IN THE CIRCUIT COURT OF MARYLAND FOR HOWARD COUNTY

MARC AND MELINDA JORDAN, et al.	*	
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Petitioners	*	
v.	*	**Case No.: C-0768348**
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HOWARD COUNTY BOARD OF APPEALS	*	
	*	
Respondents	*	

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PETITIONERS' REPLY MEMORANDUM

Petitioners, numerously listed in the Petition for Judicial Review, (hereinafter *"Protestants"*), by and through their attorneys, G. Randall Whittenberger and Miles & Stockbridge P.C., pursuant to Maryland Rule 7-207, file this *Reply Memorandum* in support of their appeal to this Court from the February 1, 2007, decision of the Howard County Board of Appeals ("Board"), which improperly granted the Applicants' (hereinafter "Williams") request for conditional use pursuant to §131 of the Zoning Regulations of Howard County.

INTRODUCTION

This is a case where a developer desires to build large (5,600 square foot) multi-level homes in a rural district under the guise of age-restricted-adult-housing, which other than being clumped together in a massive wall formation displayed prominently in front of Protestants' community, has no resemblance to the County's Plan for aging seniors. These large homes, placed directly along the busy danger point of Route 32, have little relationship to a concept of an aging resident selling a larger family home to come to a single-story abode to avoid constant step-climbing and cleaning. Planned to be placed in the western part of the County, no public transportation exists, no supplies, shops, restaurants, or senior centers are within nearby walking distance, and the only outlet to such necessities is to navigate cross-lane drives into and along busy Route 32 to separate interchanges, hardly a comfortable task for seniors aging in place.

Remarkably, the Board of Appeals granted the conditional use plan anyway, and in the process strayed far from the objectives of the County's General Plan and Conditional Use Ordinance, becoming a rubber stamp for a developer's desire to build large homes in a lucrative area, the *age-restrictive label* serving only as a means to permit home construction.

But this aberration need not be condoned, because the developer failed to comply with §131. First off, without needing to even reach the merits, Williams' proposal must fail because §131 N does not expressly permit age-restricted adult housing in the RR-DEO Zoning District. As a plain reading of §131N.1. reveals, "RR-DEO" is not listed thereunder, and strict construction of this ordinance requires the decision to be vacated as a matter of law. The Board had no statutory power or authority to grant the use at that location. Just as the Board used the RR-DEO district (not the RR district) for its §131B.2 comparisons and analysis in reaching its decision, it must also necessarily use the same RR-DEO district under §131N. The Board cannot logically use one district for one part of the statute, and a different district for another part. One way or the other the decision must be vacated or remanded.

Contrary to Williams' conclusion, he has no legislatively pre-determined right to be granted the conditional use under §131. Quite clear from this local ordinance is the recognition that even though conditional uses might be authorized in specified zoning districts based on the presumption that they are generally appropriate and compatible in the specified districts, particular uses in particular locations may have characteristics and impacts that are not typical, and are not permitted automatically, but are subject to the very rigorous and lengthy regulations contained within §131. One of these particularly rigorous requirements is §131 G, which places the entire burden of both proof and persuasion upon the applicant to satisfy not only the specificprovisos of §131 N, but to also prove the general standards of §131B.1 and §131 B.2.

This burden is even more onerously placed upon applicant under §131 B.2, which required him (Williams) to prove a negative, that the proposed use at the proposed location will not have adverse effects on vicinal properties above those ordinarily associated with such uses, and not greater at the subject site than elsewhere in the zone. As experience shows from other such age-restricted housing projects and appeals before this Court, the provisions of this very unique County ordinance are nearly impossible to prove if properly and literally followed by the Board.

This very high burden Williams failed to meet. Even before going before the Board of Appeals Williams failed to provide with his petition information to DPZ necessary for the Staff to provide an unqualified report, and the Staff never thereafter had the benefit of a complete plan and plat to perform its necessary function of review required under §131. After the project was denied and rejected by the Hearing Examiner because of these deficiencies and proof failures, Williams on the first night of hearings before the Board of Appeals was improperly permitted to make numerous material and comprehensive amendments to his proposed plan, which violated the Board of Appeals Rules of Procedure, and precluded both the DPZ and Hearing Examiner from reviewing what was in essence and reality a new conditional use proposal. This too was a mistake of law.

Even with his new and amended proposal, Williams failed to meet his rigorous burden of proof to satisfy §131 B.1. He failed to prove, among other things, that his plan, proposing a massive block of 50 multi-story, 5600 square foot units, would be in harmony with the General Plans' policies of scaling down from large family homes to smaller, easier to maintain homes with a first-floor bedroom, more equivalent to smaller units supplementing congregate and apartment choices on a single floor, and not in the rural west where no transit service exists to

provide the older residents access to services, or where the residents could age in place. To this Williams has no meaningful response.

