

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' Reply Memorandum

Comes now [Appellants} and file this Reply to the Answering Memoranda of the Board of Zoning Appeals (referred to herein as "Board Memorandum" or "BM") and WSG Holdings, LLC (referred to herein as "WSG Memorandum" or "WSGM").

I. Reply to Board Memorandum

The Board filed a perfunctory Memorandum in which it stated it would rely on the arguments of WSG. The lack of defense of its conduct of this case is understandable. There can be no defense for failing to allow cross examination when its own rules call for it; holding meetings closed to

the public when its own rules and other laws forbid it; and allowing special privileges such as unlimited time to the applicant and extremely limited time to the Protestants.

II. WSG's Misrepresentation of the Record Demonstrates that its Application Was so Lacking in Credibility that no Reasonable Mind Could Construe the Evidence as Supporting the Board's Decision

a. WSG's representation to this Court of no linkage between WSG Holdings, LLC and Washington Security Group, Inc. is belied by the record

WSG accuses Appellant of misleading the Court when it states:

Petitioners attempt to suggest to this court, as it did to the Board, that WSG will perform at this site all of those matters and services of The Washington Security Group, Inc. This is simply not the case, is not supported by the record herein and was not a finding of fact by the Board. Mr. Miller testified that The Washington Security Group, Inc. has four other sites which it utilizes Mr. Miller further testified that this site (Nanjemoy) will only be used for the matters he testified to, i.e. research and development.

WSGM at 4. However, it is WSG that fails to acknowledge the full scope of Mr. Miller's testimony. In response to questioning by Mr. Buchanan the following exchange took place"

MR. BUCHANAN: Okay. What's going to be performed at this facility could not be performed at the other facilities?

THE WITNESS [Mr. Miller]: The -- this could be performed at other facilities. It's not necessarily economically feasible for us to continue to do that on a competitive nature, on an economically competitive nature. When our headquarters is based out of Dulles, we can't do shooting, driving or anything else out of an office park in Dulles.

The other facilities could work, however -- and we will continue to use them, but from an economic standpoint, to conduct basic research evaluation and related training, to do that in areas such as Wyoming and the costs generated with doing such that would continue to make it an increase -- it would be an increase in financial issue with the government and, to a certain aspect, would be uncompetitive in certain areas, where with the expertise that is locally available, as well as the actual structure itself, that we could do this here in a way that would benefit clients that are local because the majority of the clients are local, or within a three or four-hour radius of here and that would benefit -- basically, you know, reduce costs.

1TR 44-12, 45-13. Read in context, it is clear the Mr. Miller was testifying about other sites held by Washington Security Group, Inc., a fact corroborated by the WSG in its Memorandum. It also is clear that Mr. Miller was proposing to use the Nanjemoy site for

“shooting” and “driving” for economic reasons. WSG seeks a special exception because it cannot compete for local business. As Mr. Miller, testified, “the majority of clients are local. . . .” Mr. Miller’s own testimony underscores that the “research” claim is a sham designed to allow an unauthorized commercial undertaking to take place in an area where it is not permitted, even by special exception.

b. The WSG Memorandum cannot rehabilitate the deficient testimony of Mr. Burroughs

WSG quotes extensively from the testimony of Mr. Burroughs but the cited portions of the transcript do not amount to evidence constituting an environmental analysis. As noted in Petitioners Initial Brief, It is clear from Mr. Burroughs that he viewed the environmental analyses as being conducted at a later date. Thus, the Board simply did not have substantive, credible evidence before it to support its findings.

c. WSG Witness Wentzle’s “worst case scenario” claim defies common sense

WSG attempts to salvage the its “noise” study by citing the testimony of its witness Don Wentzle that while non-representative, the proffered study represented a “worst case scenario.” WSGM at 8. WSG proposes a truly novel evidentiary standard: undertake a study that is not representative of what will transpire, and then have a witness with no apparent qualifications summarily state that what was studied was in fact worse than what was not studied. Furthermore, common experience belies the validity of Mr. Wentzle’s, as noted in the affidavit testimony of Robert O’Neil:

Q. Do you have any comments on the Applicant’s testimony on the noise of the proposed activity?

A. Yes. First, however, I want to make it clear that I am not offering expert testimony on this matter. I am not a qualified expert in this area. I would note, however, that the witness who testified for the Applicant on this issue also is not an expert in this area. Certainly, there was no indication in his testimony concerning his professional background that he had such expertise. Instead, he discussed a study prepared by a firm that has expertise in the area. I do believe that I can legitimately speak to fundamental problems with the manner in which the study was conducted. For example, with regard to vehicle noise, the witness testified that the noise measurement simulated the sound of a vehicle operating a steady-state 50 mph. From personal experience, I know that a vehicle operating at a steady-state 50 mph will be in its highest gear with the engine operating at low rpm. It will be relatively quiet. Significantly, however, the testimony of the Applicant is clear that the operations intended to be conducted do not include steady-state 50 mph operations of a single vehicle. Instead, he Applicant will be training customers in evasive maneuvers, which would suggest multiple vehicles engaged in rapid acceleration and deceleration, resulting in noise associated with high rpm engine operation, as well as noise associated with the screeching tires of

multiple vehicles. Quite simply, however accurate the study may be with what it did simulate, the simulation itself does not reflect the proposed operations.

