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NOTIFICATION OF ZONING HEARING EXAMINER'S DECISION

DATE OF DECISION: July 19, 2018
HEARING EXAMINER: Robert F. Kahoe, Jr.
RE: Zoning Appeal Case No. 5886
APPLICANTS: Charles Lembach & Seyed Mansour Mirjafary
LOCATION: 1202 Paul's Lane, Joppa
REQUEST: Appeal of written determination by Director of Planning & Zoning that the proposed tire pyrolysis operation by Auston Transfer and Processing is a permitted use in the CI Commercial Industrial District

Enclosed is an official copy of the Hearing Examiner's decision relative to the above referenced case.

The Hearing Examiner's decision shall become final **AUGUST 8, 2018**.

This decision shall be considered a recommended opinion to the Harford County Council, sitting as The Board of Appeals, if a written request for Final Argument before the Harford County Council is filed by the close of business on above date by the Applicant, Applicant's Attorney, Opponents, People's Counsel, or a person aggrieved who was a party to the proceedings before the Hearing Examiner. In addition, any Board Member, upon written notice to the Council Administrator, may request final argument.

COUNTY COUNCIL OF HARFORD COUNTY

Mylia A. Dixon
Council Administrator

Enclosure

cc: Applicant/Attorney; People's Counsel; Department of Planning and Zoning

212 SOUTH BOND STREET • BEL AIR, MARYLAND 21014 • 410-638-3343 • 410-879-2000 • FAX 410-893-4972

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APPLICANTS: Charles Lembach and
Seyed Mansour Mirjafary

REQUEST: Appeal of written determination
by the Director of Planning and Zoning for
the proposed Tire Pyrolysis operation in the
Commercial Industrial District

BEFORE THE
ZONING HEARING EXAMINER
FOR THE HARFORD COUNTY
BOARD OF APPEALS

Case No. 5886

ZONING HEARING EXAMINER'S DECISION

APPLICANTS: Charles Lembach and Seyed Mansour Mirjafary

LOCATION: 1202 Paul's Lane, Joppa, MD
Tax Map: 65 / Grid: 2B / Parcel: 992
First (1st) Election District

ZONING: CI/ Commercial Industrial District

REQUEST: Appeal, pursuant to Section 267-7A(6) of the Harford County Code, of the final written determination by the Director of Planning and Zoning, in a letter dated November 27, 2017, concluding that the proposed Tire Pyrolysis operation, by Auston Transfer and Processing, is permitted in the CI Commercial Industrial District.

PROPOSED USE:

Before delving into testimony and other evidence of record, it may be best to describe the use which is at the center of the controversy, and which is neither defined nor even mentioned in the Harford County Zoning Code, nor in the Standard Industrial Classification "SIC" Codes¹, around which much testimony revolved.

What is the proposed use?

Pursuant to "The Auston/GETH Scrap Tire Processing Solution" presentation made at a public information meeting held in Harford County (see Exhibit 9 to Motion of Auston Transfer and Processing, LLC to Intervene as a Party), the process involves 'controlled batch electric pyrolysis, distillation, clarification and chloride filter, and thermal oxidation processes.'

Pyrolysis is defined by *Encyclopaedia Britannica* as "the chemical decomposition of organic (carbon based) materials through the application of heat." (Boslaugh, Sarah E. "Pyrolysis." *Encyclopædia Britannica*, Encyclopædia Britannica, Inc., 31 Jan. 2018, www.britannica.com/science/pyrolysis.)

¹ Published by the U.S. Department of Labor Occupational Safety and Health Administration.

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The operation will process tire ‘feedstock,’ being scrapped tires, into “high-quality/ high-value end products” identified as:

‘Brent Crude’ equivalent – 45% or 3 barrels per ton of tires
Carbon black – 36% or 700 lbs. per ton of tires
Steel – 11% or 220 lbs. per ton of tires
Syngas – 8% or 180 lbs. per ton of tires

Resulting traffic impacts at the Auston property were identified as feedstock (scrap tires) deliveries to the site equivalent to 16 container trucks per day, 5 ½ days per week; 3 oil tanker trucks exiting the site per day, 5 days per week; 2 container trucks of carbon black exiting the site per day, 5 days per week; and 3 container trucks of steel per week leaving the site.

Twenty-five other vehicles are projected to enter or leave the site per day, 7 days per week.

Again referring to Exhibit 9, Auston stated its capital investment would be greater than \$25 million dollars, the use would create 20-30 new jobs, and would process 35,000 tons of scrap tires per year.

