

IN THE MATTER OF	:	BEFORE THE
<b>NARESH C. DAS</b>	:	HOWARD COUNTY
Petitioner	:	BOARD OF APPEALS
	:	HEARING EXAMINER
	:	BA Case No. 15-024C&V

.....

**DECISION AND ORDER**

On November 19 and 30, 2015, February 4, March 24 and March 28, 2016 the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the new religious facility, structure, and land use primarily for religious activities conditional use and related variance petitions of Naresh C. Das (Petitioner) in an RC-DEO (Rural Conservation-Density Exchange Option Overlay) zoning district, filed pursuant to §§ 131.0.N.42 and 130.0.B.2 of the Howard County Zoning Regulations (HCZR).

Petitioner certified to compliance with the notice and posting requirements of the Howard County Code. The Hearing Examiner viewed the subject property as required by the Hearing Examiner Rules of Procedure. Thomas Coale, Esquire, represented the Petitioner. Robert Vogel, Naresh C. Das and Mickey Cornelius appeared for the hearing and testified on behalf of the Petitioner. Charles Dorsey, Marion Farhy, Cindy Pappas, Colin Ward, Dana Ward, Chris Bowen, Michael Williams, Bruce Geil, Terri Miniford, Dr. Jon Miniford, Ruth Olorunfemi, Tracey Wheeler, James Haas, Paul Pappas, Steven Baxter, Scott Arterburn, Rachel Miniford

Mullinix, Will Lawson, John Parker and Brian Alexander appeared for the hearing and testified in opposition to the petition.

### **A Preliminary Matter**

At the outset of the November 10, 2015 hearing, the Hearing Examiner informed Petitioner and the community that the conditional use and variance petitions and plans were wanting information necessary to evaluate them properly. As explained at the hearing, it has become the Hearing Examiner's practice to address certain aspects of conditional use petitions as a preliminary matter rather than well into the hearing, after petitioner and opposition testimony. This practice is partly a response to prior petitioners' stated interests (through requests for reconsideration) in having the Hearing Examiner more fully identify concerns about petitions within the hearing process and partly a response to community participants who continue to express frustration about incomplete petitions and plans and/or multiple petition/plan amendments over the course of a hearing. A 2013 zoning text amendment enacted during the 2013 Comprehensive Rezoning Plan, HCZR § 131.0.F.2.f, imposes on DPZ the regulatory policy obligation to seek from a petitioner "the best petition" during the initial processing of a conditional use petition and before the preparation of technical staff reports. The amendment was intended in part to address this community concern. The Technical Staff Report was based on the initial submissions. For these reasons, the Hearing Examiner continued the hearing to permit Petitioner to amend the petitions and plans. By letter of

December 29, 2015, the Hearing Examiner informed Petitioner of the additional information required.

- Amend the conditional use petition/supplement to declare the total percentage of lot coverage for the proposed religious facility use.
- Remove image of "future" dome from the conditional use plan.
- Confirm the scale and width of the proposed, main religious facility elevation shown on the conditional use plan.
- If the design details of the interior of the new religious facility are currently available, please provide the layout/floor plan indicating the assembly/worship area.
- Confirm and indicate on the plan/s the correct floor area of the assembly/worship area.
- Depict the distance of the proposed religious facility main structure from all property lines and adjoining residential structures.
- Depict the true location/footprint/square footage/parking of the currently nonconforming "Priest's Residence," a principal use/structure, and amend the variance petition to include all required variances from the RC zoning district bulk regulations. Provide a narrative of the proposed use.
- Depict the true location/footprint/square footage/parking of the currently nonconforming garage/shed, including the smaller structures attached or adjacent to the main structure/use, which is an accessory use/structure, and amend the variance petition to include all required variances from the RC zoning district bulk regulations. The main shed and minor structures are shown on the 2015 Pictometry image included with the technical staff report. Provide a narrative of proposed use of the main structure by the religious facility.
- Depict all required buffering/screening/landscaping/fencing for the "Priest's Residence" and parking and the accessory garage/shed structure/use.
- Update the conditional use petition narrative supplement to describe the activities occurring during the four festivals, including indoor or outdoor activities.
- Specify the type of paving material to be used for the driveway and parking lot.
- Revise the location of the driveway such that it will be set back at least ten feet from the existing well.
- Update the conditional use variance/petitions, plans and narrative supplements as may be further required.

Petitioner introduced the amended plans and petition supplements as exhibits at the November 30, 2015 hearing in accordance with Hearing Examiner Rule 9.4.<sup>1</sup> Petitioner Exhibits 1 and 2 are, respectively, the Amended Narrative Supplement to the Conditional Use Petition (the Amended CU Narrative) and the Amended Narrative Supplement to the Variance Petition (the Amended Variance Narrative). Petitioner Exhibit 3 is the November 30, 2015 Amended Conditional Use and Variance Plan (the Amended Plan).

---

<sup>1</sup> 9.4. Amendments to Petition. If a petitioner proposes to amend a petition during the course of the proceedings, the petitioner must submit the amendment as an exhibit.

Petitioner introduced into evidence the exhibits as follows.<sup>2</sup>

1. Amended conditional use plan narrative supplement (Amended CU Narrative)
2. Amended variance petition narrative supplement (Amended Variance Narrative)
3. Amended conditional use and variance plan, November 30, 2015 (Amended Plan)
5. Amended Plan denoting sight distance information re: testimony of Mickey Cornelius, February 2016
6. Resume of Mickey Cornelius
7. Howard County Crash Listing Inventory
8. View north from proposed driveway
9. Draft, declaration and grant of private sight distance easement

Protestants introduced into evidence the exhibits as follows.

1. Satellite image depicting garage on subject property & dwelling on Parcel 19 to the west
- 2-3. Photographs, window view to subject property from dwelling on Parcel 19
4. Location map depicting regional Hindu temples in Frederick and Baltimore Counties and Baltimore City
5. Location map depicting District of Columbia regional Hindu temples
6. Facebook snapshot, August 29-31, 2014 at Jagannath temple of North America
7. Donations to temple, <http://www.jogaworld.org/jtcc.htm>
8. Photograph, tree plantings on Parcel 18 to the north and existing trees on northern adjoining Parcel 136
9. Photograph, view north from Property driveway
10. Photographs on CD, Transportation Safety Issues
11. Bus and School locator information
12. *Jagannath Temple Video by Joga Darshan, Published on Facebook January 20, 2014*
13. Photograph, view of Property from Cemetery Road
14. Photograph, view from cemetery to Accessory Structure
15. Photograph of overflowing stream and bridge, Parcel 19
16. Howard County, Welcome to Our Open Space brochure, "Retreeve Nature"
- 17A. Photograph of red shed on subject property
- 17B. Photograph of sheds and garage on subject property
18. Percolation certification plat for Parcel 22

## FINDINGS OF FACT

---

<sup>2</sup> The Hearing Examiner renumbered the exhibits to include a copy of the November 30, 2015 Amended Plan denoting the sight distances testified to by Mr. Cornelius.

Based upon the petitions, plans and all evidence of record, the Hearing Examiner finds the following facts:

1. Property Identification. The 3.35-acre property lies on the west side of Millers Mill Road about 315 feet south of Cemetery Road. It is located in the 4<sup>th</sup> Election District, referenced as Tax Map 0014, Grid 0004, Parcel 20 and known as 2028 Millers Mill Road (the Property).

2. Property Description. The Property is irregularly shaped. The generally rectangular front section along Millers Mill Road has approximately 87 frontage feet and runs about 87 feet in a westerly direction to the main, rear portion of the Property. This generally rectangular rear section is about 225 feet wide and about 525 feet deep on average.

On the north side of this section is a driveway running along the north lot line, through a small section of Parcel 136 and ending at a 1,266sf accessory structure identified as a garage and located 12.2 feet from the north lot line. There are also two small sheds next to the main shed, which Petitioner intends to remove. On the south side is a two-story, single-family detached dwelling located 5.5 feet from the southern lot line and about 39 feet south of the driveway. The dry well in this section would remain. The septic tank in this section would be relocated. This area is primarily lawn with some scattered trees. The rear section is wooded. The highest elevation on the Property lies in the southwest corner.

3. Vicinal Properties. Adjacent properties are also zoned RC-DEO. Parcel 17 to the north of the rear section is a wooded lot improved with a single-family detached dwelling fronting on Cemetery Road. Parcel 136 lies to the north of the front section is improved with a

single-story detached dwelling and detached garage/shed recently purchased by a member of the proposed religious facility (Ajit K. Das). Across Millers Mill Road, Preservation Parcel C is a farm. Parcel 22 to the south of the Property is a 15-acre unimproved lot. Parcel 19 adjoins the Property's western lot line and is improved with a single-family detached dwelling.

