

BEFORE THE ANDERSON TOWNSHIP BOARD OF ZONING APPEALS

MEMORANDUM OF THE VILLAGE OF TERRACE PARK IN OPPOSITION TO THE APPLICATION OF MARTIN MARIETTA MATERIALS, INC. FOR A VARIANCE TO SECTION 116.8, ATZR IN CONNECTION WITH A REQUEST FOR A CONDITIONAL USE FOR AN UNDERGROUND LIMESTONE MINE

1. **The Village Of Terrace Park Has Standing To Challenge This Request For Variance.**

The Village of Terrace Park owns property in the vicinity of the Martin Marietta property and will be adversely affected by the proposed limestone mining on the Martin Marietta property. It is well established under Ohio law that, as a party who is able to demonstrate a present interest in the subject matter before the BZA and who is likely to be prejudiced by an adverse decision, the Village of Terrace Park has standing to contest this request for a conditional use.¹ The Village of Terrace Park as an affected property owner will suffer an injury different from that suffered by the community at large if this variance is granted to Martin Marietta. Moreover, the granting of the conditional use request and the variance request, affect the affirmative duty of the Village of Terrace Park to maintain safe, navigable roads. Therefore, the Village of Terrace Park has standing to challenge this request for variance.

2. **By Applying For A Use Variance, Martin Marietta Has Implicitly Admitted That It Cannot Comply With The Requirements For A Conditional Use Permit Under The ATZR.**

The Village of Terrace Park requests this Board to take into account the fact that, by requesting a use variance, Martin Marietta has implicitly admitted that it cannot comply with the performance standards specified in the ATZR for granting a conditional use permit.

3. **The Vibration Performance Standard Cannot Be The Subject Of A Use Variance.**

Ohio law is unequivocal on this issue. A performance standard for the granting of a conditional use permit is distinct from a variance or a zoning change. Therefore, where the Anderson Township Zoning Resolution (ATZR) §116.8 provides that the Board of Zoning Appeals shall employ performance standards in approving conditional uses and where one such performance standard requires that “no vibration or shock perceptible to a person of normal sensibilities at or beyond the property line shall be permitted” – the Board of Zoning Appeals cannot bind surrounding property owners to accept vibrations that propagate beyond Martin Marietta’s property line by simply granting a variance from said performance standard.

Section 116 of the Anderson Township, Ohio Zoning Resolution provides the performance standards for conditional uses and one such performance standard is specified in Section 116.8 as follows: “No vibration or shock perceptible to a person of normal sensibilities at

¹ *Willoughby Hills v. C.C. Bar’s Sahara, Inc.* (1992), 64 Ohio St.3d 24, 591 N.E.2d 1203; *Wilkenfeld v. Village of Granville*, 1997 Ohio App. LEXIS 5375 (5th Dist.); *City of Macedonia v. Twinsburg Township Board of Zoning Appeals*, 2006 Ohio 2688 (9th Dist.); *D & R Properties v. Township of Burton v. Newbury Township*, 2004 Ohio 6939 (11th Dist.); *Symmes Township Board of Trustees v. Hamilton County Board of Zoning*, 110 Ohio App.3d 527 (1st Dist.)

or beyond the property line shall be permitted” (the “Vibration Performance Standard”). Martin Marietta has applied for a variance from this standard.

Mining in the Industrial ID district is a conditionally permitted use. A conditionally permitted use is not a use as a matter of right. To grant a conditional zoning certificate, this Board must find that both general and specific requirements are met, along with any special conditions the Board may impose for reasons of public health, safety, and welfare.² Even though an applicant may comply with all the requirements listed in a zoning regulation for a conditional use, a permit may still be denied after the zoning authority considers the nature and condition of all adjacent uses and structures.³

A variance is different and distinguishable from a special permit which is evidenced by a conditional zoning certificate.⁴ A variance results in a deviation from the literal import of the zoning resolution and may be granted only upon a showing of practical difficulties or unnecessary hardship. However, a special permit is different. It only authorizes a use which is permitted by the zoning regulations subject to the issuance of such permit or a conditional certificate. Thus, a special permit results in the establishment or maintenance of a use in a location and only under the specific circumstances mandated by the zoning regulation, and such permit may only be granted upon the terms that are imposed by the zoning resolution.⁵

Considerations of practical difficulties and unnecessary hardship are not relevant to the issuance to a conditional use zoning permit, as opposed to a zoning variance⁶, because a conditional use is not prohibited by state or local legislation, but is subject to limitations imposed for the purpose of restraining the discretion of the local zoning boards.⁷ Therefore, because - “no vibration or shock perceptible to a person of normal sensibilities at or beyond the property line shall be permitted” - is a performance standard for the granting of the conditional use permit, it cannot properly be the subject of a variance.