INTRODUCTION:

This case was initiated by the request of Charles Lembach (hereinafter sometimes referred to as “Applicant” or Lembach”), dated October 23, 2017 of the Director of Planning and Zoning to:

”...render a final written determination, within 45 calendar days upon my written request, as required by Harford County Code 267-9A(6), of whether the proposed use Tire Pyrolysis plant, and a scrap tire recycling plant is permitted in a particular zoning district, or whether the proposed use is a legal nonconforming use at the processing and transfer station at 1202 Paul’s Lane.

In addition to being notified if the land use is permitted or nonconforming, I am also requesting the director of planning and zoning to provide what the specific land use classification(s) are granted at the proposed site located on 1202 Pauls Lane.”

On October 24, 2017, the Applicant, by way of email to Bradley Killian, Director of the Department of Planning and Zoning (sometimes hereinafter referred to as “Director”), amended his initial request:

“In addition to the data requested below (*referring to the October 23, 2017 communication*), please include Auston’s Transfer & Processing located on 1202 Paul’s Lane current zoning parameters, as to whether they are permitted or nonconforming. Also please include the current use classifications located on 1202 Pauls Lane...”

By response dated November 27, 2017, the Director responded by stating that the (existing) use at the Auston’s Transfer and Processing, LLC location “...has received all its approvals and has

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been in operation for a number of years and is, therefore vested. Accordingly, it is not subject to a request for a written determination and this letter shall not act as such and is not subject to appeal pursuant to Section 267-7A(6).”

By separate letter, dated November 27, 2017, the Director notified the Applicant that “...the operation of the system to convert scrap tires to a petroleum product is considered “Petroleum and coal products (SIC 29)” in the Harford County Zoning Code. Per Section 267-50, Principal Permitted Uses by District, Industrial Use Classification Charts, the use is permitted by right in the CI/Commercial Industrial District.”

Feeling aggrieved by the Director’s decision, the Applicant has filed this Appeal.²

At the commencement of the hearing, Auston Transfer and Processing, LLC (sometimes hereinafter referred to as “Auston”) identified itself as the future operator of the proposed pyrolysis plant at issue, and made a Motion to Intervene. That motion was granted. Auston thereafter participated as a party.

TESTIMONY AND EVIDENCE OF RECORD:

A preliminary conference was held on February 28, at 6:30 P.M. for the purposes of determining future dates and the general progression of the case, to discuss witness identities, and to identify exhibits. No testimony was taken on that date.

The initial hearing in the case was held on April 18, 2018.

Initially, the request of Charles Lembach to “dismiss” Jeffrey L. Blomquist, Esquire as attorney for Auston was denied.

Mr. Lembach, in his opening statement, argued that the November 27, 2017 decision of the Director was erroneous in finding that the proposed pyrolysis plant is a use permitted by right in a CI/Commercial Industrial District. Mr. Lembach believes that the interpretation of the Director was erroneous as such an operation should not be allowed in a Commercial Industrial District. A recycling facility, which Mr. Lembach argues is in fact the use proposed, is not permitted in the CI District. Petroleum refining is defined in Standard Industrial Classification (“SIC”) Code 29 as, he quoted, ‘establishments primarily engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, and lubricants, through fractionalization or straight distillation of crude oils...’ The Applicant explained that sub-groups under SIC Code 29 are specific manufacturing processes, each with a 4-digit designation. The only applicable one of these four designations is SIC 2911, ‘Refining,’ and is only permitted by the Harford County Zoning Code as a special exception in the GI District. Therefore, says the Applicant, the use cannot be allowed in the CI/ Commercial Industrial District and the Director’s decision is incorrect.

Mr. Lembach identified the areas in which he disagrees with the Director:

² Joined by Co-Applicant Mansour Mirjafary by Amended Application filed March 15, 2018.

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(1st) A pyrolysis plant is not defined in the Code. It is, however, a use similar to a recycling center. The Harford County Zoning Code does not allow recycling in the CI District;

(2nd) Both the SIC Code and the North American Industry Classification System (“NAIC”) Code cites are for using petroleum or coal products to manufacture other products. They do not involve using scrap tires in order to produce petroleum, as would the Auston operation;

(3rd) It is not the County Master Plan, but rather the Zoning Code which dictates the activities which are permitted within a specific district. Use of the master plan “...is a distraction in this case, a shield to divert attention away from the issue.” (T-I / 17)³

Mr. Lembach offered into evidence Securities and Exchange Commission Application Form 10-K accepted as (Exhibit 1) which, the Applicant argues, supports his position that the process in question is a refining process. Mr. Lembach referred to page 4 of the form 10-K which states, “The Agreement gives exclusive rights to Cenco to utilize certain technology of the Company to design, construct, own and operate pyrolysis and refining plants...”