A reasonable mind cannot accept the WSG noise testimony as probative evidence supporting the Board's decision.

d. WSG's assertion that Petitioners misrepresented the testimony of Mr. Peddicord is unfounded

WSG asserts that Petitioners misrepresented the testimony of Mr. Peddicord. WSGM at 8. In fact, Petitioners quoted Mr. Peddicord and challenged the evidentiary sufficiency of his testimony based on what he actually said. Nowhere in his testimony does he state that he performed an environmental assessment of such issues as groundwater contamination. He was not even asked about that on direct examination. He offered testimony on limited points only. Taken in its entirety, the testimony would not allow a reasonable mind to conclude that the Board's decision is supported by the evidence.

III. WSG's Arguments Cannot Cure Pervasive Due Process Violations

WSG dismisses Petitioners' claims that their due process rights were violated, arguing that the opportunity to submit 3 minute statements was all that was required to accommodate their due process rights. There is no bright line denoting whether, in a specific instance, required standards of due process have been met. Here, the Board was faced with an extremely complex application involving firing ranges and automobile driving tracks, and that brought into question issues of safety, noise, and environmental protection. However, any reasonable person, and certainly this court with its years of experience, can readily see that the restrictions imposed by the Board effectively denied concerned residents of any meaningful ability to challenge the WSG application. They were effectible barred from developing and presenting a comprehensive case in opposition. Such conduct by the Board cannot be squared with fundamental tenets of due process.

WSG protests that Petitioners' claims of unfairness (lack of due process) based upon a three minute time limitations are addressed by the case of **Washington County Taxpayers Assn. v. Board of Commissioners**, 269 Md 545. That is a gross misconstruction of the argument of Petitioners as well as the Washington County Taxpayers case. Firstly, the case dealt with another matter entirely, regarding a master plan for Washington County. This process differs dramatically, in that the adoption of a master plan is entirely a legislative function. It is not an adversarial procedure, as is a special exception process, where the Protestants have some measure of responsibility to refute the case of the applicant. But most importantly, Petitioners here are not complaining so much of a three minute time limit, as they are about unequal treatment of Protestants versus the Applicant. Applicant faced no time constraints whatsoever on its witnesses. Applicant was allowed an opening and closing. Even the argument of the Respondent WSG indicates that the Petitioners bore some burden to generate evidence to

support their position in the case below. They were required to do so by an entirely different, more restrictive set of standards than the Applicant was allowed to proceed.

We can only conjecture what a vigorous cross examination of the Applicant's witnesses would have revealed, because no cross examination was allowed. “Expert witness” Peddicord could have been asked , for example, about the contradiction generated by his position that this is an appropriate site for a firing range, when the EPA Best Management Practices for Outdoor Firing Ranges document, which he cited and helped to author, indicates that firing ranges should be located away from wetlands and water bodies, hydric soils, and areas of poor drainage.

WSG requests case citations regarding violation of Due Process rights of the Petitioners. Petitioners draw the attention of the Court to the case of **Woodmont Country Club v. Mayor and Council of Rockville**, 107 Md. App. 696 (1996). This case lists such rights as the right to cross examine, the right to have a complete record, which consists of the transcript of the testimony and arguments, and to have the decision based only upon the evidence introduced into the record. See also *Boehm v. Anne Arundel County*, 54 Md App. 497 (1983)

Respondent WSG also misconstrues Petitioner's position regarding the site visit conducted by the Board of Appeals. WSG cites to undersigned counsel’s statement that the site visit was a good idea. Petitioners never disputed that. What was neither a good idea, nor legal was the closed nature of the site visit, nor the addled fashion in which it was conducted. The “record” of the case had been closed by the Board of Appeals at the close of the last hearing, yet testimony and evidence was adduced by WSG to Board members, at this convened meeting, which was apparently not recorded as required, and where the public was not allowed to attend.

WSG attempts to get this Court to view this case through one prism; that of the Court not substituting its judgment for the Board of Appeals. This maxim is true, and applies, but only applies to matters of fact determined by the Board, not matters of law. Matters of law are afforded no special deference to the decisions of the local body, and the Court is obliged to determine the law without regard to the prior legal opinions (or lack thereof) of the Board of Appeals. **Eller Media Company v. Mayor and City Council of Baltimore**, 141 Md App. 76 (2001).

There is one more component of the obligations of the Board of Appeals that WSG would prefer to ignore: its obligation under County Code 297-210 as excerpted here:

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 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)

There is ample evidence that the Board of Appeals failed to meet its obligations under this section. The hearing process for this matter made a mockery of State law regarding open Board of Appeal meetings, and State and county requirements about the keeping of records and their own rules about the conduct of meetings, the cross examination of witnesses, the order of witnesses, and the rights of interested persons (Protestants).

IV. Conclusion

This court should not allow the decision of the Board to stand. The Petitioners should be granted the relief as requested in their Initial Brief.

Kurt W. Wolfgang, Attorney for all Petitioners
Law Office of Kurt Wolfgang, Chtd.
9375 Chesapeake Street
Suite 113
La Plata MD 20646
301-934-6000

Certificate of Service

I hereby certify that I have mailed, US Postage pre-paid, a copy of this Opposition to Motion to The Charles County Board of Appeals, care of Assistant County Attorney John Buchanan, PO Box 2150 La Plata MD 20646, and Respondent WSG Holdings, LLC, care of Attorney Mark Mudd, PO Box 310 La Plata MD 20646.

Kurt W. Wolfgang, Esq.