience that if they preferred to put their thoughts in writing, they were welcome to do so. Mr. Squires came to the March 10th session prepared to present his written testimony, only to be prohibited from entering his testimony into the record.¹³

4. The Board failed to maintain a complete record of the hearing

The ability of Protestants to demonstrate that the Board action failed to comply with law depends largely on access to a complete and accurate record. However, in addition to failing to include documentary evidence in the record, and failing to make any record whatsoever of the site visit, the official transcript in explicably excludes the testimony of five Protestants. The proceedings were videotaped and that record does show the testimony. The transcript does not. [1TR77, 2-5]

C. The Board misapplied the law

When evaluating whether or not to grant a Special Exception, the Board is subject to certain substantive legal requirements. The Charles County Code, § 297-210 provides in pertinent part:

In addition to the general criteria set forth in this article for each special exception, when a use is designated SE in the Table of Permissible Uses, **the Board of Appeals shall find that the requested SE use at the proposed location will not**

¹² Hamman's exchange appears on the record. Merit and Squires' discussions with the Board were apparently after the cessation of the official recording machine.

¹³ Each of these procedural breaches was raised below by a Motion for Appropriate Relief. The Motion and the relief were denied.

adversely affect neighboring, vicinal or abutting properties; will be compatible with the existing character or future planned development of the surrounding area; and will conform to the minimum requirements contained in each of the special exceptions listed in this article. (Emphasis added)

The future planned development of an AC zone is reflected in the Charles County Comprehensive Plan, page 3-13,

The areas designated on the Land Use Concept Map as the Agricultural Conservation District most closely correspond to those areas where farming is prevalent. Included are farmlands, open fields, woodlands, stream valleys, and marshes. In this District, the County seeks to preserve the agricultural industry and the land base necessary to support it. The County's fine agricultural soils are looked upon as a natural resource to be retained for farm use wherever possible. The Agricultural District satisfies some limited rural housing need or demand, but **the prime objective is not to accommodate development, and to prevent scattered uncontrolled development over areas of open countryside.** (Emphasis added)

There is also strong state policy to orient commercial and industrial activities toward commercial and industrial zones, and away from sensitive areas, agricultural areas, and areas outside of development districts. These precepts are set forth in Article 66B, sections 1.03 and 3.05.

1. The evidence does not support the Board's finding that Applicant will operate a permitted research facility

The activities proposed by Applicant fall under classifications that properly should be in a commercial zone. The four proposed uses that that Applicant has camouflaged as "Research Center without manufacturing of goods" actually fall into one or more of the following activities:

- Rifle and Pistol Ranges, War Games, or other (outdoor) recreational activities using weapons (4.02.290),
- Automobile and Motorcycle Racing Tracks (4.02.250),
- Commercial Airport (4.05.210), [Note not private use]
- Professional Offices designed to attract and serve customers or clients on the premises (5.01.111) (not permitted in AC)¹⁴

¹⁴ "[O]n-site office" is noted as per the WSG application.

Chapter 297 Permissible Uses: 5.01.000 All operations conducted entirely within fully enclosed building, 5.01.100 Operations designed to attract and serve customers or clients on the premises; 5.01.111 Professional Offices and 5.01.115 Business Services are not permissible.

However, by attaching the word “research” to the activities it proposes to undertake, Applicant represents that its proposed activities are permitted as Special Exceptions in the AC zone. The driving track is no longer a training facility; it is, according to the testimony of WSG witness Miller, a “driver training research facility.”[1TR25, 6]

WSG witness Miller asserts that WSG would be engaged in “applied research.” A simple Google search will identify many definitions of “applied research” but a common element is that there is a specific objective. For example, at www.buildingbiotechnology.com/glossary.php the term is defined as “aimed at gaining knowledge or understanding to determine the means by which a specific recognized need may be met. Applied research builds upon the discoveries of basic research to enable commercialization.” Here, however, there are no identified discoveries that WSG proposes to build on; it merely proposes to operate a three firing ranges and an evasive driving track.

WSG’s GSA contract does not represent that WSG is engaged in research. It represents that the company possesses expertise in certain areas and, for a fee, will utilize that expertise to train its customers. Even if WSG were in fact proposing to conduct research on weapons firing, why would it need three outdoor firing ranges?

