

IN THE MATTER OF : BEFORE THE

EMMANUEL UNITED METHODIST : HOWARD COUNTY

CHURCH : BOARD OF APPEALS

Petitioner : HEARING EXAMINER

: BA Case No. 10-034C&V

.....

DECISION AND ORDER

On February 14, 2011, April 25, 2011, and May 5, 2011, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of Emmanuel United Methodist Church (the Petitioner) to (1) expand a previously approved structure used primarily for Religious Activities with a small, one-story religious facility addition and a two-story addition to be used by the religious facility and private academic school (Phase I), (2) construct a 2-story, multipurpose building as an expansion of the religious activity use (Phase II), (3) expand a private academic school conditional use by increasing the total number of students from 240 to 275, with no more than 92 students on site at any time, (4) increase the total number of parking spaces to 142,¹ (5) reduce the 50-foot school parking use setback imposed by Section 141.N.48.f to 20 feet, and (6) eliminate the ingress/egress restriction imposed in Board of Appeals Case No. 90-66E&V, in an R-20 (Residential: Single Family) Zoning District, pursuant to Sections 131.N.39

¹ DPZ's Division of Land Development provides comments on the proposed expansions. Comment 5 states that staff counts 124 parking spaces for Phase I (not 127) and 142 spaces (not 145 as indicated in the petition supplement) for Phase II. This Decision and Order uses these numbers because the discrepancy is not clarified in the record.

and 48 of the Howard County Zoning Regulations (the "Zoning Regulations"). The Petitioner is also seeking a variance to reduce the 50-foot setback from a public street right-of-way (ROW) imposed by Section 108.D.4.a.(1)(a)(ii) of the Zoning Regulations to 40 feet for the two-story addition, specifically a 10-foot wide pedestrian walkway/corridor.

The Petitioner certified to compliance with the notice, advertising, and posting requirements of the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Thomas Meachum, Esquire, represented the Petitioner. William Erskine, Esquire, represented Opponents Michael and Wanda Kemp. Reverend Stephanie Vader, Frank Mamalansan, James Cush, and Andrew Berlett testified on behalf of the Petitioner. Irma Oliver, Steven Hunt, Christina Zepf, Judy George, Steve Lutz, Vanessa Giddings and Donna Neoli testified in support of the Petitioner. Catherine C. Kemp, Karen Lacy, Patricia Smallwood, David Clark, Kristopher Singleton, Mike Kemp, and Wanda Kemp testified in opposition to the petition.

Preliminary Matters – Amended Plans

The conditional use petition and the November 8, 2010 conditional use plan submitted with the petition proposed to expand the existing religious facility and private academic school in two phases. In Phase I, the Petitioner proposed to construct a two-story addition on the south side of the existing fellowship hall and a small one-story addition on the northwest corner of the original church building, as well as expand the parking area. In Phase II, the Petitioner proposed to demolish the existing religious facility administrative office building and construct

a multipurpose building and parking area to be located 20 feet from the south property line. As originally proposed, the private academic school and church would both use the multipurpose building. The Petitioner therefore requested the Hearing Examiner to grant a 30-foot reduction in the 50-foot setback for private academic schools for the multipurpose building and several parking spaces, as is permitted by HCZR Section 131.N.48.6. The Technical Staff Report (TSR) recommended these Phase II improvements be denied based on their visual impact on adjoining residential properties, reasoning the multipurpose building and parking spaces could be reoriented or relocated to achieve compliance with the setback requirements of the conditional use categories.

At the outset of the February 14, 2011 hearing, the Petitioner introduced into evidence a February 11, 2011 amendment to the conditional use plan. This amendment proposed to eliminate the ingress/egress restrictions imposed in Board of Appeals Case No. 90-66E&V. Petitioner's Exhibit 1A&B. Petitioner's counsel referred to email correspondence between himself and DPZ planner Zan Koldewey concerning the possibility of lifting the restriction because the condition may have been based on the church's location on MD 216 and the traffic count on MD 216 at the time. Ms. Koldewey noted the State Highway Administration has downgraded MD 216 (Scaggsville Road) in the property's vicinity. Petitioner's Exhibit 2.

Prior to the scheduled April 7, 2011 continuation hearing, Petitioner's counsel Thomas Meachum informed the Hearing Examiner by a March 9, 2011 letter that the Petitioner

proposed two further amendments to the petition.² The letter advised the Hearing Examiner the Petitioner was withdrawing its private academic school use of the multipurpose building and therefore would not require any reduction in setback for this use. The letter further informed the Hearing Examiner the Petitioner determined it would need to file a variance request for the two-story building addition in Phase I to accommodate an internal pedestrian walkway/corridor.

The Hearing Examiner concluded county notice and posting requirements required the postponement of the scheduled April 7, 2011 and rescheduled the continuation hearing for April 25, 2011. On April 19, 2011, the Petitioner submitted to DPZ planner Zan Koldewey a second revised conditional use plan, a variance plan (part of the second amended conditional use plan) and a landscape plan.³ At the April 25, 2011 continuation hearing, the Petitioner introduced into evidence a two-sheet (Phase I and II), second revised conditional use plan dated April 16, 2011 (the April 16, 2011 plan), a landscape plan dated April 18, 2011 and a variance plan dated April 18, 2011.

The Hearing Examiner resolved that the variance petition would be heard on the previously scheduled May 5, 2011 continuation hearing.⁴ Opponents Michael and Wanda Kemp objected to the introduction of the amended conditional use and variance petitions and landscape plan into evidence. In their counsel's words, it was "unfair" to allow the petition to

² Copies of this letter were sent to Mr. Erskine, and six protestants who either entered their names on the sign-in sheet or testified on February 14, 2011 hearing, including Catherine C. Kemp, Karen Lacy, Patricia Smallwood, David Clark, Kristopher Singleton, and Thomas Ebaugh.

³ A copy of the letter and enclosure was sent to Mr. Erskine.

⁴ The Hearing Examiner also informed those persons who had signed in at the February 14, 2011 hearing, but not in attendance at the April 25 hearing of the variance hearing by letter. None of these persons appeared to testify.

be amended after the Petitioner's case-in-chief. After reviewing Hearing Examiner Rules of Procedure 9.4 and 9.5, which concern, respectively, amendments to a petition made during the course of the proceedings, and suspensions of hearings when a hearing examiner determines an amendment is substantive, the Hearing Examiner concluded there are no rules prohibiting a petitioner from amending a petition after his or her case-in-chief. Hearing Examiner Rule 9.4 is broadly written, allowing a petitioner to amend a petition "during the course of the proceedings."⁵ Additionally, Hearing Examiner Rule 9.5 requires a hearing examiner to suspend a hearing for a period only upon a finding that the amendment is "substantive", i.e., likely to adversely impact vicinal properties.

With respect to the Petitioner's amendment withdrawing its request for use of the multipurpose building for the private academic school use, the Hearing Examiner determined this scaling back of the proposed shared use of the multipurpose building was not a substantive amendment and could be admitted because it was not likely to impact vicinal properties adversely. With respect to the new landscape plan, the Hearing Examiner determined the Petitioner should move to admit it during rebuttal because the witness who would testify to its contents could testify only as a rebuttal witness, having neither attended nor signed in prior to the close of the Petitioner's case-in-chief.

⁵ Hearing Examiner Rule 9.4's requirement that any amendment be introduced as an exhibit notwithstanding, a general prohibition against "post case-in-chief" amendments would arguably preclude petitioners from amending plans or petitions during a proceeding in response to community concerns or to agreeing to conditions of approval proposed by the Hearing Examiner.

Except as specifically noted below, all references to the conditional use petition and plan refer to the second amended conditional use plan dated April 16, 2011 (the April 16, 2011 plan).

The Petitioner introduced into evidence the exhibits as follows.

- 1A. The Phase I, February 11, 2011 conditional use plan
- 1B. The Phase II, February 11, 2011 conditional use plan
2. February 10-11, 2011 email correspondence to/from Tom Meachum and Zan Koldewey discussing BA 90-066E&V decision for one-way traffic
3. February 10, 2011 existing conditions plan
4. Aerial map of Property
5. Site Section Plan depicting proposed multipurpose building in relation to closest residence
6. Amended conditional use plan and variance plan dated April 16, 2011, Sheet I (Phase 1), Sheet 2 (Phase II)
7. Landscape Plan dated April 18, 2011
8. Variance Plan dated April 18, 2011
- 9 A, B. Interior of proposed Phase I addition, enlargement and marked up reduced plans
10. Board of Appeals Case No. BA 90-66E&V

Protestants introduced into evidence the exhibits as follows.

