

IN THE MATTER OF	:	BEFORE THE
ROBERT & F. MAXINE	:	HOWARD COUNTY
WALKER	:	BOARD OF APPEALS
Petitioners	:	HEARING EXAMINER
	:	BA Case No. 09-035C

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DECISION AND ORDER

On April 5, 2010 and April 12, 2010, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of Robert & F. Maxine Walker for Limited Outdoor Social Assemblies and Antique Shop Conditional Uses in an RC-DEO (Rural Conservation: Density Exchange Option) Zoning District, filed pursuant to Sections 131.N.32 and N.5 of the Howard County Zoning Regulations (the "Zoning Regulations").

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

E. Alexander Adams, Esquire, represented the Petitioners. Robert Vogel, Florence Walker, Bruce Brendel and Denise Boido testified in support of the petition. Theodore Mariani, Katherine Willson, Victoria Stewart-Moore, Catlin Stewart-Moore, Barbara Graybeal, Charles Lehr, Bob Styer, Doug Rekenthaler, Robert Long, Steve Cissel, John Graybeal, Barbara Graybeal, George Willson, Lambert Cissel, James Wright, Sandra Lutes and Treva Lutes testified in opposition to the petition. Theodore Mariani appeared

as a representative of Concerned Citizens of Western Howard County, having presented a duly adopted resolution of the association in accordance with Hearing Examiner Rule 6.3 (Opponents Exhibit 1).

Preliminary Matters

Amendment to the Conditional Use Plan. At the outset of the hearing, the Petitioner introduced into evidence an amended Conditional Use Plan (Petitioner's Exhibit 1). The amended plan depicts a new 20' x 60' emergency apparatus pull-off just before the turnaround on Lot 2. This change is intended to respond to Fire Department comments (attached to the TSR) to provide said pull-off. Pursuant to Hearing Examiner Rule 9.5, I determined the amendment was not substantive and could be admitted.

Pre-Submission Community Notice. During their testimony, Charles Lehr and Robert Styer objected to not having received notice of the pre-submission meeting, stating the petitioner sent written notice only to the property owners abutting or across from Lot 2. For the following reasons, I conclude there was no prejudice to Messrs. Lehr and Styer resulting from their alleged failure to receive written notice.¹

Section 131.F.1.a of the Zoning Regulations instructs petitioners to hold a pre-submission community meeting prior to the initial submission of a petition for a conditional use. Section 131.F.a(1) requires the petitioner to provide at least 3 weeks

¹ The Petitioners had apparently convened a prior pre-submission meeting and Messrs. Styer and Lehr received written notice. Petitioners held a second meeting because they failed to file a petition within one year of the first meeting, in accordance with Section 131.F.1.g of the Zoning Regulations. The Department of Planning and Zoning apparently determined only those property owners who actually abutted or were located across from Lot 2 were adjoining property owners for notice purposes of the second meeting.

written notice regarding the date, time, and location of the pre-submission community meeting to all adjoining property owners identified in the records of the Maryland Department of Assessments and Taxation. Section 131.F.c requires the petitioner to post the property with posters provided by and at locations specified by the Department of Planning and Zoning, and make reasonable effort to maintain the posters for at least 3 weeks immediately prior to the meeting. Section 131.F.1.g of the Zoning Regulations states the purpose of a pre-submission community meeting is to "allow the petitioner to provide information to the community regarding the proposed conditional use and to allow community residents to ask questions and discuss any issues they have concerning the proposal."

In accordance with Section 131.F.1.d, the BA 09-035C case file contains the pre-submission meeting summary of the issues expressed by residents and the names of all attendees, as well as a list of the three adjoining property owners who received written notice. The summary lists Mr. Styer as an attendee, Mr. Lehr's adjoining neighbor and 22 other area residents.

Importantly, the legal rights attached to the notice requirements of a pre-submission community meeting are limited in scope. The pre-submission notice requirements do not require me to postpone or dismiss the appeal for technical irregularities or any deficiency in the notice requirements, as is required of the actual hearing on the petition. Assuming *arguendo* Messrs. Styer and Lehr's entitlement to written notice, any legal rights they enjoy were not impaired by the lack of such notice.

Indeed, Mr. Styer attended the pre-submission meeting. When queried about how they were prejudiced by the alleged lack of notice, neither Mr. Lehr nor Mr. Styer were able to state the nature of the harm they suffered from the absence of written notice. Additionally Mr. Lehr testified in response to questioning that he had cause to travel along that section of Jennings Chapel Road at the time the meeting poster was up.

FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, I find the following facts:

1. The Property. The subject property is located in the 5th Election District on the southwest side of Jennings Chapel Road, north of Daisy Road. It is referenced on Tax Map 20, Grid 10, Parcel 57, as Lot 2 and p/o Lot 1, Harwood Farm Subdivision and is also known as 3666 Jennings Chapel Road (the "Property"). Lot 2 lies wholly within Lot 1.

2. Site Description. The Property originally comprised 145.5 acres and is listed in the Howard County Historic Sites Inventory as HO-279, Harwood. After the listing, the property owners created Lots 1 and 2 in 1989 by subdivision through Record Plats 9056-9060. These plats also established an agricultural preservation easement on the 134.89-acre Lot 1.

Lot 2. Lot 2 is a generally rectangular 10.518-acre parcel. The northeast lot line, which is closest to Jennings Chapel Road, is somewhat angular. A long, curving pipestem driveway within a fifty-foot right-of-way provides access to Jennings Chapel Road and is

lined on both sides by mature evergreen and shade trees. A 350±-foot section of the driveway is located on Lot 2.²

From Jennings Chapel Road, the driveway curves to the northwest. On reaching the southeast corner of Lot 1, the driveway forms a loop to the north of the dwelling and continues along the dwelling's front to provide access to a shed proposed to be used as the antique shop conditional use. This shed lies to the southeast of the dwelling and a barn in the southwest portion of the lot. The driveway continues beyond Lot 2 to provide access to the farm fields, horse paddock and a tenant house on Lot 1.

The mid-19th century historic dwelling sits on the high ground of Lot 2. From here, the land has a downward slope to the north and south. The land area north of the driveway loop and closest to Jennings Chapel Road (the area of the angular northeast lot line) is fairly level. The higher ground beyond this area has a marked slope as it drops in grade toward the pond on Lot 1.

The dwelling's entrance faces inward, away from Jennings Chapel Road. Most of the structures on Lot 1 are oriented to the southeast and Parcel 115. In addition to the shed proposed to be used as the Antique Shop, are the barn and two sheds sited near the barn. To their west, beyond the driveway, is a large fenced horse paddock running parallel to the northerly lot line and a horse shed. Beyond a 35-wide grassy strip to the west of this paddock is another fenced paddock, the bulk of which is located on Lot 1.

² A March 15, 2010 memorandum from Joy Levy, DPZ's Agricultural Land Preservation Program Administrator, to DPZ's Zan Koldewey and attached to the Technical Staff Report finds no conflict between the driveway use and the agricultural easement.