The term “research facility” is not defined in the Charles County Code. Furthermore, the interpretation by the Board that the activities proposed by WSG in fact constituted research is entitled to no special deference. This is not directly a zoning issue; it is preliminary legal determination that must be made to determine whether, as a matter of law, an activity falls within a permitted exception. The court is free to bring its own expertise to bear in making this determination.

According to the Merriam and Webster On Line Dictionary (<http://www.merriam-webster.com/dictionary/research>), research is defined as follows:

- 1** : careful or diligent search
- 2** : studious inquiry or examination; *especially* : investigation or experimentation aimed at the discovery and interpretation of facts, revision of accepted theories or laws in the light of new facts, or practical application of such new or revised theories or laws
- 3** : the collecting of information about a particular subject

What WSG describes as its planned scope of activities does not remotely constitute research. It is training, pure and simple. WSG identified no research grants and cited no scholarly papers it has published or proposes to publish.

WSG operates a Website, and on that site it emphasized the training operations that it intended to conduct in Nanjemoy. Attached as exhibit B. is the downloaded text from the website, which clearly indicates that the applicant's primary function is training. The contents of the applicant's website were changed dramatically recently, after local opposition to this application was being voiced. However, the contents of the website were downloaded prior to the revamping of the

website.

The design of the proposed firing range also bears out the training focus of the site. The firing ranges in excess of the size of three football fields. The width of the firing range area is approximately 400 feet. The site obviously is designed to accommodate numerous shooters at the same time. It is quite evident that this range is designed for training significant numbers of trainees; it is not designed for research.

Similarly the chart depicting the proposed facilities shows approximately 25 parking spaces at the “driving research facility”. The total number of parking spaces shown on the facilities drawing is approximately 76. This is not intended by any stretch of the imagination to be a research facility. Rather it is intended to be a training facility. However, the closest training classification, trade or vocational school 4.01.120, does not allow use in the AC zone by special exception. Employment of the rule of interpretation stated in 297-62 D once again leads us to the conclusion that the trade or vocational school classification more appropriately fits the purposes for which the applicant intends this property.

2. The site is uniquely inappropriate from an environmental standpoint

The record shows that the subject property has not passed a valid perc test. It is essential that that property perc not just for sanitary sewer purposes, but for the environmentally responsible operation of a firing range. Poisonous heavy metals from spent ammunition imbedded in the earthen berms of the firing range include lead, copper, arsenic and steel. These poisonous metals also get into the soil through vapors from the firing of the weapons. When left in contact with earthen berms and in contact with acid soils and water (as in rain or irrigation) these metals are so toxic that the Federal Courts have defined the lead from firing ranges as hazardous waste. [cite] These metals, including lead will leach into groundwater, surrounding low lands and Beaver Dam Creek, which is protected by a Resource Protection Zoning of Charles County. The amount that leaches will be even worse than it would if the applicant had chosen a proper site, because the EPA Best Management Practices for shooting ranges and the USAF publication on the construction of firing ranges, both documents referred to by the applicant, would never allow this site to be chosen, due to its proximity to wetlands, proximity to a creek, poorly drained soils, and acidic soils. (Opposition Exhibit 5, Sections 2.1-2.3)

From an environmental perspective, the applicant has chosen one of the worst sites in Charles County to build a firing range. Its failure to perc, a geographic topology in Nanjemoy characterized by a layer of clay which will cause leached chemicals to migrate in the groundwater, a location adjacent on two sides to Beaver Dam Creek, which feeds wetlands hosting endangered species, and soil conditions in Nanjemoy that tend to be acidic, individually and collectively preclude a determination of no adverse impact on neighboring properties. An adverse impact on the environment is an adverse impact on the surrounding properties. Given the evidence that was adduced (notwithstanding the due process violations), the finding of the board that there are no adverse impacts on surrounding properties is not based on evidence “a reasonable mind might

accept as adequate to support [the] conclusion.” Consequently, the decision of the Board must be vacated.

3. The small size of the site makes it uniquely unsuited for operation of the three proposed firing ranges

WSG asserts that the design of the three outdoor firing ranges assures that no rounds will escape the facility.[1TR31, 3] According to WSG, it referred to US Air Force design criteria. However, the evidence shows that the USAF standards for this type of range (and the type of ammunition fired by WSG’s clients) require the establishment of a “Surface Danger Zone” (SDZ) around the firing range and behind the backstop. According to Air Force Standards, this SDZ would have to be entirely on property belonging to the government.¹⁵ The SDZ for this type of range, and

¹⁵ From the USAF definitions [Opposition Exhibit 8, Section6]:

Small Arms Range: A live-fire training facility for training and certifying personnel in the use of handguns, shotguns, rifles up to 7.62mm, rifles or machine guns up to .50 caliber, and the MK-19 40mm machine gun. A small arms range may include special ranges for 40mm grenade launchers, light anti-tank weapons (LAW), and 81mm mortars. Equipment items such as fully (self-) contained portable or expeditionary ranges fall into this category.