4. Roads. According to the November 19, 2015 pre-Amended Plan TSR, county GIS information shows the total right-of-way (ROW) as 35 feet or 17.5 feet on each side of the paved roadbed. It further states, "the proposed future right-of-way is 50 feet." The Amended Plan identifies the ROW as a 25-foot ultimate half-ROW and a 15-foot half existing prescriptive ROW. The posted speed limit is 30MPH. There is no traffic data for Millers Mill Road. The TSR further comments:

General Note No. 15 on the original Conditional Use Plan states, "Adequate vehicular sight distance requires establishment of a sight distance easement on Parcels 136 and 18." These are the parcels to the north of the Property and sight distance is limited in that direction due to the curve in Millers Mill Road and existing landscaping that obstructs the site line. The estimated sight distance to the south from the existing driveway is over 600 feet. Precise sight distance measurements may only be determined through a professional sight distance analysis. A professional sight analysis is typically conducted when the Site Development Plan is submitted. Approval of the Site Development Plan would be contingent upon any compliance with all Howard County design criteria, including sight distance.

5. Water and Sewer Service. The Property is served by private water and sewer.

6. The General Plan. The Property is designated "Rural Resource" on the PlanHoward 2030 Designated Place Types Map. Millers Mill Road and Cemetery Road are depicted as Local Roads on the PlanHoward 2030 Functional Road Classification Map.

7. Zoning History. There is a pending Zoning Regulations violation on the Property. The responsible party is Naresh C. Das. The case number is CE 14-103 and the violation is the operation of a religious facility without conditional use approval on RC zoned property.

8. The Requested Conditional Use (based on the petition, the Amended Plan & the Amended CUP Narrative (Petitioner Exhibits 1 & 3)). Petitioner is seeking conditional use approval to construct a new religious facility, entrance and driveway, to convert an existing residence to a Priest's Residence and to use the existing garage for the religious facility.

A. The New Religious Facility Structure. The Amended Plan (Petitioner Exhibit 3) depicts the religious facility Prayer Hall for use by the Jagannath Temple of North American (JTNA) with a 50'x40' footprint. The Amended Plan shows the Prayer Hall as 50'x40', as was shown on the original plan. Also shown on the Amended Plan is the front façade of the 18'-high Prayer Hall. The proposed interior of the Prayer Hall, which shows a 1,270sf assembly area, two bathrooms and a kitchen totaling about 739sf, according to the Amended Conditional Use Supplement, an entry vestibule, pantry and two storage areas. Also shown is an ADA access ramp. The Amended CUP Narrative states the Prayer Hall will be large enough to accommodate up to one hundred people. Exterior lighting would include that on the existing Dwelling, non-specialized residential style lighting on the Prayer Hall and, potentially, ground level and shielded lighting for the parking area. The Prayer Hall is dimensioned to every lot line: to the north lot line: 83.6'; to the northwest corner of the Property, 325.19'; to the south lot line, 8.06' and to the closest eastern lot line, 125'.

The Amended CUP Narrative states JTNA would hold various small services throughout the week at these times: 10:00am-12:00pm and 5:00-8:00pm, Monday-Friday and 10:00am-1:00pm and 4:00pm-8:00pm weekends. Weekday services will normally involve a priest performing rituals and chants while congregants passively observe and pray. Congregants will attend these services intermittently for 5-10 minutes per visit, totaling about 20 attendees spread throughout the seven hours the Prayer Hall is open. Weekend services will be more formal. Up to 50 people will attend Sunday Service over the course of the day. Saturday attendance would be comparable to weekdays.

JTNA would celebrate four annual festivals. 1. Holi: The Holi Festival occurs in March, during which congregants will spend about one hour outside when they put paint on each other. This outdoor component would occur sometime between 11:00am and 1:00pm. 2. Ratha Jatra occurs in July and congregants will spend about two hours outside carrying a chariot around the perimeter of the Prayer Hall and down the driveway. Unamplified music will be played. The festival will likely occur between 11:00am and 1:00pm. 3&4. Diwali and Christmas will occur indoors. During Diwali, which normally occurs between mid-October and mid-November, the outside of the Prayer Hall will be lit, like Christmas light and the lighting will be turned on from dusk-9:00pm on the day of the Festival.

B. Parking. In front of the proposed prayer hall are 24 paved parking spaces, including one accessible space. HCZR § 133.0.D.7.g requires 10.0 spaces per 1,000sf in the assembly area(s),



so 13 parking spaces must be provided. The Amended Plan depicts 24 parking spaces in front of the prayer hall, including two for the Priest's residence and one accessible space.

C. Driveway. Petitioner is proposing to reconfigure the existing driveway to comport with county regulations. The proposed 24'-wide driveway and entrance would provide access to the Property and extend to the parking area.

D. The Priest's Residence. The existing dwelling on the Property will be used as the Priest's Residence with no "exercise of religion" use.

E. The Garage. The Amended CUP Narrative states the existing garage will be used for storage. The Hearing Examiner observed during her site visit that this structure did not appear to be currently used as a garage because of the doorway entrance and stoop, but rather appeared to be a residential use converted to another use.

F. Proposed Landscaping (See also DLD's comments below). Proposed landscaping is shown on the Amended Plan and detailed in Schedule A.

9. The Requested Variances. Petitioner is requesting six variances. Driveway (§ 104.0.E.5). Reduce the 30' use setback from a lot line to 10.83' (north) and 19.33' (south) for the proposed driveway.

- Priest's Residence (§ 104.0.E.4.a(3)(b)). Reduce the 30' side setback for a principal structure to 5.5' (south).
- Priest's Residence (§ 104.0.E.4.a(2)). Reduce the 75' front setback to -309.31'\* (68.81', as measured from the Millers Mill Road ultimate ROW)
- Accessory structure (§ 104.0.E.4.a(3)(c)(1)). Reduce the 30' side setback to 12.2'.
- Accessory Structure (§ 104.0.E.4.a(2)). Reduce the 75' front setback to -319.57'\* (68.81', as measured from the Millers Mill Road ultimate ROW)

\* Measured from "minimum lot width at building restriction line," per § 104.0.E.3.a

10. Agency Comments.

Department of Planning and Zoning (DPZ), Division of Land Development (DLD). It is standard procedure to include agency comments with a TSR. In 2008, DLD began providing preliminary, limited advisory comments to DPZ's Zoning division when Zoning evaluates petitions for religious uses and prepares technical staff reports, because these projects frequently come to the subdivision review committee with major problems. After the November 30, 2015 continuation hearing, the Hearing Examiner realized DPZ's Zoning division had not forwarded the original petitions and plans to DLD for advisory comment. By letter of December 29, 2015, the Hearing Examiner requested comments on the Amended Plan, the petitions and narrative petition supplements. DLD provided these January 5, 2016 comments on the Amended Plan and narrative petition supplements.

1. The proposed prayer hall and associated improvements will require the approval of a Site Development Plan (SDP). The plan must address forest conservation, landscaping and all required information per Section 16.157 of the Subdivision Regulations. Any streams, wetlands, floodplain or associated buffers must be accurately delineated on the site development plan.
2. An Environmental Concept Plan may be required for the proposed improvements. Verify with the Development Engineering Division (DED).
3. A forest stand delineation must be submitted with the SDP. Indicate the location of any specimen trees on the property. The removal of specimen trees will require approval of a waiver to the Subdivision Regulations.
4. Please revise the exhibit to address the following.
  - Existing vegetation must be at least 30' in width to be used for landscaping credit in non-residential developments. Perimeter 3 may require additional plantings.
  - Schedule A (Perimeter Landscaping):
    - Perimeter 1-B: The type "A" landscape edge requires 1 shade tree every 60 feet. Please revise the "number of shade trees required" to 1:60.
    - Perimeter 3: The "number of shade trees provided" should be two trees.
    - Remove the asterisk from Perimeter 4. No existing vegetation exists to be used for credit.
  - General Note #11: This site is located in the 4<sup>th</sup> Election District
  - Advisory: Provide a detail of the proposed privacy fence (adjacent to existing house) on the site development plan. Include fencing type and height dimensions.
  - Advisory: Include a reasonable parking location for the Priest's Residence on the site development plan.

Health Department comments (based on the original petitions and plan). The Health Department's October 22, 2015 comments from Jeff Williams, Bureau of Environmental Health does not object to the variance request for a driveway location and notes the need to relocate the driveway setback distance to the well [the driveway shown on the Amended Plan shows the correct setback]. The Health Department has no objection to the conditional use and notes that Petitioner must establish a sewage disposal area suitable for the system serving the temple and an area suitable to serve the dwelling prior to Health approval of a site development plan or a building permit. Furthermore, a well or wells to serve both the temple and the house must be constructed and/or approved by the Health Department prior to Health approval of a building permit.

#### **Direct Petitioner Testimony**

##### ***Testimony of Robert Vogel***

11. Robert Vogel testified to being the project engineer. He explained the Amended Plan introduced as Exhibit 1 is intended to respond to the Hearing Examiner's November 29, 2015 letter request for additional information. The proposed lot coverage is now slightly less, now 3.15%, because the Amended Plan proposes to demolish the two small sheds next to the garage. The "future dome" shown on the original plan has been eliminated. Concerning the Priest's Residence, Mr. Vogel testified that the Amended Plan shows the Priest's Residence and garage location relative to the side lot lines and ultimate ROWs. The Priest's Residence is shown as a 1,341sf dwelling located 5.5' from the south lot line and 66.81 feet from the ultimate ROW and showing a Type "A" landscape buffer or a privacy fence alternative. The garage is located 12.2' from the northern, front section lot line and 319.37' from the ultimate ROW. General Note 16 specifies the proposed driveway paving as per "Howard County Section P-1 or equivalent (minimum)" and three alternative well locations are shown if the existing well needs

to be abandoned. The two small sheds would be removed.