- 1A, B, and C. Emmanuel Methodist Preschool newsletters for October 2010, November 2010 and January 2011.
2. Photograph of dumpster and/or shed behind existing school administration building
3. View from window (8524 Pineway Drive, Lot 15)
4. View from porch on adjoining property
5. No Exhibit 5 (reference to enlarged photo in testimony was to Petitioner's Exhibit 4)
6. Enlarged photograph depicting general area of proposed addition and Kemp property
- 7A, B, C. Photographs of slope along Facility's southeast property line
- 8A, B, C. Side views of Kemp rental property
- 9A. Recycling dumpster near Old Scaggsville Road
10. Faxed copy of March 9, 2011 letter to Hearing Examiner from Thomas Meachum concerning withdrawal proposed use of multipurpose building and need for variance
11. BA 90-066E&V site development plan, May 28, 1991
12. The November 8, 2010 conditional use plan
13. Emmanuel Methodist Preschool newsletter, December 2010

FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, the Hearing Examiner finds the following facts:

1. Property Identification. The subject property is located in the 6th Election District on the south side of Scaggsville Road. The Property is referenced as Tax Map 46, Grid 11, Parcels 98 and 365 and is also known as 10751 and 10755 Scaggsville Road (the Property.)

2. Property Description. The 13.4-acre, two-parcel Property is irregularly shaped. A portion of Scaggsville Road runs through the Property in front of the existing religious facility (10755 Scaggsville Road). The southerly lot line is about 1,552 feet deep. The westerly lot line is irregularly shaped.

The Property is improved with a frame church located in the Property's north front section. The church is designated on the Howard County Historic Sites Inventory as HO-708, the Emmanuel Lutheran Church of Scaggsville. A two-story fellowship hall was constructed to the south side of the church and a later central addition connected the buildings. Behind the church is a playground. Also behind the church are several small buildings and collections bins.

The church cemetery is located behind the church. A long driveway with a turnaround runs through the cemetery. A one-story, brick single-family dwelling now used as an administrative building sits to the southwest of the church.

The Property has two access driveways. A driveway in the Property's northeast corner provides access to a parking lot on the church's north side and the cemetery. The second is located in the southeast corner. A drive aisle runs along the front of the church, generally

parallel to Scaggsville Road. The driveways and drive aisle provide access to paved parking areas on the church's front and north sides. The drive aisle continues along the south side of the church and to a gravel parking area, a three-row, sixty-two space area, and beyond this, to a gravel parking area behind the existing administrative building.

The area beyond the improvements and cemetery is generally wooded. The Property is highest in elevation in the area of the church. The southerly parking lot is at grade with Scaggsville Road. Behind the church, the Property drops in elevation toward the southwest.

3. Current Use of the Property. According to the petition, the Property is currently used as follows.

- a. A Private Academic School with 140 students and an eight-person staff. The school operates from 9:00 a.m. to 3:00 p.m.
- b. The Church. The petition supplement states the church can accommodate up to 222 parishioners. There are 111 parking spaces onsite available to the use.
 - Worship services: Sundays from 9:00 a.m. to 12:00 p.m., and in July and August on Wednesday evenings from 7:00 p.m. to 7:45 p.m.
 - Committee meetings, Bible study, choir rehearsals held Monday-Friday, Up to 15 persons attend and leave the building by 10:00 p.m.
 - Community activities: Boy Scouts, Girl Scouts, yoga class, AA.⁶ Monday-Friday, Up to 30 persons attend and leave the building by 10:00 p.m.

⁶ The Hearing Examiner took official notice during the hearing that these uses are common assembly uses in the zone.

4. Vicinal Properties. Adjacent properties are zoned R-20. The abutting Parcel 40 to the church's northwest is improved with a two-story single-family dwelling situated close to the common lot line with the church. There are also several single-family dwellings further west along this side of Scaggsville Road. The TSR does not indicate the distance of these dwellings from the proposed uses or common property line. Along the Property's northwesterly property line is the wooded Open Space Lot 27 of the Willows of Rocky Gorge subdivision.

Across Scaggsville Road to the northeast is the 15.85-acre Parcel 5, which is improved with a single-family detached dwelling sitting close to the road. The remainder of this parcel appears to be a farm use.

To the southeast are multiple lots fronting on Scaggsville Road; these lots are each improved with a single-family detached dwelling. The nearest dwelling lies about 40 feet from the church's south parking lot. Also south of the Property are the Pine valley Subdivisions lots fronting on Pineway Drive. These 44,000-71,000 square foot lots are each improved with a single-family detached dwelling. The property to the southwest is wooded land owned by the Washington Suburban Sanitary Commission.

5. Roads. Scaggsville Road has two travel lanes within a variable width right-of-way (ROW). The posted speed limit is 35 MPH. According to the Technical Staff Report (TSR), visibility from the two access driveways appears to be acceptable, with estimated sight distance of 500+ feet to the northwest and 800+ feet to the southeast. There is no available traffic data for Scaggsville Road.

6. Water and Sewer Service. The Property is served by public water and sewer.

7. The General Plan. Policies Map 2000-2020 of the 2000 General Plan designates the Property as a "Residential" land use. Transportation Map 2000-2020 of the 2000 General Plan depicts this section of Scaggsville road as a Minor Collector.

8. Zoning History. BA 00-027E&V. Emmanuel United Methodist Church applied for a special exception and variance to expand an existing parking lot and a variance to reduce the 20-foot use setback from property lines to 11 feet for proposed parking (101 parking spaces) and drive aisles. The TSR recommended the variance request be denied because a fully complying parking lot could be sited further to the southwest. The Petitioner submitted a revised plan depicting 128 spaces and a parking lot set back 20 feet from the lot line for the religious facility use. The revised plan eliminated the need for a variance. The Board of Appeals granted the special exception request on February 27, 2001 with the conditions as follows.

1. The Revised Special Exception shall apply only to the proposed enlarged parking lot as described in the petition, and as depicted on the Revised Special Exception plan for "Parking Lot Addition to Emmanuel Lutheran Church" submitted on January 5, 2001, and not to any other activities, uses, or structures on the Property.
2. A Type C landscape edge shall be established and maintained in perpetuity along the south side lot line between the parking lots and abutting residential lots.

BA 90-066E&V. On June 4, 1991, the Board of Appeals granted Emmanuel United Methodist Church a special exception to expand an existing religious facility and private school from 120 students to 240 students and a variance to reduce the 50-foot front setback to 39 feet for a proposed addition subject to four conditions.

1. The Petitioner shall comply with all applicable federal, state, and county laws and regulations.

2. The Petitioner shall comply with testimony presented and limit the hours of operation; the first session shall be from 9:00 a.m. to 12:00 p.m., and the second session shall be from 12:30 p.m. to 3:30 p.m. on Mondays through Fridays.

3. The Petitioner shall submit a Site Development Plan to DPZ within 90 days of the date of the order; the configuration of the parking area shall be determined in conjunction with DPZ and the Department of Public Works during the Site Development Plan Process.

4. The eastern access entrance shall be limited to entry only and the western access limit to exit only.

9. The Conditional Use Proposal. The Petitioner is proposing to expand the religious facility (the Church), the parking lot, and the private academic school. The proposed expansions s would be made in two phases.

Phase I. In Phase I, a two-story, 3,342 square foot addition would be constructed on the south side of the existing church for pre-school and Church school use and on a portion of the existing parking lot. A 31-square foot, one-story addition would be constructed in the Church's northwest corner. According to the petition, the number of Church seats would increase to 222. The gross floor area of the use would increase to a gross floor area of 5,917-square feet (3,342 sq. ft net area).