Williams also failed to prove with substantial evidence that his proposed use at the proposed location will not have adverse effects on vicinal properties above and beyond those ordinarily associated with such uses within the zone. Substantial evidence was lacking as to safety hazards, physical conditions, lighting, and sewage and water capacities under the §131 B.2 test. Indeed, proper tests had not even been completed when Williams went before the Board from which to allow the Board to even make adverse effect comparisons within the district (RR-DEO).

Williams also failed to satisfy a number of the objective criteria of §131 N by failing to provide items with his petition which were required from the beginning of the process, such as floor plans, interior feature lists, architectural elevations and other required items necessary at each and every stage of the review process. That these were not submitted, were direct violations of the statute which the Board by law should not have overlooked. The decision must be vacated and/or remanded.

1. Burden of Proof and Burden of Persuasion

Williams fails to dispute that Howard County's complex and comprehensive conditional use regulation requires the petitioning applicant to carry: (1) the burden of proof, (2) the burden of going forward with the evidence, and (3) the burden of persuasion, on all question before the Board. Specifically, §131 G provides:

> The applicant for a conditional use shall have the burden of proof, which shall be by a preponderance of the evidence and which shall include the burden of going forward with the evidence and the burden of persuasion on all questions of fact which are to be determined by the Hearing Authority or are required to meet any provisions of these regulations.

This regulation makes clear that no burdens shift, and that Williams was required to provide all evidence and proof necessary to comply with each and every provision and requirement under §131.

2. Standard of Review

Despite the references provided by Williams, it may be recalled that a decision of an agency "is owed no deference when its conclusions are based on an error of law". Belvoir Farms Home Owner's Ass'n. Inc., v. AA. County, 355 Md. 259 (1999); Catonsville Nursing Home, Inc. v. Loveman, 349 Md. 560 (1998); People's Counsel v. Md. Marine Mfg. Co., 316, 491 (1989); United Parcel Service v. Comptroller, 69 Md. App. 458 (1986). The Board of Appeals is thus not free to ignore statutory and legal requirements in reaching its decisions. See,e.g.,MNCPP v. Rosenberg, 269 Md. 520 (1973). Decisions contrary to law or unsupported by substantial evidence are "not within the exercise of sound administrative discretion", but are "arbitrary and illegal acts". Holmes Oil Co. v. MDOE, 135 Md. App. 442, 462 (2000); Dept. of Health v. Walker, 238 Md. 512 (1965). Moreover, where the facts presented are "susceptible of but one legal conclusion, and the agency does not so conclude", the action of the Board is arbitrary and capricious, and must be reversed. Westinghouse Electric Corp. v. Callahan, 105 Md. App. 25, 34 (1995).

3. Changes to the Proposed Conditional Use Plan Constituted Substantive Amendments to the Petition

Williams now argues that the numerous changes to his Conditional Use Plan, submitted for the first time before the Board, were not substantive. The Plan itself, along with the record, proves otherwise. Williams presented a substantially modified plan on the first night of the Board of Appeals hearing. Among other things, these changes to the proposed plan included the addition of a sketch sheet relating to the configuration and size of units, additional notes

concerning design characteristics, additional notes regarding setback, changes to lot layouts and setbacks, changes to the location and type of landscape buffering, and new descriptions of design and amenity options for possible purchasers of the units.

To try to salvage the Board's decision, Williams attempts to minimize the extent of the modifications by supplying a list of the changes within his memorandum. But even this list is substantial. More to the point, such changes were *material*. This is particularly evident by comparing the decision of the hearing examiner with the decision of the Board of Appeals. Master Carbo made determinations relating to harmony and adverse impact based upon what had been presented to him, commenting upon how the materials presented did not satisfy the requirements of §131 in many of those areas where Williams later amended his plan on the first night of the hearing.

Williams also argues the Board decides what is substantive or not. But while the Board must of course make such a decision when the issue arises, the decision is one interpreting law, and as such is evaluated by this Court as a question of law. And in this respect the law was clear as to the process for what should have happened that night. In particular, Rule 2.202(c) of the Howard County Code Rules of Procedure of the Board of Appeals plainly provides:

> *Substantive Amendments to the Petition.* 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 and the Planning Board for further recommendations.

Similarly, Rule 2.202(b), relating to any amendments to the petition made before or during a hearing, provides as follows:

> *Amendments to the Petition.* If any amendments to the petition are made before or during a hearing, the Board, either before or during the hearing, may continue the hearing, or may suspend or postpone the hearing and remand the amended petition to the Department of Planning and Zoning and the Planning Board for further recommendations.