Lot 1. Lot 1 is used for agriculture and the keeping and boarding of horses. The Petitioners grow crops on the large agricultural fields. Large fenced areas enclose multiple horse paddocks. Run-in sheds dot the landscape. A 3+-acre pond in the northern area lies close to Jennings Chapel Road.

Viewshed. The rolling hillside along Jennings Chapel Road shapes the viewshed in the area of the proposed conditional uses. Owing to the high ground on Lot 2 where the dwelling is sited, the view to the east/southeast is open at this time of the year, providing a relatively clear view of the house, barn and shed on Lot 2. The evergreen trees along the driveway break up the view to the east. Although taken from what appears to be a slightly higher elevation than Jennings Chapel Road, Opponents Exhibit 7 provides a good example of a significant section of the viewshed and the view of Lot 2 from across the pond from the scenic roadway.

3. Vicinal Properties. Adjacent properties are also zoned RC-DEO.

Northeast side of Jennings Chapel Road. From the northernmost corner of Lot 1, moving southward are Parcels 99, 98, 95, 96, 97, 87 and 90. Each 5-acre parcel is improved with a single-family detached dwelling. Parcels 93 (5.19 acres) 60 (7.0 acres) and 68 (11.1 acres) are likewise each improved by a single-family dwelling. The Parcel 87 dwelling is located about 925 feet from the closest point of Possible Event Area 1 of the assembly use. The distance between Possible Event Area 1 and Parcel 87 is about 750 feet (measured at the closest property line), according to Petitioner's Exhibit 1.

Southwest side of Jennings Chapel Road. Adjoining the north side of Lot 1 of the Property and Jennings Chapel Road are the three-acre Lots 1 and 2 of Parcel 125. These unimproved lots are part of the four-lot Margori's Green Subdivision (Record Plat 10517). To the South of Lot 1 is the 8.8 acre Parcel 115. The single-family detached dwelling on Parcel 115 lies about 1,290 feet from the house on Lot 2. According to Petitioner's Exhibit 1, the distance between Lot 2 and Parcel 115 is about 800 feet. Parcel 12, a 71.29-acre parcel under the same ownership as Parcel 115, is encumbered with an agricultural preservation easement.

Southwest of Lot 1. To the southwest of Lot 1 are several parcels backing up to or near Patuxent River State Park, including Parcel 76. The dwelling on Parcel 76 lies about 1900 feet from Lot 2.

4. Roads. Jennings Chapel Road has two travel lanes with 24 feet of paving, and no shoulder within a 50-foot right-of-way. The posted speed limit is 30 MPH.

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

6. General Plan. The Property is designated "Rural Conservation" on the 2000-2020 Policies Map the 2000 General Plan. Jennings Chapel Road is depicted as a local road on the General Plan Transportation Map. Jennings Chapel Road is a designated Scenic Road.

7. The Proposals.

The Antique Shop. The Petitioners are proposing to use a 960-square foot existing shed on Lot 2 as an antique shop. The shed is sited about 155 feet to the southeast of the

dwelling. Petitioner Mrs. Walker would operate the antique shop. The shop would be open during individual limited outdoor social assembly events, Tuesdays and Thursdays, 1:00 p.m. – 3:00 p.m., and by appointment. One employee would work at the shop. Five gravel parking spaces are shown on the Amended Conditional Use Plan. Mrs. Walker agreed to set the hours of operation as follows: 1) the shop would be open during an individual assembly use event; 2) Tuesdays and Thursdays, 1:00 p.m. – 3:00 p.m., and; 3) by appointment. Mrs. Walker testified that a small horizontal antique shop sign about 24" x 48" would be erected at the driveway entrance.

Limited Outdoor Social Assembly (the "assembly use")

a. The Site. A conditional use petition submitted to the Hearing Authority must include a conditional use site description, the total land area and the total land area of the proposed use if different from the total property land area. The petition in this case describes the conditional use site as comprising Lots 1 and 2, and the total land area as 145.4 acres and states the assembly conditional land use area is 90,477 sq. ft. The Site also includes a 350±foot section of the existing driveway located on Lot 1 near Jennings Chapel Road.

The 90,477 sq. ft. area is the combined size of the three proposed temporary event areas. The parking areas and affiliated driveways are not included in this calculation. For narrative purposes, this Decision and Order refers to the assembly use area as being 2.0± acres. As a condition of approval, the Conditional Use Plan shall be amended to note the

additional land area of the use, including the equipment storage, parking and driveway areas.³

b. The Proposed Assembly Areas. The Amended Conditional Use Plan depicts three "possible" assembly areas. Area 1 (30,639 sq. ft.) would be located in the northerly portion of Lot 2. Area 2 (32,955 sq. ft) would be located just to the north of the principal dwelling in the area of the turnaround. Area 3 (26,493 sq. ft.) would be located behind the principal dwelling on the east side of the driveway. All events will occur outdoors. According to Footnote 1 in the petition supplement, the specific area used for a given event will be determined after consideration of the client's preferences and the anticipated number of attendees.

c. The Proposed Assembly Operation. The Petitioners are proposing to use Lot 2 as the site for picnics, weddings, anniversary/retirement parties, bridal and baby showers, non-profit fundraisers, banquets, rehearsal dinners, philanthropic and similar events. Temporary portable bathrooms are proposed to be located to the east of an existing springhouse southwest of the principal dwelling.

The supplement to the conditional use petition states that other than themselves, the Petitioners anticipate Mrs. Walker employing not more than 5 employees for each outdoor event, excluding personnel provided by the catering contractor. The supplement further states the equipment as follows may be used during each permitted event and

³ In response to my concern about the actual area of this Conditional Use Site, the Petitioners agreed to identify the assembly use site as all of Lot 2, with the understanding that only the three assembly areas and the affiliated parking area are in fact part of the conditional use. I am retracting this agreement, because it conflicts with the requirements of the conditional use petition.

removed or stored afterwards: one or more tents depending on the nature of each event and number of attendees; folding tables and chairs; temporary dance floor; temporary stage; portable generator; portable coolers; portable dumpster; portable barbeque grills; and spot-a-pots or restroom trailer. According to the supplement, the use would be conducted entirely outdoors.

The proposed hours of operation for the events are: Monday-Thursday, 9:00 a.m. to 10:00 p.m.; Friday and Saturday, 12:00 p.m. to 12:00 a.m.; Sunday, 12:00 p.m. to 10:00 p.m. Mrs. Walker testified that neither conditional use would operate during the Howard County – Iron Bridge Hounds Opening Day Meet and Blessing of the Hounds.