The number of reconfigured parking spaces would increase to 124 and the Petitioner is proposing some vehicle circulation revisions. The existing parking lot in the southeastern portion of the Property will be reconfigured and narrowed to accommodate the addition. During this phase, the existing and reconfigured parking lot is now proposed to provide some parking for the school use.⁷ The gravel parking area behind the existing administrative buildings

⁷ The Board of Appeals approved an expansion of this parking lot for use by the religious facility in Board of Appeals Case No. BA 00-027E&V.

would be removed and replaced by 49 paved parking spaces. A drive aisle parallel to the cemetery would connect this new parking area to the existing parking on the south side. Additionally, the Petitioner is requesting that the ingress only-egress only driveway restrictions imposed by the Board of Appeals in BOA Case No. BA 90-066E&V be removed. The parking spaces perpendicular to the south lot line indicated as part of the school use on the amended plan would encroach 30 feet into the 50-foot private academic school setback; consequently, the new parking configuration requires a 30-foot reduction in the 50-foot parking use setback.

The academic school would be expanded by increasing the number of students from 240 to a maximum of 275, with a maximum of 92 students on-site at any time. A new 2,000-square foot fenced outdoor play area would be constructed to the southwest of the proposed two-story Church addition. The dumpster would be relocated about 10 feet to the northwest of its current location.

Phase II. In Phase II, with an estimated completion date of December 2018, the Petitioner is proposing to construct a two-story 13,676-square foot (14,225 gross), masonry and brick, shingled roofed multipurpose building to be used only by the religious facility, according to the April 16, 2011 plan. The building would be sited 20 feet from the south property line and about 340 feet from Scaggsville Road in an area generally to the rear of the existing school administrative building. It would be 34 feet in height.

The number of parking spaces in the southeast and southwest portions of the Property would be increased to 142. Nine parallel parking spaces would be located along the northern edge of the existing drive aisle (next to the cemetery) and a paved parking lot containing 27

spaces would be located to the west of the proposed multi-purpose building. To accommodate this parking expansion, the Petitioner is requesting a reduction of the 50-foot parking use setback from adjacent residentially zoned property to 20 feet, as is discussed in Part III.

A stormwater management pond is proposed to be located to the southwest of the proposed parking lot behind the multipurpose building. An 850± foot retaining wall is proposed along the north side of the proposed parking lot. According the April 16, 2011 plan, the Petitioner requires an approved waiver to the Subdivision and Land Development Regulations (Subdivision Regulations) for portions of the proposed development because no grading or construction is permitted within 30 feet of a cemetery boundary wall or within 10 feet of individual gravesites.

10. The Variance Petition. The April 18, 2011 variance petition states the Petitioner is requesting a reduction in the 50-foot setback from a public street ROW to 40 feet. The ultimate ROW shown on the April 16, 2011 variance plan is different from that shown on earlier plans. The variance is needed for a small bump-out for an internal pedestrian area (a walking corridor) to the front of the existing fellowship hall. The petition explains the historic building on the west side predates the enactment of county zoning regulations, as does the original fellowship hall (as noted in BOA Case No. 90-066E&V), which were constructed 39 and 37 feet, respectively, from the ROW. The petition also notes a 1990 Decision, BOA Case No. 90-066E&V, references these setbacks. Petitioner Exhibit 10.

11. The Landscape Plan. Phase I. During Phase One, some landscaping would be planted to allow the plantings to establish themselves. The Phase I planting includes a Type D

buffer extending about 25 feet from the rear of the multipurpose building the Petitioner is proposing to construct during Phase II, to about 50 feet beyond the building's front façade. A Type C "replacement" buffer is proposed from here to the Scaggsville Road ROW and, apparently the area where the recycling dumpster is currently located (immediately south of the southernmost driveway entrance). This Phase I landscaping also includes a six-foot high solid fence along the south side of the multipurpose building.

Phase II. During Phase II, an enhanced Type C and Type D landscape buffer would be planted along the side property line close to the rear of the proposed multipurpose building and the rear parking area.

12. Outdoor Lighting. Mr. Cush testified there would be no lighting on the multipurpose building other than functional lighting.

13. Testimony about Proposed Use of the Multipurpose Building. Reverend Vader testified at the February 14, 2011 hearing that the preschool offices are now located in the church building. This building is currently used for teenage religious education and several support groups, Boy and Girl Scout troops, and neighborhood association meetings. At the April 25, 2011 continuation hearing, Reverend Vader on recall testified the Phase II multipurpose building, as amended by the April 16, 2011 plan, would include church office space, a large multipurpose space for fellowship events (persons affiliated with the church), youth events requiring a large space, and occasional worship service. A fellowship event is a dinner for church members usually held on Sundays. During the summer, there is Bible school and summer camp school. During cross-examination, she rejected a condition proposed by the

Kemps that prohibiting pre-schoolers/students from using the multi-purpose building during school hours because there could be a need for them to meet there with parents or some other church activity. She explained that the church operates the school and that all school employees are church employees.

On recall at the May 5, 2011 continuation hearing, Reverend Vader testified to other activities on the Property, including youth overnight lock-ins (the youths do not leave the building), outside activities during summer Bible school, which now occur behind the ministry center (the small house) and after construction in an area behind the cemetery, and pre-schooler bike rides in the parking lot and walking through the woods.

Discussing the proposed design of the multipurpose building, she testified it would include ADA compliant restrooms, an elevator, and additional classrooms.

14. Proposed Hours of Operation. Regarding the times of use, Reverend Vader testified initially that the church would operate on Saturdays from 8:00 a.m. to 10:00 p.m., and on Sundays from 7:00 a.m. to 9:00 p.m. Because these proposed hours differed from those proposed in the petition, the Hearing Examiner recalled Reverend Vader to clarify the desired hours. On recall, Reverend Vader explained the earlier hours pertained to services during high holy days. On cross-examination, the Kemps argued through their counsel's questions that any proposed hours of operation should include set arrival and departure times for all uses, owing to the impact of headlights on their property. Reverend Vader established the arrival and departure times as follows.

- For Sunday worship service held from 9:00 a.m. to 12:00 p.m., parishioners would not

arrive earlier than 7:30 a.m. and leave the site no later than 2:00 p.m.

- Staff for the private academic school would arrive no earlier than 7:30 a.m. and leave the site no later than 4:00 p.m. They would park in the spaces closest to the common lot line with the Kemps. Parents or guardians would drop off children no earlier than 8:30 a.m.
- During evening community events, all persons would be off the site by 10:00 p.m.
- There may be occasional events, such as the rare wedding event, when persons would be off the site later.

15. According to Reverend Vader, school staffers use the parking area in the southeast section of the Property. She agreed that the staff would be directed to park in the spaces closest to Parcel 24 (the Kemp property) in order to minimize parking sounds associated with persons dropping off or picking up children, which occurs four times a day. Reverend Vader also testified that parents or guardians escort all children to the school entrance. No children have been hurt.

16. Frank Mamalansan, a surveyor, testified at the April 14, 2011 hearing that the parking area designated for school expansion during Phase I would be removed and 122 new spaces would be created to the side and behind the existing church administration building. On cross-examination about his testimony concerning the proposed removal of the ingress/egress limitation, he did not know traffic speeds along this section of Scaggsville Road. In his view, any need for a deceleration or acceleration lane would be determined later, when a traffic study was performed at the site development plan (SDP) stage. On cross-examination about

the need for 142 ultimate parking spaces, he replied the planning team established the need.

17. Mr. Cush testified on February 15, 2011 that the undeveloped rear area is forested and sloped with a few streams, which are challenges to the development of the area. There are limitations on development near graveyard. The siting of the proposed multipurpose building is influenced by topography and construction associated activities, including paving and grading for parking and the building itself. If the building is placed closer to the cemetery, it would require a Subdivision Regulations waiver and some stair stepping, which makes no sense in relation to the use. If the building were further away, it would be difficult for children to walk several hundred feet to it. Under cross-examination, he testified the location of the proposed building would allow use of the existing sewer line. A gravity sewer might be required with another location, and it would be more costly. Moving the building behind the cemetery driveway cul de sac would add complexity to the project, including the potential use of a gravity pump for the sewer, bringing down trees, and additional engineering efforts, including more excavation. There was no place on the Property that was too steep to build, except for stream areas, but the location selected for the multipurpose building was the most agreeable.

