

IN THE MATTER OF : BEFORE THE
:
DONALDSON FUNERAL HOME : HOWARD COUNTY
:
Petitioner : BOARD OF APPEALS
:
BA Case No. 10-001C
:

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DECISION AND ORDER

The Howard County Board of Appeals (the “Board”) convened on January 10, February 28, March 1, March 8, May 3, May 29, May 31, June 14, August 2, August 14, August 23, October 9, October 25, November 1, November 27, November 29, 2012, January 22, January 24, January 31, March 5, March 14, April 4, and April 30, 2013 to hear and deliberate the amended petition of Donaldson Funeral Home (the “Petitioner”) for conditional use approval of a Funeral Home and Mortuary in an RR-DEO (Rural Residential: Density Exchange Option) Zoning District filed pursuant to Section 131.N.22 of the Howard County Zoning Regulations (the “Zoning Regulations”).

All Board members were present at all hearings or present for voting purposes having reviewed all of the evidence submitted and having listened to a recording of any portion of the hearing for which the members were not present. Chairmen John Lederer and James Walsh presided over all hearings. Barry Sanders, Assistant County Solicitor, served as legal advisor to the Board.

The Petitioner provided certification that notice of the hearing was advertised and certified that the property was posted as required by the Howard County Code. The Board members indicated that they had viewed the Property as required by the Zoning Regulations.

The Petitioner was represented by counsel, Sang Oh, Esquire. Protestants Shun Lu, the unincorporated Clarksville Residents Against the Mortuary, and the incorporated Clarksville Residents Against Mortuary Defense Fund, Inc., were represented by counsel, Katherine L. Taylor, Esquire. Protestant Alan Schneider appeared *pro se*.

The case was conducted in accordance with Section 2.209 of the Board's Rules of Procedure. The Howard County Code, the Howard County Charter, the Howard County Zoning Regulations, the various technical staff reports and agency comments, the recommendations of approval of the Department of Planning and Zoning ("DPZ") in its Technical Staff Report ("TSR") dated March 17, 2010, an amended TSR dated February 1, 2012 ("First TSR Addendum"), an amended TSR dated September 24, 2012 ("Second TSR Addendum"), the General Plan for Howard County, the General Plan of Highways, and the revised or amended conditional use plan dated September 7, 2011 submitted by the Petitioner were incorporated into the record by reference.

The following persons testified in favor of the petition: Jeffrey Samelson, William Erskine, John Gary, Robert Vogel, Carolyn Gale Bryant Stanford, Timothy Baker, Donna Curp, Ralph Fletcher, Laurie Blitz, George Hamlin, Jay Donaldson, and Mickey Cornelius.

The following persons testified in opposition to the petition: Zachary Fisch, Shun Lu, Peter Li, Wesley Johnson, Trusha Amin, Kenny Kan, Andy Sun, Sally Swygert, Michael Faulkender, Xiaoli Jin, Marianne Lee, Grace Chi, Anthony Redman, Omer Davaz, Stacy Jackson, Michael Ball, Laura Crandon, Brian Snow, Tiru Liang, Richard Klein, Alan Schneider, Yimin Hu, Delong Liu, Veronika Carella, Soon Park, and Cathy Stefano.

The following persons testified in favor of the petition during the Petitioner's rebuttal case: Robert Vogel, Mark Eisner, Mark Burchick, Mickey Cornelius, Dimitra Zozos, Jennifer Yocum, and Robert Golden.

The Petitioner offered, and the Board accepted, the following documents into evidence:

Petitioner's Exhibits

1. Architectural Plan for proposed Donaldson Funeral Home (3 sheets)
2. Section 103 of Howard County Zoning Regulations – Definition of Compatible
3. E-mail from Ed Hammerberg, Maryland Department of Environment, to John Gary dated November 4, 2011 with attachments
4. Vicinity Map Exhibit – March 2010
- 5.A-O Various photographs of the surrounding area
- 6.A Lighting Proposal for Donaldson Funeral Home (11/10/11)
- 6.B Generation 3 LED Area Lights-information sheet
- 7.A Lighting Proposal for Donaldson Funeral Home (11/10/11)
- 7.B Patriot Lighting – information sheet
8. Information sheet-Floodline Water Detection Tape
9. Aerial photograph showing Clarksville Pike and Guilford Road
10. Revised Conditional Use Plan for Donaldson Funeral Home – 9/7/11
- 11.A/B Formaldehyde Vapor Analysis Report
- 12.A Formaldehyde summary
- 12.B Formaldehyde Guidelines from US Dept. of Labor/Occupational Safety & Health Administration
- 13.A/B Formaldehyde Vapor Analysis Report dated 4/20/12 re: Donaldson
14. Aerial photograph of Witzke Funeral Home (Old Columbia Pike)
15. Aerial photograph – Thunder Hill/Patuxent Parkway
16. Aerial photograph – Old Columbia Pike/Hunter Road
17. Chart showing Traffic Volumes on MD 108 by hour
18. Bypass Lane and Deceleration Lane Exhibit to Accompany Conditional Use (9/7/11)
19. Section 16.116 of the Subdivision Regs. – Protection of Wetlands, Streams, and Steep Slopes
20. Site Development Plan and Grading Plan Christ Lutheran Church (SDP-06-32, dated 9/7/06)
21. Plat of the Preserve at Clarksville (F-06-72, May, 2007)
22. Howard County Code § 3.804(2)
23. Site Plan for Christ Lutheran Church (SDP-06-32, 9/7/06)
24. Excerpt from the Howard County Zoning Regulations (page 319-Sec. 133.D.7.b (parking requirements))
25. Definition of the word “Room” (from Dictionary.com)
26. Section 131.N.22, Funeral Home regulations
27. Definition of “Lot” (per Zoning Regulations)

28. Deed for the subject property dated 10/16/09 from Thomas L. Reedy Living Trust to Donaldson Properties
29. Google Map with distance line indicated
30. ReMax Information Sheet-homes sold in area
31. Sheet entitled "Please Come to Oppose Building a Large Mortuary/Funeral Home in Rural Residential Near the St. Louis School"
32. Revised Plan dated 8/15/12
33. Howard County Zoning Map
34. SDAT Real Property Search for 12598 Clarksville Pike, Clarksville, MD (owned by Tiru Liang)
35. Manufacturer Brochure – Double Wall Fiberglass Underground Storage Tanks
- 36.A Ground Floor Architectural Plan showing insulated drain line
- 36.B Architectural Plan showing insulated drain line
37. Site Plan showing the Building Envelope and Green Area
38. Definition of a Lot in Howard County
39. Package including Section 16.120 of the Subdivision Regulations
40. Definition of 'Compatible'
41. Site Plan titled 'Cross Section from the Preserve at Clarksville to Donaldson Funeral Home'
42. Site Plan for Christ Lutheran Church (SDP 06-32, 9/7/06) with highlights (same as Exhibit 23)
- 43.A-C Three photographs of wetlands
44. Email chain between Dimitra Zozos of Vogel Engineering and Ed Shilling, Battalion Chief, Howard County Fire Department
45. Email from Jeff Williams at the Howard County Health Dept. to Robert Vogel
46. Map showing the Woods of Tiber Branch developments
47. Real Property Data Sheet showing the Property Owners in the Woods of Tiber Branch developments
48. Curriculum Vitae of Mark W. Eisner, P.G.
- 49.A-W Copy of PowerPoint Presentation presented by Mark W. Eisner, P.G.
50. Copies of Washington Suburban Sanitary Commission Water and Sewer Bills for 313 Talbot Avenue
51. Resume of Mark Burchick, Environmental Scientist
52. Map showing Stream Segment Use Designation in Howard County
53. Maryland Stream Water Use Classification Chart
54. Map titled High Quality (Tier II) Waters in Maryland
55. Map titled High Quality (Tier II) Waters in Howard County
56. Tier II High Quality Waters Map of Carrolls Branch 1
57. Tier II High Quality Waters Map of Patuxent River UT 2
58. Drainage Area Map for subject property & surrounding area
59. SDAT Property Search for Heather Glen Way w/two maps
60. SDAT Property Search for NE Prestwick Drive w/three maps
61. Vehicle Queue Summary of MD 108 NB prepared by The Traffic Group
62. Traffic study statistics for MD 108 south of Guilford Road from 14:30 to 19:45 on 1-9-2013 prepared by The Traffic Group, Inc.
63. Traffic study statistics for MD 108 @ site access prepared by The Traffic Group

