

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1040

September Term, 2014

2003 MASON DIXON, LLC

v.

LOVE'S TRAVEL STOPS AND COUNTRY
STORES, INC., ET AL.

Meredith,
Leahy,
Reed,

JJ.

Opinion by Leahy, J.

Filed: November 12, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Love’s Travel Stops and Country Stores, Inc., in cooperation with Perini Industrial Land, LLC, (together, Appellees in this appeal), filed an application on September 19, 2013, for a special exception use and for a sign variance to build a truck stop along Interstate 81 in Washington County, Maryland. Although several other local land owners and businesses—including Appellant, 2003 Mason Dixon, LLC (“Mason Dixon”), and the Hagerstown Regional Airport—opposed the application, the Board of Appeals for Washington County (the “Board”) approved the special-exception use with conditions. Mason Dixon sought judicial review of the Board’s zoning decision in the Circuit Court for Washington County. The circuit court affirmed the Board’s decision. On appeal, Mason Dixon presents the following questions for review:

- I. Did the Board of Zoning Appeals err in granting a special exception where the Board concluded that no opposition evidence was presented and failed to analyze opposition evidence?
- II. Did the Board of Zoning Appeals err in granting a special exception where the applicant failed to present evidence sufficient to support the requirements of Section 25.6 of the Washington County Zoning Ordinance?
- III. Did the Board of Zoning appeals err in granting a special exception where the Board defined and approved a use not previously defined or permitted in the Washington County Zoning Ordinance?

We hold that the record as a whole reflects that the Board’s findings and conclusions were based on substantial evidence. We determine that the Board considered and analyzed opposition evidence in the context of all the testimony presented, as recounted in the Board’s on-the-record deliberations and in its opinion. Thus, we perceive no error in the Board’s approval of Appellees’ application for permitted and presumptively allowed

special exception use in a Highway Interchange Zone under the Washington County Zoning Ordinance. We affirm.

BACKGROUND

Love's Travel Stops and Country Stores, Inc. ("Love's") is a national chain that operates truck stop/travel stop facilities. The September 19, 2013, zoning application for special exception use stated:

Use Proposed: Love's Travel Stop (defined as Truck Stop in Zoning Ordinance). Zoning Ordinance section and subsection(s) providing for proposed use: Article 19, Section 19.3(g).

The application also included a detailed concept plan with proposed layout, design and architectural evaluations, three maps, a plot plan, and an analysis of the factors to be considered by the Board pursuant to the Washington County Zoning Ordinance, Article 25 § 25.6.

Located at 18149 Showalter Road, Hagerstown, Maryland, the proposed site is just off Exit 10 on Interstate 81 and directly across the road from the Hagerstown regional Airport. Approximately 0.5 miles down Showalter Road to the west (on the other side of Exit 10) is the Maugansville residential area. However, the 11-acre parcel is zoned as a Highway Interchange District ("HI"). Washington County zoning ordinance Article 19 § 19.1 provides:

The Highway Interchange District is established to provide suitable locations for commercial activities or light industrial land uses that serve highway travelers, provide goods and services to a regional population, or uses that have a need to be located near the interstate highway system to facilitate access by a large number of employees, or the receipt or shipment of goods by highway vehicles.

Love's' concept plan indicated that the proposed "Travel Stop" would include: 16 fueling points for cars; 7 diesel fueling lanes for tractor trailers; 2 fast food restaurants (Subway and Wendy's); a Love's Convenience Store; a Love's Tire Repair Shop (for tractor trailer tires); parking for 78 cars; and overnight parking for 100 tractor trailers.

On September 20, 2013, the Zoning Coordinator with the Washington County Division of Plan Review and Permitting issued a memorandum stating that "the use [proposed by Love's and Perini] is consistent with the Comprehensive Plan for Washington County." From October 7-9, 2013, adjacent landowner Bowman Development Corp., Hagerstown Regional Airport, and Mason Dixon all wrote to the Board in opposition to the application.