18. The Hearing Examiner recalled Mr. Cush on May 5, 2011 in relation to his testimony about keeping construction away from the graveyard. Referring to Note 16 on the April 16, 2011 plan, Sheet 1 (Petitioner Exhibit 6), which states the layout is subject to a Subdivision Regulations waiver to allow grading or construction within 30 feet of a cemetery boundary or within 10 feet of individual grave sites (Section 16.118.c), the Hearing Examiner asked Mr. Cush if the waiver request for the proposed 850-foot retaining wall near the

cemetery conflicted with a comment in a March 9, 2011 letter to the Hearing Examiner from Mr. Meachum. Explaining the Petitioner's withdrawal of the school's use of the multipurpose building, Mr. Meachum stated in this letter that it was not possible to move the building next to the cemetery because "[t]he Petitioner cannot take a chance on disturbing any of the graves." Mr. Cush responded that the retaining wall was there to allow gentle grading of the landscaping, but that the building was much less flexible and would require much deeper excavation. In his opinion, there would be no additional disturbance to the graves, but that there is a greater magnitude of excavation required for the building. During cross-examination, Mr. Cush testified that the excavation costs were higher. Regarding the location of the multipurpose building, he explained the church considered costs and proximity to the cemetery (the Petitioner's desire to maintain a respectful distance from graves), grading, and traffic. The cost difference to locate the building would include expensive shoring of the retaining wall (a battered construction). Mr. Cush further noted the playground next to the cemetery was separated by a retaining wall or step down and a fence and therefore a low visual impact on the cemetery, compared to the proposed multipurpose building.

19. Referring to Petitioner's Exhibit 5, James Cush, project architect, explained it is a site section plan depicting the proposed multipurpose building in relation to the nearest residence, Mr. Cush explained it demonstrates that pushing the building back from the dwelling, which is about 220 feet away, would only minimally reduce its visual impact, which is not significant at its proposed location.

20. On May 5, 2011, Mr. Cush testified about the proposed variance petition. He

explained the Petitioner is seeking a variance to construct a passageway or hallway to connect the existing religious facility and school and the proposed addition. The hallway is about six and one-half feet wide and the rest of the construction is exterior wall. The width is the minimum necessary to afford relief. Mr. Cush also testified during cross-examination that the fellowship hall and church predate zoning regulations.⁸ The new circulation space/hallway requiring a variance would continue the existing circulation system approved in Board of Appeals Case No. 90-066E&V to the proposed addition. It could be constructed within the existing structure and proposed addition, but at greater cost.

21. Rebuttal witness Andre Berlett, a landscape architect, testified to preparing the April 18, 2011 conceptual landscape buffer plan for the proposed conditional use expansions. Petitioner Exhibit 7. It was his testimony that some landscaping would be planted during Phase I, including a Type D buffer extending about 25 feet from the rear of the multipurpose building to about 50 feet beyond its front façade. A Type C buffer is proposed from here to the Scaggsville Road ROW and, apparently the area where the recycling dumpster is currently located (immediately south of the southernmost driveway entrance). The Phase I landscaping also includes a six-foot high solid fence along the south side of the multipurpose building. It would also serve as replacement planting for the buffer required for SDP 92-027. The Phase I landscape would be installed to permit the planting to be established before the construction of the multipurpose building. During Phase II, an enhanced Type C and Type D landscape

⁸ The Petitioner introduced into evidence the decision and order in Board of Appeals Case No. 90-066E&V, wherein Finding of Fact No. 1 states the church building and fellowship hall were constructed prior to the enactment of the current bulk regulations. Petitioner Exhibit 10.

buffer would be planted.

Under cross-examination, Mr. Berlett opined that the proposed landscaping would receive diminished sunlight but the deciduous canopy is not so dense that it would completely block sunlight. His initial concern was about the multipurpose building blocking the ability of the proposed landscaping to thrive. A replacement tree planted after construction might grow, but not thrive. If planted about five years before construction, the plantings would thrive. They would continue to thrive after construction because most of their canopy would be above the fence. In his opinion, the Phase I landscaping would require four years to be established. An arborvitae can thrive in shade, but will grow more slowly. The Armstrong Upright Maple trees proposed grow more narrowly and adapt to understory and shade, but they grow more slowly.

The Type C buffer along the school parking area adds additional screening to block headlights. With respect to the two-foot wide gravel stormwater management trench along the southeast property line, Mr. Berlet conceded the Landscape Manual prohibits stormwater management facilities from being located within the landscape perimeter. When questioned about the ten-foot reduction and the need for a fence, he replied the shrubs could overhang the trench. Responding to a question from the Hearing Examiner about whether a fence could be constructed in the area of the trench to further block headlights from shining into the Kemp property, he testified that a fence could be erected on the backside of the planting zone to buffer the uses.

22. Florence Okpala, the school's acting director, testified that the church has a governing body that oversees the preschool.

23. Opponent Catherine Kemp, an adjoining property owner, testified on February 14, 2011 that she had been in an accident coming into her driveway and to extreme speeds along this part of Scaggsville Road. She loves the church but feels that it should not enlarge due to the nature of the community. She was especially concerned about persons entering the lot, the presence of a nearby blind spot on the road, and the number of speeders along this section. She recommended a 25 MPH speed reduction in this area to Diane Schwartzman, Chief of Traffic Engineering in the Department of Public Works, Bureau of Highways,

24. Opponent David Clark testified on February 14, 2011 to living about 200 feet from the church. There were several accidents near his property, including a vehicle leaving the church. He lined his yard with Cyprus trees because he sees the current administration building, and would add to this landscaping if the proposed building were constructed. The Church generated a lot of trash until the dumpster was relocated. Opponent's Exhibit 2.

25. Opponent Karen Lacey testified that her lot adjoined the church property. Referring to Opponents Exhibits 3 and 4, she testified they show the limited landscaping along the common property line. Because this landscaping is primarily deciduous trees, the proposed multipurpose building would be very visible. She was concerned about runoff, lighting from night activities, parking lot lighting. She explained that she had a culvert between her property and a neighbor's and that when the county took over the road, the community could ask for better stormwater management and a sidewalk. She believed the trees proposed would not grow because of the northwest orientation of the church property and the presence of the deciduous trees along the rears of property. She frequently sees police running radar along this

section of Scaggsville Road. There are often backups along Scaggsville Road from cars waiting to turn into the church.

26. Opponent Tricia Smallwood testified that she had just planted sixteen trees, which are not visible on Petitioner's Exhibit 4, and that several additional trees on this exhibit were removed. In her non-adjoining triangular property is a pond installed to manage stormwater. A pump transports the water from the church hill and floods on her property. She is concerned there is not enough area between the building and the property lines for the 20-foot wingspan of a Leyland Cyprus. She further testified that the parking lot lights shine into her house.

27. Opponent Christopher Singleton testified to be an adjoining property owner. He was concerned about runoff and the petitioner's need to maintain their stormwater management. During a summer rainstorm, his property receives six inches of water from the church. He also expressed concerns about the proposed landscape buffer and its ability to be effective when this area receives only four hours of sunlight a day.

28. Michael Kemp, the adjoining property owner of 10737 Scaggsville Road, testified that the dwelling on the property is a rental property. Referring to Opponents Exhibit 6, an aerial photograph of the church property, he testified his house would be most affected by the proposed expansion because of its proximity to the church property.

29. Referring to Opponents Exhibits 8 A, B, and C., Mr. Kemp testified that car lights shine directly into the dwelling's windows. Referring to Opponents Exhibit 9 A and B, he testified that it depicts an unlawful dumpster. He disagreed with the proposed description in

the conditional use plan to it being a "private academic school" when the TSR refers to it as a "pre-school." Citing to various dictionary definitions, he contended a pre-school is different from a private academic school.

30. Mr. Kemp introduced into evidence Opponents Exhibit 11, SDP 92-27 (May 28, 1991), which he marked up to show the religious facility has not met obligations to install landscaping and gutters, control ingress/egress and internal vehicle circulation, and to remove paving. Referring to the TSR's description of BOA Case No. 00-027E&V, he testified that the BOA approved the enlargement of a paved parking lot for the church, not the school. In his opinion, persons dropping off children for preschool are violating the conditions of this approval by using the church parking area.

31. Mr. Kemp regularly sees headlights when he is on his property, which sits at a lower elevation than the church property. His tenants have had to move downstairs because of the headlights and they threaten to move out. He is concerned that construction will negatively affect his ability to rent the property. He is also concerned about traffic safety because cars back up on Scaggsville Road and fears for an onsite accident when children are dropped off. During cross-examination, he testified to seeing headlights very early in the morning, but he did not know if the driver was there in relation to the school or church.

