IN THE MATTER OF AUSTON TRANSFER & PROCESSING, LLC	*	IN THE
	*	CIRCUIT COURT
	*	FOR
	*	HARFORD COUNTY
	*	CASE NO.: C-12-CV-18-856

* * * * * * * * * * * * *

MEMORANDUM OPINION AND ORDER

This matter came before the Court on a Petition for Judicial Review filed by Petitioner, Auston Transfer & Processing, LLC ("Auston Transfer"). The Petition questioned the decision of the Harford County Council, sitting as the Board of Appeals for Harford County. The Council had adopted the recommendation of its Zoning Hearing Examiner. After two hearings, the Examiner found that the proposed use of the subject property for a "tire pyrolysis" operation was not a principal permitted use in the Commercial Industrial District ("CI District"). One of the parties below, Charles Lembach, was dismissed from the Circuit Court case and People's Counsel for Harford County intervened pursuant to Harford County Code ("HCC") § 4-26(D)(2) to defend the Board of Appeals' decision. This Court heard oral argument on April 30, 2019, between Petitioner and Intervenor. On May 13, 2019 People's Counsel filed a supplemental filing with the Court with permission. On May 30, 2019 Petitioner filed an additional submission without the permission of the Court.

Background

The genesis of this case was an opinion letter of the Director of Harford County Planning and Zoning, Bradley Killian. A final written determination was issued on November 27, 2017, opining that the proposed use of the subject property for a tire pyrolysis operation was a principal permitted use in Harford County's CI Zoning District. The subject property was owned by Auston Transfer.

The substance of the code interpretation under the authority of HCC 267-7A (6) made by the Director read as follows:

> 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 Districts, Industrial Use Classification Charts, the use is permitted by right in the CI/Commercial Industrial district.

See 11-27-17 Letter of Director Killian. No factual findings or analysis appears in the opinion at all, just a conclusion. Charles Lembach, a citizen who opposed the proposed use timely appealed the decision to the Board of Appeals for Harford County. Harford County Government gave notice that it would participate in the proceedings. The Board of Appeals initially referred the appeal to its appointed Hearing Examiner. The Hearing Examiner heard evidence and argument on April 18 and May 2, 2018.

The various positions taken at the hearings can be summarized as follows. Mr. Lembach argued that the Director did not make a proper factual conclusion when he classified the use of tire pyrolysis. Mr. Lembach's position was that tire pyrolysis is a distillation process where heat is applied to scrap tires to create crude oil and other industrial byproducts. Therefore, he concluded that tire pyrolysis is encompassed within

the use classification of petroleum refining, which is not a permitted use in the CI District.[1] April Transcript at 11-25.

Marc Allinson was then called as a witness. Id. at 26. Mr. Allinson began to proffer testimony regarding his opinion as to how tire pyrolysis should be classified. He agreed with the analysis of Mr. Lembach that tire pyrolysis is analogous to the "not permitted" use of petroleum refining. Id.at 26-28. The Hearing Examiner then stopped Mr. Allinson and would not allow him to testify as to the refining process without showing he had some expertise in the area. Id. at 28. Mr. Allinson then explained that he had a bachelor's degree

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[1] It is confusing as to whether Mr. Lembach's opening statement was admitted as testimony or was simply heard as argument. After preliminary motions, Mr. Lembach began to speak when the following colloquy ensued:

> THE HEARING EXAMINER: Are you going to make a statement, which I guess you are?
>
> MR. LEMBACH: Yes, an opening statement, Mr. Kahoe.
>
> THE HEARING EXAMINER: Then you need to be sworn in. Have all of your witnesses, Mr. Lembach, stand to be sworn in at this time.
>
> MR. LEMBACH: Sir, I'm the applicant, so my understanding is that I don't need to be sworn in.
>
> THE HEARING EXAMINER: Are you – what are you doing, Mr. Lembach? Are you giving an opening statement, or what are you doing?
>
> MR. LEMBACH: I'm just giving an opening statement, making some comments. That's what I'm here for, to share information, Mr. Kahoe.
>
> THE HEARING EXAMINER: And you don't want to give it under oath? That's fine.