Mason Dixon owns approximately 172 acres of land situated 2.4 miles north of the proposed special exception use site, along the I-81 corridor. In its opposition to the application, Mason Dixon asserted through counsel that "[b]ased upon the site's proximity to the Hagerstown Regional Airport . . . the proposed Travel Stop use . . . would have an adverse effect above and beyond those inherently associated with such use." Citing to a marketing plan prepared for another opponent, Hagerstown Regional Airport, Mason Dixon asserted that a "truck stop" would "not constitute the best compatible land use to support business growth and development on the Airport." Additionally, Mason Dixon claimed that traffic from the proposed used would have adverse effects on the nearby Maugansville residential area.

On October 9, 2013, the Board (sitting as the Washington County Board of Zoning Appeals) held a public hearing on Love's' application for special exception use. The

applicants withdrew their earlier request for variance regarding the size and height of their sign and proceeded only on the request for special exception use. The Board heard testimony in support of the application for special exception use from Love's' Director of Real Estate Development, Rick Shuffield, engineer Mark Dyck, landowner Paul Perini, and counsel Seymour Stern. Describing the proposed Travel Stop, Mr. Shuffield testified:

[W]e provide food, gas, [and] convenience items to people who are trying to get from point A to point B and those people that are local, so typically you find us located adjacent to either major highways or interstate locations similar to the location that we're hoping to develop here in Washington County.

* * *

Now, we actually call ourselves travel centers [T]o make the whole project work [] that does obviously include trucks and they're a very important part of our business, but it also includes cars, RVers, and anybody who drives up and down the interstates.

To help put it in perspective, Love's actually will see three to four times the number of cars that you see as it relates to the number of trucks, but because the trucks are so large and cumbersome, there's a tremendous amount of the design criteria that go into play when you're actually putting together a location.

* * *

And you might ask the question, well, why do you have so many truck parking spots if they only occupy, you know, 25 to 30 percent of your volume.

Well, there's a lot of reasons. One, our customers do demand it. Right now, there's such a large shortage of truck parking spaces out there, we feel like it's not only a service to our customers, but it's a safety issue.

Love's engineer, Mr. Dyck, testified that the proposed location and parking area would reduce the current demand for unauthorized overnight truck parking which interferes with residential traffic. He explained that the Showalter Road site was chosen specifically

for its location off a cloverleaf interchange, allowing trucks to access the facility through all right hand turns and, thereby, minimizing traffic concerns.

In opposition, the Board heard testimony from Jason Divelbiss (counsel for Mason Dixon), local business owner Myron Martin, Andrew Wilkinson, Bowman Development President Robin Ferree, and Hagerstown Regional Airport Director Phil Ridenour. Mr. Divelbiss acknowledged that “H.I. zoning is an appropriate place for a use like this,” but, he maintained, the location directly across from the airport and in close proximity to a residential area made the specific site inappropriate for use as a truck stop. Mr. Ridenour, testifying on behalf of the airport, reiterated the airport’s position that an “aviation-related development” was more in line with the airport’s comprehensive marketing plan. He also testified that a service station catering to smaller vehicles would be a compatible use, but a truck stop would not be.

Former Maugansville resident Andrew Wilkinson also testified in opposition, stating:

I think you have to, in your analysis, make sure that a truck stop, which is what this is, is of the appropriate scale and use and intensity right next-door to [a residential zone,] and I submit to you that it’s not.
. . . [W]e always look at . . . whether this particular use is worse at this particular site than anywhere else and I submit to you that when you think about Maugansville being right next-door, it is [a residential zone]. That changes this lot from almost any other lot up and down I-81.

At the conclusion of the hearing, the Board approved the special exception use by at three-to-two vote with three conditions:

- 1) Truck parking is required to be located to the rear of the property.
- 2) The rear portion of the property will be screened from neighboring properties.

- 3) The perimeter of the rear portion of the property (the truck area) will be fenced, except for entrance and exit areas.

The Board issued its written opinion on November 8, 2013. The opinion included 27 specific findings of fact.