Each event will be limited to 150 attendees with a maximum of 25 events in a one-year period. All food and beverage service will be catered by third-party independent caterers. Some food will be prepared on-site during an event. All tents, spot-a-pots and other uses will be removed from the site within three days after the event.

d. Parking and Driveways. The Amended Conditional Use Plan depicts 77 unpaved parking spaces to be located in the horse paddock area. These parking areas would remain in grass. The existing gravel driveways would be retained, i.e., not paved. Mr. Vogel testified the driveway will be 16 feet wide and meet county driveway width requirements. He also explained an on-site attendant might be available to direct traffic and that the existing horse farm already accommodates large numbers of people and horse trailers or suppliers.

e. Traffic Safety. Mr. Vogel offered the rationale that the uses would not cause additional traffic problems because Jennings Chapel Road in the area of the proposed uses shares the same characteristics as where it becomes a major collector road between Daisy Road and Route 97. Because a major collector road is intended to carry traffic through neighborhoods, the road should be able to accommodate the additional trips.⁴ Discussing the sight distance at the ingress/egress, Mr. Vogel stated it exceeds American Association of State Highway and Transportation Officials' ("AASHTO") standards.

f. Alcohol. Mrs. Walker introduced into evidence a proposed contract provision for Licensees who utilize the Limited Outdoor Social Assembly site (Petitioners Exhibit 3). It obliges the Licensee in part not to serve alcohol to persons under 21 years or any person showing obvious signs of intoxication, and to remind attendees that all vehicles leaving the premises must be driven by a designated driver who has not consumed alcohol.

g. Noise. By Mrs. Walker's testimony, any amplified music will end at 10:00 p.m. on Fridays and Saturdays. The petition supplement states the use will comply with County noise regulations.

h. Lighting. The supplement states the Petitioners anticipate the use of low-level temporary lighting during events. Most lighting will be employed under the tents. Other lighting will be provided to light the grass pathways between the seating, restroom and parking areas.

⁴ The Howard County Design Manual, Vol. III, Section 1.5, explains the County road classification system.

8. During his testimony, Mr. Vogel opined that Event Area 1, which has a long view over the pond on Lot 1 near Jennings Chapel Road, would be an ideal backdrop for weddings. He disagreed with the TSR's conclusion that an event in this area would offset the scenic character of the road, as Event Area 1 is more than 900 feet from Jennings Chapel Road.

9. It was Mr. Vogel's opinion that the proposed assembly use would have no greater adverse effects at the proposed location than elsewhere, given the size of the Site and the physical buffer created by Lot 1.

10. Concerning the effect of the assembly use on the site's well and septic systems, which are not depicted on the Amended Conditional Use Plan, Mr. Vogel testified that some uses may be permitted over the septic fields but not a foundation, or disturbance or new paving. There was no reason a tent or gathering could not occur in these areas. In response to questioning, Mr. Vogel testified that a tent pole driven down above the septic area would not disturb the septic area, but that grading would constitute disturbance of the active soils needed for percolation.

11. Mr. Mariani testified that the noise associated with the assembly use would have an atypical adverse impact because it would typically be amplified and the sound level of implied music would be greater than typical noise levels in the neighborhood.

12. In her testimony, Mrs. Willson disagreed with the TSR's comments that a line of trees would buffer her view of the Limited Outdoor Social Assembly Use. She testified there is no tree stand to buffer the view of the proposed tent facilities. In an exchange

with Ms. Willson, I commented that during my site visit, I saw a long, L-shape stand of deciduous woods just beyond the end of the pipestem lots, which would appear to provide a limited visual buffer. This tree line is visible in Opponents Exhibit 3C. I also remarked that based on my site visit, the most important element of the viewshed, looking from Jennings Chapel Road, is the view of Lot 2 to the east/southeast. As noted above, this viewshed is visible in the photograph entered into evidence as Opponents Exhibit 7.

13. Ms. Willson, Mr. Lambert Cissel, Mr. Styer and other opponents testified that the assembly use is not in harmony with area agricultural uses because a considerable portion of the surrounding land is subject to agricultural easements.

14. Mr. Styer testified the approval of the requested conditional uses would result in four high activity uses on Lot 2, except in the winter: farming, the existing horse operation (boarding), the antique shop and the outdoor limited social assembly use. These events would likely be scheduled from late May through the fall. He further testified the Petitioners' intention not to pave the parking area would be detrimental to handicapped persons attending events because there would be no hard surfaces. He objected to the Conditional Use Plan's failure to provide for catering and employee parking and screening. It was also his testimony that the size of the tents would require site preparation, which in his view would require soil disturbance. He was also concerned that a tent could be up for 5 or more days at a time.

15. On recall, Mr. Vogel testified that during DPZ's review of the submitted petition, the Petitioners' representatives met with DPZ on several issues. At a meeting with DPZ's Development Engineering Division ("DED"), Mr. Vogel proposed to use grass parking. If over time, the grass parking proved impractical, the Petitioners would have to go back and revisit the issue with the county. In response to my question about whether the Zoning Regulations' parking requirements mandate compliance with the Design Manual, Mr. Vogel stated that the parking and drive aisle geometry complies with the Design Manual, including a 16-foot drive aisle for a one-way circulation pattern. The goal, however, is not to have hard surface.

16. Mr. Rekenthaler testified that the proposed uses would be disruptive to this home occupation, which requires the use of sensitive electronic equipment.

17. Lambert Cissel testified to having a background in turf and soil fields. He opined the grass would become compacted during the concentration of activities between late spring and fall. Referring to the photograph of a mature cornfield on Lot 1 submitted with the petition, which Mr. Brendel (the Petitioners' tenant farmer) testified would mitigate the visual impact of the use, Messrs. Lambert Cissel and Mariani testified that the cornfield would not block the view of the use owing to the higher elevation of Lot 2 and the very limited time the mature stalks were up.

18. Charles Lehr testified the seasonality of the outdoor assembly use would have a significant impact of the visual quality of the scenic road and area.

19. Several opponents, including Katherine Willson, Victoria Stewart-Moore, Catlin Stewart-Moore, Sandra Lutes, Lambert Cissel, Steve Cissel and Barbara Graybeal, testified the noise and activities would have a detrimental impact on area properties, owing to the agricultural nature of the surrounding area. Many stated their concern that attendees would wander off the event areas and cause problems or interfere with area agricultural or horse operations.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I conclude as follows.

I. Through the Looking Glass: "Temporary Facilities" and What the Hearing Examiner Found After a Rule 10.4 Referral for Clarification

'It seems very pretty,' she said when she had finished it, 'but it's RATHER hard to understand!'

Lewis Carroll, Through the Looking Glass (Alice's remarks after reading the poem Jabberwocky, having realized the book she had picked up was a looking-glass book, which if held up to a glass made the words go the right way)

During the proceeding, Mr. Vogel picked up his looking glass and read the limited outdoor assembly use as something akin to a fair or carnival. In correspondence with DPZ, he likened the assembly use to a public park or playground, uses with temporary parking on grassed areas. He therefore reasoned the driveways and parking areas in the Petitioner's plan should likewise remain in grass, due to the similar nature of the assembly use.