12. As to the requested variances, Mr. Vogel explained the variances for the driveway are needed to accommodate the two existing structures, which are nonconforming. The county requires a 24-foot wide driveway and turning radii at the entrance. When the two 30' side setbacks are combined—60'—and accounting for the required 24' driveway, the 86' wide front section causes practical difficulty. The driveway variances are for a 10.5' setback from the front section, north lot line and 19.35' from the front section, south lot line. Variances are also needed for the two noncomplying structures, which predate Howard County Zoning Regulations.

13. Speaking to compliance with the general and specific conditional use standards, Mr. Vogel described the adjacent properties. In his view, the proposed land use is a small religious facility and appropriate to the site because it has much less than the 25 percent lot coverage and area residences are some distance away. The use would generate about 10 daily trips. Lot coverage would be 3.15%, as the two sheds next to the garage would be demolished. It would be a low intensity use.

14. Concerning safe access, Mr. Vogel testified to there being light traffic on the road during his site visits. Millers Mill Road is lightly traveled. The use would not adversely affect the operation of the road. Based on an 85<sup>th</sup> percentile speed requirement, and a sight distance survey, three trees on the subject property and/or the adjoining property would need to be removed. The trees are an intermittent interruption to sight distance. There is adequate sight

distance with the trees removed. He is unaware of any county plan to widen Millers Mill Road, but Petitioner is required to reserve the ultimate right of way.

15. In his opinion, there would be no adverse impact. Any outside regular use would be limited to persons chatting or car sounds. The proposed Prayer Hall and parking would be pretty far away from neighboring residences and substantial landscaping is proposed. Parking is appropriate for congregants coming and going at various times, not at once. There are no adverse environmental adverse impacts. An off-site stream runs in a southerly direction and stormwater management would be required at the SDP phase. The proposed religious facility would operate much like other religious facilities in western Howard County.

16. On cross-examination, Chris Bowen questioned Mr. Vogel about General Note No. 15 on the Amended Plan, which states "[a]dequate vehicular sight distance requires establishment of a sight distance easement on Parcel 136 and 18." Mr. Vogel stated sight distance is complicated and looked at in different ways. If the trees are gone, a driver would be able to see fine. One criteria is a driver sitting and waiting to exit and being able to see left and right. Their line of sight would go over the prescriptive easement and ultimate ROW. In the second criteria, the issue is whether an emergency vehicle traveling south or north toward the Property will see a driver pulling out from the Property. There is no sight distance problem in this scenario. If a sight line triangle is needed, the Petitioner will have to determine the actual property line locations and ultimate ROW at the SDP stage, which will ultimately determine the adequacy of sight distance. In reality, the scenario of a person waiting to pull out from the

Property and looking left involves a small triangle, possibly outside the prescriptive ROW or inside the ultimate ROW. If this condition exists, Petitioner will use the second sight distance scenario. Concerning the prescriptive ROW shown on the Amended Plan, Mr. Vogel testified on cross that the county has the right to take a 15-foot area to maintain a road. The power pole is probably close to the ultimate ROW. If Mr. Bowen would not agree to an easement, the county would look at the stopping sight distance scenario.

17. On the Hearing Examiner's recall at the February 4, 2016 continuation hearing, the Hearing Examiner further questioned Mr. Vogel several aspects of the Amended Plan and other matters. Concerning General Note 15, he testified to there being no problem with seeing, other than trees on Parcel 136. The note has to do with the paper line outside the prescriptive ROW. If there is a problem with the sight distance on an adjoining property, the test would be based on the emergency vehicle approach test scenario, where no further easement would be required.

18. On cross-examination by several Protestants about special events and parking, Mr. Vogel testified to not being familiar with special events, but believes they would not be unlike other religious facility uses which use driveways for additional parking.

***Testimony of Naresh Das***

19. Naresh Das testified to being a member of the Board of Directors of JTNA, which has been in existence for about 15 years. He is a longtime resident of Howard County and his children attended county schools. There are about 80 members. He described the four festivals

to be held on the Property. Diwali occurs in late October or early November. Congregants come to the temple and celebrate indoors. At Christmas, congregants celebrate the day as a fellowship event held indoors. During Holi in March, spring is welcomed. There is worship inside and people put colors on each other. This would occur outdoors between 11:00am and 2:00pm. Ratha Jatra is held in July and there is worship partly inside. Congregants would also carry a chariot around the driveway. There will no amplified music. It would be held around 11:00am and 2:00pm. Dr. Das also testified there is sufficient parking because families and congregants drive together. There are no Hindu temples in Howard County. The number of congregants is not expected to increase.

20. Several Protestants cross-examined Dr. Das about discrepancies between the activities discussed at the presubmission meeting and what is being currently proposed. Dr. Miniford, who lives across from the Property, questioned Dr. Das about attendance and usage. Regarding the maximum number of 80 attendees that Dr. Das testified to, Dr. Miniford described a meeting with Dr. Das, a physician friend of Dr. Das and himself at a kitchen meeting at the Miniford residence, wherein the physician friend who works at the National Cancer Institute discussed the Hindu practice of visiting temples and discussed his plan to attend on many occasions. Dr. Das replied that people come and go and that the 80-person attendance could be higher or lower. Concerning other events (memorials, weddings, funerals), Dr. Das testified that they are not now included, nor or other life events like birthdays. No community events such as those discussed in the presubmission meeting are proposed.

21. On cross-examination by Charles Dorsey about overnighers staying at hotels, Dr. Das testified that people might come from out of state to attend activities. On redirect, Dr. Das testified that about 30-40 percent of congregants live in the area.

**Direct Testimony of Protestants**

***Testimony of Charles Dorsey***

22. Charles Dorsey initially testified that his testimony is not intended to denounce or offend anyone's religion or beliefs. He testified about the African-American, Millers Mill Road and Cooksville history. Thomas Hood founded Cooksville, a 202-square mile area, in 1802. Many African-American freed persons and slaves lived in the area. Descendants of the persons still live in the area. At the end of Millers Mill Road by MD 97 is the 1850s Sarah Jane Powell Log Cabin, a Howard County historic site, commonly known as the Albert France Log Cabin. Thomas Hood owned Sarah Jane Powell. He freed her and built the cabin for her. Seven generations of her family have lived and continue in the cabin. In 1867, Thomas Hood and Sarah Jane Powell granted one acre to persons for a school for black children in Cooksville. In 1870, it became known as Mt. Gregory, which also later became a place of worship. The church is now known as Mt. Gregory United Methodist Church. The site also once housed Cooksville High School, a segregated public school between 1929 and 1949. The church is the pillar of the Cooksville community today.

23. Mr. Dorsey further testified that many of the descendants of the persons who founded Cooksville still live in the community, including himself. This is where they grew up and



still live. When these persons pass on, they are interred in the Bushy Park Community Cemetery. The community maintains the cemetery, which has served Cooksville since the early 1800s. More than 60 United States veterans, dating back to the Civil War, are buried there. Families walk along Millers Mill Road and Cemetery Road to have graveside visits with their loved ones.

24. Mr. Dorsey believes the crux of opposition to the proposed use is its location in such a rural setting near sacred grounds and in a zoning district intended to "preserve natural features and the rural landscape." The Millers Mill Road community is a quiet, rural area. He is concerned about the number of trees that would need to be removed for the site. While there are some small churches in western Howard County, they are more than 100 years old and the congregations had limitations as to where they could be built. On cross-examination, Mr. Dorsey testified that Gregory United Methodist Church has about 70 members and that about 30-40 persons attend on a regular basis. Concerning families walking along Millers Mill Road, he testified to it being a regular practice and every Memorial Day there is a big celebration. New houses have been built along Millers Mill Road. He was 12 years old when Sun Nurseries, located at the intersection of Bushy Park and Millers Mill Road, was established as a Christmas tree farm. He also testified to having a leadership position in the church. The Hearing Examiner took notice of the conditional use history of Mount Gregory Methodist Church, which has two means of ingress and egress on Route 97.

***Testimony of Marion Farhy***

25. Marion Farhy testified to being an owner of Parcel 19, which adjoins the Property to the west (Parcel 19). Parcel 19 has a Cemetery Road address. She fears for the safety of her children. She introduced Protestants Exhibits 2 & 3, photographs from her dwelling window view toward the Property and showing the existing wooded portion of the lot. She is concerned about the loss of forest on the Property, noise and flooding. Ms. Farhy frequently walks her three-year-old child to Glenwood Country Day School. Her family frequently walks on Millers Mill Road, which has no sidewalks. She is in favor of Howard County hosting a Hindu temple, but the location is inappropriate. Ms. Farhy also introduced Protestants Exhibits 4 & 5, which depict regional Hindu temples in Frederick and Baltimore Counties, Baltimore City and the District of Columbia. It is her understanding that any Hindu person could attend a temple to worship. In her view, this information shows where Hindu temples are located in the region.