32. Opponent Wanda Kemp, a co-owner of 10737 Scaggsville Road, testified to being concerned that any increase in size of the Facility campus would result in an increase in safety problems. She has observed children running in front of cars. She referred to the preschool's December 2010 newsletter wherein persons dropping off and picking up children are cautioned

not to block or park too close to the front entrance, noting it is "difficult walking around the fronts of cars and license plated are sharp and right at arm level." Opponents Exhibit 13. Even with landscaping, her privacy would be compromised because of the different elevations between the two properties. She has observed vehicles backed up on Scaggsville Road waiting to turn into the facility. On cross-examination about her knowledge of how many children have been hurt, she replied that she hoped none. On two occasions, her basement was flooded and she had to replace basement carpet because the Facility dumps plowed snow along the common property line. On cross-examination about the snowstorms, she testified one flooding occurred the first year she owned the property and the second a few years ago.

33. Rebuttal witness Irma Oliver testified to being a parent with a child in the school for two years. She drops off and picks up her child and has not ever encountered any problems, even with accessing the site, even with making left-hand turns onto Scaggsville Road.

34. Rebuttal witness Steven Hunt testified to being a parent with two children who previously or currently attend the school. He has had no problems with accessing the site, and has never seen a multi-car backup on the road. Parents park and drop off children and there are no problems.

35. Rebuttal witness Christina Zepf testified that three of her children previously attended the school and a fourth child currently attends. She parks the car and then walks her child to the school. She has never observed any problems with this arrangement

36. Rebuttal witness Judy George has a child attending the school. She has never encountered any safety concerns associated with the school. She further testified the school

bulletins for the other schools her child attended always had notes about parking safety.

37. Rebuttal witness Steve Lutz testified to having children attending the school, including one currently in attendance and having observed no safety issues.

38. Rebuttal witness Vanessa Giddings testified to being the interim director of the school and working at the school for 23 years. With respect to notices about school safety in the newsletter, she testified that the newsletter communicates the school's wants and needs. The newsletter includes information about school safety as a matter of course. There are clearly marked arrows directing drivers how to circulate through the parking area. There has never been an accident on-site. There was one accident about ten years ago. Under cross-examination, she explained that drivers follow the traffic circulation arrows.

39. Rebuttal witness Donna Meoli testified that she had spoken to the tenants at 10737 Scaggsville Road about moving their bedroom down to the basement. She was in the house on a tour and the female tenant told her the small rooms upstairs could not hold their bedroom furniture, so they moved downstairs and turned it into a master bedroom suite.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Hearing Examiner concludes as follows:

I. General Criteria for Conditional Uses (Section 131.B)

A. Harmony with the General Plan. Section 131.B.1 requires me to evaluate whether the proposed enlargement of an approved conditional use plan will be in harmony with the

land uses and policies indicated in the Howard County General Plan for the district based on in which it is located. In making this evaluation, I am required to consider:

- a. The nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site; and
- b. If a conditional use is combined with other conditional uses or permitted uses on a site, whether the overall intensity and scale of uses on the site is appropriate given the adequacy of proposed buffers and setbacks.

General Plan Policies. The General Plan designates the area as a Residential land use. The established presence of the religious facility and private school in the community is part of the area's character. Additionally, The General Plan encourages revitalization and redevelopment of traditional communities, including the expansion of public facilities such as churches in order to provide gathering places and "community focal points" (pg. 176).⁹

The Nature and Intensity of the Use. During Phase I, the Petitioner proposes to construct a one-story storage addition to the religious facility and a two-story, 3,342 square foot addition on the south side of the existing church for pre-school and Church school use and on a portion of the existing parking lot. The number of church seats would be increased to 222. The academic school would increase from 240 students to a maximum number of 275, with no more than 92 students on site at any time. A reconfigured parking area would increase the number of spaces to 142. During Phase II, the Petitioner would construct a two-story, 13, 676-square foot multipurpose building to be used only by the religious facility. The number of

⁹ The Hearing Examiner routinely hears petitions to expand existing religious facilities and associate uses such as private academic schools and day care centers or nurseries.

parking spaces would be reconfigured and increased to 142. This intensity of proposed expanded uses is not atypical of combined religious facility and private school uses.

The size of the site in relation to the use. The 13.40-acre size of the site adequately supports the moderate expansion in intensity of use. The Site continues to be an appropriate size in relation to the use. Subject to the denial of the reduced setback for school parking, and considering the variance request is to maintain a unified connection between structures, the Hearing Examiner concludes the enlargement is appropriate.

The location of the site with respect to streets giving access to the site. The site will continue to be directly accessed from Scaggsville Road, a Minor Collector.

The appropriateness of the conditional use in combination with a permitted use on the site. The proposed enlargement of the private school and religious facility will be combined with previously approved conditional uses, a religious facility and a private academic school, which are now permitted uses

B. Adverse Effect

Unlike Section 131.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, compatibility with the neighborhood is measured under Section 131.B.2's four "adverse effect" criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, and; (d) access.

The assessment of a proposed conditional use under these criteria recognizes the potential for adverse impact from virtually every human activity. Zoning recognizes this fact

and, when concerned with conditional uses, accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before the Hearing Examiner is not whether the proposed use would have adverse effects in an R-20 zoning district. The proper question is whether there are facts and circumstances showing that the particular use proposed at the particular location would have any adverse effects above and beyond those inherently associated with such a special exception (conditional) use irrespective of its location within the zone. People's Counsel for Baltimore County v. Loyola College in Maryland, 406 Md. 54, 956 A.2d 166 (2008); Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319 (1981); Mossburg v. Montgomery County, 107 Md. App. 1, 666 A.2d 1253 (1995).

For the reasons stated below, I conclude the Petitioner has met its burden under Section 131.B.2 of the Zoning Regulations to establish this proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with an expansion of a religious facility and private academic school.

a. Physical Conditions. Whether the impact of adverse effects such as noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions will be greater at the subject site than it would generally be elsewhere in the zone or applicable other zones.

The uses have been in operation on the site for many years. They will be conducted predominately indoors. Outdoor activities will include use of the playground and summer camp. None of the uses will generate an inordinate amount of noise. All parking lighting must comply with county regulations. The lighting on the multipurpose building will be limited to

functional lighting. There is no evidence the increase in the student population would generate inordinate noise or other physical effects detectable from adjacent properties. The Hearing Examiner concludes that any inherent operational adverse effects resulting from the proposed conditional use will not be greater at the subject site than elsewhere in the zone or applicable other zones, in accordance with Section 131.B.2.a.

b. Structures and Landscaping. The location, nature and height of structures, walls and fences, and the nature and extent of the landscaping on the site are such that the use will not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.

A pivotal issue in this case is the location of the proposed two-story multipurpose building 20 feet from the southerly property line and the proposed landscaping. Although the Petitioner has withdrawn the school use of the building, the Petitioner is proposing a landscape plan consistent with the buffering requirements for a reduced setback as may be authorized under the private academic school conditional use category per Section 131.N.48.f(2) (see Part III). The Petitioner is proposing during Phase I to install a Type D buffer extending about 25 feet from the rear of the multipurpose building, to about 50 feet beyond the building's front façade and a six-foot high solid fence along the building's length. This landscaping would be installed before construction to ensure the plants thrive. Additionally, Petitioner Exhibit 5 is intended to demonstrate the visual impact of the multipurpose building on the nearest residence is not so significant as to rise to the level of an atypical impact.

The selection of the site for the proposed multipurpose building resulted from an evaluation of reasonable siting alternatives, including the Petitioner's desire to maintain some

distance from the cemetery. Concerning the TSR's comments that the building could be shifted further north, the economic burden of grading and possibly installing a gravity sewer for this location makes this an unreasonable solution. Relocating the multipurpose building closer to the cemetery would not provide a significantly different overall visual impact from the proposed location.

Persons in opposition to the location of the multipurpose building presented evidence that they would be able to see it from their homes or properties. They testified to or presented evidence that the visual impact of the multipurpose building would be greater because it would sit at a higher elevation than their homes and properties. Many opponents expressed concern about the continued health of the proposed landscaping. The TSR similarly recommended against the location of the multipurpose building in part because of its visual impact.