Opponents picked up their looking glass, read the petition and the proposed limited outdoor social assembly use plan and found a different kind of use, something of greater duration than a carnival or fair, because the 25 events would likely be tightly scheduled between late spring and late fall. Consequently, in their opinion, the existing grass areas are inadequate to accommodate the parking and driveway requirements of the assembly use. They press upon me the Petitioners' mandate to pave the parking and driveway areas in accordance with the Howard County Design Manual. Further, in their view, the need for paved parking facilities triggers the site development plan and review requirements of the Subdivision and Land Development Regulations ("Subdivision Regulations") because the paving will involve some 12,000 square feet of site disturbance.⁵

Hearing Examiner Rule 10.4 permits me to refer an issue in a case to DPZ to clarify or update the record before making a decision. Invoking this rule, I asked DPZ, in an April 15, 2010 memorandum, for clarification on the treatment of the parking and driveway components of the proposed Limited Outdoor Social Assembly Use and information about any necessary administrative procedure to be followed for any permissible exemption.

Ms. Marsha McLaughlin, DPZ Director, responded via an April 28, 2010 memorandum. DPZ's Development Engineering Division ("DED") had reviewed the

⁵ Section 16.155(a)(1)(ii) of the Subdivision Regulations requires a site development plan for any new or expanded nonresidential development. Section 16.154(a)(1)(ii) of the Subdivision Regulations requires a site development plan for a nonresidential use that causes more than 5,000 sq. ft. of site disturbance.

proposed paving materials prior to the hearing, she informed me, and offered the comments as follows.

Due to the temporary nature of site features associated with the use, it is not recommended that any paving be required. Unless drainage or rutting problems result from the use, the existing grass should be sufficient to handle the intensity of the traffic and parking.

Placing paving on the site would lead to drainage issues and the likely necessity to create stormwater management features. Leaving the site as natural as possible is the best option. Temporary facilities on existing ground are not required to have Site Development Plans and therefore are not required to have permanent parking facilities. If rutting becomes an issue, simple tar and chip or grasscrete would be sufficient. It is only recommended that such materials be placed in the access road and not in the parking areas (similar to the County Fairgrounds). A Design Manual waiver would only be required to be processed in conjunction with a Site Development Plan.

Pursuant to Hearing Examiner Rule 10.4, I provided the parties in this case an opportunity to comment on or challenge DPZ's response. The Petitioners support DPZ's response via Mr. Adams letter of May 6, 2010. In their view, DED's "common sense approach" is consistent with the goal of leaving the site as natural as possible, considering the nature of the conditional use category, which may be applied only to historic structure sites.

Responding on behalf of area residents and as the representative of the Concerned Citizens of Western Howard County representative, Mr. Mariani challenges DPZ's clarification as erroneous for describing the assembly facilities as a "temporary" use. In his opinion "temporary" means "used for a limited purpose" and the proposed outdoor social assembly use is not a temporary use occurring once a year or so (like a fair or

carnival or fair), but a recurring or repetitive event. He further maintains that using existing grass for parking will cause access problems for handicapped persons and emergency vehicles. Instead, the travel lanes serving the parking should be paved with an environmentally friendly material that allows drainage while providing an all-weather driving surface. Lastly, because the area affected by new construction would be greater than 12,000 sq. ft. the Petitioners would be required to submit a site development plan.

Rather than comment on or challenge DPZ's response, Mmes. Willson and Victoria Stewart-Moore submitted additional testimony to support their opinion that the parking and driveways should be paved. Because this testimony is submitted after the close of the proceeding, I am not permitted to consider it. Bill English and Lisa Biordi also submitted letters. They are not listed on the sign-up sheet, nor did they testify at the hearing. There being no evidence in the record that these two persons were parties to the proceeding, I did not review their submissions.

Conclusion

DED's comments (and the TSR's) about the "temporary" nature of the limited outdoor social assembly facilities are rooted, presumptively, in one of the Section 131.N.32 criteria for the use, the prohibition against permanent structures. Within the meaning of the Zoning Regulations, a "structure" is "[a]nything constructed or built, the use of which requires permanent location on the ground, or attached to something having permanent location on the ground. Section 131.A.186. Since tents are not "structures," DPZ describes them as "temporary." This clarification is consistent with other county

regulations. The Department of Inspections, Licenses and Permits ("DILP"), for example, requires permits for the erection of certain "temporary structures," including tents.

Unfortunately, the word "temporary" as used with respect to the limited outdoor social assembly conditional use category is somewhat confusing because the Zoning and Subdivision Regulations also regulate a limited class of "temporary uses," which are uses allowed by permit after a limited public hearing.⁶ Rather than regulate the assembly use as a temporary use under the Zoning Regulations, the County wisely took the extra step of making it a conditional use, which subjects the use to the criteria applied in this Decision and Order.

In my view, the Rule 10.4 referral for clarification has functioned as a kind of looking glass through which we may read the "paving debate" as a proxy argument for the many "red flags" expressed in various DPZ documents and by area residents about the

⁶ Subdivision Regulations Section 16.155(a)(1)(i) provide an exemption for a small class of "development" associated with a use permit approved by DPZ in accordance with Section 128 of the Zoning Regulations. Section 128 (Supplemental Regulations), in turn, regulates in pertinent various "temporary and seasonal uses" listed in Section 128.D: temporary mobile homes, the sale of Christmas trees, snowball stands, and carnivals and fairs.

Pursuant to Section 128.D.3, temporary or seasonal carnivals or fairs are permitted as a matter of right in the RC district and elsewhere if sponsored by and operated on a nonprofit basis for the benefit of charitable, social, civic or educational organizations, provided that:

- a. The operator shall obtain all permits required by County or State law;
- b. Such use shall operate for a period of time not to exceed 16 days per event;
- c. All structures, materials and equipment shall be completely removed from the lot within seven days of the closing of the carnival or fair;
- d. A carnival or fair shall not be held more than once in any 30 day period at the same location.
- e. Nonprofit shall mean that no part of the net earnings inure to the benefit of a private individual, but all net earnings are exclusively devoted to charitable, social, civic or educational purposes.

Section 132 of the Zoning Regulations, entitled "Temporary Uses," provides a public hearing administrative procedure by which a temporary use may be approved. This public hearing procedure is set forth in Section 100.H.

proper process for confirming the post-decision aspects of the use, including compliance with all applicable state and local laws and regulations before the use commences. In this regard, I take notice of the March 22, 2006 DPZ TSR for ZRA-72, which proposed to amend the Zoning Regulations to add the Limited Outdoor Social Assembly Use conditional use category, provided the use is located on a lot that is the site of a historic structure. Among the miscellaneous concerns raised by the TSR are possible noise generation, well and septic capacity to serve the events, and the possibility of tents or other items intended for temporary use remaining on site after each event. To address these concerns, DPZ recommended, and the County Council adopted, the catering, tent removal and special event permit provisions of Sections 131.N.32.e and i.