64. Article from Explore Howard – “Clarksville man charged with homicide, DUI in fatal collision” (dated 10/12/09)
65. Analysis dated 3/6/12 – “Two-Way Two-Lane Highway Segment Worksheet”
66. Letter dated 2/1/13 from Edgar Shilling, Office of Fire Marshal to Robert Vogel Engineering
67. Resume for Jennifer Yocum, Feng Shui Consultant
68. Curriculum Vitae for Robert J. Golden, Ph.D., Toxicology Expert

The Protestants offered, and the Board accepted, the following documents into evidence¹:

1. Google Map of 108 property
2. Google Map of Laurel property
3. Google Map of Odenton property
5. Google Map of intersection of 108 & Clarksville Pike
6. CU Plan dated 9/7/11 prepared by Robert H. Vogel Engineering, Inc., with colored markings by Mr. Fisch
7. Donaldson Funeral Home Design with cross hatching indicating public space available
8. Diagram showing the Green Space Calculation dated 3/29/12
9. Perc Certification Plan prepared by Robert H. Vogel Engineering with colored markings by Mr. Fisch (dated Nov., 2009)
10. MDE Guidance on WasteWater Flows for Use in Designing On-Site Systems
11. Line of Sight Exhibit from Neighboring Properties (5/29/12)
12. E-mail chain between Jeffrey Williams and Zach Fisch regarding flow rates
13. E-mail chain between Jeffrey Williams and Zach Fisch regarding separation between well and septic
14. Stream Segment Use Designation Map of Howard County
15. Section 16.116, Protection of Wetlands, Streams and Steep Slopes (Subdivision Regulations for Howard County)
16. Section 103 of the Zoning Regulations (Definition of Building Restriction Line)
17. Section 2.7 of Design Manual Volume III for Howard County
18. E-mail between Bob Lalush and Zach Fisch dated May 1 & May 2, 2012 re: green space
19. Excerpt from Maryland COMAR giving definition of “Lot Area”
20. Section 3.808 of the Howard County Code (location of on-site sewage disposal)
21. Excerpt from Maryland COMAR 26.04.02.05 (Design and Construction of Conventional On-Site Sewage Disposal Systems)
22. Percolation Test Results letter dated August 19, 2009 (for 12540 Rte 108, Howard County, MD)
23. Copy of PowerPoint Presentation by Peter Li, Geologist Re: Impact of Funeral Home on Groundwater Supply
24. Pages 23 and 24 of EPA study
25. Google Aerial Map
26. Howard County River Hill Study Area Land Use Map

¹ Protestants’ Exhibits 4, 30, 31, 32, 33, 36, 37, 50, 55, 59, 66, and 72 were marked for identification but were not admitted into evidence.

27. Letter from the River Hill Village Board dated June 6, 2012, designating Kenny Kan to speak on their behalf
28. Google map of Clarksville Overlook with text box added by Michael Faulkender
29. Letter from Clarksville Overlook Homeowners Association dated July 31, 2012, authorizing Michael Faulkender to speak on their behalf
34. High Quality (Tier II) Waters in Howard County
35. Authorization from the Association of Local Businesses allowing Omer Davaz to testify on their behalf
38. Subdivision Regulation 16.108.b.7 – Building Envelope
39. Sketch dated August 19, 2012 which denotes green areas
40. Map – Drainage Area map to Tier II stream with GIS Topo and visual photograph
41. State of MD Dept. of the Environment Application Form/Notice of Intent for National Pollutant Discharge Elimination System
42. Plan dated 9/7/06 – Soils, Sediment and Erosion Control Plan of Christ Lutheran Church with highlighting on the Plan by Mr. Fisch
43. Clarks Glen Community Association, Inc., Resolution of the Board of Directors
- 44.A Resume of Brian Snow
- 44.B Individual Sheet describing Brian Snow's background
45. Text read by Mel Currie, June 10, 2011 at the CMI annual banquet for Brian Snow's Induction as a "Distinguished Member of the Cryptomathematics Institute"
46. Article – Understanding and Managing Risk Security Systems for the DOE Nuclear Weapons Complex
47. Curriculum Vitae of Richard D. Klein, President, Community & Environmental Defense Services
48. Curriculum Vitae of Anthony Redmond, AICP
49. Diagram titled Carroll Branch tributary watershed
51. Photos of closest residences to the subject site
- 52.A DVD showing trash trucks
- 52.B DVD showing wildlife
53. Photo of Tier II stream
54. Photos of stream and natural area
56. Photos of Witzke Funeral Home on Twin Knolls
57. Photos of Witzke Funeral Home on Old Columbia Pike
58. Photos of residential zoned property in Ho. Co.
60. Howard County Traffic Volume Map
61. Pre-submission Community Meeting notes
62. 4 photographs of school
63. First page of State of Maryland Report "Maryland's Children and the Environment"
64. Maryland Children's Environmental Health Progress Report dated January 2013
65. Howard County 2012 Water Quality Report
67. EPA Compliance – 'Funeral Home Waste Disposal' – page 1 and Public Health Significance of Cross-Connections – page 2
68. Article 'Formaldehyde (Gas) CAS No. 50-00-0'

69. Drinking Water Quality Reports of Lisbon Elementary, Old & New Bushy Park Elementary, Glenwood Elementary, Dayton Oaks Elementary, Folly Quarter Middle and Glenelg High School
70. PowerPoint Presentation – Formaldehyde Creates Hazard to Human by Soon Park
71. Funeral Home Parking Data Study prepared by Cathy Stefano

As a preliminary matter, on January 10, 2012 and August 23, 2012, the Petitioner submitted revised conditional use plans to the Board (all filed conditional use plans collectively referred to herein as the “Plan”). In accordance with Sections 2.202(b) and (c) of the Board’s Rules of Procedure, the Board remanded the amended petitions to DPZ for further recommendations. On February 1, 2012, DPZ issued the First TSR Addendum. On September 24, 2012, DPZ issued the Second TSR Addendum.

FINDINGS OF FACT

Based upon the evidence presented at the hearings, the Board makes the following Findings of Fact:

1. The subject property (the “Property”) is located in the 5th Election District on the west side of Maryland Route 108, approximately 1,600 feet south of Maryland Route 32. The Property is referenced on Tax Map 34, Grid 12 as Parcel 45 and is also known as 12540 Clarksville Pike.

The 3.207 acre, trapezoid-shaped Property is currently improved with a single-family detached dwelling located in the front northern area of the Property. Several sheds are situated to the rear of the dwelling and a gazebo is depicted at the rear of the Property. Two gravel driveways provide access. All existing structures and driveways will be removed for the proposed development.

The Property is predominantly wooded. The topography drops gradually from east to west. A perennial stream is located on Parcel 77 adjoining the rear of the Property, and an unnamed tributary is located at the northwest corner of the Property.

2. Vicinal Properties. Adjoining the Property to the north is Parcel 196, an approximately 17.18 acre parcel zoned RR-DEO. Parcel 196 is the site of the St. Louis Catholic Church, which property is improved with a chapel and sanctuary buildings, a school building, and ancillary structures and parking lots located primarily in the northeast area of the parcel. In the southern portion of Parcel 196 is an approximately 6,470 square foot rectory located approximately 54 feet from the south property line

To the east of the Property, across Maryland Route 108, is Parcel 162, which is zoned RR-DEO and is improved with a two-story single family detached dwelling set back over 180 feet from Maryland Route 108. Surrounding Parcel 162 is the approximately 86 acre Parcel 88 zoned RR-DEO and used as a farm field.