Mr. Lembach’s argument can best be summarized as stating that the Director, in reaching his interpretation, improperly found that the process of converting scrap tires to oil using a distillation process to recover oil, “...which is the definition of refining...” is permitted in the CI District, when, in fact, oil refining is only permitted in the GI District by special exception.

Mr. Lembach then called Marc Gregory Allinson as a witness. Mr. Allinson then began to explain the process of refining and distillation. Mr. Allinson testified that the proposed pyrolysis plant will produce petroleum distillate fuel oils and aliphatic and aeromantic byproducts. “Making it by the definition of SIC, a petroleum refinery” (T-I / 39)

Mr. Allinson emphasized his opinion that the proposed pyrolysis plant is a petroleum refinery. The applicable SIC category is not limited to crude oil as a feedstock. Its feedstock “...is petroleum derived rubber. Their end product is petroleum derived distillate fuel oil.” (T-I / 40).

“The proposed pyrolysis plant will produce petroleum distillate fuel oils and aliphatic and aromatic by-products from other processes. Making it by the definition of SIC, a petroleum refinery. (T- I / 39).

Upon cross-examination, Mr. Allinson acknowledged that the feedstock of the proposed tire pyrolysis plant will be shredded tires. He agreed that shredded tires are not crude oil. Mr. Allinson agreed that the definition does not refer to a feedstock of rubber. (T-I / 48). It does not refer specifically to scrap tires. Mr. Allinson stated, however, that the list is not intended to limit itself to crude oil only. Mr. Allinson agreed that tires are not an unfinished petroleum derivative, but it “...will fall under other processes.”

Mr. Allinson acknowledged upon questioning by Auston’s counsel that the GETH tire pyrolysis process, which is the proposed use, produces scrap steel, carbon black and a grade of crude,

³ References are to Transcript volume number and page number.

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along with certain other byproducts. Mr. Allinson contended that petroleum refining can take different feed stocks and he would not agree that a refinery usually takes crude oil or crude oil that it processes and makes "...numbers of different oil products. No, I wouldn't agree with that. I think a petroleum refinery can take multiple different feedstocks. It's a heat source and a cooling tower. It collects distillation or condensed vapors." (T-I / 57)

Addressing SIC Code 2911, Petroleum Refining, Allinson acknowledged that nowhere within that definition is found the word 'pyrolysis'.

Mr. Allinson summarized his position by stating that the disagreement he has with Auston is that Auston is arguing that the feedstock of a refinery is limited to crude oil. Allinson is stating that SIC Code 2911 clearly lists "other processes." Specifically, the SIC Code addresses other petroleum derivatives which are not crude oil. Mr. Allinson states that the pyrolysis of tires would fall under another process to produce distillate crude oils. (T-I / 60).

Next in opposition testified Joyce Bechtold, 813 Philadelphia Road, Joppa, Maryland. Mrs. Bechtold and her husband own 21 acres of land which adjoin the Auston property. Mrs. Bechtold stated that she went to public meeting on September 5, 2017 at Joppa Magnolia Fire Company to discuss the issue and was told at that time that the proposed facility would be open 5 days a week and receive 21 container trucks per day. Mrs. Bechtold went on state that she went to a subsequent meeting and received the distinct impression that the process had now changed to a 24 hour/ 7 day per week operation and she was confused. She did not feel like she had been getting clear answers to her questions. Mrs. Bechtold was also very concerned about proposed emissions and really has no idea as to what they will be. However, there was reference at the meeting to a 75 foot tall stack. The stack would be at the level where she and her tenants actually live, and she is concerned. She feels there are simply too many questions and not enough answers regarding the proposed pyrolysis operation. (T-I / 66-70).

Next in opposition testified Amanda Spliedt, 805 Philadelphia Road, Joppa, Maryland. Ms. Spliedt agreed with everything stated by Mrs. Bechtold, and is also worried about how the plant will appear to any prospective buyer of her property. She is worried about values of the property and the health of her family. Ms. Spliedt is also concerned about being able to enjoy the outdoors on her property while the pyrolysis plant is in operation. (T-I / 70-75)

Mr. Lembach again testified and essentially reiterated his positions. Reclaimed Rubber, SIC 3031, is not allowed in a CI District, he stated. Furthermore, Recycling Centers are not permitted uses in the CI District. The only use close to the use proposed by Auston is SIC Code 2911, Petroleum Refining, which is only permitted by special exception in GI District. Mr. Lembach states that the proposed use is actually recycling as defined by the County Development Regulations Section 267-4. He believes this defines the exact process which is under discussion, and recycling is not permitted in the CI District. (T-I / 96).