1. [Love's] proposes establishment of a travel center on the subject property.
2. The center will be located on approximately 11 acres at the western edge of the parcel.
3. Love's, with 300 locations in 39 states and 10,000 employees, is a Fortune 10 privately-held company.
4. This location would be their first location in the state of Maryland.
5. The proposed facility is a travel center, rather than a truck stop.
6. A travel center is for the convenience of truck, automobile, and recreational vehicle (RV) motorists. It provides fuel sales and other retail services, including fast food, on a small acreage. It does not have a full-service restaurant or a lounge for drivers.
7. In contrast, a truck stop primarily caters to truckers on a 25-30 acre site with a full-service restaurant and drivers' lounge.
8. The proposed facility will have 16 fueling points for automobiles and motorcycles and 7 diesel lanes for trucks.
9. It will include an 11,000 square-foot building with fast food restaurants, retail sales space, and restrooms.
10. It will also include an 8,000 square-foot tire care center, which is expected to sell an average of five tires per day. [Love's] has found that its 24-hour onsite operation helps to keep the travel center clean and secure.
11. Twenty-five percent of the traffic is expected to come from trucks, or around 400-500 truck trips per day.
12. 1,800 automobile trips are expected daily.

13. Peak hours are automobile heavy, as truckers generally try to avoid the heaviest automobile traffic periods.
14. Truck parking, including 100 spaces, will be located at the rear of the property.
15. The locality has a need for truck parking, particularly overnight.
16. There will be 78 parking spaces for automobiles or motorcycles.
17. The perimeter will be fenced and screened with plantings.
18. The site is approximately 1,000' from the Showalter Road/Interstate 81 interchange, a distance [Love's] has found is ideal for the location of a travel center.
19. The necessary stormwater management facilities will be of low-impact and designed to prevent standing water, so that geese, birds, and other waterfowl will not be attracted to the area or a threat to aviation.
20. The airport and its related businesses support 850 employees, and there are no convenience amenities (gas, snacks, coffee, and convenience sales) in the immediate area.
21. Air cargo operations are a goal of the airport and would require support for truck traffic.
22. The airport marketing plan calls for a mix of commercial uses in the area, but notes that a truck stop may be a "threat" to further development of the airport environs.
23. The Airport Director indicated a preference that land surrounding the airport be used for aviation or aviation-related support businesses, including hotels, motels, and the like, and questioned the proposed use's nexus to airport operations. He voiced some concerns regarding the location of the stormwater management facilities and lighting that may interfere with pilots' night vision.
24. Myron Martin, principal of Martin's Elevator, testified that he was concerned with crime that may attend the travel center, but agreed that retail gas sales were needed in the neighborhood.

25. Jason Divelbiss, the attorney for 2003 Mason Dixon LLC, testified that the site's proximity to the airport results in the proposal failing the *Schultz v. Pritts* [291 Md. 1, 15 (1981),] test. He noted that the marketing plan calls an airport-adjacent truck stop a threat, noted that Showalter Road was only two lanes, and questioned its ability to handle voluminous truck traffic. He also pointed out the proximity of the Maugansville residential area, noting that Showalter Road dead-ends in Maugansville, making it difficult for trucks to turn around if they miss the interstate entrance. In short, he argued that the site's immediate proximity to the airport presents inherent adverse effects above and beyond those associated with the same use generally when compared to other sites in the HI zone.
26. Rob Ferree, president of Bowman Development Corporation, an adjacent landowner and the most-affected by the proposal, testified that Bowman envisioned a "higher-end" development in the immediate area to support upscale jobs. He testified that the proposed use would result in diminished property values. Given the unique nature of the neighborhood due to the airport's presence, the proposed travel center is not a "good fit."
27. Andrew Wilkinson, a former 8-year resident of Maugansville, testified that the subject property was too close to significant residential development to be compatible with the neighborhood.

Despite finding that the proposed use was a "travel stop," the Board analyzed the requested special exception use as a "truck stop" under section 19.3(g). The Board stated:

The Highway Interchange district "is established to provide suitable locations for commercial activities or light industrial land uses that serve highway travelers, provide goods and services to a regional population, or uses that have a need to be located near the interstate highway system to facilitate access by a large number of employees, or the receipt or shipment of goods by highway vehicles." Section 19.1. "Truck stops" are defined as "A structure or land used or intended to be used primarily for the sale of fuel for trucks and, usually long term truck parking, incidental service or repair of trucks, overnight accommodations, or restaurant facilities open to serve the general public; or a group of facilities consisting of such a use and attendant eating, repair, sleeping or truck parking facilities." Section 28A.