A landowner desiring to use land in a manner proscribed by zoning resolutions may either attempt to secure a rezoning by legislative change, or seek a variance if the zoning ordinance provides a variance procedure.⁸ The distinguishing factor between a variance and an amendment to a zoning ordinance is that the conditions creating the hardship relate primarily to the particular property for which the variance is desired as contrasted with conditions which create hardships of a similar nature to all property owners in the same area; in the former case, the granting of a variance is proper, and, in the latter, relief must be by amendment to the zoning law.⁹ Thus, the Board of Zoning Appeals cannot burden all property owners by providing a variance from the Vibration Performance Standard. There is a specific legislative process for amending the ATZR. The application to the BZA for a variance is not the proper procedure to amend the ATZR.

² *Tempo Holding Co. v. Oxford City Council*, 78 Ohio App.3d 1, 603 N.E.2d 414 (12th Dist. Butler County 1992)

³ *Community Concerned Citizens, Inc. v. Union Twp. Bd. Of Zoning Appeals*, 66 Ohio St.3d 452, 613 N.E.2d 580 (1993)

⁴ *Boston v. Montville Tp. Zoning Bd. Of Appeals*, 32 Ohio Misc. 118, 289 N.E.2d 184 (C.P. 1972)

⁵ *Boston v. Montville Tp. Zoning Bd. Of Appeals*, 32 Ohio Misc. 118, 289 N.E.2d 184 (C.P. 1972)

⁶ *Nunamaker v. Board of Zoning Appeals of Jerusalem Tp.*, 2 Ohio St.3d 115, 443 N.E.2d 172 (1982)

⁷ *Families Against Reily / Morgan Sites v. Butler County Bd. Of Zoning Appeals*, 56 Ohio App.3d 90, 564 N.E.2d 1113 (12th Dist. Butler County 1989), dismissed, 46 Ohio St.3d 709, 546 N.E.2d 944 (1989)

⁸ *Driscoll v. Austintown Associates*, 42 Ohio St.2d 263, 328 N.E.2d 395 (1975)

⁹ *State ex rel. Humble Oil & Refining Co. v. City of Marion*, 4 Ohio App.2d 178, 211 N.E.2d 667 (3d Dist. Marion County 1965)

4. Contrary To Martin Marietta’s Assertion, The Vibration Performance Standard Is Not Subjective In Nature.

In its request for a variance, Martin Marietta asserts that the Vibration Performance Standard “is subjective in nature and depending on its interpretation could prohibit blasting at all.” Other than this blanket assertion, Martin Marietta fails to provide any reasoning or arguments as to why it cannot comply with the Vibration Performance Standard. Assuming for the sake of argument that a person of normal sensibilities is “extremely” sensitive and can sense the faintest of vibrations, the Vibration Performance Standard may be interpreted, in its most extreme, to require zero vibration “at or beyond the property line.” It does not place any limitations on the vibrations that occur anywhere on the Martin Marietta property, let alone 400 to 800 feet below the surface. Furthermore, Article XXII, §221 of the ATZR provides as follows:

“In interpreting and applying the provisions of this Resolution and any amendments thereto, they shall be held to be the *minimum* requirements for the promotion of the public health, safety, morals, comfort and general welfare. Whenever the regulations of this Resolution require a greater width or size of yards or other open spaces or require a lower height of building or less number of stories or require greater percentage of lot to be left unoccupied or require a lower density of population of population, *or require a more restrictive use of land, or impose higher standards than are required in any other resolution or regulation*, private deed restrictions or private covenants, *these regulations shall govern*, but if the requirements of the other resolution, regulation, private deed restriction or private covenant is the more restrictive, then those requirements shall govern [Emphasis Added].”