The hearing resumed on May 2, 2018.

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In opposition to the Director's position testified Frank Hines, 1308 Terry Way, Fallston, Maryland. Mr. Hines stated that 73,000 citizens could be impacted by the pyrolysis plant. There are 6 schools within a one mile radius of the proposed location, and 16 schools within a 6 mile radius. Mr. Hines stated that the use will impact Kingsville, White Marsh, Essex, Abingdon, Fallston, Bel Air, Edgewood, and Joppa. He is concerned that this plant will be located in the middle of a residential area. He believes the plant would be very dangerous.

Next in opposition testified Mark Spliedt, 805 Philadelphia Road, Joppa, Maryland. Mr. Spliedt is concerned because the plant will literally be in his backyard. Mr. Spliedt introduced photos representing the view from his back yard. Mr. Spliedt stated there are violations on the subject property which have not been addressed. He can see the plant from his back porch and is concerned about how it will be operated in the future and how it will affect his property. (See Applicant's exhibits 11, 12 & 13) (T-II / 11).

Mr. Spliedt testified that he had been to the public meetings concerning the proposed use.

Next testified Joyce Bechtold, who had testified at the prior hearing. Mrs. Bechtold reiterated her concern that there had not been sufficient transparency concerning the proposed use. Ms. Bechtold stated that the neighborhood that will contain the proposed plant is residential, and she had counted 64 homes from Old Mountain South to Joppa Road and north of the railroad tracks. Mrs. Bechtold also acquired over 100 names on a petition of people who are concerned about the use. (T-II / 20-25)

Next in opposition testified Dr. Peter Allinson, 1806 Old Joppa Road, Kingsville, Maryland. Dr. Allinson testified that he has been a resident of Harford County for 28 years, and is a practicing physician.

Dr. Allinson is concerned by a facility that produces potentially toxic materials, including butyl, chlorine, and chlorobutyl rubber, which is a material that "...can easily produce case dioxane, which is one of the agent orange family compounds that produces cancer and can cause mutations in unborn children." Dr. Allinson also stated that heavy metals are produced and that Auston has not responded to EPA requests for details on how these emissions are to be prevented. (T-II / 25)

Dr. Allinson described the pyrolysis process as "...a distillation process that basically occurs in an oxygen-free environment. This produces a gas vapor which the petroleum products that are liberated from the rubber, which was synthetic rubber formed (sic) from petroleum, are then distilled into various other petroleum products and reclaimed." The pyrolysis plant will operate at fairly high temperatures, 600-800 degrees (T-II / 26).

To summarize his testimony, Dr. Allinson stated that the purpose of these pyrolysis plants "...is to form petroleum products that can be recycled and put into use from burning synthetic rubber, basically, without oxygen. It's going to be – pyrolysis is going to vaporize it." (T-II / 27).

On cross-examination, Dr. Allinson stated that the process is an oil refinery process. The crude oil is used to make synthetic rubber which is then harvested to produce other petroleum products (T-II / 28). He agrees that crude oil is not a direct input.

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Next in opposition testified Bill Wehland. Mr. Wehland's understanding of the pyrolysis process is that it recycles used tires. The tires are heated and shredded in a reactive vessel "...and contain an oxygen-free or no-burning atmosphere. And you get carbon black. You get char. You get carbon black char. You get steel radial and all. And then those are used for various purposes or sold." (T-II / 30-31). Mr. Wehland also stated that there are no other such plants in the state of Maryland. He does not believe this plant fits in a CI/Commercial Industrial District as CI zone is intended for "...industrial, office and business use at a moderate scale and intensity... and that the GI Industrial District is for a larger scale or more intensive processing, with large areas of unenclosed storage which may generate substantially more impact on surrounding properties." (T-II / 31-32). Mr. Wehland believes the process belongs in the GI District. The process is properly under SIC Code 3031, Reclaimed Rubber. (T-II / 32).

On cross-examination, Mr. Wehland agreed that the pyrolysis process for shredding tires does not produce asphalt, paving, or roofing materials. It does produce carbon black and a bright crude. (T-II / 40). In summary, Mr. Wehland believes that the proposed use is a recycling center and belongs in the GI District.