* * *

There is no question that certain adverse effects are attendant to a truck stop, including increased traffic volumes, odors, fumes, noise, and lighting, among

others. These adverse effects [are] associated with the use regardless of its location in the HI zone. The question here is whether these effects are worse, or more problematic, here than they would be at any other HI site.

We are convinced that the adverse effects at this site are no greater than those effects commonly attendant to such a use regardless of its placement in the HI zone. Rather, the evidence and testimony showed us that the customary adverse effects attendant to the proposed use are actually attenuated and ameliorated at this site.

On December 6, 2013, Mason Dixon filed a Petition for Judicial Review in the Circuit Court for Washington County. The Washington County Board of County Commissioners filed a motion requesting leave to intervene as a party-defendant in the judicial review on December 18. That motion was granted on January 7, 2014. On January 13, 2014, Love's filed their response to Mason Dixon's Petition for Judicial Review, and Perini filed a response on January 15.

The Judicial review hearing before the circuit court was held on May 23, 2014, and, one month later, on June 23, 2014, the circuit court issued its Opinion and Order affirming the decision of the Board. The circuit court stated:

This Court has reviewed the testimony and the exhibits presented to the Board and read the deliberations of the Board, which both summarized and reviewed the evidence presented in the hearing. In its role as fact-finder, the Board is entitled to credit the evidence with whatever weight the Board believes is reasonable. If the Board gives full credit to Respondent's witnesses due to their experience in building truck stops, and does not credit the Petitioner and the witnesses testifying in opposition, then that decision forms part of the substantial evidence in support of its decision. *See [Cnty Comm'rs of Carroll Cnty v.] Uhler*, 78 Md. App. [140, 146-47 (1989)].

Throughout its deliberation and the written opinion, the Board weighed the evidence both for and against the special exception, and decided that the "adverse effects at this site are no greater than those effects commonly attendant to such a use regardless of its placement in the Highway Interchange zone. Rather, the evidence and testimony showed [the Board]

that the customary adverse effects attendant to the proposed use are actually attenuated and ameliorated at this site.” [Board] Op. 5.

On balance, this Court finds that there is substantial evidence in the record, as recapitulated above, to support the Board’s decision, and the Board is entitled to credit the evidence how it sees fit. Therefore, the Petitioner’s appeal must be denied.

Mason Dixon filed a timely Notice of Appeal on July 24, 2014.¹ Additional facts will be discussed as they pertain to the issues.

DISCUSSION

“A proceeding on a special exception is subject to a full judicial review.” *E. Outdoor Adver. Co. v. Mayor & City Council of Baltimore*, 146 Md. App. 283, 300 (2002) (quoting *Alviani v. Dixon*, 365 Md. 95, 107 (2001)). “We review an administrative agency’s decision under the same statutory standards as the Circuit Court.” *Jordan Towing, Inc. v. Hebbville Auto Repair, Inc.*, 369 Md. 439, 449-50 (2002) (quoting *Gigeous v. ECI*, 363 Md. 481, 495 (2001)) (internal quotation marks omitted). “The circuit court’s decision acts as a lens for review of the agency’s decision, or in other words, ‘we look not at the circuit court decision but *through* it.’” *McClure, supra*, 220 Md. App. at 379 (emphasis in original) (quoting *Emps. Ret. Sys. of Balt. Cnty. v. Brown*, 186 Md. App. 293, 310, *cert. denied*, 410 Md. 560 (2009)). We treat “the agency’s decision [as] *prima facie*

¹ Washington County Zoning Ordinance Section 25.55 provides that “any taxpayer . . . may appeal the [decision of the Board Appeals] to the Circuit Court [for] Washington County in a manner set forth in 4.08 of Article 66B of the Annotated Code of Maryland, 1970 Edition.” Section 4.08 of Article 66B has been recodified without substantive change to what is now Title 4 (Zoning) of the Maryland Code, Land Use Article (2012). Land Use § 4-405(b) provides that, after judicial review in the circuit court, a party may file an appeal with this Court.

correct and presumed valid[.]” *Bd. of Physician Quality Assur. v. Banks*, 354 Md. 59, 68 (1998) (quoting *CBS v. Comptroller*, 319 Md. 687, 698 (1990)).