The Board of Appeals' decision to proceed with the hearing, and not remand the amended petition to DPZ for further review was a *mistake* of law. A reading of both rules together suggests that even non-substantive amendments merit remand, and substantive amendments mandate it. In other words, the amendment better be very insignificant, or the Board risks having its decision vacated, as should happen here. The amendments to the petition and plan in this matter were clearly substantive. These changes did not involve corrections of spelling errors, corrections of typos, or similar corrections which would have had no impact on the presentation. Rather, the changes made to the plan by Williams were of a nature that changed the complexion of the review process.

Williams also argues the plan was submitted without objection, but this is not accurate. An objection was made to the whole amendment process, and it was clear from the record that the Board was deciding whether Williams would be permitted to proceed. The transcript at page 31 et. seq. makes this evident, and shows Protestants arguing that such changes constituted substantive amendments to the petition which required the application to be remanded to the Department of Planning and Zoning and the Planning Board for further review. The record indicates that the Protestants aggressively argued that such changes also constituted a new proposed plan *never* yet reviewed by the appropriate agencies. And the record shows they forcefully argued that under such circumstances, the applicant must *start over* and proceed through the process, including DPZ review and hearing examiner review, before any further Board of Appeals hearing. After the issue had been decided by the Board (incorrectly), it was understood when the papers were submitted, that the Board wished to proceed on, thus eliciting a "no objection" by one of the Protestants to papers being marked as an exhibit. This did not mean, as a full reading makes clear, that Protestants never objected to the Board taking the

action it did, which action was contrary to Rule 2.202. Protestants by all means raised the issue below.

But even if *arguendo* there had been no objection, the Board under its rules *was required* to remand the matter. The Howard County Code and §131 require that the Conditional Use Plan be reviewed at every stage, from beginning to end. It is not a work-in-progress concept. Maryland law also requires that substantial amendments to Planning and Zoning applications must be reviewed in each stage of the process; otherwise, the review process at each stage has not occurred, and the full requirements of the law have not been met or complied with -- a mistake of law. Williams' argument that the proceeding was heard *de novo* misses the point. The ability to elicit new evidence at a *de novo* hearing, Halle Companies v. Crofton Civic Assn., 339 Md. 131 (1995), does not alter the requirement that the same application and same plan must be reviewed at each review stage. If this were not true, there would be no purpose for having the planning department or hearing examiners involved.

4. Williams Failed to Prove that His Proposed Conditional Use Plan Will Be In Harmony with the Land Uses and Policies Indicated in the Howard County General Plan

Williams now claims his plan *was* in harmony with the General Plan, but fails to address or explain just how his plan satisfied (was in harmony with) the General Plan policies.

The General Plan is chocked full of policies to cover this situation. As so pertinently described by the Hearing Examiner in his Decision and Order, these policies are directly contradictory to the Williams' proposed plan. Because there is no rational way to argue that he proved that his plan is in harmony with these plan policies, Williams now tries to sidestep the requirement by arguing he did not have to because the General Plan language was general and left the details of such matters to future legislation. But this does not answer the

strict issue involved, where policy is plainly involved and incorporated within §131, and where it is the applicant's burden to prove that units are in harmony with such policy. Just because details of the stated goals and policy have not been enacted does not mean the policy contained within the General Plan does not exist. Indeed, it is the precedent of the Board and this Circuit Court to require the applicant to prove that its use plan is in harmony with the General Plan policies even when such policies merely contain recommendations for future legislation. [1] Thus, to ignore these policies is to ignore the clear mandate of §131B, which incorporates the General Plan in the sense that an applicant must prove that his plan is in harmony with its policies. A look at some of these General Plan policies shows Williams' failure to satisfy §131B.

One such policy of the General Plan recognizes that this market of active seniors is seeking to "sell their large family home and yard and to purchase a smaller, easier to maintain home with a first-floor bedroom". (General Plan, p. 82). If, by statutory construction, the use plan must be in harmony with this expressed policy, then the proposed use must be a plan for units that would not be the equivalent of a large home, but rather a smaller easier to maintain unit with a first-floor bedroom.[2] The size of the planned homes, shown on Williams' plan, obviously shows this policy was not met. Likewise, Williams' plan fails to prove that the units

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[1] The Board of Appeals has in the past utilized policies containing recommendations for future legislation as a basis to make its §131 B.1 harmony-with-General Plan determination. See In the Matter of Kimberly Homes Ellicott Properties, LLC (BA Case No. 02-039C), p. 10-14, attached to Protestants' Rule 7-207 Memorandum as **Exhibit E,** where the Board "viewed the language of the General Plan" to base its harmony decision, despite that language recommending future enactment. This was upheld by this Circuit Court. It is astonishing that the Board later granted Williams' use plan by reversing its argument regarding "future legislation". Such a flip-flop is the essence of arbitrary, capricious and ad hoc review.