Adjoining the Property to the south is Parcel 47, the site of Christ Evangelical Lutheran Church of Columbia ("Christ Lutheran Church"). Parcel 47 is zoned RR-DEO and is improved with a religious facility, a parsonage building, and parking lots. South of Parcel 47 are several parcels zoned RR-DEO and improved with single family detached dwellings.

Adjoining the Property to the west is the RR-DEO zoned Parcel D of Parcel 77, an approximately 42.44 acre non-buildable preservation parcel that is part of the Preserve at Clarksville subdivision. To the west of Parcel D are several RR-DEO lots improved with single-family detached dwellings of approximately 9,000 square feet.

3. Roads. Maryland Route 108 has two travel lanes with a variable paving width within a proposed 80 foot wide right-of-way. The posted speed limit is 35 miles per hour.

4. Water and Sewer Service. The Property is served by private well and septic facilities.

5. General Plan. The Property is designated Rural Residential on the Policies Map 2000-2020 of the 2000 General Plan. The Property is designated as being within the County's Low Density Development on Map 6-2, Designated Place Types, of PlanHoward 2030. Maryland Route 108 is depicted as a Major Collector on the Functional Road Classification Map of PlanHoward 2030.

6. Conditional Use Proposal. The Petitioner proposes to remove the existing structures and driveways on the Property and to construct an approximately 17,049 square foot funeral home and mortuary (the "Funeral Home"). As shown on the Plan, the Funeral Home would be approximately 135 feet in length (from east to west) and 70 feet in width (from north to south). The Funeral Home would be generally sited in the southeastern section of the Property, approximately 125 feet from the Maryland Route 108 right-of-way and 30 feet from the south lot line. Architectural renderings submitted with the Plan depict the Funeral Home as being approximately 32.5 feet in height.

Access to the Property is proposed with one marked lane into the Property and separate right and left turn exit lanes. The proposed drive aisle would run along the north side of the Funeral Home structure and lead to a large parking area. The Petitioner proposes a total of 98 parking spaces.

The Petitioner proposes to hold viewings on the Property between 2 p.m. and 4 p.m. and between 7 p.m. and 9 p.m., Sunday through Friday. The Petitioner proposes to hold funeral services between 10 a.m. and 1 p.m. Monday through Saturday. Outside of those times, fewer people would be on the Property for general office and business purposes of the Funeral Home.

7. Jeffrey Samelson, Pastor of the Christ Lutheran Church adjoining the Property to the south, testified that he lives in a parsonage on the Christ Lutheran Church property. Pastor Samelson further testified that neither he nor his congregation have any objection to the Funeral Home or the Plan.

8. William Erskine, an attorney for the St. Louis Catholic Church, testified regarding the Petitioner's revisions to the Plan. Mr. Erskine noted the following revisions: (i) the size of the Funeral Home had been greatly reduced compared to previous versions of the Plan; (ii) the number of parking spaces provided was increased, eliminating any risk of parking spilling over onto the St. Louis Catholic Church property; (iii) the distance between the Funeral Home uses and the northern lot line had increased; (iv) the buffering between the Property and the St. Louis Catholic Church property was increased substantially; and (v) the lighting plan was revised such that no light trespass would occur beyond paved surfaces of the parking lot. Mr. Erskine testified that the Petitioner had agreed to construct a deceleration lane of at least 250 feet and requested that the Board impose such a condition if the Board were to approve the petition.

9. John Gary, a registered architect, testified that his firm specialized in funeral home design and planning and had designed approximately 1,000 new funeral homes across the country. Mr. Gary testified that the Funeral Home was designed to be compatible in scale and character, and to be able to coexist in harmony, with residential development in the vicinity. Due to the topography of the Property, Mr. Gary designed the funeral home in such a way that it would appear to be one story from Maryland Route 108. Mr. Gary stated that the scale of the Funeral Home should be taken in context with the large, existing church structures immediately north and south of the Property.

Mr. Gary further testified regarding the residential characteristics of the Funeral Home, including a focal point in front of the Funeral Home; a carport; a fireplace off of the main lobby for a sitting area; residential-type windows; small fenestrations; limited points of entrance; hip roofs instead of flat roofs, with composition shingles; masonry consisting of inset brick with stone; and a stone water table. Mr. Gary concluded that given its proposed scale and character, the Funeral Home was capable of coexisting in harmony with residential development in the vicinity.

Mr. Gary also testified regarding a proposed holding tank for embalming fluid wastewater. Mr. Gary stated that the embalming room was designed to utilize a closed system of drainage pipes, all of which would lead to a 6,000 gallon holding tank encased in concrete with an interior lining. This tank, according to Mr. Gary, would be emptied by a septic disposal company in the same manner as a septic system. Mr. Gary testified that all other wastewater from the Funeral Home would drain to a separate septic system located in the area shown on the Plan.

10. Robert Vogel, a professional engineer, testified that greater than 20 percent of the area within the building envelope, formed by the structure setbacks from property lines and public street rights-of-way, would be green space not used for buildings, parking area, or driveways. Mr. Vogel testified that the area of the Property is greater than three acres in size. Mr. Vogel noted that the Funeral Home and parking areas would be 30 feet from Christ Lutheran Church and that Christ Lutheran Church is committed to a long term institutional use. Mr. Vogel also stated that the Plan is consistent with the General Plan given that legislation had recently been proposed to remove the funeral home conditional use from the RR-DEO zone, but DPZ and the Howard County Planning Board recommended against its enactment. According to Mr.

Vogel, this action by County planning agencies affirmed that funeral homes are important in the RR-DEO zone.

According to Mr. Vogel, the Zoning Regulations require 98 parking spaces for the Funeral Home, and the Plan provides 98 spaces. Mr. Vogel testified that the parking areas are adequately sized, and that the parking areas, loading areas, driveways and refuse areas will be screened from public roads and residential uses. Mr. Vogel also noted that the location, nature and height of structures, walls and fences, and landscaping proposed are such that the Funeral Home would not hinder or discourage the development and use of adjacent land and structures. Mr. Vogel believed that given the Property's location adjacent to two churches and a nonbuildable open space parcel, the Funeral Home would hinder or discourage the development and use of adjacent properties less at the Property than elsewhere in the RR-DEO zone.

Testifying regarding potential adverse impacts, Mr. Vogel provided a lighting plan that would generate no light trespass beyond the parking lot. Mr. Vogel testified that the adverse effects of noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions would not be greater at the Property than they would generally be elsewhere in the RR-DEO zone or applicable other zones.

Regarding the proposed septic system, Mr. Vogel testified that he worked with the Howard County Health Department and received an approved Percolation Certification Plan. According to Mr. Vogel, the Health Department utilized water usage figures from existing, operating funeral homes and determined that the Funeral Home would generate an average of 300 gallons of wastewater per day. Mr. Vogel testified that the septic system was designed to process twice that amount, or 600 gallons per day.

11. Carolyn Gale Bryant Stanford testified that she is a resident of Highland, Maryland, and she requested that the Board grant the petition. Ms. Stanford stated that the Property would be a suitable location for the Funeral Home given that it adjoins two churches.

12. Timothy Baker testified that he is a resident of Ellicott City, Maryland, and he requested that the Board grant the petition.

13. Donna Curp testified that she is a resident of Laurel, Maryland, and she requested that the Board grant the petition.

14. Ralph Fletcher testified that he is a resident of Columbia, Maryland, and he requested that the Board grant the petition.

15. Laurie Blitz testified that she is a resident of Columbia, Maryland, and she requested that the Board grant the petition.