Next testified Michael Phipps, 1300 Old Mountain Road South. Mr. Phipps stated he lives about one block from Paul's Lane and his property sits behind the proposed project. Mr. Phipps is concerned about unknown health impacts of the use. (T-II / 45).

Next testified Mrs. Donna Hines. Mrs. Hines believes that the use should not be permitted in this Commercial Industrial District. Many people have died in these plants for various reasons and improper cleaning could result in a damage or explosion which would allow emissions to be released. She believes that the process has not been fully studied by Harford County. (T-II / 48-49)

Next in opposition testified Adrian Cox, 811 Philadelphia Road. Mr. Cox is also concerned by the lack of transparency and the lack of communications from the Department of Planning and Zoning with the community. (T-II / 52)

Next testified Moe Davenport of the Department of Planning and Zoning. Mr. Davenport described the property in question as being 6 acres, zoned Commercial Industrial, currently improved by a 1,250 sq. ft. building, a 10,000 sq. ft. building, and a 20,000 sq. ft. building. It contains a processing facility and a transfer station. The transfer and processing operation is considered a transfer station and is a permitted use in its District. (T-II / 53-54). Transportation, communication, and utility uses are permitted in the CI District. The property is also included in the Harford County solid waste Master Plan. Auston currently operates a waste transfer station which processes building debris, construction debris, and tires.

The tire pyrolysis plant, now proposed by Auston, is not defined under the Harford County Development Regulations. It is not mentioned in the SIC Code or the NAIC Code. The Department was accordingly "...given the task of trying to identify the process of tire pyrolysis in our current code in the Permitted Use Charts." (T-II / 54).

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Mr. Davenport states that the pyrolysis plant will distill tire parts that have been shredded on the property. They take those tires and they “distill them through what is called tire pyrolysis. They produce three materials. Petroleum products, petroleum black, carbon black, which is a coal product, and the steel from the radial tires themselves.” The Department concluded that the use is under Petroleum and coal products (SIC 29), unless otherwise listed, a specific use under the Permitted Use Charts. (T-II / 55).

The Department believes that the “manufacturing process of scrap tires (is a) part of the solid waste transfer station where they processed tires permitted under the solid waste management plan.” (T-II / 55). The Department’s position is that “...the most suitable location in the SIC Code Permitted Use Charts, which was SIC 29, petroleum and coal products, unless otherwise listed.” (T-II / 56).

On cross-examination by Mr. Lembach, Mr. Davenport gave a perhaps more complete explanation of the Department’s position.

When asked if he is stating that the use is similar to coal and petroleum, Mr. Davenport responded,

“Petroleum and coal products. Yes, sir. Certainly I’d be glad to. It’s pretty straight forward. As I identified earlier, there are processes that are – technologies and trends that are not specifically in the Permitted Use Charts. Therefore, it’s our obligation to get together, review the SIC code, the NAIC codes, and study the process itself to determine where it fits most appropriately in the permitted use charts.

So in this case, our determination has been that they are taking tire scraps produced through the solid waste transfer station. They are distilling those tire scraps and making petroleum products, coal and steel.” (T-II / 67).

Mr. Davenport also stated that Petroleum and coal products (SIC 29), unless otherwise listed, are permitted in CI and GI Districts.

On cross-examination by Auston’s counsel, Mr. Davenport stated that a manufacturing use inside a 20,000 sq. ft. building is typically considered of moderate intensity. The parcel is located within an area that the Master Land Use Plan classifies as industrial employment. A moderate intensity manufacturing use would be consistent with that classification. (T-II / 87).

Mr. Davenport states that the Permitted Use Charts do not allow recycling in the CI District (T-II / 88).

Upon cross-examination by Mr. Lembach, Mr. Davenport stated that reclaimed rubber recycling and primary smelting are not permitted in the CI District. (T-II / 95).

In its post-hearing brief, Auston once again made a Motion to Dismiss, alleging that the Applicant (Mr. Lembach) “does not request the Board to grant any special request, so the Board is left to speculate as to the relief desired by Applicant.” One wonders what Auston can possibly mean

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by this statement as, after two evenings of highly contentious hearings, there can surely be no doubt about the Applicants' request. The Motion to Dismiss is denied.