***Testimony of Colin Wood***

26. Colin Ward testified to residing on Cemetery Road. Over the years, traffic has increased as drivers seek an alternative to Route 97. The traffic has created a safety hazard for this two small children. Cemetery Road is a small narrow road connecting Millers Mill Road to Bushy Park Road. It lacks safety basics, being paved with tar and chip, which produces loose gravel along its edges and there is no center line or shoulder. There is no posted speed limit. It has a near 90-degree turn with no warning signs or chevrons. At some points it narrows to about 18 feet and in others, 17 feet. Pedestrians use the road, as do organized bike riders who use Cemetery Road and Millers Mill Road, who must share the road with multiple converging

vehicles. There are nine trees within 4 ½ feet of the road. Some are within 3 feet.

27. Mr. Ward also testified about the two cemeteries bookending Cemetery Road. (The Hearing Examiner takes notice one is located on Parcel 20 at the 90-degree bend.) The Parcel 92 cemetery (Bushy Park Community Cemetery) has three historic gravestones less than 5 feet from the road and drivers commonly pull off the road for traffic safety but doing so in this area could result in the destruction of these stones.

28. Mr. Ward lives a few feet east of the 90-degree turn in the road. Between the road and his house is a white fence, a section of which he removed because drivers frequently crashed into it. He testified to motorists traveling west and north being at increased risk due to elevation change, a narrowing road, sight distance and an obscured stop sign. He oftentimes walks his children down Cemetery Road and up Millers Mill Road to Glenelg Country Day School and believes the additional traffic from the religious facility will increase their risk of harm. On cross-examination, he testified to being unaware of any cyclists or walkers having been hit.

***Testimony of Chris Bowen***

29. Chris Bowen testified to being the owner of Parcel 18 at the intersection of Cemetery and Millers Mill Roads. His residence is about 100 yards from the proposed religious facility. He and his wife grew up in Howard County. He introduced Protestants Exhibit 6, a Facebook snapshot, which advertises a three-day festival (August 29-31, 2014) at the proposed temple site, which in his view contradicts Dr. Das' testimony that only four festivals would be held at the site.

30. Mr. Bowen also introduced Protestants' Exhibit 7, a list of almost 100 donors to the proposed religious facility. The list was obtained from <http://www/jogaworld.org/jtcc.htm>, which is connected to the proposed facility. The exhibit is intended to dispute Dr. Das' testimony about the number of congregants.

31. He also introduced Protestants Exhibit 8, a copy of a photograph depicting tree plantings on his property and mature trees on adjoining Parcel 136. It shows the bend in Millers Mill Road, pointing out that it confirms the TSR's comment that Petitioner needs to demonstrate safe ingress and egress. He stated he would never grant a sight distance easement on his property. On his property are several young arborvitae trees, which he planted. Protestants Exhibit 9, is a copy of a photograph depicting the view north from the existing driveway on the Property. It is intended to dispute Mr. Vogel's testimony that there is a clear view to the intersection of Millers Mill Road and Cemetery Road. In his view, the sight distance concern is a major safety issue, given the number of congregants.

32. On cross, Mr. Bowen was unaware of any accidents since he purchased his property. Concerning the arborvitae trees, he testified to having planted multiple trees on his property. The arborvitae were planted late last year. There is sometimes a sign saying "No Millers Mill Temple." He did not make the sign. When asked if he knew the arborvitae trees would block the view from Parcel 136, he responded that he did not. He is aware of the current 15' prescriptive ROW on his property. When crossed about the location of the arborvitae trees, Mr. Bowen explained someone in DPZ informed him he could plant two feet from the edge of

the road. Dr. Das complained about their original location and he was cited for planting trees in the ROW, which he was informed was 15 feet from the center of the road.

33. When questioned by the Hearing Examiner, Mr. Bowen testified to having taken Protestants Exhibit 8 and 9 on a Monday and Tuesday around 6:00 or 6:30pm. The Hearing Examiner also asked Mr. Bowen if he is aware of any portion of Millers Mill Road widened to the ultimate ROW due to development. He replied that no portion has been widened.

***Testimony of Michael Williams***

34. Michael Williams testified to residing on Millers Mill Road. He is a 25-year veteran of the Howard County Police force, where one of his positions involved investigating traffic accidents. In his last position, he was a resource supervisor, which involved working in high schools on school transportation and safety matters. He is currently employed by Howard County Public Schools in school safety and security.

35. Mr. William's testimony went to concerns with transportation safety on Millers Mill Road and connection roads. He explained that Millers Mill Road is about 1.1 miles long. He described it as a country road. The speed limit is 30 MPH and there are about four curves where the speed limited is posted as 20 or 15MPH. Sight distance at these curves is limited. Most of the traffic is local. He introduced Protestants Exhibit 10, a 14-photograph Power Point presentation. These 14 photographs show the Bushy Park Road/Millers Mill Road intercept, the straight portions of Millers Mill Road and road curvatures, where slower speeds are posted, as are "curve" warning signage.

36. Mr. Williams also noted the location of the new dwellings further south at another curve on Millers Mill Road, commenting that the fence line has been hit twice by speeding vehicles. This is the access that the Hearing Examiner questioned Mr. Bowen about. The images show no shoulder was constructed along this section of the road.

37. Mr. Williams further testified that people in the neighborhood walk, run and ride bikes. He is concerned congregants at the proposed facility would cause traffic safety problems with funeral processions at the Bushy Park Community Cemetery. Based on his professional experience, many motorists exceed the speed limit, including teenagers at the nearby high school. In his view, the proposed use is not compatible with the area because of transportation safety reasons. He is also concerned about the increase in noise and light. Because the "garage" is already being used for the use, he can hear them when he walks out in the morning. Mr. Williams also introduced Protestants Exhibit 11, which contains information about county public school bus locations along Millers Mill Road. There is a school bus stop in front of 1924 Millers Mill Road.

38. On cross-examination, Mr. Williams testified to having taken the photographs on November 11, 2015. The accident he referenced took place about 100 yards from the Property, but he is not aware of any accidents in front of the Property. He asked the Police Department about accidents and the department told him there have been none recently. When questioned by the Hearing Examiner, Mr. Williams testified to being aware of organized cycling clubs using Millers Mill Road and a county triathlon uses the road.

***Testimony of Bruce Geil***

39. Bruce Geil testified to residing at 2236 Millers Mill Road. He testified about slow moving vehicles on Millers Mill Road and the change in sight distance along Millers Mill Road as seasons changed. His neighbor's fence has been taken out twice and his mailbox (all mailboxes are located on the east side of Millers Mill Road) is hit almost every month. Millers Mill Road is busiest in the mornings, the same time that congregants would attend the temple. Mr. Geil also noted that the November 11, 2015 date of the photographs in Protestants' Exhibit 10 was Veterans Day.

***Testimony of Terri Miniford***

40. Ms. Miniford testified to residing at 2031 Millers Mill Road, directly across from the proposed temple. Her driveway is almost directly across from the proposed temple driveway. For the last 17 years, she has run Misty Meadows Stables at the property. The horses are ridden on her property. Two of her four pastures front on Millers Mill Road. It was her testimony that the proposed use would spook the horses, which could harm both riders and horses. On cross-examination, Ms. Miniford testified that about five people come every day to see or ride their horse. The stable is located in the middle of the Property.

***Testimony of Dr. Jon Miniford***

41. Dr. Miniford testified to residing at 2031 Millers Mill Road. In his view, the issue is whether the proposed use will have the reasonable chance to harm the Resource Conservation

zone and thus, its residents. He summarized Dr. Das' testimony about the scope and scale of the proposed use. It will be limited to the founding 30-40 families only. Visitations by non-founding members would be limited. Events will be limited to the four religious holidays. No significant nonreligious events will occur, including weddings, birthdays, anniversaries, lectures, fairs or fundraisers. Very little growth is expected. It was Dr. Miniford's further testimony that this "reasonable usage" characterization of the proposed religious facility is contradicted by Dr. Das' own statements from a Jagannath Temple video created by Joga Darshan and published on Facebook on January 20, 2014. The video was introduced as Protestants Exhibit 12.

42. In Dr. Miniford's view, the conditional use petition and Dr. Das' video statements, particularly the first three minutes, present two very different temple projects. On the video, Dr. Das and a second person, Sujit Das, discuss the history of the temple project. There is an explanation as to why the Jagannath temple and community center is needed. Dr. Das discusses the site selection process, stating that it would be close to the freeway so people don't have to drive a long distance in the traffic and the site would not compete with existing established temples. The Cooksville location would serve the need for a temple, community activity and parking on about three acres. Something needs to get started quickly. Language would be taught and there will be activities for senior citizens. On cross-examination, Dr. Miniford testified the video was made before the presubmission meeting. The Hearing Examiner took notice that the ISKCON Hindu temple in Catonsville appears at the beginning of the video. (The location of this temple is shown on Protestants Exhibit 4.)