Although I am sympathetic to these concerns, the Opposition's concern about the visual impact of the multipurpose building on their homes and properties is legally insufficient, the Opposition having failed to adduce any evidence of how the building's visibility would have an atypical adverse impact.¹⁰ While a difference in elevation between the location of the

¹⁰ When Howard County introduced legislation to substantially revise the special exception provisions of the Zoning Regulations in 2001 (ZRA 30) (creating the new condition use provisions), DPZ proposed 50-foot setbacks for many conditional use categories, including structures used primarily for religious facilities. The legislature, however, declined to apply the 50-foot setback to religious facilities. ECB 11-2001 proposed to revise the conditional use category as follows.

131.N.45. Religious Activities, Structures Used Primarily for

A [[special exception]] CONDITIONAL USE may be granted in the RC, RR, R-ED, R-20, R-12, R-SC, R-SA-8, R-A-15, R-MH, or R-VH Districts for structures used primarily for religious activities provided that:

[[a. Lot coverage shall not exceed 25 percent of lot area.

multipurpose building and adjoining residential properties may rise to the level of an atypical adverse impact, the Opposition has failed to adduce such evidence through a comparison of the elevation of other religious facilities relative to adjoining residential properties in the R-20 district. Additionally, the Opposition's concerns about the continued health of the proposed landscaping are not unique to this case; it is, rather, a matter common to all landscape buffers. To ensure the Petitioner abides by its commitment to establish the landscaping along the area of the proposed multipurpose building and to "replace" the landscaping conditions imposed in previous orders, the Hearing Examiner is requiring these plantings to be installed within one year of the date of this Decision and Order.

Concerning the proposed addition to the fellowship hall, the evidence of record leads the Hearing Examiner to conclude it is well separated from vicinal residences, as are the one-story addition and the proposed retaining wall near the cemetery. Additionally, the proposed landscaping will screen the uses from vicinal residences.

b]]A. Structures used primarily for religious activities may be erected to a greater height than permitted in the district in which it is located, provided that the front, side and rear setbacks shall be increased one foot for each foot by which such structure exceeds the height limitation [[established for the district in which such structure is located]].

B. BUILDINGS, PARKING AREAS AND OUTDOOR ACTIVITY AREAS WILL BE AT LEAST 50 FEET FROM ADJOINING RESIDENTIALLY ZONED PROPERTIES OTHER THAN A PUBLIC ROAD RIGHT-OF - WAY. THE BOARD OF APPEALS MAY REDUCE THIS SETBACK TO NO LESS THAN 20 FEET OR THE MINIMUM SETBACK REQUIRED BY THE ZONING DISTRICT, WHICHEVER IS GREATER, IF:

(1) THE ADJOINING LAND IS COMMITTED TO A LONG TERM INSTITUTIONAL OR OPEN SPACE USE THAT PROVIDES AN EQUIVALENT OR BETTER BUFFER FOR VICINAL RESIDENTIAL DEVELOPMENT; OR (2) THE PETITION INCLUDES DETAILED PLANS FOR SCREENING, CONSISTING OF A COMBINATION OF A SOLID FENCE OR WALL AND LANDSCAPING, OR AN EQUIVALENT COMBINATION, THAT PRESENTS AN ATTRACTIVE AND EFFECTIVE BUFFER FOR NEIGHBORING RESIDENTIAL PROPERTIES.

C. AT LEAST 20 PERCENT OF THE AREA WITHIN THE BUILDING ENVELOPE WILL BE GREEN SPACE, NOT USED FOR BUILDINGS, PARKING AREA OR DRIVEWAYS. THE BUILDING ENVELOPE IS FORMED BY THE REQUIRED STRUCTURE SETBACKS FROM PROPERTY LINES AND PUBLIC STREET RIGHTS-OF-WAY.

The Petitioner has therefore met its burden of presenting sufficient evidence to establish the proposed multipurpose building, the two additions and the retaining wall uses will not have adverse effects on vicinal properties above and beyond those ordinarily associated with a religious facility in the R-20 district, in accordance with Section 131.B.2.b.

c. Parking and Loading. Parking areas will be of adequate size for the particular use. Parking areas, loading areas, driveways and refuse areas will be properly located and screened from public roads and residential uses to minimize adverse impacts on adjacent properties.

The TSR commented on the proposed parking at length. For the school, 16 spaces are required for the 92 maximum number of students on site at any time (one space for every six students). For the 222-seat religious facility, 74 spaces are required (one space per every three seats). As the TSR emphasizes, the Petitioner bases the number of proposed parking spaces on the religious facility's greater need for parking than the school's need, yet upon completion of Phase II, there will be a total of 142 spaces rather than the required 74 for the religious facility, nearly double the minimum number of required spaces. Additionally, the number of school parking spaces depicted on the April 16, 2011 plan exceeds the parking requirements for the proposed school session in operation at any time. Mr. Cush testified the planning committee derived the parking needs study, but no parking needs study was introduced into evidence. To accommodate these parking spaces the Petitioner is seeking a reduced setback to locate many school parking spaces within the 50-foot parking setback imposed by the private academic school conditional use category, as is discussed in Part III. It also appears that portions of the driveway on the south side would be located within the 50-foot setback.

The Petitioner is proposing to mitigate the adverse effects of the parking in the desired reduced setback with a Type C landscape buffer extending buffer from the multipurpose building to an area near Scaggsville Road ROW and, apparently the area where the recycling dumpster is currently located (immediate south of the southernmost driveway entrance). During Phase II, an enhanced Type C and Type D landscape buffer would be planted along the side property line close to the rear of the proposed multipurpose building and the rear parking area.

Mr. Kemp testified about the current effects of headlights and parking noises along the south side of the Petitioner property line. The existing parking spaces were approved for the religious facility, yet the record indicates they support the school use, which unlike the religious facility, operates five days a week. Moreover, while the Petitioner scaled back its use of the multipurpose building to one use, it did not correspondingly reduce the number of parking spaces for school use. The Hearing Examiner is not persuaded the proposed buffering will mitigate the adverse effects of the school parking use, which would be greater at this site because of the reduced setback and the unexplained number of proposed parking spaces. The petition and plans do not accord with Section 131.B.2.c.

No loading areas are proposed. The dumpster will be relocated about 10 feet to the northwest of current location and will be well separated from vicinal residences. Apparently, the recycling dumpster will be removed from the site because the landscape plan shows a Type E buffer where it is located and the plan does not indicate an alternative location.

d. Access. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate.

In BOA Case No. 90-66E&V, the Board of Appeals approved a special exception to expand an existing religious facility and private school from 120 students to 240 students and a variance to reduce the 50-foot front setback to 39 feet for a proposed addition, subject in part to the condition that "[t]he eastern access entrance shall be limited to entry only and the western access limit to exit only." The Petitioner has for at least nine years violated this condition by permitting the two driveway access points to be used for both ingress and egress. Petitioner's Exhibits 1A&B, and 2. The Petitioner now seeks to lift this restriction, subject to testing and approval at the SDP stage.

Opponent Catherine Kemp testified in opposition to the lifting of this restriction based on the presence of a blind spot on the road, her own car accident in front of or near the old church building and the continuing presence of speeders along this section of Scaggsville road.

In the Hearing Examiner's opinion, the lifting of the ingress/egress restriction is a public safety issue best reviewed during the site development plan process. The Hearing Examiner is therefore lifting this restriction subject to the condition that county staff determines during the SDP process that it is appropriate and safe to do so. Until then, however, the Hearing Examiner is requiring the Petitioner to abide by the ingress/egress condition. The Petitioner is instructed to post signs and markers noting the ingress/egress restrictions and to educate parishioners, parents, guardians and community residents using the facilities about the restrictions. Based

on these conditions, the existing access driveways appear to provide continued safe access, with adequate sight distance, in accordance with Section 131.B.2.d.

II. Specific Criteria for Structures Used Primarily for Religious Activities (Section 131.N.39)

a. Lot coverage shall not exceed 25 percent of lot area.