16. George Hamlin testified that he is a resident of Clarksville, Maryland, and he requested that the Board grant the petition.

17. Jay Donaldson testified that the Petitioner is the owner and operator of funeral homes in Odenton and Laurel. Mr. Donaldson stated that the Funeral Home would contain three viewing rooms within a multipurpose room. The viewing rooms would contain partitions that could be opened to allow for three small viewings or one larger viewing or service. Mr. Donaldson also testified that there would typically be between 50 and 60 guests during a funeral service, with potentially two to three processions per week. Between two and four employees would be on site at any one time. Mr. Donaldson believed that the Plan provided sufficient parking, and he testified that his other locations had never needed close to the number of parking spaces proposed for the Property.

18. Mickey Cornelius, a professional traffic engineer, testified that egress from the Property enjoyed adequate sight distance of over 600 feet in both directions. Mr. Cornelius stated that the Petitioner would provide an acceleration lane and a deceleration lane along southbound Maryland Route 108, as well as a left turn bypass lane for Route 108 northbound. Mr. Cornelius concluded that the ingress and egress drives would provide safe access, based on actual conditions.

Mr. Cornelius also testified that the location of the Property with respect to the streets giving access to the Property would be in harmony with the land uses and policies of the Howard County General Plan. Mr. Cornelius stated that the General Plan identified the section of Maryland Route 108 adjoining the Property as a major collector. The purpose of major collector roadways, according to Mr. Cornelius, is to provide access to adjacent properties in addition to providing through travel.

Mr. Cornelius testified that he analyzed the impact on traffic volumes on Maryland Route 108 that would be generated by the Funeral Home. Mr. Cornelius stated that the peak traffic hours along Route 108 at the Property were on weekdays, between 7 a.m. and 9 a.m. and between 4 p.m. and 7 p.m. Given the proposed hours for services and viewings, Mr. Cornelius stated that the Funeral Home would generate very little traffic during peak hours. Mr. Cornelius concluded that the Funeral Home would not adversely impact the traffic congestion or the safety of Maryland Route 108.

19. Zachary Fisch, a professional engineer, testified in opposition to the petition. Mr. Fisch stated that he believed that the Property is too small for the proposed use and that the Plan did not satisfy turning radius criteria of the Howard County Department of Fire and Rescue Services ("DFRS"), though he noted turning radius sufficiency was determined by DFRS. Mr.

Fisch further testified that he believed that the size of the Property, the size of the proposed parking areas, and the amount of green space provided were insufficient. Mr. Fisch also believed that wetlands or a wetlands buffer, which were not depicted on the Plan, might extend onto the Property.

20. Shun Lu testified that she is a resident of Clarksville, Maryland, and that she is opposed to the petition. Ms. Lu testified that persons of Asian descent have a cultural sensitivity to funeral homes and that she believed it to be bad luck to live close to a funeral home.

21. Peter Li, a professional geologist, testified that he is a resident of Highland, Maryland, and that he is opposed to the petition. Dr. Li testified that he believed the Funeral Home could generate 10,000 gallons of wastewater per day based on guidelines published by the Maryland Department of the Environment (“MDE”). Dr. Li further stated that he believed that the Funeral Home could generate adverse impacts to groundwater due to the geology of the area. Dr. Li also testified that funeral homes are not compatible with nearby residences from a feng shui perspective.

22. Wesley Johnson testified that he is a resident of Heather Glen Way in Clarksville and that he would have never purchased his home in 2011 if he knew a funeral home was going to be built nearby. Mr. Johnson stated that living near a funeral home would be similar to living near a landfill or cemetery.

23. Trusha Amin testified that she is a resident of Clarksville and opposes the petition. Ms. Amin expressed her concerns about increased traffic and possible effects upon the water system if the funeral home is built.

24. Kenny Kan testified on behalf of the River Hill Village Board in opposition to the petition and stated that their concerns were regarding traffic and safety in such a high impact area.

25. Andy Sun testified that he is a resident of Clarksville, Maryland and that he is opposed to the petition. Mr. Sun testified that he was concerned that the proposed funeral home is a biochemical processing waste facility and is not an appropriate use in a rural residential area.

26. Sally Swygert testified that she is a resident of Clarksville, Maryland, and that she is opposed to the petition. Ms. Swygert testified that she was concerned with the potential traffic impacts of the Funeral Home and that she believed it would be difficult to turn left out of the Property.

27. Michael Faulkender testified that he is a resident of Clarksville, Maryland, and that he is opposed to the petition. Mr. Faulkender testified that he and the Clarksville Overlook Homeowners Association are concerned with the potential traffic impacts of the Funeral Home and that he believed traffic heading northbound along Maryland Route 108 backs up to the Property from the light at Guilford Road.

28. Xiaoli Jin testified that she is a resident of Clarksville, Maryland, and that she is opposed to the petition. Ms. Jin testified that she was concerned with the potential traffic impacts of the Funeral Home.

29. Marianne Lee testified that she is a resident of Clarksville, Maryland, and that she is opposed to the petition. Ms. Lee testified that persons of Asian descent have a cultural sensitivity to funeral homes. Ms. Lee further testified that she was concerned with the potential traffic impacts of the Funeral Home.

30. Grace Chi testified that she is a resident of Clarksville, Maryland, and that she is opposed to the petition. Ms. Chi testified that she was concerned about the Funeral Home using a commercial dumpster.

31. Anthony Redman, a professional land planner, testified that he believed the Property to be too small for the proposed use. Mr. Redman stated that he believed that MDE could require a 150 foot buffer from the stream tributary running along the west side of the Property instead of the 100 foot buffer shown on the Plan. Mr. Redman testified that the stream is a Tier II stream.

32. Omer Davaz testified that he is a resident of Ellicott City, Maryland, and that he is opposed to the petition. Mr. Davaz testified that he was concerned with the potential traffic impacts of the Funeral Home.

33. Stacy Jackson testified that she is a resident of Clarksville, Maryland, and that she is opposed to the petition.

34. Michael Ball testified that he is a resident of Ellicott City, Maryland, and that he is opposed to the petition. Mr. Ball testified that funeral home may have adverse effects upon property values in the area.

35. Laura Crandon testified that she is a resident of Clarksville, Maryland, and that she is opposed to the petition because property values in the area will go down.

36. Brian Snow testified that he is a resident of Clarksville, Maryland, and that he is opposed to the petition. Mr. Snow testified that he and the Clarks Glen Community Association are concerned with the potential traffic impacts of the Funeral Home.

37. Tiru Liang testified that she is a resident of Clarksville, Maryland, and that she is opposed to the petition. Ms. Ming testified that she was concerned with the potential traffic

impacts of the Funeral Home. Ms. Ming stated that she was also concerned with the potential environmental impacts of the Funeral Home.

38. Richard Klein, a professional environmental consultant, testified that he believed the Property might not be able to satisfy environmental site design standards.

39. Alan Schneider testified that he is a resident of Clarksville, Maryland, and that he is opposed to the petition. Mr. Schneider testified that he believed the Funeral Home to be not compatible in scale with residential development in the area. Mr. Schneider stated that commercial garbage vehicles would generate adverse impacts regarding noise. Mr. Schneider also testified that he had concerns regarding the potential traffic impacts of the Funeral Home.

40. Yimin Hu testified that he is a resident of Clarksville, Maryland, and that he is opposed to the petition.

41. Delong Liu testified that he is a resident of Clarksville, Maryland, and that he is opposed to the petition.

42. Veronika Carella testified that she is a resident of Glenwood, Maryland, and that she is opposed to the petition. Ms. Carella testified that she had concerns regarding the potential environmental impacts of the Funeral Home.

43. Soon Park testified that he is a resident of Clarksville, Maryland, and that he is opposed to the petition. Mr. Park testified that he had concerns regarding the use of formaldehyde by the Funeral Home.