[2] As to first-floor bedrooms, the original plan submitted by Williams which was reviewed by DPZ did not specify first-floor bedrooms. Amendments were accepted by the Board improperly (as argued above), which now provide design detail for a first-floor master bedroom. But as these amendments should not have been allowed, Williams' original use plan should be rejected as not being in harmony with this policy from the General Plan.

proposed are smaller than large family homes which active seniors would be selling, or that these units (consisting of two stories and 5600 square feet of space) would be easier to maintain. The record of this case plainly shows that these units are as large or larger than family homes active seniors would be selling. Indeed, the Board's decision to allow these multi-level mansion-size houses to pass as acceptable age-restricted adult housing for seniors, makes a mockery of the entire age-restricted adult housing concept.

Another such policy of the General Plan recommends "in order to supplement the congregate and apartment housing choices now available to seniors, the County should amend the Zoning Regulations to provide other housing options for seniors, including attached and detached single story, single family homes". (General Plan, p. 82). Williams fails to address this policy in his memorandum, and for good reason. His use plan fails to prove that its units constitute houses of a single story. Very possibly all of the units in the project would be greater than a single story. And as this policy references these single story family homes in the same grouping (and to supplement) congregate and apartment housing, the Council could only have meant single story units of comparable size. Hence, the large multi-story houses (5600 square feet) with extensive upper stories cannot be in harmony with the policy. Again, Williams was required to prove[3] they were in harmony to satisfy his burden under §131 B.1. He did not do so.

Yet another policy of the General Plan finds, "The County needs to reconsider senior housing developments that are currently allowed in the Rural West . . . the West has fewer service available and does not have transit service that could provide access to services". (General Plan, p.83). Williams also fails to address this policy in his memorandum. Of course,

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[3] Williams is not benefited by any presumptions relating to the harmony issue, given the wording of §131 G. As such, Richmarr Holly Hills, Inc. v. American PCS, L.P., 117 Md. App. 607, 701 A.2d 879 (1997), relating to a finding of non-harmony under a separate local statute, does not apply.

the Board of Appeals is an agency of the County, and may easily consider this policy exactly as it pertains to this proposal. Williams had the burden to prove his proposed plan was in harmony with this policy. He did not so prove. The record is plain that no public transportation exists at this location,[4] and seniors would have to drive in highway-like conditions, along a 55 mph road, with one lane of traffic in each direction, with no median between lanes (using headlights mandated due to Howard County's recognition of the hazardous conditions) to attain any needed services, such as groceries, gas, medical treatment, books, clothing, toiletries, hair cuts, etc. The only road to these services, Route 32, is a level "F" road. Williams' reference to Hikmat and other testimony fails to address this failure.

Similarly, the General Plan espouses seniors being able to safely age in place. (General Plan, p. 83-84). With such transit and road difficulties at this location, it is impossible for Williams' plan to be in harmony with this safely-age-in-place policy. Again, Williams fails to address his plan's failure to satisfy this policy.

A separate policy from the General Plan, that of affordability (General Plan, p.77-80), was also not addressed by Williams. He concedes that none of the dwelling boxes shown on the plan are so labeled. And he concedes not a single piece of information about unit prices, condominium fees (necessary for maintaining the 50 acre grounds, the roads, a property management company, snow removal, sewage treatment facilities, lighting, pool, tennis courts, meeting room, security, legal enforcement of condo fees, and other), or financing was submitted. The Staff noted that Williams was to provide DPZ with an "explanation about how five of the proposed dwelling units of the same general size indicated on the [proposed] plan will be provided as Moderate Income Housing Units". The Staff requirement, sounding like a

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[4] Both Protestants and Applicants testified these are not transit services available.

challenge, was an impossible requirement to fulfill at this location. And Williams failed to fulfill it. No proof was given as to *how* the project would or could accommodate moderate income residents. Due to this lapse, he is left with the after-the-fact argument that such information is not required until a later planning stage. But this is clearly not the case where Williams has the burden of proof to establish at the conditional use stage that his plan is in harmony with this policy from the General Plan.

To avoid his proof problems, Williams also argues that the General Plan is "overstated" in its "relative importance", citing cases inapposite under this Howard County legislative construct where §131 is significantly more comprehensive in requiring proof at the conditional use stage (not later), so that the Board has a basis to evaluate harmony-with-plan as well as the other numerous sub-components of §131.