Note 18 on the April 16, 2011 conditional use plan states the total land area of the two uses upon completion of Phase II is 7.5 acres, or 324,668 square feet. Note 15 states the building envelope is 11.92 acres, and building, paving and walks, 2.74. The combined parcels comprise about 13.4 acres. The total lot coverage is less than 25 percent of the 13.4 acre Property, in according to the conditional use plan, in compliance with Section 131.N.39.a.

b. Structures used primarily for religious activities may be erected to a greater height than permitted in the district in which it is located, provided that the front, side and rear setbacks shall be increased one foot for each foot by which such structure exceeds the height limitation.

Section 131.N.39.c does not apply because the petition does not propose any structure higher than permitted (34 feet).

c. The Hearing Authority may approve parking facilities which are accessory to a religious facility, and are located on a separate lot, but do not meet the location requirements of subsection 133.B.4.D of the parking regulations by being separated from the religious facility by a public street, if the Hearing Authority finds that the accessory parking facility complies with the following criteria:

- (1) The accessory parking facility is not separated from the lot containing the principal use by an arterial highway of any category.**
- (2) A pedestrian street crossing connecting the accessory parking facility lot to the principal use lot is provided and is made clearly noticeable to drivers by means of both pavement marking and signs**
- (3) The pedestrian street crossing is safe, based upon such factors as, but not limited to: traffic volume at the times(s) of the use of the accessory parking**

facility; practical traffic speeds; sight distance; length of the crossing; and adequate markings and signage.

(4) The entire pedestrian pathway from the accessory parking facility to the principal religious facility is a durable, paved, no-step path.

Section 131.N.39.c does not apply because the petition does not propose parking facilities on a lot separated by a public street.

III. Specific Criteria for Structures Used Primarily for Schools, Colleges, Universities – Private Academic (Section 131.N.48)

a. The maximum density permitted is 60 pupils per acre for lots less than three acres, and 100 pupils per acre for lots three acres or greater.

The proposed number of students at the private academic school on the 13.4-acre Site is 275, in accordance with Section 131.n.48.a.

b. In addition to meeting the area requirements of Section 131.N.54.a, schools with residence accommodations shall provide an additional 500 square feet of lot area per site resident. Residents shall include students, staff members, caretakers and their families who reside on the site.

This section is inapplicable as no residential accommodations are proposed.

c. A private school may be erected to a greater height than permitted in the respective district, provided that no structure is more than three stories in height and the front, side and rear setbacks shall be increased two feet for each foot by which such structure exceeds the height limitation.

This section is inapplicable, as no building will be erected to a greater height than the 34 feet permitted in the R-20 district.

d. Sufficient off-street school bus loading areas shall be provided if bus service is provided for students.

No bus service is proposed. As no bus service is proposed, this section is inapplicable.

e. Outdoor uses will be located and designed to shield residential property from noise or nuisance. Play areas, athletic fields and similar uses shall be buffered from residential properties by fencing, landscaping, adequate distance or other appropriate means.

The depicted play areas are fenced and located more than 80 feet from the south property line and are well separated from residential properties by distance in accordance Section 31.n.48.e. However, although there was Petitioner testimony that children occasionally ride bikes in the south parking area and would later use an area behind the cemetery, this use is not depicted on any plan and the Hearing Examiner is therefore denying this use.

f. Buildings, parking areas and outdoor activity areas will be at least 50 feet from adjoining residentially zoned properties other than a public road right-of-way. The Hearing Authority may reduce this setback to no less than 20 feet or the minimum setback required by the zoning district, whichever is greater if:

- (1) The adjoining land is committed to a long term institutional or open space use that provides an equivalent or better buffer for vicinal residential development; or**
- (2) The petition includes detailed plans for screening, consisting of a combination of a solid fence or wall and landscaping, or an equivalent combination, that presents an attractive and effective buffer for neighboring properties.**

The petition does not propose any new religious facility building, parking areas, or outdoor activity areas. Petitioner testimony indicates that pre-schoolers occasionally ride bikes in the south parking lot but the record does not indicate whether this outdoor activity occurs within the 50-foot setback.

For the reasons set forth in the parking and loading adverse impact analysis in Part I, the Hearing Examiner has determined to deny the Petitioner's request for a reduced school parking use setback. The Petitioner need only provide 16 parking spaces for the school use, yet it is

proposing to provide significantly more, and this drives the need for the reduced setback. Nothing in the evidence of record demonstrates a need for the number of school parking spaces proposed.

Although the Petitioner offered to construct a privacy fence along the spaces closest to the Kemp property, the Hearing Officer is not convinced there is enough area for such a fence to be constructed in conjunction with the proposed landscaping and the two-foot wide gravel stormwater management trench along the southeast property line, considering that the Landscape Manual prohibits stormwater management facilities from being located within the landscape perimeter. The Hearing Examiner is not persuaded the proposed landscaping will mitigate the effects of school parking in the reduced setback.

g. At least 20 percent of the area within the building envelope will be green space, not used for buildings, parking area or driveways. The building envelope is formed by the required structure setbacks from property lines and public street rights-of-way.

According to the April 16, 2001 plan, about 69.6 percent of the Site is green space. No new buildings, parking areas, or driveways are proposed. The petition accords with Section 131.n.48.g.

h. The site has frontage on and direct access to a collector or arterial road designated in the General Plan, except that expansions of a conditional use that was approved prior to the effective date of Council Bill No. 11-2001 are permitted.

The Property fronts on and has direct access to a Minor Collector and is an expansion of a conditional use approved prior to the effective date of Council Bill 11-2001, in compliance with Section 131.n.48.h.

IV. Criteria for Granting a Variance (Section 131.B.2.a)

The standards for variances are contained in Section 130.B.2.a of the Regulations. Pursuant to this section, I may grant a variance only if the Petitioner demonstrates compliance with all four variance criteria. Based upon the foregoing Findings of Fact, and for the reasons stated below, I find the requested variance complies with Section 130.B.2.a.(1) through (4), and therefore may be granted.

(1) That there are unique physical conditions, including irregularity, narrowness or shallowness of the lot or shape, exceptional topography, or other existing features peculiar to the particular lot; and that as a result of such unique physical condition, practical difficulties or unnecessary hardships arise in complying strictly with the bulk provisions of these regulations.

Compliance with this first criterion is a two-part test. First, there must be a finding that the property is unusual or different from the nature of the surrounding properties. Secondly, this unique condition must disproportionately impact the property such that a practical difficulty arises in complying with the bulk regulations. See *Cromwell v. Ward*, 102 Md. App. 691, 651 A.2d 424 (1995). A "practical difficulty" is shown when the strict letter of the zoning regulation would "unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome." *Anderson v. Board of Appeals, Town of Chesapeake Beach*, 22 Md. App. 28, 322 A.2d 220 (1974).

In this case, the Petitioner is seeking a 10-foot reduction in the 50-foot setback from a public street for a small school/church internal pedestrian corridor addition to be constructed in Phase I. Ordinarily, existing structures may not be considered "unique" features of a

property. The existing church and fellowship hall, however, were both constructed prior to the enactment of county zoning regulations, as found in Board of Appeals Case No. BA 90-66E&V (1991). Relying on a finding that these two structures were lawfully noncomplying structures, the Board concluded in that case that the location of the two structures within the setback was a unique physical condition causing the Petitioner practical difficulty in complying with the front setback.

The same reasoning applies to this case. There is practical difficulty in complying with the setback from a public street ROW because the addition must work with the existing buildings, as did the addition approved in 1991. Consequently, I find that the location of the existing religious facility is a unique physical condition causing the Petitioner practical difficulty in complying with the setback requirement, in accordance with Section 130.B.2.a(1).

(2) That the variance, if granted, will not alter the essential character of the neighborhood or district in which the lot is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare.

The religious facility use has operated at the Property for more than 150 years. The pedestrian corridor will be well separated from vicinal properties by distance. The Hearing Examiner concludes the variance will not alter the essential character of the neighborhood or district, will not impair the use of adjacent property and will not be detrimental to the public welfare. The petition accords with Section 130.B.2.a.(2).

(3) That such practical difficulties or hardships have not been created by the owner provided, however, that where all other required findings are made, the purchase of a lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship.

The original church structure and fellowship hall predate county zoning regulations and the on-site physical conditions were not caused by the Petitioner, in accordance with Section 130.B.2.a.(3).

(4) That within the intent and purpose of these regulations, the variance, if granted, is the minimum necessary to afford relief.