April Transcript, 9-10. Immediately after that conversation the other witnesses were sworn. There is no indication that Mr. Lembach was sworn notwithstanding the preceding conversation. However, soon into Mr. Lembach's statement the Hearing Examiner told Mr. Lembach, "You're under oath. You're presenting evidence on your behalf at the present time, or what you believe is evidence." Id. at 13. Thus, it is impossible to glean from the transcript whether Mr. Lembach's statements were evidence considered by the Hearing Examiner in his recommendation or whether it was merely oral argument. What is more confounding is that at the end of the April hearing the Hearing Examiner explained the following to Mr. Lembach:

> You will make argument when the case is over. You are going to present the rest of your testimony now. You can go back to the table. You are going to present the rest of your testimony now, Mr. Lembach. Even though you started to do it earlier, I I'll let you finish it up now.

Id. at 89.

in accounting, had completed feasibility studies in projects relating to energy, maintained some patents for energy-related inventions, had never testified in a court or administrative hearing, and had no direct experience in petroleum refining or tire pyrolysis. Id. at 28-30. His background was found to be inadequate to testify as to the scientific processes of petroleum refining and pyrolysis. The Hearing Examiner considered that these required an expert opinion. Mr. Allinson's testimony was halted on that ground. Id. at 31. Mr. Allinson then testified that, as a neighbor, he simply does not want a tire pyrolysis plant in his neighborhood. Id. Mr. Allinson ended his testimony with a brief discussion of Standard Industrial Classification ("SIC") 2911, stating that petroleum refining, as defined under SIC 2911, is not limited to a process of distilling crude oil into petroleum, but, rather, includes the distillation of other products into petroleum products. Id. 37-38. Thus, he argued that tire pyrolysis is essentially another version of petroleum refining and, under the Permitted Use Chart, it is not permitted in the CI District. Id. This testimony was not objected to or stricken. On cross-examination, Mr. Allinson stated he has never worked with SIC codes and does not specialize in tire pyrolysis or SIC codes. Id. at 43-49.

Mr. Lembach then tried to introduce testimony as a witness, attempting to argue again and also making statements regarding alleged permit violations by the subject property owner. Id. at 63-64. After a brief recess, the Hearing Examiner stressed that no evidence would be admitted as to alleged permit violations and that Mr. Lembach could not testify a second time.[2]

[2] Considering the confusion noted in Footnote 1 of this opinion, it is unclear whether Mr. Lembach would have been testifying a second time after Mr. Allinson's testimony.

Mr. Lembach then called Joyce Bechtold as a witness. Id. at 66. Ms. Bechtold, an adjoining neighbor to Petitioner's property, testified generally about the lack of any or adequate notice to the public when meetings were convened concerning the regulation of the proposed tire pyrolysis project. Id. at 66-69. Ms. Bechtold also expressed a general concern regarding possible emissions from such an operation. Id. at 69. There was no cross-examination of Ms. Bechtold. Id. at 70.

Amanda Spliedt was called as the next witness. Id. at 70. Ms. Spliedt testified that she could see Petitioner's existing facilities from the window of her home and expressed that she would be able to see any smokestack from her home, which caused her concern for the value of her property and the health of her child. Id. at 71-73. Cross-examination of Ms. Spliedt did not yield anything substantively different than her testimony on direct.

At the end of the April hearing, the attorney for the Petitioner and Mr. Lembach on the record before the Hearing Examiner sorted through Mr. Lembach's exhibits that he sought to introduce. Id. at 78-89. The Hearing Examiner then permitted Mr. Lembach to finish his testimony. Id. at 89; see Footnote 1, supra. Mr. Lembach's testimony at that point was essentially the same substance as his opening statement. Id. at 92-99. Mr. Lembach then represented that he was closing his case. Id. at 100. At that point the hearing ended.

The May 2nd hearing continued the case, with Mr. Lembach representing that he had only closed the first portion of his case and that there were more witnesses to present. May Transcript, 3-4. The Hearing Examiner allowed Mr. Lembach to proceed.

Frank Hines was introduced as the next witness. Id. at 5. Mr. Hines testified generally about his perceived dangers of a tire pyrolysis plant and the possible impacts one

might have on various locales in Harford County. Id. at 6-7. On cross-examination, when asked about the specifics of the process of tire pyrolysis and the proposed project, Mr. Hines testified that he did not have knowledge of those matters. Id. at 7-9. Similarly, Mr. Hines stated that he was not an authority in classifying different uses within the Permitted Use Chart. Id. at 10.

