

**IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY,
MARYLAND**

NRG MD ASH MANAGEMENT LLC :
 :
 Petitioner :
 :
 : **Case No. CAL18-11495**
 v. :
 :
 PRINCE GEORGE'S :
 COUNTY COUNCIL, et al. :
 :
 Respondents :

MEMORANDUM and ORDER

This matter came before the Court on October 9, 2018, on the Petition of NRG Maryland Ash Management, LLC for Judicial Review of the Decision of the County Council of Maryland Sitting as a District Council In the Matter of Special Exception S.E. 4765 (Brandywine Fly Ash Storage Site). Oppositions were filed by the County Council, sitting as a District Council, and Patuxent Riverkeeper, a participant in the special exception 4765 proceedings.

In short, Petitioner challenges the District Council's jurisdiction to act in this matter, insofar as the Zoning Hearing Examiner's approval of Petitioner's application occurred more than 30 days prior to the District Council's action. Petitioner further asserted that even if the District Council is deemed to have acted timely, its denial of Petitioner's application was contrary to Maryland law.

Patuxent Riverkeeper argued, in sum, that the record supported the District Council's denial and that the District Council timely reviewed the matter consistent with the Council's state ethics law obligations.

The County Council, sitting as the District Council, argued, *inter alia*, that the matter was timely heard by the District Council and that the District Council's findings and conclusions were based on substantial evidence. It further asserted that the Examiner's recommendation of approval was erroneous as a matter of law.

The Court's "review of an administrative agency action is typically 'limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.'" *Cty. Council of Prince George's Cty. v. Chaney Enterprises Ltd. P'ship*, 454 Md. 514, 528, 165 A.3d 379, 387 (2017), *reconsideration denied* (Aug. 24, 2017) (quoting *Marzullo v. Kahl*, 366 Md. 158, 171, 783 A.2d 169 (2001)) (citation omitted).

As the Court of Special Appeals opined in *Floyd v. Cty. Council of Prince George's Cty.*, 55 Md. App. 246, 254–55, 461 A.2d 76, 81 (1983):

If a zoning decision is fairly debatable, the decision must be affirmed by the Circuit Court. *See, e.g., Prince George's County v. Meininger*, 264 Md. 148, 285 A.2d 649 (1972).

In *Northampton v. Prince George's County*, 273 Md. 93, 100, 327 A.2d 774, 778 (1974), the Court of Appeals stated:

When an appeal is taken in a case like this, the function of the circuit court is a limited one: it reviews the entire record to determine whether the action of the district council was unreasonable, arbitrary or capricious. [Citations omitted].


[I]t is not the function of the reviewing court to zone or rezone, or to substitute its judgment for that of the zoning authority if the action of the zoning authority is based on substantial evidence and the issue is thus fairly debatable. [Citations omitted]. *Id.* at 101, 327 A.2d 774.

In the instant case, the Court must review both the issues of the District Council's jurisdiction, as well as the District Council's ruling.

Having considered the record, memoranda and arguments herein, this Court finds that the District Council had jurisdiction to consider the application at issue. It is further found that the Council's ruling is supported by substantial evidence in the record and is fairly debatable. The District Council's actions were not illegal, unreasonable, arbitrary or capricious nor were they premised upon an erroneous conclusion of law.

It is, accordingly, this 17th day of October, 2018,

ORDERED, that the District Council's decision herein is AFFIRMED.


CATHY H. SERRETTE
Judge, Seventh Judicial Circuit

COPY

Copies mailed and faxed by the Court to:

Paul J. Kiernan, Esq.
Holland & Knight LLP
800 17th Street N.W., Suite 100
Washington, D.C. 20006

Arthur J. Horne, Jr., Esq.
Shiple & Horne, P.A.
1101 Mercantile Lane, Suite 240
Largo, MD 20774

Attorney s for Petitioner

Rajesh A. Kumar, Esq.
Prince George's County Council
County Administrative Building
14741 Governor Oden Bowie Dr., Room 2055
Upper Marlboro, MD 20772

Attorney for District Council

Seema Kakade, Esq.
University of Maryland Environmental Law Clinic
Francis King Carey School of Law
500 West Baltimore Street
Baltimore, MD 21201-1786

William Piermattei, Esq.
University of Maryland Environmental Law Clinic
Francis King Carey School of Law
500 West Baltimore Street
Baltimore, MD 21201-1786

Attorneys for Patuxent Riverkeeper

Iriel Hampton 10/17/18
Iriel D. Hampton, Law Clerk Date