“In judicial review of zoning matters, including special exceptions and variances, the correct test to be applied is whether the issue before the administrative body is fairly debatable, that is, whether its determination is based upon evidence from which reasonable persons could come to different conclusions.” *Mills v. Godlove*, 200 Md. App. 213, 223-24 (2011) (quoting *White v. North*, 356 Md. 31, 44 (1999)) (internal quotation marks omitted). If the evidence presented makes the question fairly debatable as to whether a special exception use is appropriate, the matter is one for the Board to decide. *Schultz v. Pritts*, 291 Md. 1, 15 (1981). Our role in reviewing the Board’s decision is narrow and “is limited to determining if there is substantial evidence in the record as a whole to support the agency’s findings and conclusions, and to determin[ing] if the administrative decision is premised upon an erroneous conclusion of law.” *Banks*, 354 Md. at 67-68 (quoting *United Parcel v. People’s Counsel*, 336 Md. 569, 576-77 (1994)) (internal quotation marks omitted).

Special Exception Use Generally

When a use district is established, the applicable zoning regulations set out certain uses permitted as of right (permitted use), while other uses are permitted only under certain conditions (conditional or special exception use). *Schultz v. Pritts*, 291 Md. 1, 20-21 (1981). Where the legislative body determines that the benefits of a certain use outweigh its potential adverse effects, the use is designated as a permitted use. *Id.* at 21. Permitted uses may be developed “even though [that] particular permitted use at the particular

location proposed would have an adverse effect above and beyond that ordinarily associated with such uses.” *Id.*

A county legislative body may also determine that other uses are “compatible with the permitted uses in a use district, but that the beneficial purposes such other uses serve do not outweigh their possible adverse effect.” *Id.* at 21-22. These uses are designated as conditional or special exception uses. *Id.* (citing *City of Takoma Park v. County Bd. of Appeals for Montgomery County*, 259 Md. 619, 621 (1970); *Creswell v. Baltimore Aviation Servs. Inc.*, 257 Md. 712, 719 (1970)). A special exception use is a part of the comprehensive zoning plan and is also presumed to be valid and in the interest of the general welfare. *Id.* at 11. “The special exception adds flexibility to a comprehensive legislative zoning scheme by serving as a ‘middle ground’ between permitted uses and prohibited uses in a particular zone.” *Mills*, 200 Md. App. at 228 (quoting *People's Counsel for Baltimore Cnty. v. Loyola Coll. in Maryland*, 406 Md. 54, 71 (2008)). This Court has reiterated that “a proposed conditional use is *prima facie* valid absent any fact or circumstance negating that presumption.” *E. Outdoor Adver. Co.*, 146 Md. App. at 291 (quoting *Eastern Outdoor Advertising Company v. Mayor and City Council of Baltimore*, 128 Md. App. 494, 525 (1999), *cert. denied*, 358 Md. 163, 747 A.2d 644 (2000)).

Upon review of an application for a special exception use, the appropriate zoning board must determine whether the neighboring properties in the general neighborhood would be adversely affected and whether the use in the particular case is in harmony with the general purpose and intent of the zoning plan. *Schultz*, 291 Md. at 11. In *Schultz*, the Court of Appeals stated:

[A] special exception use has an adverse effect and must be denied when it is determined from the facts and circumstances that the grant of the requested special exception use would result in an adverse effect upon adjoining and surrounding properties **unique and different from the adverse effect that would otherwise result from the development of such a special exception use located anywhere within the zone.**

291 Md. at 15 (emphasis added). The applicant for a special exception use has the burden of adducing testimony to establish that the proposed use meets the prescribed standards and requirements. *Id.* at 11. However, the applicant need not establish affirmatively that the proposed use would be a benefit to the community. *Id.* If the evidence presented makes the question of adverse effect on the surrounding area and to the comprehensive plan of zoning fairly debatable, the matter is one for the Board to decide. *Id.*

The Washington County Zoning and Review Framework

Article 19 of the Washington County Zoning Ordinance describes and governs Highway Interchange Districts, such as the one involved in the present case. Regarding permitted and special exception uses it provides:

Section 19.2. Principal Permitted Uses

(a) All Principal Permitted Uses allowed in the BL, BG, PB, and ORT Districts. Also permitted are all Principal Permitted Uses in the IR District except heliports and Commercial Communications Towers.