6.2. Surface Danger Zone (SDZ): The portions of the range in the horizontal plane that are endangered by firing a particular weapon. The SDZ includes the area between the firing line and the target line, an impact area, a ricochet trajectory area, and a secondary danger area. The SDZ may also include a weapon back-blast area.

The SDZ must be located completely within the boundaries of U.S. government-owned or -leased properties.

6.3. Vertical Danger Zone (VDZ): For non-contained and partially contained ranges, the VDZ is the volume of airspace above the SDZ between the ground surface and the maximum ordinate of a direct-fired or ricochet round. The height of the VDZ varies with the weapon and ammunition fired (see Attachment 1).

6.5. Partially Contained Range: This range has a covered firing line, side containment, overhead baffles, and a bullet backstop. Direct fire is totally contained by the firing line canopy, side containment, baffles and bullet trap (no “blue sky” observed from firing positions). Ricochets are not totally contained, but reduced by the baffles and side containment. A partially contained range requires an SDZ length equal to 50 percent of the maximum range of the most powerful round to be used on the range. A partially contained range will not permit lateral movement along the firing line or movement toward the target line unless the range has the additional baffles required to stop direct fire at the downrange firing lines.

7.5.2 Ballistic Safety Structures, Overhead Baffles: An overhead baffle is an angled baffle

for the ammunition specified by the applicant, would result in an SDZ extending behind the range for about two miles. The applicant does not own the land 1100 meters behind its proposed range. It is Maryland parkland. The USAF standards also indicate what it refers to as a “vertical danger zone” which varies with the type of ammunition fired, using the properly designed range. The vertical danger zone for the most powerful ammunition to which the applicant admits would result in a vertical danger zone of more than 500 yards, which is clearly a threat to aircraft taking off and landing on the runways on the site.

The USAF standards also refer to a safety zone of two miles from the range for the type of ammunition to which the applicant admits (.223 rifle ammunition, commonly used in M-16 and M-4 military weapons).[Opposition Exhibit 8, Page 8 Table 1] Within two miles of the project site are Purse State Park, Potomac River, Nanjemoy Community Center, Post Office, Fire House, Nanjemoy Store, the County-designated Nanjemoy Village Center, dozens of neighbors and an untold number of wild and domesticated animals including nesting pairs of eagles.

The small size (80 acres) of the site and the proximity of residences make it uniquely unsuited for an outdoor firing range. Given the fact that the public now knows that the proposed design is not permitted by the Air Force for safety reasons, whenever the range is in use residents have good reason to be fearful. Will the operation of this so-called “research facility cause parents to be reluctant to let their children play outside? Will it engender wide-spread fear that will destroy the peacefulness and harmony of this unique part of Charles County? The opposition witnesses raised such concerns and the burden rested with WSG to respond and dispel those concerns. It did not. The record is devoid of evidence that would allow a reasonable person to conclude that the Board’s finding that there are no adverse impacts is supportably.

4. The operation of the three outdoor firing ranges and the driving track will create undue noise that is detrimental to the community.

The witness (Wentzle) who testified regarding noise testing was not an expert on acoustics and the study he sponsored failed to examine the proposed mode of operation. [1TR54, 18] Accordingly, his testimony is entitled to no greater weight than the testimony of any other non-expert. His testimony was countered by several Opposition witnesses, who spoke from personal knowledge regarding the sound of weapons fired in Nanjemoy. The many residents, outside visitors and all of the wildlife within a few miles of this location (“earshot”) will not be reassured of their safety and well being with the sound of automatic gunfire from multiple weapons and screeching tires from a tactical/race track. The land of protestant Charles Parmley is practically intertwined with the subject property, and the value of the Parmley property for residential (AC) use will be

(vertical baffles are not authorized for new range projects)."