44. Cathy Stefano testified that she is a resident of Columbia, Maryland, and that she is opposed to the petition. Ms. Stefano testified that she had concerns regarding the potential traffic impacts of the Funeral Home, and she believed the number of parking spaces proposed may be inadequate for the use.

45. On rebuttal, Mr. Vogel testified that the Petitioner would utilize double walled pipes and a double walled tank, with leak sensors, for the embalming fluid drainage system. Mr. Vogel addressed Mr. Fisch's contentions regarding the green space calculation, noting that DPZ agreed with Mr. Vogel's use of the definition of "building envelope" as provided in Section 131.N.22.e of the Zoning Regulations. Regarding compatibility, Mr. Vogel testified that the Funeral Home was residential in scale, and capable of coexisting in harmony with residential development in the vicinity, based upon the design of the Funeral Home and the sizes of nearby residences. Mr. Vogel stated that he visited the Property and that no wetlands or wetlands buffers existed on the Property. Regarding potential impacts to the Tier II stream, Mr. Vogel testified that the purpose of the 100 foot buffer was to protect the stream. So long as the Petitioner complied with the imposed buffer, according to Mr. Vogel, the stream would not be adversely impacted. Mr. Vogel testified that the DFRS determined that the Plan satisfied turning radius requirements. Finally, Mr. Vogel testified that persons of Asian descent moved into new homes located in close proximity to two existing funeral homes on Old Columbia Pike in Ellicott City.

46. On rebuttal, Mark Eisner, a professional hydrogeologist, testified that the Funeral Home would not generate an amount of wastewater approaching Dr. Li's alleged 10,000 gallons per day. Mr. Eisner testified that the Health Department determined a flow of 600 gallons per day maximum, although Mr. Eisner stated that the Funeral Home would generate less wastewater per day than that figure. Mr. Eisner testified that the geology of the Property was essentially the same as the rest of Maryland west of Interstate 95 and that such geology would not cause adverse impacts to groundwater supply in the area. Mr. Eisner also stated that the Property's proposed septic system was a sufficient distance from nearby wells to ensure against any adverse impacts.

47. On rebuttal, Mark Burchick, an environmental consultant, testified that the stream buffer would be 100 feet from the unnamed tributary located at the northwest corner of the Property. Burchick stated that even if a temporary encroachment into the buffer was necessary during the site development process, MDE would be unlikely to impose a greater buffer from the stream tributary. Mr. Burchick testified that the 100 foot stream buffer shown on the Plan would be sufficient to prevent deleterious impacts to the stream.

48. On rebuttal, Mr. Cornelius testified that he conducted a queuing study to measure the number of vehicles heading northbound on Maryland Route 108 at the intersection of Maryland Route 108 and Guilford Road, which vehicles were stacking towards the Property. Mr. Cornelius testified that using the most conservative figures, during peak traffic hours, the queue never reached the Property's proposed site access. Mr. Cornelius stated that the recorded amount of queuing was neither unusual nor extraordinary.

Mr. Cornelius also testified that he conducted a gap study to measure the number and duration of two way gaps in traffic along Maryland Route 108 in front of the Property. Mr. Cornelius testified that during the proposed hours for viewings and services, the average wait time for a vehicle to make a left hand turn from the property would be 10 seconds or less. For vehicles turning right from the Property, Mr. Cornelius stated that average wait times would be even less. Mr. Cornelius testified that these average wait times were not unusual.

Mr. Cornelius also testified that he performed a capacity analysis to determine the traffic capacity of Maryland Route 108 in front of the Property. Mr. Cornelius testified that even during peak traffic hours, when the Funeral Home would generate little traffic, Maryland Route 108 operates at 51 percent capacity. During the proposed hours for viewings at the Funeral Home, Mr. Cornelius stated that Maryland Route 108 operated even further under capacity.

49. On rebuttal, Dimitra Zozos testified that she had provided a copy of the final revised version of the Petitioner's Plan to Ed Shilling of DFRS. Ms. Zozos offered, and the Board admitted into evidence as Petitioner's Exhibit 66, a letter from Ed Shilling of DFRS to Robert H. Vogel Engineering.

50. On rebuttal, Jennifer Yocum, a feng shui consultant, testified that the Petitioner incorporated into the Plan several features Ms. Yocum proposed in order to improve the feng shui of the Funeral Home. Ms. Yocum testified that she did not believe the Funeral Home would adversely impact nearby residents from a feng shui perspective.

51. On rebuttal, Robert Golden, a toxicological researcher, testified that he had substantial professional experience regarding formaldehyde. Dr. Golden testified that he visited the Petitioner's Laurel facility and reviewed the results of air quality formaldehyde tests. Dr. Golden stated that the Funeral Home's proposed ventilation system would dilute the air ventilated from the embalming room to outside the Funeral Home to such an extent that the concentration of formaldehyde emitted would be similar to that of ambient air. Dr. Golden testified that the potential adverse impacts of fumes from the Funeral Home on nearby properties would be no greater than the impacts of ambient air.

Dr. Golden also testified that minor spills of embalming fluid that could potentially occur during the emptying of the holding tank would not adversely impact vicinal properties. Dr. Golden stated that he had no concerns about the Funeral Home from a health impact perspective.

CONCLUSIONS OF LAW

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

A. General Standards Required for Conditional Use Approval (Section 131.B)

1. Harmony with the General Plan: Section 131.B.1 of the Zoning Regulations requires that a conditional use plan be in harmony with the land uses and policies indicated in the General Plan for the district in which it is located. In evaluating a plan under this standard, the Board must 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. As no other conditional or permitted use is proposed on the Property, subsection (b) of Zoning Regulations Section 131.B.1 is inapplicable.

The Petitioner's Plan is in harmony with the land uses and policies indicated in Howard County's General Plan, PlanHoward 2030, for the RR-DEO zoning district. Funeral homes and mortuaries that satisfy the conditional use requirements of the Zoning Regulations are presumed to promote the general welfare of the community and the RR-DEO zoning district. Evidence was produced before the Board indicating that legislation had been proposed to remove the funeral home and mortuary conditional use from the RR-DEO zoning district. The Howard County Planning Board and DPZ, however, recommended against such removal, and the legislation was not enacted. These actions by agencies charged with planning responsibilities for the County confirm that funeral homes and mortuaries are important in the County's RR-DEO zoning district and are consistent with the policy goals of the General Plan.

The proposed Funeral Home is an institutional use which would be primarily conducted indoors. Additionally, the Property is larger than the minimum lot size required by Zoning Regulations Section 131.N.22. In its TSR, before the Petitioner revised the Plan to result in

significant size reductions to the Funeral Home, DPZ determined that the nature and intensity of the Funeral Home and the size of the Property in relation to the use were appropriate. Given the reduced size of the Funeral Home and the decreased intensity of the proposed program shown on the revised Plan, the Board concludes that the nature and intensity of the Funeral Home and the size of the Property in relation to the use are such that the Funeral Home will be in harmony with the land uses and policies indicated in the General Plan for the RR-DEO zoning district.

The Property fronts on Maryland Route 108, a major collector roadway, and the purpose of major collector roadways is to provide access to adjacent properties in addition to providing through travel. The Funeral Home use would have little impact on the existing traffic conditions on Maryland Route 108 since the vast majority of traffic generated by the Funeral Home would occur during non-peak hours. The Board concludes that the location of the Property with respect to streets giving access to the site is such that the Plan will be in harmony with the General Plan.

2. Adverse Effect: Section 131.B.2 of the Zoning Regulations provides, in pertinent part, that the Board shall have the power to permit a conditional use provided that the proposed use at the proposed location will not have adverse effects on vicinal properties above and beyond those ordinarily associated with such uses. In evaluating the Plan under this standard, the Board shall consider the following four adverse effect criteria: (a) physical conditions; (b) structures, walls, fences, and landscaping; (c) parking areas, loading areas, driveways, and refuse areas; and (d) safe access.