Marc Spliedt then testified. Id. at 11. An adjoining neighbor, he voiced his concerns about seeing Auston Transfer's current operation and about possible negative health impacts of a tire pyrolysis operation. Id. at 11-13. On cross-examination, Mr. Spliedt candidly admitted that he had no knowledge of or experience with SIC codes. Id. at 19-20. Joyce Bechtold then testified a second time, expressing the same concerns that she had regarding the proposed tire pyrolysis plant that she voiced at the April hearing. Id. at 20-22; see April Hearing, 66-69. On cross-examination, Ms. Bechtold testified that she had no experience with SIC codes, nor did she have experience in use classification. May Hearing, 24.

Dr. Peter Allinson was called as the next witness. Id. at 25. Dr. Allinson identified himself as a practicing physician in Maryland and a resident of Harford County. Id. He explained that he graduated from University of Miami Medical School and obtained his medical degree and majored in chemistry as an undergraduate. Id. He testified that he worked at fellowships in neonatal pediatric intensive care and adult intensive care. Id. Dr. Allinson then testified that he had concerns that a tire pyrolysis plant could potentially produce harmful, toxic chemicals and compounds. Id. at 26. He testified that tire pyrolysis is a process where rubber is heated in an oxygen-free environment to produce a vapor that

is then distilled into a petroleum product. Id. at 26-27. On cross-examination, Dr. Allinson testified that the raw material for tire pyrolysis is shredded tires, which, themselves were made from crude oil products. However, as a tire it is not crude oil itself. Id. at 28. He then testified that he did not have experience in applying SIC codes specifically regarding tire pyrolysis and that he had never worked in an office concerning zoning. Id. at 28-29.

Bill Wehland then testified as a witness. Id. at 29. Mr. Wehland voiced his concerns regarding transparency in the various approvals for the proposed tire pyrolysis plant. In particular he testified in that tire pyrolysis should be confined to the General Industrial Zoning District because of the perceived intensity of such an operation. Id. at 31. Mr. Wehland testified that tire pyrolysis was encompassed within the Permitted Uses Chart under the use of "Reclaimed Rubber (SIC-3031)." Id. at 32. On cross-examination, Mr. Wehland agreed that SIC 29 is a part of the manufacturing division of the SIC code. Further he agreed that pyrolysis is both a mechanical and chemical process and that SIC 29 comprises three industrial subgroups. He further agreed that he is not familiar with petroleum refining, that he has never worked for the Department of Planning and Zoning, and that tire pyrolysis is not explicitly mentioned in the SIC or the North American Industry Classification System ("NAICS"). Id. at 34-43.

Michael Phipps was then called as a witness. Id. at 45. Mr. Phipps testified generally about his concerns of possible health impacts caused by a tire pyrolysis operation, and that he simply did not want the proposed use in his neighborhood. Id. at 45-46. No cross-examination of Mr. Phipps occurred.

Donna Hines was next called as a witness. Id. at 47. Ms. Hines testified that tire pyrolysis poses certain risks, including dangers to human life. She claimed that the Department of Planning and Zoning did not fully understand the process of tire pyrolysis when it rendered its interpretation. Id. at 48-49. On cross-examination, Ms. Hines admitted that she had never worked for a tire pyrolysis plant or spoke with persons involved in such an operation. Id. at 50.

Last called in opposition to the Director's determination was Adrian Cox. Id. at 51. Mr. Cox expressed concerns regarding the transparency of Auston Transfer's current and proposed operation. Id. at 52. There was no cross-examination of Mr. Cox.

Moe Davenport, representative for the Department of Planning and Zoning, then delivered the Department's staff report on the Director's final determination. Mr. Davenport began his testimony by describing the property itself and the facilities thereon. He testified that the property comprises six acres in the CI District and is improved by three buildings of 1,250 square feet, 10,000 square feet, and 20,000 square feet, respectively. Id. at 53. The two largest buildings are used for transferring and processing construction debris, tires, and other commercial materials. Id. at 53-54. The entire operation is classified and currently operates as a solid waste transfer station. Id. at 54. He testified that Auston Transfer anticipated bringing in tire pyrolysis equipment into the existing 20,000 square foot building. Id. at 55. Mr. Davenport explained, that tire pyrolysis is not a specific use enumerated in the Permitted Use Chart of the Harford County Code, and noted that tire pyrolysis as a specific process is absent from the SIC and NAICS industrial codes. Those two codes are mentioned in the HCC zoning chapter by way of reference. Id. at 54-55. Mr.