APPLICABLE LAW:

See Appendix attached.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Pyrolysis is the decomposition of organic materials through the application of heat. No identified pyrolysis plant exists in Harford County. While there may be one or more pyrolysis plants located elsewhere in the State of Maryland, none were identified at the hearing. Pyrolysis is not defined in the Harford County Zoning Code, nor is it even mentioned in the Standard Industrial Classification Code or the NAIC Code. While, apparently, not a new process, it is one which is obviously not widespread.⁴

Auston proposes to construct a pyrolysis plant at its waste transfer station located in Joppa. The property is zoned Commercial Industrial, in a neighborhood which supports both commercial and residential uses. Not appearing on the Principal Permitted Use Charts, Auston asked the Director for his interpretation that the use is allowed in its district. The Director's finding that this tire disposal facility falls under the Industrial Use Classification of the Principal Permitted Use Charts as "petroleum and coal products (SIC 29), unless otherwise listed" has prompted this Appeal by interested citizens.

Section 267-49(A) of the Development Regulations⁵ is a beginning point for a determination of whether a particular use is permitted in Harford County:

"The principal uses permitted in each district are set forth in the Permitted Use Charts and § 267-50 (Principal Permitted Uses by District). Uses permitted by right, temporary uses, special developments or special exceptions are set forth in each of the zoning districts... Any use not listed is prohibited, unless the Director of Planning determines that it falls within the same class as a listed use as set forth in § 267-52 (Materially Similar Uses)."

⁴ The 2017 North American Industry Classification System identifies approximately 18,000 uses. 'Pyrolysis' is not among them.

⁵ All referenced Code provisions are reproduced in the Appendix attached.

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Similarly, Section 267-50, Principal Permitted Uses by District, states:

“The Permitted Use Charts specify the principal permitted uses in each district. Only those uses with a letter designation are permitted... A blank cell indicates that the use is not permitted.”

Furthermore, and reinforcing this provision, Section 267-52, Materially Similar Uses states:

“Uses not listed as a permitted use, temporary use, special development or special exception are *presumed to be prohibited* from the applicable zoning district.” (italics provided).

That Section goes on to state that the Director “...shall determine whether a materially similar use exists.” If no materially similar use is found “... then the proposed use shall be deemed prohibited in the district.”

Therefore, the standard is clearly established: if not mentioned, a use is prohibited unless the Director finds a materially similar use within the Permitted Use Charts. A pyrolysis plant is therefore not allowed unless a materially similar use is found.

However, and despite this clear requirement, and without any discussion, explanation, exposition, background or factual findings, the Director in his letter dated November 27, 2017 stated that the operation of the system “...to convert scrap tires to a petroleum product⁶ is considered ‘Petroleum and coal products (SIC-29).’” No finding of a materially similar use is made by the Director in his letter, and no explanation is offered.

Standing alone, it is no wonder that such a conclusory and superficially inexplicable decision provoked the filing of an appeal.

Furthermore, a review of the Staff Report provides no additional details, or findings, or explanation, or even an attempt to define the use at issue. It is simply impossible, from the Director’s letter and the Staff Report, to understand how it is that the Director classified this operation in what is essentially the catch-all category of “Petroleum and coal products (SIC 29), unless otherwise listed.”⁷

⁶ The Director appears to ignore the fact that not all of the resulting product is petroleum product.

⁷ At the risk of adding an additional layer of confusion, “Petroleum and coal products (SIC 29), unless otherwise listed,” is sub group 2999 which falls under SIC 29, Petroleum, Refining, and Related Industries, Products of Petroleum and Coal Not Elsewhere Classified.

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During his testimony the only occasion on which Mr. Davenport, the Director's representative, attempted to explain the Department's understanding of the pyrolysis process was when he stated at Page 54:

"It does not exist in the SIC Code, specifically in the NAIC Code...the process has been discussed here today...they distill tire parts that have been shredded on the property. They take those tires and they distill them through what is called tire pyrolysis. They produce three materials. Petroleum products, petroleum black – carbon black which is a coal product, and steel from the radial tires themselves."⁸

Mr. Davenport's description of the operation as a distillation process is also incomplete, at best. The presentation prepared by GETH, and noted in Auston's Motion to Intervene as Exhibit 9, defines the process as a "controlled batch electric pyrolysis, distillation, clarification, and chloride filter, and thermal oxidation processes."

Based on the above, it is unclear if the Director fully understood the process.