When assessing a proposed conditional use under these criteria, the Board must begin with the realization that virtually every human activity has the potential for adverse impact. 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 before the Board is not whether the proposed use would have adverse effects in an RR-DEO zoning district. The proper question is whether those inherent adverse effects are greater at the proposed Property than they would be generally elsewhere within the RR-DEO zoning district. *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981); *Mossburg v. Montgomery County*, 107 Md. App. 1, 666 A.2d 1253 (1995).

Once a petitioner presents sufficient evidence establishing its proposed use meets the requirements of the statute and the *Schultz v. Pritts* standard, it is incumbent upon those opposed to the petition to show that 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).

While the Protestants expressed concerns about the size and intensity of the Funeral Home, traffic congestion and safety, and environmental impacts, the evidence placed before the Board does not sufficiently demonstrate any adverse effects unique or different than those ordinarily associated with the proposed use in the RR-DEO zoning district.

Much of the testimony presented by the Protestants amounted only to unsupported opinions and conclusions. Unsupported conclusions or fears of witnesses to the effect that a proposed use of property will or will not result in harm amount to nothing more than vague and general expressions of opinion that are lacking in probative value. *Anderson v. Sawyer*, 23 Md. App. 612, 329 A.2d 716 (1974).

For the reasons stated below, the Petitioner has met its burden in presenting sufficient evidence establishing that the proposed use will not have adverse effects on vicinal properties

above and beyond those ordinarily associated with funeral home and mortuary uses in the RR-DEO zoning district.

a. Physical Conditions. The Funeral Home use would be conducted primarily indoors and would consist of activities that are normally associated with a funeral home and mortuary use. Evidence presented by the Petitioner that the adverse effects from noise, dust, odors, lighting, and vibrations would not be greater at the Property than elsewhere in the RR-DEO zoning district was not substantially disputed. Regarding fumes, the Board finds the testimony of Dr. Golden to be credible. Any fumes leaving the funeral home would contain the same concentration of formaldehyde as ambient air and would not adversely impact vicinal properties, if at all, greater than elsewhere in the RR-DEO zoning district.

Regarding environmental impacts, many witnesses for the Protestants expressed generalized fears concerning groundwater contamination and adverse impacts upon the stream to the west of the Property. The Petitioner's proffer of double walled pipes and a double walled tank, with leak sensors, for the embalming fluid drainage system, which shall be a condition of the Board's approval, will ensure that embalming fluids will not adversely affect vicinal properties. The Petitioner has received an approved Percolation Certification Plan from the Health Department, and the size of the proposed septic system was designed based on actual water usage figures from existing, operating funeral homes. Furthermore, the Plan complies with all legally imposed stream buffer requirements. The Protestants presented no credible testimony that the stream buffer would be increased, or that adverse impacts would occur to the stream irrespective of the Petitioner's adherence to the legally imposed buffer. The Petitioner's witnesses, on the other hand, testified that the proposed use as shown on the Plan would not result in adverse impacts on the stream.

The Board further concludes that the cultural sensitivities testified to by various Protestants is not a “physical condition” to be considered pursuant to Zoning Regulations Section 131.B.2.a. Even if it were a relevant consideration, the Board considered the totality of the evidence presented in this case and is not persuaded that the proposed use will create an adverse cultural impact on vicinal properties or that such impact will be above and beyond those ordinarily associated with funeral home and mortuary uses in the RR-DEO zoning district.

The proposed use, therefore, will not generate excessive noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions beyond those inherently associated with funeral home and mortuary conditional uses in an RR-DEO zoning district, in accordance with Zoning Regulations Section 131.B.2.a.

b. Structures, Walls, Fences, and Landscaping. The Board concurs with Mr. Vogel’s testimony that any adverse effects resulting from structures, walls, fences, and landscaping would be no greater at the Property than elsewhere in the RR-DEO zoning district. The Property is adjoined to the north and south by church uses, and representatives of both adjoining churches testified that they had no objections to the Plan. Immediately west of the Property is a County-owned open space parcel. A good distance exists between the Funeral Home and adjoining properties, and the Petitioner requested no variances to the setback requirements for the proposed development. The landscaping shown on the Plan meets and exceeds County requirements and will not adversely impact adjoining properties.

Based on the evidence presented, the Board concludes that 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 elsewhere in the RR-DEO zoning district, in accordance with Zoning Regulations Section 131.B.2.b.

c. Parking Areas, Loading Areas, Driveways, and Refuse Areas. Per Zoning Regulations Section 133.D.7.b, a funeral home requires the greater of 10 parking spaces per public viewing room or 1 parking space per 50 square feet of floor area in public rooms. Based on this requirement, the Funeral Home, with 4,876 square feet of floor area in public rooms, requires 98 parking spaces. The Plan provides 98 parking spaces. The Board concludes that the parking area will be of an adequate size for the proposed use.

The majority of the parking area is located to the west of the Funeral Home structure and will not be visible from Maryland Route 108. The parking areas will be screened from residential uses by existing and proposed trees and landscaping. The loading areas, driveway, and refuse area are also located to minimize their visibility from Maryland Route 108, and they will also be screened from residential uses by structures, landscaping, and adequate distance.

Based on the evidence presented, the Board concludes that the 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, in accordance with Zoning Regulations Section 131.B.2.c.

d. Safe Access. The Property enjoys an adequate sight distance of over 600 feet in both directions. Mr. Cornelius testified that the Petitioner proffered to provide a 250 foot long deceleration lane for vehicles entering the Property from southbound Maryland Route 108 as well as an acceleration lane for vehicles exiting the Property in the southbound direction. The Petitioner also proffered to construct a left turn bypass lane for northbound Maryland Route 108 in the vicinity of the Property's proposed access point. With these site access improvements,

which shall be a condition of the Board's approval, the Board concludes that 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 accordance with Zoning Regulations Section 131.B.2.d.

B. Specific Criteria for Funeral Homes and Mortuaries (Section 131.N.22)

1. Section 103.A.118 of the Zoning Regulations defines "lot" as "[a] piece of land described in a Final Plat or Deed and recorded in the Land Records of Howard County" The Petitioner admitted Petitioner's Exhibit 28, the deed for the Property recorded among the Land Records of Howard County. In the Property's deed, the Property is described to contain 3.207 acres of land, more or less. The Board concludes that the area of the lot is not less than three acres, in accordance with Zoning Regulations Section 131.N.22.a.

2. The Property has frontage on and direct access to Maryland Route 108, a major collector roadway, in accordance with Zoning Regulations Section 131.N.22.b.

3. Section 131.N.22.c of the Zoning Regulations requires the design of the Funeral Home to be compatible in scale and character with residential development in the vicinity. The Zoning Regulations do not provide a definition for the term "compatible." Zoning Regulations Section 103.A provides that the term has the definition provided in any standard dictionary. The Petitioner introduced as Exhibit 40 a definition from a standard dictionary defining "compatible" as "capable of existing together in harmony." The Protestants did not offer an alternative definition of "compatible." The Board finds credible and accepts the Petitioner's dictionary definition of the term.

As the Petitioner's witness Mr. Gary testified, the Funeral Home will be compatible in character with residential development in the vicinity. The Funeral Home was designed with

features characteristic of upscale residential areas, such as a focal point in front of the Funeral Home, a carport, residential-type windows, small fenestrations, limited points of entrance, hip roofs with composition shingles, and masonry consisting of inset brick with stone. The compatibility of the residential character of the Funeral Home was not substantially disputed by the Protestants.

Regarding its scale, the Funeral Home will be two stories tall but will look like one story from Maryland Route 108 given the building design and topography of the Property. The Funeral Home will appear residential in height and width when viewed from Maryland Route 108. Many homes in the vicinity are large, with building footprints and widths comparable to the Funeral Home. Additionally, the Funeral Home is adjoined by two churches of similar or larger sizes than the Funeral Home. The Protestants presented no probative evidence that the Funeral Home was not capable of existing together in harmony with residential development in the vicinity.