Davenport testified it was the Department's conclusion that, although absent from the Permitted Use Chart, that the use of the property for tire pyrolysis is within the use classification of "Petroleum and coal products (SIC-29), unless otherwise listed." Id. at 54-56. On cross-examination, Mr. Davenport more fully explained the Department's process of classifying tire pyrolysis as a use:

> It's pretty straight forward. As I identified earlier, there are processes that – 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.

Id. at 67.

The Hearing Examiner issued his recommended decision on July 19, 2018. The Hearing Examiner concluded that the Director erred as a matter of law:

> [T]he 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.

Hearing Examiner's Decision (hereinafter cited as "Decision"), 11. The Hearing Examiner cited HCC § 267-52, the provision on materially similar uses, as well as HCC § 267-49 and § 267-50, emphasizing that uses not permitted are presumed to be prohibited. Id. at 9. He also cited excerpts of Mr. Davenport's testimony as support for his conclusion that the Director committed legal error. In essence, the Hearing Examiner found that the Director believed he was compelled to find a classification for tire pyrolysis, under the belief that the Zoning Code merely provides for an open-ended inquiry into whether a proposed use

is permitted, with no mandatory classification. Id. at 11. Additionally, the Hearing Examiner concluded that the Director committed factual error. The Hearing Examiner found error when the Director relied upon "Petroleum and coal products (SIC 29), unless otherwise listed," as the section of the Permitted Use Chart that encompassed tire pyrolysis. Petroleum and coal products (SIC 29) was specifically defined in the SIC under SIC 2999 as "[e]stablishments primarily engaged in manufacturing packaged fuel, powdered fuel, and other products of petroleum and coal, not elsewhere classified." Id. at 12. The Hearing Examiner then compared that code definition with the encyclopedic definition of pyrolysis, and explained "this definition [in the SIC] 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.'" Id. The Hearing Examiner also stated that the Director's factual determination was incorrect in that the primary purpose of tire pyrolysis is to scrap tires and not to manufacture petroleum products. Id. On appeal, the matter was then taken up by the Harford County Council sitting as a Board of Appeals.

The Board of Appeals heard final arguments on the matter, reviewed the record before the Hearing Examiner, and considered the Hearing Examiner's recommended decision. On October 2, 2018, the Board of Appeals issued its final decision, unanimously adopting the Hearing Examiner's recommended decision, finding that tire pyrolysis is prohibited in the CI District. From that final decision, a timely appeal to this Court was filed.

Standard of Review

"Judicial review of an administrative agency action is narrow." United Parcel Serv., Inc. v. People's Counsel for Baltimore City, 336 Md. 569, 576 (1994). It is not the role of the Court to substitute its own opinion in place of the expertise of administrative agency officials. Bulluck v. Pelham Wood Apartments, 283 Md. 505, 513 (1978), (citing) Bernstein v. Real Estate Comm'n of Md., 221 Md. 221, 230 (1959). In reviewing an agency decision, the Court must determine "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." United Parcel Serv., 336 Md. at 577. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Snowden v. Mayor and City Council of Baltimore, 224 Md. 443, 448 (1961) (internal quotation marks omitted) (citation omitted). Unlike appellate review of court decisions, judicial review of an agency decision is limited to the agency's stated findings and reasoning. Mehrling v. Nationwide Ins. Co., 371 Md. 40, 65 (2002), (citing) United Steelworkers of Am. AFL-CIO, Local 2610 v. Bethlehem Steel Corp., 298 Md. 665, 672 (1984). In sum, the Court must review both the legal and factual conclusions of the administrative agency. All that is needed to sustain a factual determination is substantial evidence in the record. Legal conclusions are not entitled to the same deference and maybe reversed where they are merely erroneous. It must be noted that this appeal is from the Board of Appeals' summary decision of October 2, 2018, which simply adopted the recommended decision of the Hearing Examiner. Therefore, review

here is of the factual findings, reasoning, and legal conclusions of the Hearing Examiner's report.

Discussion

This case would appear to present a review of a mere interpretation of part of the Harford County Code. Yet this case presents a confluence of contradictory legislation, new and concerning recycling processes and administrative decision making within these uncharted waters. To begin this Court is convinced that the Hearing Examiner was correct when it ruled that the Director of the Department of Planning and Zoning committed legal error. However, the scope of the legal error maybe broader than that identified by the Hearing Examiner. Consistent with *de novo* review of legal issues, the Court must discuss the entire scope of legal error.