***Testimony of Ruth Olorunfemi***

43. Ruth Olorunfemi testified to residing on Cemetery Road (Parcel 17). She is a direct descendent of John Dorsey and Catherine Tyler Dorsey, both of whom were slaves on what was known as Bushy Park. She is concerned about the loss of old trees on the Property. Her relatives helped build Cooksville and maintained land on Millers Mill and Cemetery Roads. Many of her relatives are buried at Bushy Park Community Cemetery. Other relatives are buried at the Parker Cemetery on Cemetery Road. Burials are still being held at the Bushy Park Community Cemetery. She enjoys sitting on her deck because of the tranquility, the woods, the stream running through her property and the wildlife, which would be disrupted by the proposed use. She is concerned the proposed outdoor uses would conflict with the nature of the cemetery and those who visit the cemetery. The parking would be too close to her backyard and the car lights would face her bedroom window. Wildlife would be disturbed. A proposed religious facility is out of keeping with the exiting residential community look. On cross, Ms. Olorunfemi testified to her house being far back from the Property.

***Testimony of Paul Pappas***

44. Paul Pappas testified to residing on Cemetery Road. He is opposed to the proposed land use for safety reasons, the disruption to the tranquil community and impacts on the cemetery. People walk on the street, joggers run and cyclist bikes. The additional traffic will cause safety problems. In his opinion, the TSR Conclusion # 2 rests on the false narrative basis of 10 daily vehicle trips on weekdays and twice that on weekends. "The intensity of the use is

anticipated to be very low, given the relatively small size of the facility and the fact that the use of the facility will be spread throughout the day rather than for congregational assembly."

45. Mr. Pappas introduced Protestants Exhibit 13, a photograph depicting the distance from Cemetery Road to the Property, which he estimates to be about 100 feet. He is concerned about noise generated by outdoor activities, cars and congregants wanting to be outside on nice days to socialize. Of equal concern are the festivals, due to conflicting testimony about who will be attending. Mr. Pappas is also concerned about the impact of the proposed religious facility on the Bushy Park Community Cemetery. He introduced Protestants Exhibit 14, a photograph taken from inside the cemetery looking toward the Property, and which shows the blue door of the accessory structure. The photograph shows the narrowness of Cemetery Road and the proximity of grave markers close to the road (between the gravestone and the roadbed).

46. When questioned by the Hearing Examiner about Protestants Exhibit 14, Mr. Pappas explained the bent object is a road marker, of which there are many. From the grave marker to the road, the distance is about 6-7 feet.

***Testimony of James Haas***

47. James Hass testified to residing on Cemetery Road (Parcel 19), the adjacent western lot. His driveway has limited sight distance, due to a wall and bushes. He had an accident a few years ago. In his opinion, the proposed land use will exacerbate traffic safety problems.

48. There is a stream on his property created by a spring on his property. When it rains,

all stormwater runs into the stream. He introduced Protestants' Exhibit 15, which depicts a bridge across the heavily flooded and muddy stream, the result of a heavy rain. He also introduced Protestants' Exhibit 16, a copy of the Howard County Open Space Plan, and which references the role of forests in floodwater control, and Exhibits 17A & B, which depict the mature forests on the Property behind the sheds seen in the photos. The site plan calls for development behind the sheds. He also testified to the downward elevation on the western side of the Property, with rain running off onto his property. The ground on his property tends to be swampy and drainage is a problem. He is concerned removal of the trees on the Property will have an adverse effect on the drainage on his property and cause an adverse environment effect. When questioned by the Hearing Examiner, Mr. Haas testified that the stream may dry up if there is no rain for a long period. He has never discussed the natural widening of the stream with the county.

#### ***Additional Protestant Testimony***

49. Several additional Protestants testified in opposition to the petition, citing to the noise, traffic, environmental and public safety concerns and the rural nature and historic uniqueness of the neighborhood raised by the above Protestants, including Tracey Wheeler, Cindy Pappas, Dana Ward, Rachel Miniford Mullinix and Brian Alexander.

#### **Petitioner's Rebuttal**

#### ***Rebuttal Testimony of Mickey Cornelius***

50. Mickey Cornelius introduced Petitioner Exhibit 6, his resume. He is a certified professional traffic operations engineer and the vice-president of The Traffic Group. He offered testimony rebutting the Protestants' testimony about adequate sight distance and safe ingress and egress. Mr. Cornelius testified to the difference between intersection sight distance, as testified to by Mr. Vogel and controlling General Plan Note 15 on the Amended Plan, and stopping sight distance. The stopping sight distance (discussed in the below § 131.0.B.3.d evaluation) is 313 feet, which Mr. Cornelius mistakenly testified was depicted on the Amended Plan. Using the Hearing Examiner's copy of the Amended Plan, Mr. Cornelius pointed to the 313 feet distance, which the Hearing Examiner denoted with an asterisk. For clarity the Hearing Examiner identifies this depiction of the 313-foot stopping sight distance as Petitioner Exhibit 5. He also introduced Petitioner Exhibit 7, a State Highway Administration (SHA) generated Crash Listing Inventory for Howard County for the years 2008-2012, and which in the area of the proposed land use does not report any vehicle accidents. Petitioner Exhibit 8 is a photograph showing the view north from the proposed driveway. Mr. Cornelius testified to it being unlikely that the low volume use, with 20 persons a day exiting the proposed driveway at different times of the day would have the potential for accidents on Millers Mill Road.

51. Mr. Cornelius also introduced Petitioner Exhibit 9, which is a draft private sight distance easement for Parcel 136, and which when executed would be recorded in the Land Records of Howard County.

#### **CONCLUSIONS OF LAW**

Based upon the evidence of record, the Hearing Examiner concludes as follows.

**I. General Criteria for Conditional Uses (§ 131.0.B)**

HCZR §§ 131.0.B.1-3 require the Hearing Authority to evaluate a proposed Conditional Use through the application of three standards, harmony with the General Plan, overall intensity and scale of use and adverse impacts.

**A. Harmony and Intensity of Use (§§ 131.0.B.1 & .2)**

**1. The proposed Conditional Use plan will be in harmony with the land uses and policies in the Howard County General Plan which can be related to the proposed use.**

As the TSR explains, the PlanHoward2030 Policy 4.5 seeks to "Refine the Rural Conservation (RC) and the Rural Residential (RR) zoning regulations to provide greater flexibility for the agricultural community as well as appropriate protections for rural residents." The Implementing Actions are to "[e]xamine and amend where appropriate the list of accessory and conditional uses in the RC and RR districts, and refine uses and standards for approval" and to "[r]eview use designations (permitted by right, by permit, and conditional) in each Rural West zoning district, and determine whether amendments are needed to make some uses less or more restrictive." The TSR further explained that the 2013 Comprehensive addressed these Implementing Actions when the Zoning Regulations were reevaluated and a number of revisions were proposed and approved. However, there were no revisions which significantly reduced the general acceptability of religious facility uses locating in the Rural West.

**2. 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 are such that the overall intensity and scale of the use(s) are appropriate for the site.**

This general standard requires the Petitioner to demonstrate the proposed land use is appropriate at the proposed location based on three factors: a) the nature and intensity of the proposed land use, b) site size and c) the site's location with respect to streets providing access to that site. For the reasons set forth herein, the Hearing Examiner concludes Petitioner has not met his burden of production and persuasion to prove compliance with this standard.

a. The Nature and Intensity of Use. Petitioner's evidence going to compliance with this general standard consists of the CU petition, the Amended Plan and the Amended CU Narrative. Additionally, Robert Vogel testified to the proposed religious facility land use, including a Priest's Residence, as a low intensity use, although on cross-examination he testified to not being familiar with the four annual festivals proposed as part of the use. Also to be considered is Petitioner's testimony about the use. Concerning the appropriateness of the use at the proposed location in relation to the nature and intensity of the use, Mr. Vogel opined that it was appropriate based on the small percentage of lot coverage and the distance of area residences.

The proposed religious facility includes a Prayer Hall with a 1,270sf assembly area. Services would be held only in the Prayer Hall and would routinely be small and frequent. During the week and on Saturday, services would run from 10:00am-12:00pm and 5:00-8:00pm, with about 20 attendees spread throughout the hours the Prayer Hall is open. Congregants would attend these services intermittently for 5-10 minutes per visit. On Sunday, about 50 people would attend between 10:00am-1:00pm and 4:00pm-8:00pm. Four annual

festivals will be celebrated. Dr. Das testified to there being about 80 members. The proposed Priest's Residence will not be used for any religious activity.

As a first matter, the Hearing Examiner is obliged to evaluate all proposed conditional uses operating at full capacity. Four yearly festivals or major activities will be held on the Property, which evidences a more intense use. The proposed Prayer Hall has a 1,270sf assembly area. According to the Amended CUP Narrative, it can accommodate up to 100 people. The Priest's Residence, which the TSR did not incorporate into its recommendation (it not being proposed in the initial petition as part of the conditional use) may house up to eight persons. Accordingly, the Amended Plan shows 22 parking spaces for the assembly area and two for the Priest's Residence. Thus, when evaluating this CU petition, the intensity of the proposed religious facility is, at a minimum, a matter of the 1,270sf assembly use by 100 persons and the proposed Priest's Residence use, which may house up to eight persons.