The Village of Terrace Park respectfully submits that the Vibration Performance Standard is not subjective. Even if the standard can be construed to imposes higher or stricter requirements than industry “guidelines,” Article XXII, §221 of the ATZR requires that the Vibration Performance Standard must prevail.

5. Even If The Vibration Performance Standard Is Deemed By This Board To Be Subjective, Martin Marietta Is Essentially Asking For An Amendment To The Zoning Resolution In Violation Of Article XXIII Of The ATZR.

The ATZR may only be amended in accordance with Article XXIII §231 of the ATZR provides as follows:

“Amendments or supplements to the Zoning Resolution may be initiated by motion of the Anderson Township Zoning Commission, by the passage of a resolution therefor by the Trustees or by the filing of an application therefor by one or more

of the owners or lessees of property within the area proposed to be changed or affected by the proposed amendment or supplement with the Anderson Township Zoning Commission. Upon adoption of such motion, certification of such resolution, or the filing of such application, the procedure provided in Section 519.12 of the Ohio Revised Code shall be followed. In the event the Trustees deny or modify the recommendations of the Township Zoning Commission, the unanimous vote of the Trustees shall be required. ***Be it further provided, that no amendment or supplement to the Zoning Resolution shall be adopted except by a vote of a majority of the Trustees. *** [Emphasis Added].***

Martin Marietta, in its application for variance from the Vibration Performance Standard states that “This standard has been replaced by regulatory agencies by guidelines and control of blasting to allow for a specific standard to be established that would prevent damage to neighboring property owners, allow for a definite measure, eliminate continued enforcement problems, and protect the health, safety, and welfare of the community. Martin Marietta Materials, Inc. is requesting a variance to set the lowest vibration level available and still allow for the removal of the underground limestone ***.” It also notes that “With the adoption of the .2 inches per second standard, no damage will occur to any structures or property.” The Vibration Performance Standard requires that no vibrations occur at or beyond the property line. Martin Marietta is requesting that this standard be “replaced” and the .2 inches per second at the property line be “adopted.” Such “replacement” and “adoption” is contrary to the procedures required by Article XXIII §231 of the ATZR.

6. Anderson Township By Granting A Variance From The Performance Standard Is Essentially Helping Martin Marietta In Committing A Trespass And Creating A Nuisance.

Even if this Board determines that a variance may be granted, Ohio law is clear that the surrounding property owners, including the Village of Terrace Park, may be able to bring a claim against Martin Marietta for trespass and nuisance and against Anderson Township for aiding and abetting in such trespass and nuisance. Section 116.10 of the ATZR which addresses additional performance standards for conditional uses, provides:

In order to prevent the operation or use of any facility or property from constituting a nuisance to or upon surrounding property, all odor, dust, smoke, gas, emissions, noise or similar nuisance shall be so located on the tract that such use does not create a nuisance at or beyond any boundary line of the tract, and evidence shall be submitted, consisting of testimony or a certified statement by a competent authority in the field affected, to clearly demonstrate that the use will not create a nuisance. The best practical means known for the abatement of a nuisance caused by odor, dust, smoke, gas, emissions, noise or similar nuisance shall be employed in a manner approved by the Board of Zoning Appeals [Emphasis Added].

Thus, nuisance is one of the concerns of the ATZR that may weigh against the granting of a conditional use permit. In *Weaver v. Yoder*, 184 N.E.2d 622 (1961), the Court held that the defendant-quarry operator's blasting and quarrying operations that resulted in vibrations on the adjoining property constituted a nuisance and the continuation thereof should be enjoined. In doing so, the Court ruled that the operator of a stone quarry who by means of blasting invades the rights of an adjoining land owner by interfering with his enjoyment thereof by continuous concussion commits a wrongful act in the nature of a trespass and will be enjoined from continuing the operation. The Court said that the operator of the quarry is liable for injuries to the owner of the adjoining real estate resulting from continuous vibrations of the earth or air caused by the use of explosives to quarry stone by means of blasting, irrespective of the question of negligence or want of skill in the blasting operations.

Similarly, in the case of *Tiffin v. McCormack*, 34 Ohio St. 638, the Ohio Supreme Court noted as follows: "the use of land by the proprietor is not an absolute right, but qualified and limited by the higher right of others to the lawful possession of their property. To this possession the law prohibits all direct injury, without regard to its extent or motives of the aggressor. A man may prosecute such business as he chooses upon his premises, but he cannot erect a nuisance to the annoyance of the adjoining proprietor even for purpose of lawful trade. *** Neither can one in possession of a parcel of land operate and manage a mine or quarry upon it in such manner as to injure or destroy the property of an adjoining proprietor, justify himself by showing that he used ordinary care in the use of his own property."