As such, in evaluating the nature of the use in this respect, Williams failed to prove by substantial evidence that his proposed plan would be in harmony with the regulations and the affordability policies indicated in the Howard County General Plan.

5. Williams Failed to Prove that His Proposed Use at the Proposed Location Will Not Have Adverse Effects on Vicinal Properties Above and Beyond Those Ordinarily Associated with Such Uses

Williams argues that "the Protestants attempted to present evidence to the Board that more age-restricted housing units were being proposed on the subject property than would be permissible if non-age-restricted homes were built". Actually, this is not what they tried to prove, but the argument misses the point, as the Protestants did not have the burden of proof. Williams did. And Williams failed to meet his burden of proof and persuasion for §131B.2. in that he failed to provide substantial evidence of information, based upon a preponderance of

evidence, that his proposed use at this location will not have adverse effects on vicinal properties above and beyond those ordinarily associated with such uses.

Williams' suggestion that Protestants reverted a to Gowl argument, overruled by Shultz v. Pritts, is misplaced. Rather, Protestants argue that the Shultz-like provisions embedded within §131B were not met by Williams, whether or not considered with a Mossberg-overlay. The Howard County ordinance is unique in that, under §131G, it requires the applicant to carry all proof burdens, even the burden to prove the negative under Shultz v. Pritts.

Due to the construct of this local regulation, the burden of both proof and persuasion was on Williams to prove this negative. See §131 G. This does not mean a certain degree of acceptable adverse effect may be implied. Rather, given the strict burden within this local ordinance, the proof comparison must be real to show that the proposed use here, will not have adverse effects above and beyond those adverse effects ordinarily associated with such conditional uses in the zone. Under this double-burden construct, Protestants had no burden to prove the existence of adverse effects on vicinal properties (though they did).[5] Rather, Williams was required to prove the negative, either: (1) that no adverse effects exist to any degree, or (2) that every adverse effect which does exist does not go above and beyond the ordinary adverse effect associated with such use elsewhere in the same zone. Obviously, given the way this local ordinance is written, this is no small task for an applicant. Yet enacting this local ordinance in this fashion was not Protestants' doing. And Williams, by not

[5] The Board's Decision reveals that the Board was improperly shifting the burdens. See e.g. Decision and Order, p. 17 ("Conversely, the opposition failed to provide sufficient evidence . . . "), p. 12 (". . . it is then incumbent upon those opposed to . . ."). This burden shifting would only be applicable if §131 G, imposing both burden of proof and burden of persuasion, was not embedded in the local ordinance, requiring the applicant to prove the negative.

providing substantial evidence and information where he was required to, failed to meet his burden.

a. Testimony Relating to Adverse Effects Impacting the Vicinal Properties Relating to Safety Hazard

For example, Williams' proposed use does adversely impact safety along Rt. 32. Indeed, the focus of Williams' presentation purposefully ignored the 800 lb. gorilla, Route 32, and how active seniors within this community would be bottled up from safe transport to necessities. But he did agree that Route 32 was a Level "F" road, and testified that Rt. 32 is a "failure",[6] and conceded, "Route 32 is a dangerous road".[7] In point of fact, Williams confirmed Protestants' testimony by stating that the intersection was "the craziest intersection anyone could ever . . .",[8] and that "Route 32 has never had an entrance that was acceptable".[9] The facts of this adverse effect were not disputed.

Clearly there would be less of a traffic safety hazard if the proposed senior housing development were placed in a location in the district that does not require all transportation to occur along a service level "F" road. Route 32 was an integral part of the analysis of above and beyond, unique adverse effects, which was ignored by the Board. As it was Williams' burden to prove the negative, that this safety hazard and physical condition would not be greater here than elsewhere in the zone, §131B.2.a, his failure to so prove with substantial evidence renders the Board's decision erroneous.

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[6] See Transcript, p. 357.
[7] See Transcript, p. 358.
[8] See Transcript, p. 359.
[9] See Transcript, p. 357.

b. Testimony Relating to Physical Condition

Another example is the adverse effect of the clustering and massing effect creating a visual wall stretching some 1300 feet, as descried by Master Carbo, who stated that it was "larger in size and massing than any other age-restricted adult housing unit that I have reviewed in the past four years". Recognizing this adverse effect, Williams now argues it is an "enclave". Changing the label does not change the effect. Due to the clustering of the proposed units onto about 14 acres, the proposed housing would have the appearance of lots being of less than three tenths (3/10) of an acre, ten times less than the majority of homes in the neighborhood. As noted by Master Carbo, this wall of clustered units backed up against the larger lots to the immediate East, would be in stark contrast (especially in seasons when leaves have fallen) to the vicinal neighborhood.