The burden of production and persuasion going to compliance with § 131.0.B.1 rests squarely with Petitioner. Multiple Protestants challenged Petitioner's presentation of the proposed land use as a low intensity use during their cross-examination of petitioner witnesses and in their direct testimony. On cross-examination by Dr. Miniford, Petitioner Narash Das conceded persons other than the 80 congregants would attend services or the four festivals and that the 80-person attendance number could be higher or lower owing to the Hindu practice of temple visits. On cross by Charles Dorsey, Dr. Das testified that people might come from out of state to attend activities.

The Hearing Examiner also credits Protestants' rebutting evidence that a more intense use may be contemplated, notwithstanding Petitioner's contention, through counsel, that any presubmission statements are irrelevant to the evaluation of the petition, and further that any unapproved use of the conditional use, if the petition were approved, is more properly a matter of code enforcement, rather than grounds for denying the petition. The Hearing Examiner disagrees.

In the Hearing Examiner's view, a petitioner's representations at a presubmission meeting are not simply to be discounted as irrelevant. Pursuant to the Howard County Subdivision Regulations § 16.128 et seq., the purpose of a presubmission meeting is for a developer to provide information to the community regarding the proposed development and to allow community residents to ask questions and make comments. Presubmission meeting minutes are part of the record of a conditional use petition and need not be introduced into evidence. More pointedly, Protestants' interest in these presubmission meeting notes, as well as Protestants' video Exhibit 12, the Jagannath Temple Facebook Video, go to the credibility of Petitioner's representation of the proposed use. Having weighed the evidence of record, the Hearing Examiner is simply not persuaded the intensity of use will be as low as represented by Petitioner.

b. Site Size. The Hearing Examiner concludes the proposed use strictly complies with the 3.00-acre lot minimum.



c. The Site's Location With Respect to Streets Providing Access to the Site. Of great matter to this case is whether the overall intensity and nature of the proposed land use at the particular site use is appropriate, given the site's location vis-a-vis the streets that would provide access to the site. The Hearing Examiner's evaluation of Petitioner's ultimate compliance with § 131.0.B.1 is conservatively based on the religious facility as a 1,270sf assembly use of 100 persons and the Priest's Residence use by up to eight persons.

Millers Mill Road is the principal road providing access to the proposed site. It is a local road about 19 feet wide with two travel lanes and no sidewalks. It is also an open section roadway (without curb and gutter) with no shoulders. Petitioner's evidence going to compliance with this consisted in main part of Robert Vogel's testimony, having testified to not being familiar with the festival uses, that the proposed religious facility is a low intensity use owing to the nature of worship services and particularly because of its 3.15 percent lot coverage, the distance between the proposed use and area residences and a 10-trip daily vehicle trips on week days and twice that on weekends.

Protestant Michael Williams, a Howard County police force veteran who in one of his positions investigated traffic accidents and is now a Howard County Public Schools safety and security employee and Millers Mill Road resident, provided credible, substantial and thorough evidence about the nature of the streets giving access to the site. This evidence indicates that Millers Mill Road is about 1.1 miles in length between Bushy Park Road and Route 97. The posted speed limit on Millers Mill Road is 30MPH along the straight portions of the road. There

are about four sharp curves in the road where the posted speed limit is 15 or 20MPH. Sight distance at these curves is limited. Other Protestants presented credible evidence that Cemetery Road, which also provides access to the site, is even more of a rural road. Lanes are not marked. The tar and chip paving produces gravel along its edges. There are no shoulders. There is no posted speed limit. In some areas it is 17-18 feet wide. There is an almost 90-degree turn in the road. Residents who live on the west side of Millers Mill Road residents must cross the road to retrieve their mail, their mailboxes being located on the east side. On these access roads—which lack sidewalks and shoulders—neighbors walk their children to school or stroll in the neighborhood. Millers Mill and Cemetery Roads regularly host organized cycling club routes and these roads are popular with cyclists in general. Residents routinely walk these roads for graveside visits at the Bushy Park Community Cemetery. Funeral processions move through the roadways.

These findings convince the Hearing Examiner that the overall nature and intensity of the use, in conjunction with the size of the site, and *especially* its location to the streets that give access to the property, are inappropriate. When considering the use operating at full capacity, the intensity of use is greater than Petitioner claims. Petitioner's reliance on the percentage of lot coverage as a measure of intensity is specious. Religious facilities approved through the conditional use process in the RC zoning district, and actually built, have low lot coverages historically, less than 8 percent. The religious facility conditional use granted to Hosanna Baptist Church at 11424 Old Frederick Road for a 20-seat, 870sf assembly area in

Board of Appeals Case No. BA 03-055C, had a 1.7 percent lot coverage. The religious facility conditional use granted to Mt. Airy Bible Church at 16700 Old Frederick Road to expand to a 1,000 seat, 38,870sf assembly area in Board of Appeals Case No. BA 03-055C, had a 7.4 percent lot coverage. The lot coverage is similar in the RR zoning district. For example, the Board of Appeals in BOA Case No. 99-49E granted Gethsemane Baptist Church's conditional use petition to expand an existing religious facility at 14135 Burntwoods Road to accommodate two separate religious facilities, for 280 seats total, had a 6.25 percent lot coverage.

The proposed location of the religious facility with respect to the location of streets giving access to the property are part of the fabric of a unique rural neighborhood. Although the outermost boundaries of the neighborhood include a commercial nursery and a regional park, the location where the use is proposed is very much a local rural residential neighborhood. There was considerable credible Protestant testimony about the effects of the proposed use into the neighborhood.

In an analogous case, the court in *People's Counsel for Baltimore County v. Mangione*, 85 Md.App. 738, 584 A.2d 1318 (1990) concluded the Baltimore County Board of Appeals did not act arbitrarily and capriciously in denying appellees' request for a special exception to locate a large convalescent home in an area zoned for residential use, where the Board found uncommon problems with the intense proposed development at the proposed location, because the use itself represented in part the "*deepest intrusion into the residential community*" (emphasis added.) *Peoples Counsel v. Mangione*, 85 Md.App. at 743, 584 A.2d at

1320. In *Gotach Ctr. for Health v. Bd. of County Comm'rs of Frederick County*, 60 Md.App. 477, 481, A.2d 786, 789 (1984), the court similarly concluded the Frederick County Board of Appeals did not act arbitrarily and capriciously in denying the appellee's request for a special exception to operate a private school when it found in pertinent part "[t]hat the nature and intensity of the operation of the property for a private school in conjunction with the size of the property and *most particularly with its location to the streets that give access to the property* would not be in harmony with the appropriate and orderly development of the neighborhood in which it is located" (emphasis added.)

Although the general standards for conditional uses do not contain express language requiring "harmony with the appropriate and orderly development of the neighborhood in which it is located," HCZR § 130.0.C, Limitations, Guides and Standards, orders the Hearing Authority (the Hearing Examiner and the Board of Appeals) to disapprove a use after an "examination of the specific property involved and the immediate neighborhood" and after considering in pertinent part "the most appropriate use of land and structures", where the Hearing Authority finds the use would menace the public health, safety, security, or general welfare, or would result in dangerous traffic conditions, or would jeopardize the lives or property of people living in the neighborhood. In this case, I described my November 19, 2015 site visit on the record. During that site visit, I traveled up and down Millers Mill and Cemetery Roads and became knowledgeable about the curving rural roads giving access to the site, rural roads, which in character, are substantially different than the roads giving access to the

multiple religious facility conditional uses I have approved during my almost 10-year tenure as a hearing examiner. Perforce of this knowledge, I cancelled the continuation hearing scheduled for January 28, 2016 after the January 22-24 crippling blizzard, even after learning Millers Mill Road had been plowed (before the county snow-tracking was taken down), out of concern for the safety of area residents travelling on these roads.

**B. Adverse Impacts (§ 131.0.B.3)**

Unlike § 131.0.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, or § 131.0.B.2, which concerns the on-site effects of the proposed use, compatibility of the proposed use with the neighborhood is measured under § 131.0.B.3's six off-site, "adverse effect" criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading; (d) access; (e) environmentally sensitive areas; and (f) historic sites. Inherent in the assessment of a proposed Conditional Use under these criteria is the recognition that virtually every human activity has the potential for adverse impact. The assessment therefore 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 district. The proper question is whether there are facts and circumstances showing 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 applicable zones. *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, Petitioner has not met his burden of presenting sufficient evidence under HCZR §131.0.B.3 to establish the proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with a religious facility in the RC zoning district.

**a. The impact of adverse effects such as, but not limited to, noise, dust, fumes, odors, intensity of lighting, vibrations, hazards or other physical conditions will be greater at the proposed site than it would generally be elsewhere in the same zoning district or other similar zoning districts.**

There is no evidence of any atypical adverse effects on vicinal properties from noise, dust, fumes, odors, intensity of lighting or hazards or other physical conditions. Protestants' general concerns about noise and lighting are typical effects associated with religious facilities.