(b) Agriculture, as defined in Article 28A, including animal husbandry facilities, as defined in Article 28A, which shall be subject to the requirements set forth in Article 22, Division IX.

Section 19.3. Special Exception Uses (Requiring Board Authorization after Public Hearing)

* * *

(g) **Truck stops.**

(Emphasis added). Under Section 25.2(b) of the Washington County Zoning Ordinance the Board has the authority to hear and decide special exceptions to the Ordinance.

Framing the scope and bounds of the considerations in the Board hearing, section 25.6

“Limitations, Guides and Standards” provides, in pertinent part:

[T]he Board shall study the specific property involved, as well as the neighborhood, and consider all testimony and data submitted, and shall hear any person desiring to speak for or against the issuance of the permit. However, the application for a permit shall not be approved where the Board finds the proposed building, addition, extension of building or use, sign, use or change of use would adversely affect the public health, safety, security, morals or general welfare, or would result in dangerous traffic conditions, or would jeopardize the lives or property of people living in the neighborhood. In deciding such matters, the Board shall consider any other information germane to the case and shall give consideration to the following, **as applicable**:

- (a) The number of people residing or working in the immediate area concerned.
- (b) The orderly growth of a community.
- (c) Traffic conditions and facilities.
- (d) The effect of such use upon the peaceful enjoyment of people in their homes.
- (e) The conservation of property values.
- (f) The effect of odors, dust, gas, smoke, fumes, vibrations, glare and noise upon the use of surrounding property values.
- (g) The most appropriate use of land and structure.
- (h) Decision of the courts.
- (i) The purpose of these regulations as set forth herein.
- (j) Type and kind of structures in the vicinity where public gatherings may be held, such as schools, churches and the like.

(Emphasis added).

I.

Opposition Evidence

Mason Dixon argues that the Board failed to analyze the evidence presented by the opposition and, instead, concluded that the opposition had presented no evidence. Mason Dixon cites to *Mills, et ux. v. Godlove, et al.*, 200 Md. App. 213 (2011), *reconsideration*

denied, for the proposition that the Board commits error where it fails to acknowledge and analyze opposition evidence presented in a special exception use hearing. In *Mills*, this Court determined that “[t]he Zoning Board’s conclusions . . . were insufficient because it merely presented conclusions without pointing to any evidentiary basis.” 200 Md. App. at 236 (citing *Critical Area Comm'n for Chesapeake & Atl. Coastal Bays v. Moreland, LLC*, 418 Md. 111, 134 (2011)); *see also Rodriguez v. Prince George's County*, 79 Md. App. 537, 550 (1989). An appeal of a Zoning Board decision is not amenable to meaningful judicial review when the Board merely states conclusions not supported by an evidentiary basis. *Id.* at 236-37 (citing *Moreland*, 418 Md. at 134; *Bucktail, LLC v. The County Council of Talbot County*, 352 Md. 530, 552-53 (1999)).

In *Mills*, wherein the applicants requested a special exception use to store paving equipment on their property, we stated:

In making this conclusion, [that adverse effects at the proposed site would not be above and beyond those inherent in the requested use; thus, allowing for approval,] the Zoning Board did not address the adverse effects of storing contractor's equipment, nor did it address how appellants' storage of paving equipment would be different. The Zoning Board should have fleshed out any adverse effects appellants' use would have had on the neighborhood, and determined whether those effects were above and beyond those inherently associated with storing paving equipment. The Zoning Board, moreover, did not discuss the neighborhood, provide an in depth analysis of the effect storing paving equipment would have on the neighborhood, or anything else when it concluded that the proposed use was of low intensity and compatible with the neighborhood. Likewise, the Zoning Board merely stated, without support, that there was no evidence in support of the notion that the “proposed use was incompatible with the neighborhood; disruptive of neighbors' quiet enjoyment of their properties; detrimental to surrounding property values; generative of excessive odors, dust, gas, smoke, fumes, vibrations, or glare; generative of traffic that would exceed the capacity of existing infrastructure; or that the proposal was inappropriate use of land or structure.” Accordingly, we must conclude that the circuit court correctly

held that the Zoning Board did not sufficiently discuss the adverse effects above and beyond those inherently associated with a storage yard.