In its comments on the first conditional use application for a limited outdoor social assembly use, the TSR now raises concerns about noise from outdoor music, sight distance, traffic management, and the location of tents in Possible Event Area 1. The Bureau of Environmental Health's comments about the use of chemical toilets are another concern (as addressed in Parts II, III and IV.) These red flags pertain to the public health, safety, security or general welfare aspects of the assembly use. Certainly, opponents to the assembly use repeatedly expressed concern about many post-decision aspects of the use during the proceeding. These concerns are echoed in the TSR's recommendation that the Subdivision Review Committee (the "SRG") review the change in use and all proposed site modifications to ensure compliance with all Design Manual and Subdivision and Land Development requirements.

Section 131.H.1 of the Zoning Regulations empowers the Hearing Authority to attach conditions to the proposed use or plan as deemed necessary to ensure continuous conformance with all applicable standards and requirements. Additionally, Section 131.H.2 empowers the Hearing Authority to place a time limit on a conditional use or to require renewal of the use after a certain time period as a condition of approval.

The power to impose conditions upon the grant of a variance or special exception is implicit in the power to grant a variance or special exception. *Halle Companies v. Crofton Civic Ass'n*, 661 A.2d 682, 689, 339 Md. 131, 141 (1994). Such conditions may be imposed as necessary to protect the public health, safety and welfare. *Id.* at 141-142, 661 A.2 at 686.⁷ This protective power is expressed in Section 130.C of the Zoning Regulations, which instructs me to deny an application where I find 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.

I see no benefit to the public safety and welfare by placing a time limit on the new principal use or by requiring renewal of the use after a certain time period. But certainly the county's and residents' concerns about the operation of a limited outdoor assembly use

⁷ In *Halle*, the Maryland Court of Appeals held the Anne Arundel County Board of Appeals could entertain a proposed alternative access even though it had not been raised before the hearing officer as part of the original application. Importantly, for this Decision and Order, the Court upheld the Board's decision to condition approval on the new access, which had to be acquired over property owned by third parties, an uncertainty.

at this location in compliance with all applicable state and local law and regulations compels the need for sufficient conditions to ensure its effects upon neighboring property and the community at large are mitigated.

One of the statutory conditions of approval for the assembly use is that it does not commence until the applicant has obtained approval of all necessary permits for its operation. I am invoking my discretionary authority to broaden this mandatory condition, by requiring as a further condition of approval, that the assembly use does not commence until the Petitioners obtained all necessary permits and demonstrated compliance with all state and county laws and regulations. Per the TSR's guidance, I am also charging the Department of Planning's Subdivision Review Group with oversight review of the Petitioners' submissions pertaining to its post-decision, pre-use commencement obligations under federal state and county laws and regulations, including the acquisition of all necessary permits.⁸ Failure to comply with this condition shall result in the voidance of the approval for the outdoor limited social assembly use.

⁸ The deployment of the Subdivision Review Group as the committee charged with compliance oversight does not trigger the Site Development Review Process set forth in the Subdivision Regulations, unless the group determines a site development plan is required. I take notice here that this Hearing Examiner regularly and routinely grants conditional use petitions subject to the general requirement that it comply with all federal, state and local law and regulations. This Hearing Examiner also regularly and routinely approves conditional use petitions subject to multiple conditions to be met in a post-decision forum. Most often, I designate DPZ as the agency charged with compliance oversight. In this case, I adopting a DPZ recommendation that the SRG is the appropriate DPZ section to administer the post-decision obligations of my Decision and Order because multiple county agencies are involved. This condition does not obviate the necessity for obtaining all required permits for an individual event, as Section 131.N. 32.i requires.

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

1. Harmony with the General Plan. Section 131.B.1 requires me to evaluate whether the proposed conditional use plan will be in harmony with the land uses and policies indicated in the Howard County General Plan for the district based on in which it is located. In making this evaluation, I am required to consider:

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

General Plan Policies. The Howard County General Plan designates the area in which the Property is located as a "Rural Conservation" land use area. Antique shops and limited outdoor social assemblies are presumptively compatible and appropriate in an RC district if the Petitioner adduces evidence that the proposed use is contemplated or addressed in the General Plan through its land use policies or furthers its recommendations, or if the use is positively evaluated under Sections 131.B.1.a and b.

The antique shop is a limited business often associated with rural properties and would generally be harmonious with the General Plan for the Rural Conservation Area. The TSR notes the county created the Limited Outdoor Social Assembly conditional use category to ensure the economically viability of preserving historic resources, based on the General Plan's recognition that historic properties incur unusual maintenance

expenses. General Plan Policy 5.8 expressly notes the county's policy to "inform[] owners of special exception uses for historic properties that may provide for an economically viable use for the property."

A second General Plan policy is the preservation of the characteristics of scenic roads, including Jennings Chapel Road. The county scenic road program, described in Chapter 3, Preservation of the Rural West and codified in Section 16.401 et seq. of the Subdivision Regulations, is intended to ensure that "new development" abutting a scenic road is designed to minimize impacts on scenic roads while allowing development permitted by the Zoning Regulations. The Zoning Regulations define a "development" in pertinent part *as the establishment of a principal use on a site or a change in a principal use of a site* (emphasis added). Section 103.A.37. Additionally, in reviewing a conditional use development—the establishment of a principal use on a site—the Hearing Authority may not permit the proposed conditional use if it will impose atypical adverse impacts on vicinal properties.

In this case, the Petitioners are proposing to establish a limited outdoor social assembly use—a principal use—along a scenic road. The TSR recommends that tents not be placed in Possible Event Location 1, reasoning the ground elevation in this area would make a tent more visible here than in Event Locations 2 and 3. Considering the elevation of Lot 2 and the visibility of tents in Possible Event Area Location 1, the TSR concludes, as do I, that the use would seriously compromise views from the scenic road and would have an atypical adverse impact on the visual resources enjoyed by vicinal residents

owing to the scenic corridor setting. For these reasons, I am conditioning approval of the outdoor social assembly use on the elimination of any temporary structures or facilities in Event Location I. In my view, this condition will balance two equally important Master Plan goals and regulations for the rural west, aiding owners of historic structures to provide for an economically viable use for the property and protecting scenic roads.

The Nature and Intensity of the Uses. Based on the criteria for the antique shop conditional use category, as set forth in Part III, an antique shop conditional use in an RC zoning district is an operation run or owned by a property owner who resides on the site. The conditional use criteria limit the activities permitted to outdoor displays during store hours only and requires the structure to be compatible with vicinal structures. In this case, the property owner is proposing to use an existing shed as the proposed antique shop. In appearance, the shed is compatible with the many structures on the property and an integral part of the scenic viewshed. The proposed shop is also low intensity use, given the limited proposed hours of operation and will comply with all criteria for the use.