In *Louden v. The City of Cincinnati*, 90 Ohio St. 144, the Court made the following observation: "We are unable to distinguish between a case where a fragment of rock or a portion of the soil is thrown onto an adjoining property and a case where the force of an explosion is transmitted through the soil and substratum jarring, cracking and breaking it ... it is a distinction without difference.

In *Heilman v. The France Stoner Co.*, 20 Ohio App. 261, 151 N.E. 798, it was held that the operator of a stone quarry who by means of blasting invades the rights of an adjoining land owner of real estate by interfering with his enjoyment thereof by concussion, commits a wrongful act in the nature of a trespass and will be enjoined from continuing the operation.

Based on the above case law, it would be reasonable to conclude that, should this Board grant a variance to Martin Marietta from the Vibration Performance Standard, the surrounding property owners, including the Village of Terrace Park may be able to bring a claim against Anderson Township for aiding and abetting in the trespass and nuisance.

7. The Granting Of A Variance From The Vibration Performance Standard Is Contrary To The ATZR Purpose Of Promoting The Health, Safety, Morals, Comfort Or General Welfare And To Protect Property And Property Values.

Martin Marietta claims that "[a]uthorization of the variance will not be materially detrimental to the public welfare or injurious to property in the District or vicinity in which the property is located." Public welfare and injury to property are only a couple of the considerations specified in the ATZR.

Article 1, §11 states the purpose of the ATZR. It states: “For the purpose of promoting health, safety, morals, comfort or general welfare; to conserve and protect property and property values; to secure the most appropriate use of land; *** all in accordance with the provisions of Section 519.01 et seq. of the Ohio Revised Code, ***.” Similarly, Article XII, Section 116.14 requires consideration of the enhancements proposed by the applicant: “In reviewing Conditional Use applications, the Board of Zoning Appeals shall consider enhancements proposed by the Applicant to the transportation network, the working environment, and the neighborhood as positive reasons for granting the application.” Thus far, Martin Marietta has proposed no enhancements. In fact, its truck traffic will only burden the already-strained transportation network even more. Additionally, Article XVIII, Section 184.7 states that “[i]n authorizing such Conditional Uses, the Board of Zoning Appeals shall employ the performance of standards described in Sec. 116 et seq. and shall also consider the compatibility of such uses with surrounding uses and the effect of such uses upon the health, safety, and morals of the community.

According to the affidavit of Stephen E. Benson, President of Austin Power Great Lakes LLC, Martin Marietta is planning to use ANFO which is a mixture of ammonium nitrate (AN) and fuel oil (FO). Online research on ANFO from the material safety data sheets of suppliers revealed that the products of combustion of ANFO may contain oxides of nitrogen, ammonia, nitric acid, carbon monoxide, carbon dioxide and other toxic materials. The product also contains ingredients which are classified as category 3 carcinogens. Ingestion may cause methemoglobinemia, nausea, dizziness, increased heart rate, hypotension, fainting and possibly shock. The material safety data sheets explicitly state that the user must prevent this material from entering waterways, drains and sewers. Incomplete detonation of ANFO in blasting operations also appears to result in nitrates in discharge water, particularly in mines that have significant ground water flows. Among the ecotoxicity effects listed are that it dissolves slowly in water and is harmful to aquatic life at low concentrations. It is also listed as potentially dangerous if allowed to enter domestic or irrigation water supplies, lakes, streams, ponds or rivers.

The Village of Terrace Park respectfully submits to this Board that the increased dust, noise, traffic, strain on the transportation network, vibrations, pollution, and possible safety hazards that may result from Martin Marietta operations in an area surrounded by residential uses are contrary to the purposes and considerations outlined in the ATZR. Therefore, the Village of Terrace Park respectfully demands this Board deny Martin Marietta’s request for a variance from the Vibration Performance Standard.

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum has been served upon the attorneys listed below as well as to the Anderson Township Board of Zoning Appeals by e-mail, fax or hand delivery on or before the 5th day of November, 2008.

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