200 Md. App. at 239.

Mason Dixon quotes from the opinion of the Board stating:

In its Opinion, the Board concluded:

No evidence was presented that the proposed use was incompatible with the neighborhood; disruptive of neighbors’ quiet enjoyment of their properties; detrimental to surrounding property values; generative of excessive odors, dust, gas, smoke, fumes, vibrations, or glare; generative of traffic that would exceed the capacity of existing infrastructure; or that the proposal was an inappropriate use of land or structure.

(emphasis added by Mason Dixon). However, it is clear that this was not the final conclusion of the Board, and through its on-the-record deliberations and opinion, the Board recounted the evidence presented by both sides and articulated its analysis.

Although, in the present case the Board used language in its opinion stating that “no evidence was presented” supporting the opposition claims, the analysis conducted by the Board and the evidence considered is readily apparent from the hearing, deliberation, and opinion in the record. It is clear from the written findings of the Board, reproduced *supra*, that the Board considered the opposition testimony. Additionally, prior to deliberation by the Board members, the Board Chairman gave an extensive summation of the testimony and evidence presented to the board. This summation included a recap of the opposition testimony given by Mr. Divelbiss, Mr. Martin, Mr. Ridenour, Mr. Ferree, and Mr. Wilkinson. The Board chairman also reminded the members about the two opposition letters received. Thereafter, the Board deliberated on the record and, after weighing the evidence, put the application to a vote.

In the November 8, 2013, Opinion of the Board, following its findings of fact which recognized and recounted the opposition testimony, the Board articulated its analysis regarding character of the proposed site:

The site is of ample size to support the travel center, and it is located in an area with open spaces and mixed uses. The uses include the airport, light industrial uses, warehouses, offices, and aviation-related and non-aviation related uses. The use will not be discordant with these uses; rather, its fuel, food, and convenience items will support these uses' employees and customers. It is located away from significant residential development. Moreover, the location is 1,000' from Interstate 81, making it easily accessible by trucks and traffic and the "ideal distance" from the interstate.

The design of the center itself is meant to ameliorate any adverse effects associated with the use. Truck traffic, fueling, and parking are kept to the rear of the property. The rear of the site will be fenced to maximize safety and security and to ensure that debris stays onsite, rather than polluting neighboring properties. Vegetative screening will further buffer the center from surrounding uses, minimizing any incompatibilities. There will be no full service restaurant or drivers lounge as normally found in truck stops. A 24-hour tire facility will further enhance the security and cleanliness of the site. The stormwater facilities will be designed so as to not be an attractive nuisance for waterfowl.

That the next paragraph states that the opposition presented "no evidence" does not, as Mason Dixon argues, indicate that the Board disregarded the testimony and evidence presented in opposition. Nor does it indicate that, as in *Mills*, the Board "merely presented conclusions without pointing to any evidentiary basis." 200 Md. App. at 236. Rather, the statement, in context, is more akin the Court of Appeals formulation for special exception use in *Schultz v. Pritts*:

[I]f 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.

291 Md. at 11-12 (emphasis added) (citing *Turner v. Hammond*, 270 Md. 41, 54-55 (1973); *Rockville Fuel & Feed Co. v. Board of Appeals of Gaithersburg*, 257 Md. 183, 187-88 (1970); *Montgomery County v. Merlands Club, Inc.*, 202 Md. 279, 287; *Anderson v. Sawyer*, 23 Md. App. 612, 617 (1974)).

As noted above, if the evidence presented to the Board makes the question of adverse effect on the surrounding area and to the comprehensive plan of zoning fairly debatable, the matter is one for the Board to decide as fact-finder. *Id.* at 15. Thus, it is left to the Board to determine the *probative value* of the evidence presented. Further, it is clear from the final vote of 3-2 in favor that the board members considered the opposition evidence and two of them were persuaded by it. Both dissenting Board members articulated their analysis and concerns during the Board’s deliberations.

II.