The outdoor limited assembly use would host up to 25 celebratory and organizational temporary events a year in at most, two tented event areas, as conditioned. All events will be conducted within temporary tents located several hundred feet from non-adjoining properties. The intensity of the use is limited by the land available for the erection of temporary tents. Importantly, the uses will be buffered by distance due to the large surrounding parcel. Although the nature of the proposed assembly use represents a more intense use of the site, the use is intended to support the preservation of the historic

structure on the site. Further, there is no credible evidence that the proposed use is incompatible with current farming and horse operations, or with the proposed antique shop. Because the General Plan expressly supports complementary conditional uses to help preserve historic resources, and considering the use's compliance with the specific criteria for outdoor assembly uses and all conditions of approval to which the use is subject, I conclude the nature and intensity of the proposed operation is appropriate for the site.

The size of the site in relation to the use. The antique shop will operate within an existing structure, so the site can easily support it. The criteria for a limited outdoor assembly use requires it to be located on a 5+-acre site with a historic structure. In this case, the historic structure site is 10.518 acres in size. The proposed use area, as restricted, includes the 2+-acres of the two temporary event areas, affiliated parking, driveways and the storage area. Although the square footage of the parking area is unknown, the total use would temporarily occupy a relatively small percentage of the site.

The location of the site with respect to streets giving access to the site. The site is accessed via a long driveway off a local road. Mr. Vogel testified the ingress/egress complies with, or exceeds, AASHTO standards. Further, based on Mr. Vogel's testimony Jennings Chapel Road in the area of the site has the same characteristics as that section of Jennings Road designated as a major collector road, a type of road intended to safely accommodate a limited amount of through traffic in a neighborhood.

The appropriateness of the conditional use in combination with a permitted use on the site. The proposed conditional uses would be combined with three permitted uses, a farm, a horse operation and a residence. The antique shop would be located in an existing shed. The assembly use would comprise only a small portion of the site. Considering that Lot 2 is more than twice the minimum lot size for the conditional use category (5 acres), the combination of uses is appropriate.

2. **Adverse Effect.** Unlike Section 131.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, compatibility with the neighborhood is measured under Section 131.B.2's four "adverse effect" criteria": (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, and; (4) access.

The assessment of a proposed conditional use under these criteria recognizes first the potential for adverse impact by virtually every human activity. Zoning recognizes this fact and, when concerned with conditional uses, accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before me is not whether the proposed uses would have adverse effects in an RC zoning district. The proper question is whether those inherent adverse effects are greater at the proposed site than they would be generally elsewhere within the RC 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).

For the reasons stated below, and in consideration of all conditions of approval, I conclude the Petitioners have met their burden of presenting sufficient evidence under

Section 131.B.2 of the Zoning Regulations to establish the proposed uses will not have adverse effects on vicinal properties beyond those ordinarily associated with antique shop and limited outdoor social assembly uses in an RC district.

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

The antique shop would be conducted indoors in an existing shed. The assembly use would be conducted outdoors in tents. Low-level lighting will be used. Considering all conditions of approval, the adverse impacts of dust, fumes, odors, lighting, vibrations, hazards or other physical conditions will not be greater at the subject site than it would generally be elsewhere in the zone or applicable other zones.

As to the adverse impacts of noise from the assembly use, the Petitioners have agreed to end amplified music used during the operation of any assembly event at 10:00 p.m. on Friday and Saturday nights. Importantly, the assembly use site is encompassed by Lot 1, which the Petitioners own and will act as a significant buffer between any noise associated with the assembly use and neighboring properties.

Although many opponents who testified in opposition to the assembly use contended the increase in noise caused by the assembly use would cause adverse impact, the required test is that the impact be atypical, which they did not prove. Moreover, perforce of the Howard County Noise Ordinance (Howard County Code, Title 8, Section 8.900 et. seq.) the police and health departments are charged with enforcing its

requirements, not the Hearing Authority. Hence, in this case, the only condition or restriction I may impose on the assembly use with respect to noise is that it shall not violate the county noise ordinance.

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

The antique shop use will be located in an existing shed several hundred feet and surrounded by the 134.89-acre Lot 1, the Petitioners' property. Because this use will be located several hundred feet from other properties, the existing natural landscaping, including existing fences and vegetation, the antique shop will neither hinder nor discourage the use or development more at the subject site than it would generally in the zone or applicable other zones.

There are no permanent structures proposed in relation to the assembly events. Because the assembly use operation adjoins, in main part, the Petitioners' property (Lot 1), the use will not hinder or discourage its development and use. The 800-1000 foot distance between the use and adjacent properties on Jennings Chapel Road will mitigate the use's impact and the event areas will be limited as set forth in Part IV. I therefore conclude the outdoor social assembly use will neither hinder nor discourage the use or development more at the subject site than it would generally in the zone or applicable other zones.

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

The Amended Conditional Use Plan and petition depict 5 parking spaces for the antique shop, the minimum required. Because the Zoning Regulations (Section 133.D) do not specify a required number of parking spaces for a limited outdoor social assembly use, Section 133.D.8 applies. This section requires the applicant of a non-listed use to submit a parking needs study and any data used in calculation the estimate.

In this case, the Petitioners have applied the parking needs for an assembly use (Section 133.D.6.1), which requires one space per three seats. The assembly use sets a maximum of 150 persons per event. The use therefore requires 53 spaces and 53 are proposed. These spaces would be located in the horse paddock area. No additional landscaping is proposed because the parking will be buffered by distance.

Neither the Amended Conditional Use Plan nor the petition demonstrate compliance with Section 133.C.1.d, which requires parking provisions to comply with the American Disabilities Act ("ADA") and the Maryland Accessibility Code. To ensure the proposed uses comply with this requirement, as a condition of approval the Petitioners shall submit an amended conditional use plan and narrative notes demonstrating compliance with Section 133.C.1.d to the SRG as part of its post-decision obligations.⁹

⁹ The ADA standards for accessible design, codified in 28 CFR Part 36, expressly apply to temporary structures, buildings or facilities. Under the ADA, temporary buildings and facilities are not of permanent construction but are extensively used or are essential for public use for a period of time. The Maryland Accessibility Code, COMAR 05.02.02, applies to all "facilities," meaning all or any portion of buildings,

No changes are proposed for the long existing driveway, except for minor widening. The Amended Conditional Use Plan depicts a 20 ft. by 60 ft. fire truck pullover where the driveway turns into the main portion of Lot 2. No discrete loading areas are proposed.

Although no refuse areas are proposed, apparently, for the assembly use, the Petitioners have not demonstrated how refuse will be handled. To ensure individual assembly event refuse will be handled in a manner that does cause atypical adverse impacts on adjacent properties, as a condition of approval the Petitioners shall include in the amended conditional use plan a note stating how and when refuse will be removed after each event. Subject to these conditions of approval, I conclude the proposed 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.