SEE Table 1. Minimum SDZ Distance Requirements for Small Arms Ammunition — Non-contained Range

utterly destroyed. The distance from the shooting range to the area in which the Parmley's keep a camper for their use is less than 500 feet. [1TR54 13-16]

5. The unique character of the community will be adversely affected.

Nanjemoy is unique in that it is extremely rural and quiet. There are no activities in Nanjemoy that are noisy. The addition of a three firing ranges and tactical driving tracks will cause a quantum increase in noise. The sound of automatic gunfire from as many as 50 simultaneous weapons, plus screeching tires and racing engines will not be drowned out the usual birdsongs, the occasional tractor, or the emergency siren heard from time to time in the neighborhood. An increase in air traffic will not go unnoticed.

Nanjemoy is the second least populated area of the state, second only to Western Maryland. This is so because it is a peninsula created by the Potomac River and Nanjemoy Creek. There are virtually no industries within that peninsula, and virtually the exclusive use of the peninsula currently is agricultural, undeveloped, and residential. The area is also blessed with some of the most pristine waterways in the State, including the Nanjemoy Creek, to which Beaver Dam Creek, adjacent to the proposed firing range, is a troubled tributary. The rarity of such a wild and natural area so close to a major Metropolitan area, and especially the Nation's Capitol, has been recognized by the public and our leaders as well.

In 2004, the citizens of Nanjemoy joined together with the U.S. Bureau of Land Management, the Maryland Department of Natural Resources, and the Charles County Government to create the Nanjemoy Vision Plan, in an effort to ensure that the relatively low cost of property in the area did not result in inappropriate development. This plan won national honors, winning both the Bureau of Land Management "Four C's Award", given by the Director of the Bureau, and the American Planners Association Community Initiative Award. The WSG proposal runs completely contrary to the Nanjemoy Vision Plan. Industries of this sort, with their attending noises and environmental hazards are not to be permitted within the Vision Plan area. Indeed, the stated goal of the County is to preserve our rural heritage, and there is no part of our county that has that rural nature as much as Nanjemoy. This makes Nanjemoy a precious gem that requires special effort and vigilance to preserve. Attached as Exhibit D is a copy of the award-winning Nanjemoy Vision Plan.

Given the mandate of § 297 Section 210 (B) of the County Code, the Board and the evidence of record, the Board could not lawfully approve the application. In order to grant the application, it was required to find that the requested SE use at the proposed location would not adversely affect neighboring, vicinal or abutting properties, and that the use would be compatible with the existing character or future planned development of the surrounding area. The Board could not make such a finding based on the evidence presented.

The dictates of 297, Section 210 are a significant burden on the applicant, but are required by the ordinance. No reasonable person could reach the findings required in the light of the evidence that there would be no adverse impact on neighboring, vicinal, and abutting properties, or

that the use would be compatible with the existing character or future planned development of the surrounding area. To make such a finding would defy common sense, and the evidence presented. The noise alone will diminish the property values of the vicinal properties, and devastate the value, use, and future development of the immediately adjacent properties. Neither is the proposed use even remotely associated to either the existing character or the future planned development of the surrounding area. To grant the proposed use would eviscerate the County Comprehensive Plan, and defile a sensitive environmental site, as well as diminish the public enjoyment of the adjacent parkland.

VI. Conclusion

This application should have been rejected out of hand, as being classified incorrectly as a “research facility without the processing of materials.” As a matter of law, this Court should find that the record does not contain substantial evidence sufficient to support the Board’s finding that the Applicant will operate a research facility. Also, the court should find as a matter of law that the activities undertaken by Applicant will involve the “the processing of materials.” For either of these reasons, the court should vacate the order.

The court should also find that the Boards determination of no adverse effect from the facility is not supportable on the evidence of record and for this reason it should vacate the order.

To the extent the court considers itself unable to make these determinations based on the record, it should hold that the Board denied opponents due process of law in the manner the hearing was conducted, and should therefore vacate the order.

Petitioners also respectfully request such other relief as may be warranted.

Respectfully Submitted,

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AUTHORITIES

1. Constitution of the United States, Fifth and Fourteenth Amendments
2. Constitution of Maryland, Declaration of Rights, Article 24
3. Article 66B, Sections 4.07 and 4.08
3. Charles County Code, 297 Sections 210 and 412
5. *People's Counsel v. Loyola*, 406 Md. 54; 956 A.2d 166(2008)
6. Unpublished Rules of Procedure of The Board of Appeals

Certificate of Service

I HEREBY CERTIFY that on this 26th day of October, 2006, the foregoing Petitioners' Memorandum was mailed, postage pre-paid U.S. Mail to

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Attorney for ^