However, and more significantly, a further analysis demonstrates that the Director was attempting to apply an improper standard. The Director is not compelled to find a category into which pyrolysis does or may fit. If the use is not found to be on the Principal Permitted Use Charts and is not found to be materially similar to an existing use, it is not to be allowed. The Director appears to have operated under the misconception that he is required to find a category into which pyrolysis would fit. This is incorrect as a matter of law. This conclusion is supported by testimony of Moe Davenport on page 54, lines 17-22 when, referring to Auston, Mr. Davenport stated:

"The proposed tire pyrolysis, which does not exist in the Code. It does not exist in the SIC Code specifically and the NAIC Code, therefore we were given the task of trying to identify the process of tire pyrolysis in the current Code and the Principal Permitted Use Charts."

Furthermore, and perhaps more strikingly, Mr. Davenport stated at page 67, lines 16-19:

"Therefore, it's our obligation to get together, review the SIC Code, the NAIC codes, and study the process itself to determine where it fits most appropriately in the permitted use charts."

⁸ This, of course, is an incomplete description, as "syngas" is also produced.

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Nevertheless, a remand of this case to the Director for a correct analysis is not necessary. It is found that the proposed pyrolysis plant is not and cannot be concluded to be materially similar to the Principal Permitted Use Charts classification of “Petroleum and coal products (SIC 29), unless otherwise listed,” which is defined by the Standard Industrial Classification Manual as a manufacturing category:

“Establishments primarily engaged in manufacturing packaged fuel, powdered fuel, and other products of petroleum and coal, not elsewhere classified.” See attached.

This definition cannot, by any stretch, be seen to describe a pyrolysis plant, the definition of which is, “the chemical decomposition of organic (carbon based) materials through the application of heat.”⁹

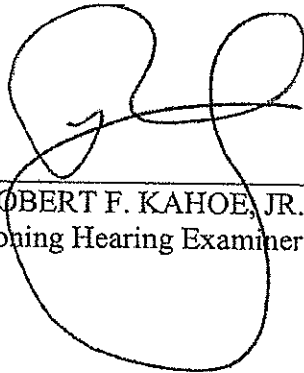
CONCLUSION:

The Director assumes an obligation which he does not have. Indeed, he exercises a power which he does not have. He cannot legitimize a use that is not materially similar to an existing permitted use. It is incorrect as a matter of law for him to attempt to do so.

However, and perhaps more to the point, the Director was incorrect in finding that a pyrolysis plant is allowed by the Harford County Zoning Code. The primary purpose of the proposed pyrolysis plant is to destroy scrapped tires. Its primary purpose is not to manufacture products of petroleum and coal.

For the above reasons, it is found that the pyrolysis process proposed by Auston is not materially similar to any existing use as permitted by the Development Regulations of Harford County, and is, therefore, prohibited.

Date: JULY 19, 2018



ROBERT F. KAHOE, JR.
Zoning Hearing Examiner

Any appeal of this decision must be received by 5:00 p.m. on AUGUST 8, 2018.

⁹ Boslaugh, Sarah E. “Pyrolysis.” *Encyclopædia Britannica*, Encyclopædia Britannica, Inc., 31 Jan. 2018, www.britannica.com/science/pyrolysis.

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APPENIDX

Harford County Development Regulations Chapter 267 – Zoning

Section 267-7 Director of Planning.

A. The Director of Planning or a duly authorized designee shall be vested and charged with the power and duty to:

1. Render a final written determination, within 45 calendar days of the written request, of whether a proposed use is permitted in a particular zoning district, or whether a proposed use is a legal nonconforming use upon written request of any person. The Director of Planning may determine a materially similar use exists, based on the North American Industrial Classification System (NAICS). The final written determination of the Director of Planning shall be subject to appeal to the Board by the applicant within 20 calendar days of the date of the decision.

Section 267-49 General Provisions.

A. The principal uses permitted in each district are set forth in the Permitted Use Charts and § 267-50 (Principal permitted uses by district). Uses permitted by right, temporary uses, special developments or special exceptions are set forth in each of the zoning districts. The minimum design standards and specific regulations for each district are set forth in § 267-51 (Requirements for specific districts) and in Tables 53-1 through 61-1. Any use not listed is prohibited, unless the Director of Planning determines that it falls within the same class as a listed use as set forth in § 267-52 (Materially similar uses).

Section 267-50 Principal Permitted Uses by District.

The Permitted Use Charts specify the principal permitted uses in each district. Only those uses with a letter designation are permitted, subject to other requirements of this Part 1. Uses designated as "P" are permitted uses. Uses designated as "SD" are permitted pursuant to the special development regulations in Article VIII of this Part 1. Uses designated as "SE" are special exception uses subject to approval of the Board pursuant to § 267-9 (Board of Appeals). Uses designated as "T" are permitted pursuant to § 267-28 (Temporary uses). A blank cell indicates that the use is not permitted.