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

Mr. Vogel testified the existing driveway has adequate sight distance, exceeding AASHTO standards and that an on-site attendant might be available to direct traffic. Because this performance standard mandates safe access, and because the record indicates the potential need for a traffic manager, as a condition of approval I am requiring the Petitioners to note on the amended conditional use plan how traffic will be

structures, site improvements, roads, walks, passageways, parking lots, or other real property, located on a site.

managed during a limited outdoor assembly use event. In my view, a traffic management plan should obviate the need for acceleration or deceleration lanes along the scenic road. Subject to these conditions, the ingress and egress drives appear to provide safe access, with adequate sight distance.¹⁰

III. Specific Criteria for Antique Shops (Section 131.N.5)

The Hearing Authority may approve a conditional use for Antique Shops, Art Galleries and Craft Shops (Commercial) in the RC District in existing structures subject to three criteria.

a. No merchandise will be stored outside of structures, except outside displays during store hours only. Such displays may not extend into minimum required structure or use setback areas.

Mrs. Walker testified that no merchandise would be stored outside and that she would comply with the requirements of the conditional use. The proposed use complies with Section 131.N.5(a).

b. The design of structures will be compatible with that of other structures in the vicinity.

The proposed antique shop is a long-existing shed on a historic farm. As such, its design is deemed to be compatible with other structures in the vicinity. The proposed use complies with Section 131.N.5(b).

c. The use shall be operated by the person or persons residing in a residence located on the same lot.

¹⁰ The Hearing Examiner takes notice of her decision in Board of Appeals Case No. 09-011C, where she imposed as a condition of approval for the enlargement of an existing religious facility for nonreligious assembly the requirement that the site development plan be amended to include a note detailing a parking management plan.

Mrs. Walker, who resides on Lot 2, will operate the use. The proposed use complies with Section 131.N.5(c).

IV. Specific Criteria for Limited Outdoor Social Assemblies (Section 131.N.32)

A conditional use may be granted for limited outdoor social assemblies in the RC District, provided that:

- a. The lot is the site of a historic structure as defined in these regulations.**

The Property is listed in the Howard County Historic Sites Inventory as HO-279.

The proposed use complies with Section 131.N.32.a.

- b. The minimum lot size is 5 acres or greater.**

The Site is located on Lot 2, which is 10.518 acres in size. The proposed use complies with Section 131.N.32.b.

- c. If the driveway providing access to the proposed site is shared with other properties or has direct access to and frontage on a local road, the petitioner shall demonstrate that the use will not result in damage to or deterioration of the shared driveway or in increased hazards to other users of the driveway or local road. The Hearing Authority shall prescribe appropriate conditions and safeguards to ensure the conditional use operator's responsibility for repair of any damage or deterioration of the shared driveway caused by the conditional use, including requirements for surfacing of access driveways.**

20.

The driveway providing access to the proposed site of the assembly use is not shared with other properties. Mr. Vogel testified the use will not result in increased hazards to other users of Jennings Chapel Road because the sight distance at the driveway

exceeds AASHTO standards. Jennings Chapel Road in the area of the proposed use sharing the same characteristics as the major collector leg of the road between Daisy Road and Route 97. Because a major collector road is intended to carry traffic through neighborhoods, the road should be able to accommodate the additional trips without additional hazards.

Mrs. Walker introduced into evidence a proposed alcohol contract provision for Licensees who contract to have an individual assembly event on the site. It obliges the Licensee in part not to serve alcohol to persons under 21 years or any person showing obvious signs of intoxication, to remind attendees that all vehicles leaving the premises must be driven by a designated driver who has not consumed alcohol. Additionally, as discussed heretofore, as a condition of approval the Petitioners are required to provide a traffic management plan in the form of a note on the amended conditional use plan to be submitted to the SRG detailing how traffic will be managed during an individual assembly event. This plan shall address the management of traffic entering and leaving the driveway to ensure there will be no increased hazards to Jennings Chapel Road and the internal traffic flow within the site and along the long driveway. Subject to these conditions, the proposed use complies with Section 131.N.32.c.

d. The limited outdoor social assemblies are the following private functions: Picnics, weddings, anniversary/retirement parties, bridal or baby showers, not for profit organization fundraisers, banquets, rehearsal dinners, philanthropic events, or other similar events.

The petition states outdoor events would include picnics, weddings, anniversary/retirement parties, bridal and baby showers, non-profit fundraisers, banquets, rehearsal dinners, philanthropic and similar events, in compliance with Section 131.N.32.d.

e. No permanent structures, including catering or restaurant facilities shall be constructed on site.

The temporary nature of the proposed tent facilities is extensively discussed in Part I. No permanent catering facilities are proposed. The petition supplement states the Petitioners anticipate using certain equipment during each permit and removing or storing it after each event.

At no time during the hearing did the Petitioners present evidence addressing the storage of this equipment. No such storage area is depicted on the Amended Conditional Use Plan. As a condition of approval, the Petitioners shall amend the Amended Conditional Use Plan to depict the storage area. Subject to this condition, the use complies with Section 131.N.32.e.

f. The outdoor assembly area is located and designed to shield residential property from noise or nuisance and screened from adjacent residential properties.

The Petitioners' witnesses testified the location of the assembly site, lying as it does wholly within Lot 1, will mitigate any noise from the use. The Petitioners are also requiring all amplified music to end at 10:00 p.m. on Fridays and Saturdays and the

petition supplement states the use will comply with County noise regulations. They perceive no nuisance uses.

I am not persuaded by Mr. Brendel's testimony that the cornfield on Lot 1 would shield and screen area residential properties. Equating distance with screening, the conditional use plan does not show the use as being screened from adjacent properties. In part, this is because the Petitioners narrowly define "adjacent" residential properties as those physically adjoining Lot 2.

While "adjoining" properties are always adjacent, not all adjacent properties have physical contact. The Zoning Regulations are replete with requirements pertaining to adjoining parcels and lots, by which the regulations mean properties that physically touch at some common property line. These same regulations also prescribe a broad array of design or performance standards intended to protect "adjacent" residential properties, by which the regulations mean neighboring properties. This definition accords with the plain meaning of "adjacent": "not distant: nearby, like the city and adjacent suburbs." Adjacent may or may not imply contact but always implies absence of anything of the same kind in between, like a house with an adjacent garage. <http://www.merriam-webster.com/netdict/adjacent>.

Rather than require new landscaping to screen the temporary facilities from adjacent residential properties, which would be inharmonious with the Petitioners' self-stated objective of retaining the natural character of the site, as a condition of approval I am requiring that no tent side wall facing toward the northeast, east and southeast (toward

Jennings Chapel Road) be tied back during an assembly use in order to provide the required screening. Subject to the conditions of approval, the petition complies with
Subject to this condition, the use complies with Section 131.N.32.f.

g. Limited social assembly events shall have the following limitations:

(1) Maximum capacity is not to exceed 150 attendees;

The petition states no more than 150 attendees will be permitted to attend an event, in compliance with Section 131.N.32.g(1).