The Hearing Examiner was correct in ruling that the Director erred when the Department of Planning and Zoning assumed it was charged with finding a classification within the Permitted Use Chart in the district into which tire pyrolysis would fit. HCC § 267-49(A) states that "principal uses permitted in each district are set forth in the Permitted Use Charts." The code continues that "[a]ny 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)." HCC § 267-52 reads in relevant part as follows:

> 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 not exist, then the proposed use shall be deemed prohibited in the district.

Viewing the relevant Code provisions, the methodology set out in the Code is as follows. When requested to classifying a proposed use, the Director of Planning must first see if the proposed use is listed within the Permitted Use Chart for the district. If the use is specifically listed, then the inquiry is over. If the use is not listed within the Permitted Use Chart, the Director must determine whether the proposed use is materially similar to a classified use in the zoning code. If the Director determines that there is a materially similar use in the district, then the assigned classification of the materially similar use in the Permitted Use Chart in the district governs. If the Director determines there is no materially similar use in the district or if the materially similar use is permitted in another district, then the proposed use is prohibited in the subject property's district. Underlying this process is the presumption that uses not specifically listed are "presumed to be prohibited." HCC § 267-52. Just as the Hearing Examiner stated, there is nothing in this process that mandates that a materially similar use be found in the district. Indeed, HCC § 267-52 carefully states that "the Director of Planning shall determine *whether* a materially similar use exists . . . ." (emphasis added).

Mr. Davenport's testimony, noted by the Hearing Examiner in his decision, points to the fact that the Director set out to find any place within the Permitted Use Chart where tire pyrolysis would fit in the district:

> 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.

May Hearing, 67. Had Mr. Davenport testified that the Department of Planning and Zoning set out to determine, if or whether, tire pyrolysis is materially similar to a use listed anywhere in the code, then the Court could be satisfied that the Code was followed. However, the testimony suggested otherwise. The Hearing Examiner expressed it aptly: "The Director assumes an obligation which he does not have." Decision, 12. The Director is not obligated to find a place in the Permitted Use Chart for the district for every conceivable proposed use. Rather, there is a presumption from the legislation itself that unlisted uses are prohibited, only to be overridden when a thorough review of the facts surrounding the proposed use and the code itself yields the conclusion that the proposed use is materially similar to a use or uses already considered by the legislative body to be permitted in the district. Thus, the Hearing Examiner's ruling that the Director committed legal error in his final written determination was not erroneous and must be sustained.

It is noteworthy that the legislation at play here is not entirely consistent. From the inception of the case, Petitioner sought an opinion pursuant to HCC 267-7A(6). The full text of that part of the code reads as follows:

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

HCC § 267-7A(6). In undertaking the "materially similar use" analysis, the Director is explicitly charged to consult the NAICS and base the decision thereon. However, the NAICS is not part of Permitted Uses Chart in the Harford County Zoning Code. See generally, HCC Chapter 267. There is no citation or reference to this document as a source for permitted uses anywhere in the Code itself. Through computer research one can navigate to the webpage of the United States Census Bureau, where there is an introduction to the NAICS, search functions for current and past NAICS manuals, and a link to a full portable document format (PDF) of the 2017 NAICS Manual, which is the most current version.[3]

The legal conundrum arises when the Director under a 7A (6) analysis looks to the Permitted Use Chart to determine, whether a materially similar use exists. The Permitted Use Chart lists various use classifications as they relate to each zoning district, with a lettering system employed to indicate if and how a given use is permitted in a given zoning district. See HCC, Zoning Chapter, Attachment 19. While most use classifications are merely phrases (e.g., "Theaters, indoor," "Fire stations," or Hospitals"), classifications under the heading of "Industrial" in the Permitted Use Chart almost all contain a reference to the SIC. Id. Just as with the NAICS, the Harford County Zoning Code, and Permitted Use Chart do not explicitly cite to the SIC or explain its relevance in the Permitted Use Chart. To the public, it is likely unknown what is meant by the acronym SIC until another internet search yields a website maintained by the Occupational Health and Safety

[3] The webpage is located at https://www.census.gov/eos/www/naics/. Although the 2017 NAICS Manual is accessible from that webpage, it can be found directly at the following online address: https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf.

Administration, a unit of the United States Department of Labor.[4] The website has a search function for the SIC and an online interface for manually searching the SIC.