Williams placed no evidence in the record comparing other locations within the zone, and whether this 3-acre versus 1/3 acre clustering effect would have the same drastic and unique effect elsewhere within the zone. Contrary to the Board mis-citing Mossberg v. Montgomery County, 107 Md. App. 1, 606 A.2d 1253 (1995) to suggest the burden of persuasion shifts to opponents, the burden of proof and persuasion under this local ordinance rested on Williams under §131 G, to prove the negative, that such stark and unique contrast would not be greater here than elsewhere in the zone (such as where the vicinal lots would be more compatible in acreage).

Instructive is People's Counsel for Baltimore County v. Mangione, 85 Md. App. 738, 584, A.2d 1318 (1991), where the Court of Special Appeals held that the prominence of a convalescent home structure which could overwhelm and dominate the surrounding landscape would not satisfy the Shultz v. Pritts standard of adverse impact, because the applicant failed to

meet its burden of proof under the local ordinance, which phrased its requirements in the negative (. . . it must appear that the use for which the Special Exception is requested will not . . ."). Similarly here, Williams failed to prove with substantial evidence that such a massing arrangement, uniquely affecting the vicinal properties, was not of greater effect here than elsewhere in the zone. Indeed, no evidence exists on record to meet this heavy (and difficult) burden of both proof and persuasion.

Protestants also provided uncontradicted testimony that the proposed use in this unique regard would have an adverse effect on vicinal property values, describing the starkly contrasting structures and acreage differential. This was overlooked by the Board, which failed to properly regard the issue in reaching its decision. See Board of County Commissioners v. Holbrook, 314 Md. 210, 550 A.2d 664 (1988), where the Court of Appeals held that:

> In summary, where the facts and circumstances indicate that the particular special exception use and location proposed 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, the application should be denied.

In Holbrook, the Court of Appeals concluded that the location of a mobile home near the neighbor's more upscale dwelling had a unique and adverse impact on the neighboring property value, above and beyond other areas in the zone, mandating a denial of the special exception (conditional use) request. The Board failed to follow Holbrook in failing to consider this evidence, which was uncontradicted.

Again, as the burden rested with Williams to prove by substantial evidence that the adverse effect was not greater here than elsewhere within the zone, he failed to meet his burden.

c. Testimony as to the Adverse Effects of Lighting

Williams argues the lighting will be the same here as in other locations but with the vicinal properties shielded due to the "enclave" nature of the buildings. This is fiction, unsupported by the record, which in reality shows the location of the buildings as prominent with grass as the non-buffer. More to the point, there exists no lighting now, which differs markedly with other points in the district.

There was testimony that there are other areas in the district that would be less impacted because of the existence of street lighting and/or commercial lighting. Though his burden, Williams produced no substantial evidence of lighting effects or comparisons with any other locations within the zone. He argues that this would be addressed at a later site plan stage, but §131B requires the proof at the conditional use stage. Thus, Williams failed to satisfy the requirements of §131B.2.a.

d. Testimony as to Wells and the Proposed Sewage Disposal System

Williams presents no meaningful argument on this point. His expert witness, Mr. Sheesly, testified that the site would have a community sewage plan but that no final plan had been completed. Sheesly's testimony did not describe any comparative testing and provided no rebuttal to Protestants' testimony that wells had run dry during summers under current conditions. Sheesly testified that he could not specify the capacity of the proposed system. Sheesly stated that the sewage system (and hence the project) could not be completed unless approvals and permits were obtained. But his testimony is irrelevant and should not be considered for this conditional use petition since it did not (and could not) address the immediate conditional use test (i.e., would the development have greater adverse effects here than in other areas in the district). His testimony was relevant only to sewage approval in a

non-conditional use setting. Sheesly further testified that the State or County would likely require some type of treatment system, but was unable to offer specifics. Several Protestants testified that the proposed system would have adverse effects greater than the effects in other parts of the district.

The Board's Decision "punted" the issue. It stated, at page 7, "There remains one part left for analysis of the water supply, the seventy-two hour pump test to ensure sufficient water availability and recharge such that there will not be any impact on water wells in the area". This mumbo-jumbo is a concession to the fact that tests were not completed or available to prove that the proposed use would not have an adverse effect upon the vicinal properties. In essence, the Board was without a means to evaluate the pertinent issue for either sewer or water.