The Board concludes that the design of new structures will be compatible in scale and character with residential development in the vicinity, as demonstrated by architectural elevations or renderings submitted with the petition, in accordance with Zoning Regulations Section 131.N.22.c.

4. The buildings, parking areas, and outdoor activity areas will be at least 50 feet from adjoining residentially-zoned properties other than public road rights-of-way and other than along the south boundary line adjoining the Christ Lutheran Church property. The Petitioner has requested a reduction of this 50 foot setback from the Christ Lutheran Church property imposed by Zoning Regulations Section 131.N.22.d to 30 feet for the Funeral Home structure and parking areas.

The Board may reduce the setback to no less than 20 feet, or the minimum setback required by the zoning district, whichever is greater, upon an affirmative finding of one of two conditions. The RR-DEO zoning district imposes a 30 foot setback from the Christ Lutheran Church property. Therefore, the Board may only reduce the 50 foot setback to 30 feet provided that (a) the adjoining land is committed to a long term institutional use or open space use that provides an equivalent or better buffer for vicinal residential development, or (b) 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 Christ Lutheran Church property is committed to a long term institutional use. As shown on the Petitioner's Exhibit 4, the Christ Lutheran Church development will also buffer the Funeral Home from residential properties further to the south. Essentially, the Petitioner has requested to develop the Property 20 feet further to the south than is permitted by right under Section 131.N.22.d. The width of the Christ Lutheran Church parcel alone will provide a better buffer for the residential properties further south than would the imposition of an additional 20 feet of setback on the Property. The Christ Lutheran Church structures will also provide better buffering and screening than would an additional 20 feet of setback on the Property.

The Board, concluding that the adjoining land is committed to a long term institutional use that provides an equivalent or better buffer for vicinal residential development, hereby reduces the Property's 50 foot setback from the Christ Lutheran Church property to 30 feet as shown on the Plan. Accordingly, the Plan complies with Zoning Regulations Section 131.N.22.d.

5. Zoning Regulations Section 131.N.22.e requires that at least 20 percent of the area within the building envelope shall be green space, not used for buildings, parking area or driveways. That section also defines the term "building envelope," providing that the building envelope is formed by the required structure setbacks from property lines and public street rights-of-way. Using this definition, 22.33 percent of the area within the building envelope will be green space, not used for buildings, parking area or driveways, in accordance with Zoning Regulations Section 131.N.22.e.

6. Crematoriums are permitted as accessory uses to a funeral home or mortuary under Zoning Regulations 131.N.22.f. Because no crematorium is proposed, this section is inapplicable.

ORDER

Based upon the foregoing, it is this 3rd day of July, 2013, by the Howard County Board of Appeals, **ORDERED:**

That the Petition of Donaldson Funeral Home for a Conditional Use for a Funeral Home and Mortuary in an RR-DEO (Rural Residential: Density Exchange Option) Zoning District, is hereby **GRANTED**, subject to the following conditions:

1. The conditional use shall apply only to the proposed funeral home and mortuary as described in the petition and as depicted on the Amended Conditional Use Plan dated August 15, 2012 and not to any other activities, uses or structures on the Property.

2. The Petitioner shall utilize a double-walled holding tank for embalming fluid wastewater with double walled pipes and leak sensors for the system.

3. The Petitioner shall construct (a) a deceleration lane at least 250 feet long for vehicles entering the Property from southbound Maryland Route 108; (b) an acceleration lane for

vehicles exiting the Property in the southbound direction; and (c) an appropriate left turn bypass lane for northbound Maryland Route 108 in the vicinity of the proposed access point for the Property.

4. The Property shall not be used as a crematorium without subsequent conditional use approval.

5. The Petitioner shall comply with all applicable Federal, State, and County laws and regulations.

ATTEST:

Alison Mathieson
Alison Mathieson, Secretary

**HOWARD COUNTY BOARD OF
APPEALS**

[Signature]
John Lederer, Chairperson

[Signature]
James Howard, Vice-Chairperson

PREPARED BY:
HOWARD COUNTY OFFICE OF LAW
MARGARET ANN NOLAN
COUNTY SOLICITOR

Barry M. Sanders
Barry M. Sanders
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James Walsh
James Walsh

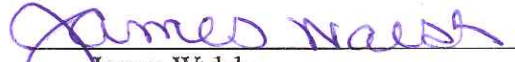
Maurice M. Simpkins
Maurice Simpkins

DISSENT - See

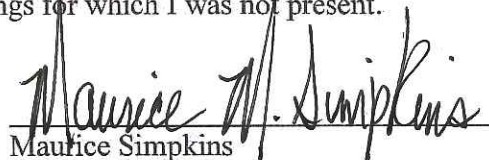
Henry Eagles

*Minority
Opinion*

I hereby certify that I reviewed all of the evidence submitted and listened to a recording of the May 29, 2012, May 31, 2012 and March 14, 2013 hearings for which I was not present.


James Walsh

I hereby certify that I reviewed all of the evidence submitted and listened to a recording of the August 14, 2012 and August 23, 2012 hearings for which I was not present.


Maurice Simpkins

I hereby certify that I reviewed all of the evidence submitted and listened to a recording of the June 14, 2012, October 9, 2012, March 5, 2013 and March 14, 2013 hearings for which I was not present.


Henry Eagles

I hereby certify that I reviewed all of the evidence submitted and listened to a recording of the November 1, 2012 hearing for which I was not present.


James Howard

IN THE MATTER OF	:	BEFORE THE
	:	
DONALDSON FUNERAL HOME	:	HOWARD COUNTY
	:	
Petitioner	:	BOARD OF APPEALS
	:	
	:	BA Case No. 10-001C
	:	
.....		
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MINORITY DECISION

Petitioner filed an original Petition for a conditional use to the Howard County Hearing Authority on January 7, 2010, use of a Funeral Home (Donaldson Funeral Home) to be located on Route 108, 12540 Clarksville Pike, Clarksville, Maryland – a 3.207 acre site, trapezoid shaped property.

On March 17, 2010, the Department of Planning and Zoning (DPZ) issued a Technical Staff Report recommending denial of the Petition. The Hearing Examiner issued an Order, dated November 29, 2010 denying Petitioner’s Petition. Petitioner filed an appeal to this Board on December 21, 2010.

Prior to proceedings conducted by the Board, Petitioner amended his conditional use plan, dated September 7, 2011. This showed a buffer of 75 feet to a Tier II stream watershed running through the northwest corner of the property.

During proceedings conducted by the Board, Petitioner again amended the Petition, Second Revised Petition, dated August 15, 2012 (Pet. Ex. 32), showing a change of the buffer from 75 feet to 100 feet, required by revision in the Zoning Regulations. This necessitated a change, too, in the layout of parking spaces on the plan to comport with the number of spaces required by the Zoning Regulations.

Board Procedural Rule §2.202 (e) provides:

If any substantive amendments to the petition are made before or during the hearing, the Board, either before or during the hearing, shall suspend or postpone the hearing and remand the amended petition to the Department of Planning and Zoning [DPZ] and the Planning Board for further consideration.