The difficulty in using mere SIC numbers, in the Code and their current inclusion in the Permitted Use Chart, is fully revealed when one reads the NAICS Manual. Portions of the introductory text read as follows:

> In 1937, the Central Statistical Board established an Interdepartmental Committee on Industrial Classification to develop a plan of classification of various types of statistical data by industries and to promote the general adoption of such classification as the standard classification of the Federal Government. The List of Industries for manufacturing was first available in 1938, with the List of Industries for nonmanufacturing following in 1939. These Lists of Industries became the first Standard Industrial Classification (SIC) for the United States.
>
> [. . .]
>
> Since the inception of the SIC in the 1930's, the system was periodically revised to reflect the economy's changing industrial composition and organization. The last revision of the SIC was in 1987. Rapid changes in both the U.S. and world economies brought the SIC under increasing criticism.
>
> [. . .]
>
> In July 1992, the Office of Management and Budget (OMB) established the Economic Classification Policy Committee (ECPC) and charged it with a fresh slate examination of economic classifications for statistical purposes. The ECPC prepared a number of issue papers regarding classification, consulted with outside users, and ultimately joined with Mexico's Instituto Nacional de Estadística, Geografía e Informática (now the Instituto Nacional de Estadística y Geografía) (INEGI) and Statistics Canada to develop the North American Industry Classification System (NAICS), which replaced the 1987 U.S. SIC and the classification systems of Canada (1980 SIC) and Mexico (1994 Mexican Classification of Activities and Products (CMAP)).
>
> [. . .]

[4] The website is located at https://www.osha.gov/pls/imis/sicsearch.html.

The U.S. statistical programs implemented NAICS for the first time in 1997, some twenty-two years ago. Office of Management and Budget, North American Industry Classification System 13 (2017) (citations omitted). The NAICS abrogated the outmoded SIC in 1997 and since then has been the unifying standard for industrial classifications. SIC is defunct. Why it remains in the Harford County Code is unknown and was not explained or analyzed by the Director.

Had the Harford County Code maintained references only to SIC under the 7A (6) analysis there at least would be consistency in the legislation, however, the Director's duty to consult NAICS under 7 A (6) in making a materially-similar-use analysis against SIC uses in the Permitted Use Chart was a recipe for disaster. The Director is not directed to base the decision on SIC in making such an analysis. See HCC § 267-7A(6). Yet, utilizing the SIC is all but inescapable when nearly every industrial classification in the Permitted Use Chart contains a general or specific SIC number.[5] It is no wonder that the two hearings before the Hearing Examiner focused on SIC classifications found in the Permitted Use Chart, as opposed to NAICS classifications. It is also now no surprise that the opposing parties seemed to be speaking two different languages at argument. Frankly, they were. It was the Director's duty to base its decision on NAICS when determining whether there was a materially similar use. In addition, the Director was required to make a factual record

[5] The SIC contains "major groups," which are two-digit codes that are thereafter divided into "industry groups," which are three-digit codes that ultimately encompass one or more four-digit codes that each define an individual SIC classification. For example, within the manufacturing division of the SIC is Major Group 29, entitled "Petroleum Refining and Related Industries." Within Major Group 29 are three Industrial Groups 291, 295, and 299. While Industrial Group 291 contains the sole classification of SIC 2911, "Petroleum Refining," Industrial Group 299 contains the two classifications of SIC 2951 and 2952.

of the basis for its decision. Should an expert testimony be needed as a foundation for an opinion, that expert report or opinion should be part of the record to support the interpretation. Here expert testimony was deemed necessary to counter the opinion, then in all likelihood an expert opinion was likely needed to create it.

The testimony of Mr. Davenport, the Department of Planning and Zoning's representative, confirmed that the Director strayed from the statutory duty. The testimony indicated that the SIC was the predominant consideration of the Director and the Department: "So that is the County's position, the Department of Planning and Zoning position that the most suitable location in the SIC code Permitted Use Charts, which was SIC 29, petroleum and coal products, unless otherwise listed." May Hearing, 56; "I can say we considered the SIC code in general." Id. at 83; "We looked at a number of SIC codes." Id. at 83-84. While Mr. Davenport generally stated that the NAICS was consulted, there was not a single NAICS number mentioned even once in the totality of both the April and May hearings. See generally April & May Hearings. No mention of the NAICS was make in the Director's letter opinion either.