The record confirms this. When asked if adverse impacts would occur, Williams' expert, Mr. Sheesly, answered, "As far as answering the question exactly, we've not finished with the overall study".[10] As to water balance in the community, he told Chairman Sharps, "I can't make that determination yet . . .".[11] And he "in all candor" could not determine water availability for any unit or bedroom quotient,[12] which served to flummox Chairman Sharps, who stated, "And why are we here and you don't have that answer for us and we gotta make a decision,"[13] and adding, "I've been on this Board 8 years, I've not come to this point where that question is probably relative to a lot of what's going on here, capacity and usage, and what's available".[14] Yet, remarkably, even without the evidence needed to make the §131 B determination, the Board erroneously granted Williams' proposal.

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[10] See Transcript, p. 110.
[11] See Transcript, p. 125.
[12] See Transcript, p. 126.
[13] See Transcript, p. 127.
[14] See Transcript, p. 128.

6. Williams' Proposed Use Plan Failed to Satisfy the Objective Criteria of §131N

Rather than oppose the specific §131N criteria discussed by Protestants in their memorandum, Williams instead presented a self-serving chart purportedly grading himself as meeting all the §131N criteria. Charts are fine if understood, but like a student filling out his own report card, where all subjects show "A"s, Williams is not the teacher (or judge) of whether he actually met the criteria. A closer look is required for several of those criteria not satisfied.

a. §131 N.1.i Was Not Satisfied

Specifically, §131.N.1.i mandates:

> The project shall be designed to provide a transition or adequate buffering near the periphery of the site, either with open space areas and landscaping, or by designing the buildings near the periphery to be compatible in scale and character with residential development in the vicinity as demonstrated by architectural elevations or renderings submitted with the petition. (emphasis added).

No architectural elevations or renderings were "submitted with the petition". Staff pointed this out. This is a direct violation of §131 N.1.i. Thus, by law, since Williams failed to submit for review these required materials for full agency review, the Board's Decision must be reversed and vacated. Williams now argues this requirement is stated in the disjunctive, which is debatable. But even read this way, §131N.1.i. still requires architectural elevations or renderings to be submitted with the petition. This plainly did not happen.

Reading the requirement in the disjunctive is also irrelevant because the Board rested its decision on its finding at p.17, "the opposition failed to provide sufficient evidence that the design of the development is incompatible with the neighborhood". Not only was this inaccurate, as Protestants overwhelmingly provided testimony regarding the quite obvious

incompatibility with the residential development, it was simply not Protestants' burden. See §131G. Hence, by law, the Board's Decision *must* be vacated and/or remanded.

Moreover, it is impossible to determine based upon anything provided (even late) by Williams what the resultant product would be, so as to determine *compatibility*. Presuming the massive visual wall described by Master Carbo, under the real possibility that all (or most) units would be of the 5600 square foot variety, compatibility is certainly disproven.[15] Presuming, by contrast, the units to be of the 1800 square foot variety, Williams' engineer, (but also the interested developer), Mr. Hikmat, quickly admitted that would not be compatible with residential development in the vicinity.[16]

Even after amendments were improperly permitted (late), sketches provided on page 3 of the new proposal failed to demonstrate or compare whether buildings near the periphery would be compatible in scale and character. Certainly, no analysis was possible by Staff to review the later amendment to determine whether replaced landscaping would maintain compatibility, and Hearing Examiner Carbo denied the proposal based on Williams' failure to prove adequate buffering. He noted the massing and arrangement of the units in a line 20 feet or less apart, 80' wide and 30' tall ("larger in size and massing than any other age-restricted adult housing unit that I have reviewed in the past four years"), would create a visual wall stretching some 1300 feet. Nothing submitted (even late) by Williams' provided the Board with a means to analyze

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[15] The Board improperly presumed (without a sufficient basis) an unspecified range of single and double-story units.

[16] See Transcript, p. 93. Hikmat was so concerned with this question that he immediately wanted to offer a condition, realizing his plan provided no criteria on what exactly would be built to assess compatibility. Remarkably, Chairman Sharps, failing to realize the critical importance of this statutorily required detail, stated, ". . . I'm not going to hear, let's play what kind of house we're going to have". Yet that was exactly what was needed to be known.

the sufficiency of the buffering or the compatibility of the many peripheral units.[17] Again, the burden of proof rested entirely on Williams to show substantial evidence and compliance. This he failed to do, despite creating his own chart to tell himself he did.