The Board determined that the Tier II stream watershed buffer change from 75 to 100 feet was a substantive change, and remanded the Second Revised Petition to DPZ for an updated Technical Staff Report (TSR). In a letter to DPZ dated August 28, 2012, the “Board requested that a full re-evaluation of this plan be conducted for compliance with all applicable zoning regulations and that any additional agency comments be included in the update Technical Staff Report.” DPZ issued the updated TSR on September 24, 2012 to the Second Revised Petition and recommended approval. The stream buffer was not discussed of whether it was of adequate length, but that it may be counted as green space of a lot, as required by the Zoning Regulations, and can be included in the building envelope of the lot: “counting the stream buffer as green space is consistent with the concept that this area is a permeable portion of the site.” (TSR, p.3)

The issue raised here is whether the Board gave proper consideration to the adequacy of the length of the Tier II stream buffer. The General Plan Howard 2030, page 22, states that

The effectiveness of stream and wetland buffers depends on the buffer width, vegetation, and management practices. To provide the greatest benefit, *buffers should be wide enough to allow adequate filtering of overland runoff* and include adjacent steep slopes and highly erodible soils. [Emphasis added.]

Similarly, the Maryland Stream Health website states that “The problem with impervious surfaces is that they prevent natural soaking into the ground and slowly seeping into streams. Instead, rain water accumulates and flows rapidly into storm drains . . . resulting in flooding and severe bank erosion.”

Section 130 of the Zoning Regulations sets out the authority of the Hearing Authority. Subsection C provides that where “the Hearing Authority is called upon to decide certain issues, such Hearing Authority *shall examine the specific property involved* and the immediate neighborhood In deciding such matters, the *Hearing Authority shall give consideration*, among other things, to the following: C.5. The *legislative intent of these regulations* as provided in Section 100.A.” (Emphasis added.)

Section 100 A.7. provides: “*To insure that all development and land uses protect or enhance the natural, environmental, historic, architectural and other landscape resources of the County, especially highly fragile and environmental important features* such as floodplains, wetlands or steep slopes.” (Emphasis added.)

The Maryland Department of the Environment (DME) requires a Tier II antidegradation review. An applicant shall update an antidegradation review when applying for a permit. COMAR 26.08.02.04-1G. State law supersedes County Board of Appeals determinations. *Cf. Perdue Farms Inc. v. Hadder*, 109 Md. App. 582, 675 A.2d 577, 43 ERC 1538 (Ct. Spec. App. 1996). Permit application form presented at Protestant Ex. 41.

Specifically, pursuant to §130 of the Zoning Regulations, *supra*, it was and is incumbent on the Board when considering whether the Petition should have been granted in this case to determine that all legal requirements have been complied with.

Anthony D. Redman, having an extensive history of environmental planning – a Masters degree in environmental planning and 22 years as an environmental consultant, and Planning Director for various counties and States (Resume, Protestant Ex. 48) – testified as to the need for DME review and likelihood that a 150 foot buffer would be required, rather than the 100 foot

buffer shown, because of impervious clay soil conditions on the property. (Hearing date Oct. 11, 2012):

My testimony is going to submit that in order to satisfy MDE requirement, on this site, that the buffer will need to be 150 feet. And that's because the soils in this area of the buffer are class C soils, which is a hydrologic unit that has a sufficiently high clay content that doesn't drain. The berm did filtrate or the bio retention area that the applicant has proposed, and has tonight indicated is tentative that it might change, that area is also in class C soils, meaning it's not suitable. It will not properly recharge the ground water table or mimic the existing conditions on the site, which was discussed earlier by Mr. Vogel.

This important testimony is not well set out in the majority opinion. (Op. at 17)

Robert Vogel, a civil engineer, developed Petitioner's site plan. Mr. Vogel had not previously worked on a funeral home site plan using a septic waste system. He testified that he used Maryland Department of Environment requirements. (Hearing, March 1, 2012) Mr. Vogel, while not an attorney, also testified that MDE approval is to be considered at the time of the site development plan stage. (Hearing, January 1, 2013)

On behalf of Petitioner, in contrast to Mr. Redman's testimony, Mark Burdick, an environmental consultant, "testified regarding several options that would be better for the watershed than merely increasing the stream buffer on the Property, such as planting trees on County open space lot or retrofitting and enhancing St. Louis Church's storm water management pond. Burdick testified that MDE would be more likely to request improvements such as these than to require a permanent increase in the stream buffer on the Property due to a temporary encroachment to install piping." (Petitioner's Mem. p.7) Mr. Burdick's testimony is similarly set out in the majority opinion. (Op. at 20) It is conjecture as to what MDE would be more likely to request, and says nothing about the clay soil condition of the property. It was necessary for Petitioner to submit the Plan to MDE for review prior to submitting the Plan to the Hearing Authority for a conditional use approval.

Richard Klein, having worked 18 years for the Department of Natural Resources (DNR), has expertise regarding effects of land use on aquatic systems. Mr. Klein testified that an applicant customarily approaches DNR before presenting a conditional use plan for approval. His opinion was that there was no way for environmental design requirements to be met with this plan to protect the uniquely sensitive area. (Hearing, Nov. 27, 2012).

Zachary Fisch, a civil engineer, testified that there is a requirement for the Petitioner to work with MDE respecting the Tier II stream. A MDE permit application must be filed for every development greater than one acre. The area of the stream buffer cannot be counted as part of the building envelope. Mr. Fisch understands “setback” as defined in Section 103, item 19 of the Zoning Regulations to include building setbacks *and* environmental setbacks that comports with the Subdivision and Land Development Regulations. Section 16.108.b.7 of these regulations defines “building envelope”: “The area of a lot in which the principal buildings shall be located. The envelope is formed by the building restriction lines.” Consequently, “green space” was not calculated correctly respecting the Second Revised Plan when the TSR of September 24, 2012, page 3, states that the term “building envelope” is not defined in the Zoning Regulations and so can be included in the area of the stream buffer as green space part of the building envelope. (Hearing, Nov. 27, 2012)

Mr. Vogel, in rebuttal, also stated that the stream buffer is not excluded from the building envelope. (Hearing, Jan. 31, 2013) Yet, only after Mr. Fisch presented his testimony did Mr. Vogel decide to develop the Second Revised Plan to increase the stream buffer to 100 feet. (Hearing, Oct. 9, 2012)

In his testimony, Mr. Fisch referred to a matter, “the Lilly Pond case,” where MDE required the stream buffer to extend beyond the 100 foot zoning requirement. Mr. Fisch noted,

too, that the TSR, p.3, last paragraph, inferentially indicates that a stream buffer increased to 150 feet by DME would decimate the Second Revised Plan.

While the Second Revised Plan technically complies with the specific requirements of the Zoning Regulations, the Department of Planning and Zoning acknowledges that the incremental changes in the revised plans, *especially with regard to the increases in the stream buffer and parking requirements and the 50 foot northern property setback are factors which increase the difficulty of accommodating the proposed development on the site.* [Emphasis added.]

The Board granted the Petition in this case notwithstanding that Petitioner, before seeking approval for its proposed conditional use, had not submitted an application for a DME Tier II antidegradation review of the Tier II watershed buffer on the proposed site for DME's determination of whether the 100 foot buffer is adequate.

While the Board previously had considered that an increase in the stream buffer for the Second Revised Plan from 75 feet to 100 feet was a substantial change in the Plan to warrant further review by DPZ, anomalously the Board disregarded a potential change of buffer length by DME from 100 feet to 150 feet – twice the length of the original 75 foot buffer specified – as not being a substantial change to the Plan. In the face of this, too, the Board voted to grant the Petition.

The effect is that the Board prematurely granted the Petition where potentially the Plan may subsequently be determined not to be in compliance with Zoning Regulations and State law. And the Board, then, will no longer have jurisdiction over the case. In doing so, the Board abdicated responsibility to properly consider the environmental factors regarding the Tier II stream watershed in accordance with §130 C of the Zoning Regulations, and whether the Plan submitted by Petitioner for a conditional use is viable at all. The Board is relying on the Planning Board to do so when reviewing Petitioner's Site Development Plan for the conditional use.

In the absence of Petitioner seeking review by DME of the Tier II stream watershed buffer before applying for conditional use approval, the Petition for a conditional use approval in this case should properly have been denied by the Board.

Date: *July 3, 2013*


Henry Eagles, Member
Howard County Board of Appeals