Section 267-52 Materially Similar Uses.

Uses not listed as a permitted use, temporary use, special development or special exception are presumed to be prohibited from the applicable zoning district. In the event that a particular use is not listed as a permitted use, temporary use, special development or special exception, the Director of Planning shall determine whether a materially similar use exists in this chapter. Should the Director of Planning determine that a materially similar use does exist, the regulations governing that use shall apply to the particular use not listed and the Director of Planning shall issue a zoning certificate pursuant to § 267-8 (Zoning certificates). Should the Director of Planning determine that a materially similar use does not exist, then the proposed use shall be deemed prohibited in the district.

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Description for 2999: Products of Petroleum and Coal, Not Elsewhere Classified

Division D: Manufacturing | Major Group 29: Petroleum Refining And Related Industries

Industry Group 299: Miscellaneous Products Of Petroleum And Coal

2999 Products of Petroleum and Coal, Not Elsewhere Classified

Establishments primarily engaged in manufacturing packaged fuel, powdered fuel, and other products of petroleum and coal, not elsewhere classified.

- Calcined petroleum coke-mfpm
- Coke, petroleum: not produced in petroleum refineries
- Fireplace logs, made from coal
- Fuel briquettes or boulets, made with petroleum binder
- Waxes, petroleum: not produced in petroleum refineries

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Major Group 29: Petroleum Refining And Related Industries

This major group includes establishments primarily engaged in petroleum refining, manufacturing paving and roofing materials, and compounding lubricating oils and greases from purchased materials. Establishments manufacturing and distributing gas to consumers are classified in public utilities industries, and those primarily engaged in producing coke and by-products are classified in Major Group 33.

Industry Group 291: Petroleum Refining

- 2911 Petroleum Refining

Industry Group 295: Asphalt Paving And Roofing Materials

- 2951 Asphalt Paving Mixtures and Blocks
- 2952 Asphalt Felts and Coatings

Industry Group 299: Miscellaneous Products Of Petroleum And Coal

- 2992 Lubricating Oils and Greases
- 2999 Products of Petroleum and Coal, Not Elsewhere Classified

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PERMITTED USE CHARTS

USE CLASSIFICATION	ZONING DISTRICTS															
	AG	RR	B1	R2	R3	R4	RO	RP	RD	B1	B2	B3	C1	LI	SI	
INDUSTRIAL																
Ordinance and accessories (SIC-348)															SE	P
Paper and allied products (SIC-26), unless otherwise listed																SE
Paper bond containers and boxes (SIC-265)													P	P	P	P
Perfumes, cosmetics and other toilet preparations (SIC-2844)													P	P	P	P
Petroleum and coal products (SIC-29), unless otherwise listed													P			P
Petroleum refining (SIC-291)																SE
Pharmaceutical preparation (SIC-2834)													P	P	P	P
Preserved fruits and vegetables (SIC-203)	P												P	P	P	P
Primary metal industries (SIC-33), unless otherwise listed													P			P
Primary smelting and refining (SIC-333)																P
Printing and publishing (SIC-27), unless otherwise listed													P	P	P	P
Reclaimed rubber (SIC-3031)																P
Recycling Center																P
Rubber & misc. plastic products (SIC-30), unless otherwise listed													P	P	P	P
Secondary smelting and refining (SIC-334)																P
Stone, clay and glass products (SIC-32), unless otherwise listed	SD														P	P

KEY	
"P"	indicates permitted subject to applicable code requirements
"SD"	indicates permitted subject to special-development regulations, pursuant to Article VIII.
"SE"	indicates permitted subject to special-exception regulations, pursuant to Article IX.
"T"	indicates permitted subject to temporary-use regulations, pursuant to § 267-28 (temporary uses).
	A blank cell indicates that the use is not permitted.
"SE*"	indicates permitted subject to special-exception regulations, pursuant to Article XI.

- (1) Indicates permitted in the Edgewood Neighborhood Overlay District (ENOD) only.
- (2) RO - maximum of 4 units.
- (3) Indicates permitted in the Chesapeake Science and Security Corridor (C-SSC) only.
- (4) The following shoppers merchandise stores-business and office equipment rental or leasing, business equipment sales, party supply shops, photography equipment and supply shops, and medical equipment rental and sales, are permitted in the RO District.