The Board, not having adequate information from Williams, thus in its decision at page 16 straddled the issue, finding, "The units proposed will be single and double-story and will range in size form 1800 square feet to 6000 square feet." This was not quite accurate, as the testimony was that the units could all be of the 6000 square foot variety (and incompatible), or could all be of the 1800 square foot variety (and incompatible). Indisputably, Williams failed to provide the specific evaluations for all units "with the petition".

b. §131 N.1.m Was Not Satisfied

Very plainly, §131 N.1.m mandates:

> m. The petition shall include floor plans or other material demonstrating that the proposed dwellings will be appropriate for the age-restricted population, including design features that incorporate universal design principles to be accessible to or adaptable for residents with limited mobility and other age related functional limitations. The petition must include a list of interior features that make individual dwelling units adaptable and must demonstrate that accessible routes will be provided between parking areas, sidewalks, dwelling units and common areas. (emphasis added).

A review of the petition reveals that the petition filed with DPZ failed to include such an interior feature list. Nor did it include floorplans.[18] Nor did it include other material demonstrating dwelling appropriateness for the age-restricted population. As such, Williams failed to satisfy §131 N.1.m, and the Board's Decision, by law, should be reversed and vacated.

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[17] The fact that Williams' amended proposal replaced some of the naturally wooded perimeter with Type "C" landscaping does not by itself satisfy the compatibility requirement in Howard County. The Board has taken the position that, "A Type 'C' perimeter landscaping will not provide a transition and adequate buffering near the periphery of the site", in a case in which the applicant proposed to remove existing trees and replace them with Type C landscaping in order to satisfy the County landscaping handbook requirement for periphery buffering. See In the Matter of Kimberly Homes v. Ellicott Properties, LLC, (BA Case No.: 02-039C), Decision and Order, p. 19, a copy of which is attached to Petitioners' Rule 7-207 Memorandum as **Exhibit E.**

[18] Even the amendments improperly allowed at the Board of Appeals hearing did not contain floorplans.

7. Distinction Between RR Zoning District and RR-DEO Zoning District

Williams' clever argument that the RR-DEO District is an "overlay district", does not answer why §131N includes a number of separate residential zoning district variations within the statute, but does not include this one. They are not one and the same. There is a recognized distinction between the RR Zoning District and the RR-DEO Zoning District. Otherwise there would be no reason to have the two designations. Other separately characterized districts exist, such as R-ED , R-20, R-12, R-SC, etc. Inversely, no DEO district is set forth under §131N.1, though also separately dealt with under the Zoning Ordinance. But, to the point, the RR-DEO designated district is not one permitted under §131 N. There are many plausible reasons for the legislature not including it within §131 N.1,[19] but there need not be a good reason. Even if legislative error or oversight, the fact remains that RR-DEO is not one of the districts included thereunder.

Beyond this, the application of Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319 (1981)(. . ."adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone"), necessarily requires first a determination of what zone is being analyzed. Here the Board did not use the RR Zone to analyze the proposal for Schultz v. Pritts and §131B purposes, but instead utilized the RR-DEO District. This is confirmed by the Board's Decision and Order, at p. 11-12, stating:

> The proper question is whether those adverse effects are greater at the proposed site than they would generally be elsewhere within other RR-DEO districts of the County. (emphasis added).

[19] For example, the density exchange purpose points to preserve significant blocks of farm land, which may not necessarily be achieved by wedging large age-restricted-adult-housing complexes in these restricted areas.

Thus, it is also obvious from this finding that the Board made a distinction between the separately categorized RR and RR-DEO zones (districts) in analyzing this case, and that the distinction for purposes of §131 is not a mere matter of semantics.

Simply put, a plain reading of §131N.1 does not include the RR-DEO District as one where an age-restricted adult housing complex may be granted. Thus, by law, as age-restricted adult housing is not expressly authorized in the RR-DEO District, the Board of Appeals' order must be reversed and vacated. Inversely, if the RR-DEO districts are not separately classified for purposes of evaluating §131, then the Board utilized the wrong test in its §131B determination, requiring remand for proper legal review.

WHEREFORE, Protestants request this Court to reverse the decision of the Board of Appeals, ordering that the conditional use plan be denied; alternatively, to remand the action to the agency for further proceedings; or for such other relief this Court deems just and appropriate.

Respectfully submitted,

G. Randall Whittenberger
MILES & STOCKBRIDGE P.C.
30 West Patrick Street 6th Fl.
Frederick, MD 21701
301-662-5155

Attorneys for Petitioners/Protestants

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on this 9th day of November, 2007, a copy of the foregoing *Petitioners' Reply Memorandum* was sent, via first class mail, postage prepaid, to:

Howard L. Alderman, Jr., Esq.
Levin & Gann, P.A.
Floor, Nottingham Centre
502 Washington Avenue
Towson, MD 21204

Barry M. Sanders. Esq.
Howard County Board of Appeals
George Howard Building
3430 Courthouse Drive
Ellicott City, MD 21043

G. Randall Whittenberger