SIC may be historically related to the NAICS, and reference between the two systems is possible through a chart that is accessible on the main NAICS webpage. However, SIC is out of date and was superseded by the NAICS. No mention of the chart was made by the Director. This Court cannot ignore that the Code explicitly mandated that the Director utilize the NAICS classification system, to determine a materially similar use.

The Director's use of the SIC without reference to the NAICS was followed by the Hearing Examiner and ratified by the Board of Appeals. The Hearing Examiner determined

that a remand to the Director of Planning and Zoning was unnecessary, notwithstanding the Director's legal error, because tire pyrolysis could not possibly be within the Permitted Use Chart classification of "Petroleum and coal products (SIC 29), unless otherwise listed," The Hearing Examiner concluded that SIC 29 conflicted with even an encyclopedic definition of pyrolysis. Decision at 12. Thus, the Hearing Examiner's factual analysis of the Director's classification of tire pyrolysis had adopted the same unsupportable framework that relied upon the SIC. The Board of Appeals then also relied upon SIC under a 7A (6) analysis. As noted, this was against the requirements of the Code.

In sum, there were two levels of legal error committed in this case. First, as correctly decided by the Hearing Examiner, the Director erred in affirmatively setting out to classify tire pyrolysis within the Permitted Use Chart in the district, as opposed to simply making an inquiry with the presumption that uses not explicitly listed as permitted in the district are not permitted. As noted the Director did not set forth any factual findings or a factual foundation or analysis for the opinion reached. There was no expert report or opinion offered to support the underlying opinion rendered. Second, the Director's and the Hearing Examiner's factual analysis under 7 A (6) relied upon SIC instead of NAICS when classifying tire pyrolysis. Since the Board of Appeals merely adopted the Hearing Examiner's findings of fact, reasoning, and decision, the final ruling shall be affirmed but for the reasons consistent with this decision.

As noted much was made of the need for expert testimony for witnesses to even discuss the Harford County Code. During argument it became apparent that the County did not provide a copy of SIC 29 or the NAICS to citizens who had approached the Planning

in this case. Should the County choose to use industrial codes embedded within the Code, it is incumbent that the public be provided with a ready copy of the referenced material or a link to an online version when an inquiry is made. This would not be necessary where the Code employs the use of the ordinary meaning of terms.

The requirement for an expert opinion to testify or opine whether a use is permitted or not within a zoning classification puts both the County and the public in an unintended position. While the issue here centered on the standard employed by the Director to determine if there was a materially similar use, the Harford County Code employed an outmoded classification system in the Permitted Use Chart. Ultimately the lay witness, Mr. Wehland, appeared to be on the more solid ground when he testified that a tire pyrolysis plant was more akin to a reclaimed rubber operation than any other stated use in the chapter. Such a use was only a permitted use in General Industrial zone. This was the apparent finding that escaped the Director here as the charge employed was to make tire pyrolysis fit somewhere within permitted uses in the CI district as opposed to finding which listed use in the zoning code was materially similar to the proposed use. Simply put, since the proposed use was not permitted in the district, it was prohibited.

The remaining question is what disposition must be made in this case. In reviewing decisions of an administrative body, "[u]nless otherwise provided by law, the court may dismiss the action for judicial review or may affirm, reverse, or modify the agency's order or action, remand the action to the agency for further proceedings, or an appropriate combination of the above." Maryland Rule 7-209. Based on the Court's analysis above, the Court will affirm the Board of Appeals' decision, but for the reasons stated within and

consistent with this opinion. In summary the Court is affirming the Hearing Examiner's ruling that the Director committed legal error, so the determination of the Director remains overturned, but on the grounds reflected in this opinion and not on the grounds as previously advanced.

Paul W. Ishak, Judge

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IN THE MATTER OF AUSTON TRANSFER & PROCESSING, LLC	*	IN THE
	*	CIRCUIT COURT
	*	FOR
	*	HARFORD COUNTY
	*	CASE NO.: C-12-CV-18-856

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ORDER

Upon consideration of Petitioner's Petition for Judicial Review of the decision of the Harford County Board of Appeals, and oral and written argument in this matter, it is this 23rd day of August, 2019, by the Circuit Court for Harford County, hereby

ORDERED, that the decision of the Board of Appeals is affirmed on the grounds as provided in the accompanying opinion.

Paul W. Ishak, Judge

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