Substantial Evidence

Next, Mason Dixon contends that the Board erred in granting the special exception use where the applicants failed to present sufficient evidence to support the requirements of Section 25.6 of the Washington County Zoning Ordinance. Under section 25.6, the Board must consider any (and all) of the ten enumerated factors that are *applicable*. Although Love’s and Perini had the burden of adducing testimony to establish that the proposed use meets the prescribed standards and requirements, they were not required to affirmatively establish that the proposed Love’s Travel Stop would be a benefit to the community. *Schultz*, 291 Md. at 15.

The administrative record reveals that the Board was presented with testimony and documents regarding each of the applicable 25.6 factors. Love’s’ application and concept plan addressed each of the applicable factors. In addition, engineer Mr. Dyck provided testimony regarding: (a) the number of people residing or working in the immediate area concerned; (b) the orderly growth of a community; (c) traffic conditions and facilities; (d) the effect of such use upon the peaceful enjoyment of people in their homes; (e) the conservation of property values; (f) the effect of odors, dust, gas, smoke, fumes, vibrations, glare and noise upon the use of surrounding property values; and (g) the most appropriate use of land and structure. Mr. Shuffield, Mr. Perini, and Mr. Seymour Stern also gave supporting testimony addressing the 25.6 factors.

The two remaining 25.6 factors—(h) decision of the courts; (j) type and kind of structures in the vicinity where public gatherings may be held, such as schools, churches and the like—were addressed briefly to assert their inapplicability. Love’s’ concept plan states: “[t]he applicant has no knowledge of court decisions that are applicable to this application. . . . There are no public gatherings in the vicinity of the development and therefore [factor (j)] is not applicable to this application.” No party has disputed the inapplicability of these factors.

From the record it is clear that the Board was presented with and considered testimony and evidence regarding each of the applicable factors under Washington County Zoning Ordinance section 25.6. As noted above, if the evidence presented makes the question of whether special exception use is appropriate fairly debatable, the matter is one

for the Board to decide. *Schultz*, 291 Md. at 15. Here, the record as a whole reflects that the Board’s findings and conclusions were based on substantial evidence.

III.

Truck Stop versus Travel Center

Finally, Mason Dixon argues that the Board erred in granting a special exception use for a “Travel Stop” where that is not an enumerated special exception use. As the circuit court observed:

At the hearing in this case, counsel for [Love’s] admitted that the use of the term “travel center” is a “term of art” and a “marketing tool to soften opposition and to identify and promote its business. [Love’s] also admitted that the application must meet the “truck stop” qualifications since [Love’s] applied for a “truck stop” special exception.

Indeed, Love’s’ application for special exception use states that it is for a “Truck Stop in Zoning Ordinance” pursuant to “Article 19, Section 19.3(g).” The Board’s opinion construes Love’s application as one for a truck stop under section 19.3(g), and applies the section 28A definition of truck stop.² The Board’s entire analysis is conducted as a review of the section 25.6 factors and requirements for a truck stop special exception use. Thus, the Board approved Love’s’ application for an Article 19, section 19.3(g) Truck Stop—a

² Washington County Zoning Ordinance, Article 28A, provides, in pertinent part:

Truck Stop:

A structure of land used or intended to be used primarily for the sale of fuel for trucks and, usually long term truck parking, incidental service or repair of trucks, overnight accommodations, or restaurant facilities open to serve the general public; or a group of facilities consisting of such use and attendant eating, repair, sleeping or truck parking facilities. As used in this definition, the term “trucks” does not include any vehicle whose maximum gross weight is 10,000 pounds or less, as rated by the State Motor Vehicle Administration.

permitted and presumptively allowed special exception use in a Highway Interchange zone. It is a paradox to Mason Dixon's argument on appeal that the opponents of Love's travel plaza testified that it was the truck stop component of the plan that threatened the airport and neighboring community. Clearly the Board not only examined opponent's allegations regarding a "truck stop," it examined the application and the evidence presented fully in accordance with the requirements of the zoning ordinance. Accordingly, the Board committed no error.

**JUDGMENT OF THE CIRCUIT COURT
FOR WASHINGTON COUNTY,
AFFIRMING THE DECISION OF THE
WASHINGTON COUNTY BOARD OF
ZONING APPEALS, AFFIRMED.**

COSTS TO BE PAID BY APPELLANT.