**b. The location, nature and height of structures, walls or fences, and the nature and extent of the existing and/or proposed landscaping on the site are such that the use will not hinder or discourage the development and/or use of adjacent land and structures more at the subject site than it would generally elsewhere in the same zoning district or other similar zoning districts.**

No new walls or fences are proposed. The proposed Prayer Hall would be located the distances as follows from every lot line: to the north lot line: 83.6'; to the northwest corner of the Property, 325.19'; to the south lot line, 8.06' and to the closest eastern lot line, 125'. The Priest's Residence, currently a non-conforming residential use would sit 5.5' from the south lot line. The garage, also a non-conforming structure and proposed to be used only for storage, would site 12.2 feet from the front section, north lot line.

According to Robert Vogel's testimony, retention of several forested areas together with

the "substantial landscaping" proposed, as set forth in Schedule A of the Amended Plan, will ensure the proposed use will not hinder or discourage the development and/or use of adjacent land and structures more at the subject site than it would generally elsewhere in the same zoning district or other similar zoning districts. Based on DLD's advisory comments, the proposed landscaping is not as substantial as Mr. Vogel opined, and the Landscape Plan would need to be revised for compliance. Had the Hearing Examiner approved the conditional use petition, it would have been conditioned on compliance with DLD's landscaping comments.

**c. The number of parking spaces will be appropriate to serve the particular use. Parking areas, loading areas, driveways and refuse areas will be appropriately located and buffered or screened from public roads and residential uses to minimize adverse impacts on adjacent properties.**

No loading or refuse areas are proposed. A kitchen is proposed, which suggests the need for a refuse area. Had the Hearing Examiner approved the petition, it would have been conditioned on the kitchen being designed and used only for reheating and not as a commercial kitchen for full food preparation service and providing a screened refuse area. The Hearing Examiner would also have required the two parking spaces for the Priest's Residence be relocated next to the dwelling.

**d. 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. For proposed Conditional Use sites which have driveway access that is shared with other residential properties, the proposed Conditional Use will not adversely impact the convenience or safety of shared use of the driveway.**

*A Background Issue.*

*What Are We Testing For When We Test for Atypical Adverse Impacts  
From Proposed Ingress and Egress Drives?*

HCZR § 130.0.B.3 requires the Hearing Examiner to evaluate a conditional use petition for potential off-site adverse impacts, whether the proposed land use at the proposed location would generate any atypical adverse impact on the surrounding neighborhood that cannot be mitigated. HCZR § 131.0.B.3.d specifically tests for whether the proposed ingress and egress drive for a particular land use will provide safe access with adequate sight distance without atypical adverse impacts on the neighborhood.

It was once standard operating procedure for conditional use petitioners and conditional use TSRs to provide a generalized assessment of compliance with HCZR § 131.0.B.3.d, with the caveat that a precise sight distance analysis would be conducted later on in the development review and permitting stage. Dirt lawyers call this "punting." Petitioners have analogously and unsuccessfully argued in specific conditional use petition cases that hearing examiners possess limited, if any, discretionary authority to impose conditions to ensure safe access or to deny a petition based on access concerns. See Hearing Examiner Board of Appeals Case No. 10-011C (Donaldson Funeral Home, decided November 29, 2010.)<sup>3</sup>

These arguments are predicated on a false "division of labor," "regulatory separation of powers" logic that certain aspects of a conditional use plan development are properly reviewed under the aegis of county agencies at a later phase in the development review and approval process. This false logic misapprehends the testing objective of § 131.0.B.3.d. When a

---

<sup>3</sup> The Donaldson funeral home petitioner appealed the Hearing Examiner's denial to the Board of Appeals, which granted the petition. Protestants appealed the Board decision to the circuit court, which upheld the Board. The case is currently on appeal to the Court of Special Appeals.



conditional use petition is before a hearing examiner, the examiner does not review the evidence for conformance with county subdivision regulations or the Howard County Design Manual, Vol. III, Design of Roads and Bridges. Section 131.0.B.3.d does not cite to these regulations and standards as a regulatory directive limiting the evaluation to compliance with them. There is no such citation directive because this is not what is being tested at the conditional use petition hearing phase of development.

What *is* being tested for is atypical off-site neighborhood characteristics associated with the proposed ingress/egress drive for the proposed land use at the particular location on the particular roadway, which may warrant additional analysis to determine whether any such characteristics have impact greater at the site than the same use elsewhere in the zoning districts where the conditional use is permitted. The analytical focus is the *locality* involved in the specific proposal (emphasis added). See e.g., *People's Counsel v. Loyola*, 406 Md.App. 54, 104, 956 A.2d 166, 194-195 (2008) (quoting *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981)).<sup>4</sup> The inquiry looks for atypical adverse interference with the safe streaming of traffic on a particular roadway as vehicles pull out of the driveway for the proposed conditional land use onto the particular roadway. If there are atypical impacts, the hearing examiner makes a further determination as to whether conditions of approval will mitigate the undue harm to the neighborhood. If, after considering such mitigating measures, the Hearing Examiner concludes

---

<sup>4</sup> *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981) is the bell weather case on the adverse impact tests to be applied to special exceptions (conditional uses) by boards of appeals. The high court in *People's Counsel for Baltimore County v. Loyola College* offers a sustained exegesis of the case law informing the *Schultz* decision and the subsequent and significant case law weighing in on the interpretation of the *Schultz* test.

they are unachievable on the face of the conditional use plan, the petition must be denied. For these reasons, the information conditional use petitioners provide about sight distance is an estimate, not a "precise sight distance analysis."

Petitioner employed alternative methodologies to meet his burden of proof under § 131.0.B.3.d. Petitioner rebuttal witness Mickey Cornelius used a stopping sight distance (SSD) estimate methodology. As he explained, SSD tests the minimum stopping distance for a driver to be able to stop safely without hitting an object in the road, when driving at a certain speed. It measures only the approach to an object at an intersection, in this case the proposed religious facility driveway. SSD testing has a limited focus: determining the length of a visible roadway ahead when a driver first sees an object in its path, and when brakes are applied, and the distance required to stop after the brakes are applied, as regulated by county laws and regulations. It does not bear on the location of the proposed land use egress drive/driveway/intersection.

The Amended Plan, prepared by Robert Vogel, who testified about this aspect of the petition in his direct testimony and on recall by the Hearing Examiner, incorporates an intersection sight distance (ISD) estimate analysis. An ISD estimate evaluation gauges the distance a person sitting in a vehicle at a certain height at an intersection—in this case the proposed driveway—needs to see in either direction to comfortably pull out of the intersection (depart the property) into the road and neighborhood, at a certain speed of oncoming traffic. An ISD analysis consequently derives sight distance by dimensioning a clear sight distance

triangle based on a motor vehicle operator's view and specific location at an egress drive/driveway/intersection. Unlike SSD, which is based on an object (vehicle) in the road, ISD factors in potential obstructions and the extra time needed to pull out of a land use egress drive/driveway/intersection without interfering with the speed of other cars—without making them slow down—traveling on the neighborhood road. It takes into account the locality of the proposed land use egress/driveway/intersection.

The Hearing Examiner routinely accepts stopping sight distance estimates, after considering together the proposed ingress/egress drive, the proposed conditional land use and the neighborhood road, when traffic safety is not at issue and there are no apparent sight obstructions. In this scenario, a stopping sight distance estimate is a reasonable access, limited, proxy test for atypical impacts. Intersection sight distance is the appropriate test when the locality of the proposed ingress/egress drive for a particular land use in a particular neighborhood, implicates potential traffic safety and potential sight obstructions warranting additional analysis. This "heightened" test will determine if specific approval conditions are obligatory to mitigate undue harm to the neighborhood. Guiding this reasoning is the Hearing Examiner's overarching discretionary authority to impose access conditions to reduce or prevent potential traffic hazards and to protect the public welfare pursuant to HCZR § 130.0.C., which, as was invoked in reference to compliance with § 131.0.B.2.c, unconditionally commands the Hearing Authority to deny an application where the authority finds the proposed structure, addition, extension of structure or use, use or change of use, would

menace the public health, safety, security, or general welfare, or would result in dangerous traffic conditions, or would jeopardize the lives or property of people living in the neighborhood.

-----

In this case, based on Mr. Vogel's ISD testimony, together with Amended Plan General Note 15's acknowledgement that adequate vehicular sight distance requires establishment of a sight distance easement on Parcel 18, the Hearing Examiner concludes Petitioner has not met his burden of production and persuasion that the proposed ingress/egress driveway/intersection will provide safe access with adequate sight distance, based on actual conditions. This accords with the TSR's conclusion that "[t]he Petitioner needs to demonstrate that the ingress and egress drive will provide safe access with adequate sight distance, based on actual conditions." TSR, pg. 7. Here, inadequate sight distance at the proposed driveway would generate modal conflicts, undue delay and safety, between vehicles negotiating the intersection (the proposed driveway) and vehicles and cyclists on Millers Mill Road. Also to be considered is the location of a bus stop in front of adjoining Parcel 139, 1924 Millers Mill Road (Protestants Exhibit 11). With inadequate ISD, there will be interference with the stream of traffic on Millers Mill Road, an open section rural road with no shoulders in a unique locality.