(2) No more than 25 of these events shall be held within a one year period.

The record indicates that the Petitioners will not hold more than 25 assembly events within one year period, in compliance with Section 131.N.32.g(2).

(3) Operation hours shall be restricted to between 9:00 a.m. and 10:00 p.m., Monday thru Thursday; between 12:00 p.m. and 12:00 a.m., Friday and Saturday; and between 12:00 p.m. and 10:00 p.m., Sunday.

The Petitioners state they will adhere to these hours. Because this performance standard specifically refers to "operation" hours, and not "event" hours, all event operations, including, but not limited to, site preparation, set ups, or post-event break downs, must occur within these hours. Subject to this condition, the use complies with Section 131.N.32.g(3).

h. All event activities occur outdoors.

The record indicates that all event activities will occur outdoors, in compliance with Section 131.N.32.h.

i. Special events with catered food or food prepared on-site are subject to review by the food protection program of the Howard County Department of Health and may require a special events permit. The conditional use may not commence until the applicant has obtained approval of all necessary permits for its operation. Tents, spot-a-pots or other temporary uses associated with the event shall be removed from the site within 3 days after the event.

This last performance standard has two discrete elements. The first applies to the initial establishment of the assembly use, and instructs the applicant not to commence the assembly use until all permits necessary to the use are obtained. As recognized above, a central issue with the limited outdoor social assembly conditional use category--and this first petition—is how the Petitioners will demonstrate compliance with all federal, state and local laws and regulations (including all necessary startup permits), in the absence of a subsequent administrative procedure (such as the submission and review of a site development plan.)¹¹ Again, to protect the public health, safety, security, or general welfare aspects of the assembly use, the Petitioner is required to amend the conditional use plan as required by this decision and order and to make all such necessary proofs or submissions to the SRG, which shall coordinate the Petitioners' post-decision obligations.

The second element pertains to individual assembly events and puts the petitioner on notice that individual assembly events with food may require review and a special event permit by the Howard County Department of Health. It also instructs the petitioner

¹¹ The review will provide a forum to resolve, hopefully, the debate between the Petitioners and the Michael J. Davis, Assistant Director of the Howard County Health Department's Bureau of Environmental Health about the use of chemical toilets for assembly events. I took notice of this debate during the proceeding.

to remove tents, spot-a-pots or other temporary uses associated with the event within 3 days after the event. The petition states the Petitioners will comply with this requirement.

By this decision and order, the Petitioners are also on notice that the Department of Inspections, Licenses, & Permits ("DILP") requires a permit for any tent (a temporary structure) erected for each individual assembly use event if the tent exceeds 120 sq. ft. in size. To ensure the permit complies with the requirement that any tent be taken down within 3 days after the event, I recommend the Petitioners consult with DILP to determine if the duration of the temporary permit application necessarily includes this take-down date.¹²

As a general condition of approval, I am also requiring the Petitioners to obtain all required permits for individual events or verify that the appropriate party has obtained all required permits before the first individual assembly event.

V. Opposition Testimony

While those in opposition in this case expressed general concerns about potential traffic safety, noise, potential environmental impacts, and the expansion of commercial uses in the area, the testimony presented amounted only to unsupported opinions and general conclusions. Maryland courts instruct us that the 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 which are lacking in probative value. *Anderson v. Sawyer*, 23 Md. App. 612, 329 A.2d 716 (1974).

¹² This list of required permits is not exhaustive.

Except as otherwise concluded in the above conclusions of law, the Opposition's general testimony in this case was unsupported by any evidence that the anticipated harmful effects are likely to occur. I must therefore accord it little weight.

ORDER

Based upon the foregoing, it is this 27th day of May 2010, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the Petition of Robert and F. Maxine Walker for Limited Outdoor Social Assemblies and Antique Shop Conditional Uses in an RC-DEO (Rural Conservation: Density Exchange Option) Zoning District, is hereby **GRANTED; Provided, however,**

1. The Petitioners shall amend the Conditional Use Plan to note the total area of the limited outdoor social assembly use.
2. The Petitioners shall amend the Conditional Use Plan to depict the location of the assembly use storage equipment area.
3. The Petitioners shall amend the Conditional Use Plan to depict the location of the well and septic areas.
4. The Petitioners shall amend the Conditional Use Plan to demonstrate compliance with Section 133.C.1.d, which requires parking provisions to accord with the American Disabilities Act ("ADA") and the Maryland Accessibility Code.
5. The Petitioners shall amend the Conditional Use Plan with a note stating how refuse for the limited outdoor social assembly use will be handled for individual events.
6. The Petitioners shall amend the Conditional Use Plan with a note detailing a traffic management plan for individual limited outdoor assembly use events. This plan shall address the management of traffic entering and leaving the driveway to ensure there will be no increased hazards to Jennings Chapel Road and the internal traffic flow within the site and along the long driveway. The traffic management plan is subject to revision by the Department of Planning and Zoning's Subdivision Review Group.

7. The Petitioners shall amend the Conditional Use Plan to eliminate the Outdoor Limited Social Assembly Use Possible Event Area 1.

8. No tent wall used in conjunction with an individual limited outdoor assembly use shall be tied back where the wall faces the northeast, east and southeast (toward Jennings Chapel Road).

9. Individual limited outdoor social assembly events shall comply with the Howard County noise ordinance.

10. All amplified music for an individual limited outdoor social assembly use shall end by 10:00 p.m. on Friday and Saturday nights.

11. All aspects of an individual limited outdoor social assembly use, including setups and cleanups, shall comply with the approved hours of operation, which are: Monday-Thursday, 9:00 a.m. to 10:00 p.m.; Friday and Saturday, 12:00 p.m. to 12:00 a.m., and; Sunday, 12:00 p.m. to 10:00 p.m.

12. Neither the antique shop nor the limited outdoor social assembly use shall operate during the Howard County – Iron Bridge Hounds Opening Day Meet and Blessing of the Hounds.

13. The limited outdoor social assembly use shall not commence (no individual assembly use may be held) until the Petitioners have demonstrated compliance with all federal, state and county laws and regulations and obtained all permits necessary for the start up of the use. The Department of Planning's Subdivision Review Group is charged with coordinating the review of the Petitioners' post-decision obligations. The Petitioners'

failure to comply with this condition shall result in the voidance of the grant of approval for the limited outdoor social assembly use.

14. The Petitioners shall obtain all required permits for individual limited outdoor social assembly events or verify that the appropriate party has obtained such permits before the event.

15. Each individual limited outdoor social assembly event is limited to 150 attendees with a maximum of 25 events in a one-year period. All food and beverage service will be catered by third-party independent caterers. All tents, spot-a-pots and other uses will be removed from the site within three days after the event.

16. Low-level temporary lighting shall be used for individual limited outdoor social assembly events, including lighting under tents and along grass pathways between the seating, restroom and parking areas.

**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 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.