The 10-foot encroachment for the internal pedestrian area is the minimum necessary for a corridor, in accordance with Section 130.B.2.a.(4).

V. Opposition Testimony

Once a petitioner presents sufficient evidence establishing its proposed use meets the requirements of the statute, it is incumbent upon those opposed to the petition to show the use at the proposed location would cause an adverse effect upon adjoining and surrounding properties unique and different, in kind or degree, than that inherently associated with such a use regardless of its location within the zone. *Mossburg v. Montgomery County*, 107 Md. App. 1, 666 A.2d 1253 (1995).

The persons who testified in opposition to the proposed enlargements to approved conditional uses have not met their burden of showing the proposed use would have an atypical burden upon adjoining and surrounding properties. The speculative nature of their testimony about the visual impact of the proposed multipurpose is addressed above in the adverse impacts analysis. As to the Opposition's testimony about stormwater runoff, the Hearing Examiner's zoning authority does not encompass consideration of environmental

impacts. Such impacts are assessed at the site development plan stage, where the Petitioner must provide detailed information about stormwater management measures.

Although there have been two accidents in front of the religious facility, the Opposition has not adduced sufficient adverse traffic safety evidence to overcome the testimony by the Petitioner's rebuttal witnesses—all of whom have children attending the preschool—about the absence of traffic safety problems, including site ingress and egress as well as preschooler drop-offs and pickups.

Lastly, Mr. Kemp alleged the proposed multipurpose building was an accessory building subject to a 15-foot height limit, but he did not argue the point sufficiently. During the hearing, the Hearing Examiner explained the determination of what is an accessory religious land use or accessory religious facility structure implicates significant constitutional and statutory protection concerns under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).¹¹ The Hearing Examiner therefore declines to address this objection in the absence of a considered examination of the case law addressing whether a particular alleged secular activity or structure can be deemed an accessory use or structure to the principal religious use or structure for RLUIPA purposes.

¹¹ 42 U.S.C. §§ 2000cc to 2000cc-5 (2006); see Sara C. Galvan, *Beyond Worship: The Religious Land Use and Institutionalized Persons Act of 2000 and Religious Institutions' Auxiliary Uses*, 24 YALE L. & POL'Y REV. 207, 208 (2006) (noting that in the "tax context . . . government has distinguished some auxiliary uses from others: Tax laws favorable to religious institutions may only be applied to their auxiliary uses if the institution can prove that the use is substantially related to its religious, educational or charitable mission, . . . [while] [i]n the religious land use context, however no such line has been drawn"). See also Shelley Ross Saxer, *Faith In Action: Religious Accessory Uses And Land Use Regulation*, 2008 UTAH L. REV. 593 (2008). Available at <http://epubs.utah.edu/index.php/ulr/article/viewDownloadInterstitial/15/6>. Site visited October 28, 2010.

VI. Zoning Regulations Violations

According to Mr. Kemp's testimony and Opposition Exhibit 11, the Property is in violation of the zoning regulations for not complying with conditions imposed by earlier Board of Appeals decisions. However, Maryland courts instruct us that it is an improper exercise of the Hearing Authority's function to transform zoning application proceedings into a violation and enforcement process. For this reason, I may not deny the requested conditional use in this case because the applicant has allegedly committed violations of the conditions of a previous decision and order. *Klein v. Colonial Pipeline Co.*, 55 Md. App. 324, 337, 462 A.2d 546, 554, 1983 (internal citations omitted).¹²

This instruction notwithstanding, Section 131.H.1 of the Zoning Regulations permits the Hearing Examiner to attach conditions to the proposed use or plan as deemed necessary to ensure continuous conformance with all applicable standards and requirements, including findings or conditions imposed in previous conditional use decisions and orders approved on the Site. To ensure the Petitioner complies with all conditions imposed in previous Decision and Orders, as a condition of approval I requiring the Petitioner to demonstrated compliance to DPZ with any and all such conditions by the Hearing Authority in previous Decisions and Orders no later than one year from the date of this Decision and Order. The Hearing Examiner is imposing this one year deadline because the Petitioner has not established a completion date for the Phase I expansions and Phase II is not estimated to be completed until December 2018.

¹² Section 102.B permits persons aggrieved by an alleged violation of the Zoning Regulations to request the Department of Planning and Zoning to issue a zoning violation notice. In addition, Section 131.L of the Zoning Regulations permits the Department to initiate action to revoke a conditional use.

ORDER

Based upon the foregoing, it is this **6th day of June 2011**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the request of Emmanuel United Methodist Church to reduce the 50-foot school parking use setback to 20 feet as may be authorized by the Hearing Examiner by Section 141.N.48.f is **DENIED**;

That the request of Emmanuel United Methodist Church to (1) expand a previously approved structure used primarily for Religious Activities with a small, one-story addition for use by the religious facility and a two-story addition to be used by the religious facility and private academic school, (2) construct a 2-story, multipurpose building as an expansion of the religious activity use, (3) expand a private academic school conditional use by increasing the total number of students from 240 to 275, with no more than 92 students on site at any time, (4) increase the total number of parking spaces for the religious facility use to 142, (5) eliminate the ingress/egress restrictions imposed in Board of Appeals Case No. 90-66E&V, and (6) variance the 50-foot setback from a public street right-of-way to 40 feet for the church and private academic school pedestrian corridor addition in an R-20 (Residential: Single Family) Zoning District is hereby **GRANTED**;

Provided, however, that:

1. The Hearing Examiner is eliminating the ingress/egress restriction condition imposed in Board of Appeals Case No. 90-66E&V subject to the condition that county staff determines at

the site development plan stage that it is appropriate and safe to do so. Should county staff make such determination, it shall establish the appropriate internal circulation for the uses.

2. The Petitioner shall immediately post signs and markers noting the ingress/egress restrictions and it shall educate parishioners, parents, guardians and community residents using the facilities about the restrictions. This signage and marking are to remain in place until the county approves a site development plan eliminating the ingress/egress restriction. The Petitioner shall continue to use the internal circulation pattern approved in prior Decisions and Orders until the county approves a site development plan eliminating the ingress/egress restriction.

3. The Petitioner is to install signage along the current religious facility parking spaces along the south property line stating the parking is not to be used by school staff or persons dropping off/picking up children from school.

4. The Petitioner is to cease using the parking lot as a bike exercise area for preschoolers.

3. The hours of operation approved for the religious facility use are as follows:

- Sunday worship service shall be held from 9:00 a.m. to 12:00 p.m. Parishioners shall arrive no earlier than 7:30 a.m. and leave the site no later than 2:00 p.m.
- Staff for the private academic school shall arrive no earlier than 7:30 a.m. and leave the site no later than 4:00 p.m. They shall not park in the spaces closest to the common lot line with the Kemps. Person dropping off children shall arrive no earlier than 8:30 a.m.
- During evening community events, all persons shall be off site by 10:00 p.m. Any parking lot lighting shall be turned off by 10:15 p.m.

3. The hours of operation approved for the private academic school use are as follows:

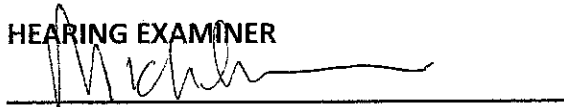
First session (Monday-Friday): 9:00 a.m. to 12:00 p.m.

Second session (Monday-Friday): 12:30 p.m. to 3:30 p.m.

4. The uses approved for the religious facility are worship services, religious education support groups, committee meetings, Bible study, choir rehearsals, Boy and Girl Scout troop assemblies, yoga classes, neighborhood association meetings, fellowship events for persons affiliated with the church, youth events requiring a large space, Bible school and summer camp school.
5. No school use is permitted in the multipurpose building.
6. The maximum number of students permitted to be enrolled at any school session is 275, with no more than 92 students on site at any time.
7. The Petitioner is to install the landscaping proposed on the south side of the proposed multipurpose building and the landscaping denoted as "replacement landscaping no later than one year from the date of this Decision and Order.
8. The Petitioner shall obtain all building permits by December 13, 2017, with substantial construction in accordance with the permits by December 13, 2018.
10. The Petitioner shall comply with all applicable federal, state, and county laws and regulations.

HOWARD COUNTY BOARD OF APPEALS

HEARING EXAMINER



Michele L. LeFaivre

Date Mailed: 6/7/11

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.