The evidence supports the conclusion that Petitioner fully appreciates these conditions as atypical and aims, unsuccessfully, to mitigate them by implicating the county's right to take

or maintain the 15' "prescriptive" ROW shown on the Amended Plan.<sup>5</sup> On the ISD clear sight distance triangle, Mr. Vogel testified it *possibly* lay outside the "prescriptive" ROW or inside the ultimate ROW, but that the County has the right to take or maintain this adjacent land if necessary, which, as the Hearing Examiner understands this testimony, would resolve the sight distance problem after the trees on the Property and adjoining Parcel 136 are removed.

The Hearing Examiner accords no evidentiary weight to the matter of the "prescriptive" ROW as a mechanism to mitigate atypical adverse impacts, it being equivocative and disingenuous. I am aware of no conditional use plan where a *county maintenance* "prescriptive" ROW was depicted on a CUP to prove a petitioner's wherewithal to mitigate atypical adverse impacts. Even more, multiple photographs in Protestants Exhibit 10, Mr. Williams' Power Point presentation about Millers Mill Road, unmistakably shows substantial vegetation within this "prescriptive" ROW, and from which the Hearing Examiner infers such maintenance is discretionary and complaint driven, not an affirmative governmental obligation to support a private property owner's quest for conditional use approval. This inference is bolstered by Protestant Chris Bowen's testimony on cross-examination that the very Petitioner in this case filed a complaint about trees Mr. Bowen had planted on his Parcel 136 property within the

---

<sup>5</sup> The Hearing Examiner was admittedly perplexed by this depiction of the prescriptive ROW and Mr. Vogel's testimony about same and for this reason recalled him for clarification, explaining that "prescriptive rights of way" when shown on plans have a meaning different from its use in this case. Mr. Vogel did not cite to the controlling code or Design Manual language or any other road policy authorizing such maintenance. The Hearing Examiner takes notice that Howard County Code § 21.305 et seq., which regulates sight distance obstructions to traffic, authorizes the Director of Public Works to make determinations that a physical obstruction, other than a building, on a public ROW restricts the vision of drivers on a height such that the obstruction creates a hazardous condition. On making such a determination, the Director notifies the property owner of the condition and the steps necessary to correct the obstruction.

ROW. Mr. Bowen removed the offending vegetation on receiving a citation. This removal does not appear to have resolved the ISD issue.

**e. The proposed use will not have a greater potential for adversely impacting environmentally sensitive areas in the vicinity than elsewhere.**

The TSR identifies an off-site stream located about 1,500 feet to the south of the Property. James Haas, the owner of Parcel 19 to the west of the Property and north of this stream, testified to a widening stream running through his property and which can be seen at high level in Protestants' Exhibit 15. Ms. Olorunfemi also testified to a stream running through her property. Had the Hearing Examiner approved the conditional use petition, it would have been conditioned on Petitioner and county agencies factoring in these streams in the Environmental Concept Plan, if required by federal, state and local regulations, and during the SDP phase.

**f. The proposed use will not have a greater potential for diminishing the character and significance of historic sites in the vicinity than elsewhere.**

PlanHoward Policy 4.5 called for the refinement of the RC and RR zoning regulations to "provide greater flexibility for the agricultural community as well as appropriate protections for rural residents." Implementing Action 4.5.a recommended amending the standards for conditional use approval to realize this goal. The 2013 Comprehensive Zoning Plan was the major regulatory vehicle for implementing Action 4.5.a.

DPZ's February 25, 2013 "Preliminary Comprehensive Zoning Plan: Regulation Highlights" is an overview of the pertinent regulatory amendments included in the Preliminary

Comprehensive Zoning Plan presented to the Planning Board. Concerning § 131.0, this document explained the entire section is undergoing comprehensive revision, including modifying and expanding the General Standards used to evaluate all Conditional Use categories in order to better ensure Conditional Use proposals are compatible with, and do not negatively affect, the neighborhood in which they are proposed. To this end, § 131.0.B.3 was proposed to be amended to add tests for atypical adverse impacts on vicinal environmentally sensitive areas and historic sites (§§ 131.0.B.3.e & .f) The 2013 Comprehensive Zoning Plan enacted by the County Council included these tests with no change in language.

Since the October 6, 2013 effective date of the Comprehensive Zoning Plan, TSRs, petitioners and the Hearing Examiner have had occasion to review petitioner's compliance with § 131.0.B.3.e only in reference to historic sites designated by County Council resolution, i.e., the Howard County Historic Sites Inventory. However, the plain language of § 131.0.B.3.e does not cite to the Historic Sites Inventory as a regulatory directive limiting proof of compliance with this standard to this Inventory. Consistent with the goals of PlanHoward2030, § 131.0.b.3.e is written broadly to accommodate fact-specific, neighborhood-specific compliance.

In this case, the TSR identified the closest historic site to the proposed conditional use site as the 1850s "Sarah Jane Powell Log Cabin" (HO-102), located some 2,600 feet to the southeast of the Property. Protestants Charles Dorsey, Ruth Olorunfemi and others testified to the Millers Mill/Cemetery Road neighborhood itself being an historic African-American "site" within Cooksville, anchored on the south by the Mt. Gregory United Methodist Church (HO-

276) and the Sarah Jane Powell Log Cabin, and on the north, by the Bushy Park Community Cemetery. In this neighborhood reside descendants of persons, including freed persons and slaves, who founded the Cooksville community or lived in it. These descendants walk along Millers Mill Road and Cemetery Road when they make graveside visits to their loved ones. Burials are still held at the cemetery with attendant funeral processions. Protestant Colin Wood testified to three historic gravestones sitting less than 5 feet from Cemetery Road and to drivers pulling off the road, which in this area could result in the destruction of these stones. Protestant Paul Pappas testified to photographic Protestant Exhibit 14 showing the narrowness of Cemetery Road and the proximity of grave markers to the road. The bent object seen in the photograph is a road marker. Charles Dorsey, one of the leaders of Mt. Gregory United Methodist Church, testified to his belief that much of the opposition to the proposed land use turns on a 100-person assembly use and residence being constructed near "sacred grounds."

Beyond the immediate history of this Cooksville African-American neighborhood and community, there was also testimony about the neighborhood's significance to the history of African-American life in Howard County. Charles Dorsey testified to more than 60 veterans, dating back to the Civil War, being buried in the Bushy Park Cemetery. Mt. Gregory United Methodist Church was once the site of Cooksville High School, a segregated public school between 1929 and 1949.

In the Hearing Examiner's view, Protestants' rebuttal evidence goes to this historic African-American, Millers Mill/Cemetery Road section of Cooksville being a "vicinal" historic



site, within which is located the subject property proposed as the site of a 100-person assembly use. Bolstering this view is the fact that the Historic Sites Inventory includes multiple property/area "sites," including Allview Estates (HO 10-092); Arrowhead Subdivision (HO-091); the Patapsco Quarry Company Sites (HO-733) and the Levering Avenue Survey District (HO-785). The land use proposed to be inserted on Millers Mill Road will have greater potential for diminishing the character and significance of an historic site in the vicinity than elsewhere. The presence of the proposed use cannot be mitigated.

**II. Specific Criteria for Religious Facilities, Structures and Land Used Primarily for Religious Activities (§ 131.0.N.42)**

**a. The minimum lot size in the RC and RR Districts is three acres and the minimum lot size in the other districts is one acre, however, existing religious facilities previously approved as a Special Exception or a Conditional Use are exempted from this requirement. Lot coverage shall not exceed 25% of the lot area.**

The religious facility Property is 3.35 acres, which exceeds the three-acre minimum lot size for RC-zoned properties and the lot coverage is 3.15%, in compliance with § 131.0.N.42.a.

**b. Structures 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.**

The proposed 18-foot high Prayer Hall will be lower than the maximum 40 feet. The petition complies with § 131.0.N.42.b.

**c. The access to the facility shall not be on a driveway or private road shared with other uses.**

The Hearing Examiner notes that had the petition proceeded on the original petition, it would have had to be denied as a matter of law, because it would share a driveway with another use, the residential use. Because the Amended Plan depicts the entire subject property as the conditional use site, it complies with Section 131.0.N.42.c.

**d. 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 Section 133.0.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.**

This standard does not apply, as no parking facilities on a separate lot are proposed.

### **III. The Requested Variances**

Petitioner having not met his burden of production and persuasion as to compliance with the general standards for conditional uses, the variances must be dismissed.

**ORDER**

Based upon the foregoing, it is this **5<sup>th</sup> day of May 2016**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Conditional Use Petition of Naresh C. Das for a new religious facility, structure, and land use primarily for religious activities is **DENIED**.

It is **FURTHER ORDERED** that the Petition of Naresh C. Das for multiple variances for a new religious facility, structure, and land use primarily for religious activities is **DISMISSED**.

HOWARD COUNTY BOARD OF APPEALS  
HEARING EXAMINER

  
\_\_\_\_\_  
Michele L. LeFaivre

**Date Mailed:** \_\_\_\_\_

**Notice:** A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 calendar 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.