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**
	*	
HOWARD COUNTY BOARD OF APPEALS	*	
	*	
Respondents	*	

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PROTESTANTS' RULE 7-207 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 Memorandum in Support of their appeal to this Court from the February 1, 2007, decision of the Howard County Board of Appeals ("Board"), which granted the Applicants' (hereinafter "Williams") request for conditional use pursuant to §131 of the Zoning Regulations of Howard County.

A. INTRODUCTION

This is a case in which an application for a conditional use to permit a 50 unit age-restricted adult housing development was wrongly granted by the Howard County Board of Appeals. Section 131 (conditional uses) of the Howard County Zoning Regulations sets forth the very extensive local procedure for procuring conditional use approval, and specifically for age-restricted adult housing, §131N of the Zoning Regulations.[1] 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

[1] All references to §131 are to that section of the Zoning Regulations of Howard County, a copy of which is attached hereto as **Exhibit A.**

impacts that are not typical, and are not permitted automatically, but are subject to the very rigorous and lengthy regulations contained within §131. As will be described, 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 specific provisos of §131 N, but to also prove the general standards of §131B.1 and §131 B.2. As will be seen, this burden is even more onerously placed upon applicant under §131 B.2, which requires 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.

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 massive amendments and changes 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.

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.

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.

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.

Finally, Williams' proposal must fail because §131 N does not expressly permit age-restricted adult housing in the RR-DEO Zoning District. As indicated by the Board in its Decision, this RR-DEO zone applies for the 131 B.2 analysis, and so marks the distinction between the RR and RR-DEO categories; otherwise, analysis of the zone (district) was too confined, requiring remand to evaluate the plan using an appropriately defined district.

B. QUESTIONS PRESENTED

1. Did the Board err in permitting substantive amendments and changes to the conditional use petition and plat on the first night of hearings before the Board?

2. Did Williams fail to prove that his proposed conditional use plan satisfied the general standards of §131 B.1?

3. Did Williams fail to prove that his proposed conditional use plan satisfied the general standards of §131 B.2?

4. Did Williams fail to satisfy the minimum criteria of §131 N?

5. Did Williams' proposed conditional use plan satisfy the requirements of §131?

6. Were the Board's findings and decision arbitrary, capricious, and/or discriminating?

C. STATEMENT OF FACTS

1. DPZ Staff Review

On November 16, 2005, Williams submitted his conditional use petition and plat to the Department of Planning and Zoning.[2] His proposed plan provided for a development including 50 multi-story units each containing 6000 square feet of floor area. Under §131F.2., the Applicant was required to provide the following:

> a. A conditional use plan which shows all existing and proposed uses, structures, parking areas, points of ingress and egress, landscaping, and the approximate location of relevant natural features which, when required by the Department of Planning and Zoning, shall include wetlands, steep slopes, and tree and forest cover. [Council Bill 19-2002 (ZRA-35), effective 7/10/02].
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> b. Information regarding noise, dust, fumes, odors, lighting, vibrations, non-sewage solid waste, hazards or other physical conditions resulting from the use which may adversely impact vicinal properties.
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> c. A statement that indicates:
> (1) Whether the property is served by public or private water and sewage disposal;
> (2) That additional information can be obtained from the Howard County Health Department; and
> (3) The current address of the Howard County Health Department. [Council Bill 19-2002 (ZRA-35), effective 7/10/02]
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> d. Supporting documentation, such as traffic studies, market studies, and noise studies, may be required by the Department of Planning and Zoning or by these regulations.
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> e. For expansion or modification of an existing conditional use, the Department of Planning and Zoning may require information regarding compliance with previous requirements and conditions. (Emphasis supplied).

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[2] See Conditional Use Petition, attached hereto as **Exhibit B**. The Plat submitted with the Petition is part of the record.

The Technical Staff Report

Upon review, the Department of Planning and Zoning ("DPZ") prepared a Technical Staff Report, dated February 22, 2006,[3] which was purportedly later transmitted to the Hearing Examiner under §131F.4. While the general recommendation from the DPZ Staff was to grant the request subject to conditions,[4] the Technical Staff Report (p. 7) clearly required the applicant to supply further paperwork for DPZ review, including "more detailed building plans and floorplans", "more details on how the age-restrictions will be maintained and enforced", "floor plans or other material demonstrating that the proposed dwellings will be appropriate for the age-restricted population", and "further explanation about how five of the proposed dwelling units of the same general size indicated on the Plan will be provided as Moderate Income Housing Units". Hence, despite the *confusing* recommendation subject to conditions, the Technical Staff Report in reality demanded more information and detail before the conditional use would or could ever be granted.

Problems Cited by Staff

The Staff in its report cited a number of problems it had with the proposal. Among the problems in Williams' Plan was the fact that the proposed detached residential units had no apparent qualities that showed any distinctions as Age-Restricted Adult Housing from typical by-right single-family detached dwellings. The proposed plan provided for 50 units of two full stories each containing 6,000 square feet of floor area. The Staff called this "quite excessive", considering the intended "aging in place" purposes of age-restricted housing. Not in favor of such units, The Staff in *paragraph IV B* (Evaluations and Conclusions) stated:

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[3] See Technical Staff Report, attached hereto as **Exhibit C.**

[4] The "conditions" to the recommendation were in fact requirements to supply further information, and did not constitute "conditions" at all. Of the five "conditions" listed on page 7 of the report, four of them mandated the submission of more engineering and planning documents not provided with the petition.

> The proposed detached residential units as depicted on the plan have no apparent qualities that show any distinctions as Age-restricted Adult Housing from typical by-right single-family detached dwellings. With two full stories as depicted in the Schematic Footprint and Elevation on the plan, these units might contain 6,000 square feet of floor area. This appears to be quite excessive upon consideration of the intended "aging in place" purposes of universal design features and overall active-senior housing objectives for smaller, more easily maintained dwellings.

Explaining the problem further, Staff reported that such units could be considered an "exploitation" of the Age-Restricted Adult Housing Conditional Use category to significantly increase the density of a standard detached dwelling product over what could be achieved through a by-right residential subdivision. Cutting through the bureaucratic lingo, this meant the applicant was simply using the age-restricted conditional use category as a way to build and sell big and expensive houses. As stated on page 6, the Staff noted that there would need to be "clear evidence" that the dwellings have a specifically limited number of bedrooms and that the space within the dwellings would not be easily convertible to additional bedrooms. Given so much possible space, the Staff's evaluation demanded that Williams would be required to present more detailed building plans and floorplans to prove that the dwelling units qualify, stating at *paragraph IV.B.* the following:

> In the event the proposed dwellings are no different from many by-right single-family dwellings, this could be considered an exploitation of the Age-restricted Adult Housing Conditional Use category to significantly increase the density of a standard detached dwelling product over what could be achieved through a by-right residential subdivision, even one with receiving density. There needs to be clear evidence that the dwellings will have a specifically limited number of bedrooms to meet the Health Department concerns, and that the space within the dwellings will not be easily convertible to additional bedrooms. The Petitioner should present more detailed building plans and floorplans to prove that the dwelling units qualify as Age-restricted Adult Housing on the basis of building design.

The Staff Report further noted that it was improper for the applicant to say in his application that he would not submit floorplans until the time of building permit application. The Staff concluded that more was needed under §131.N.1.m, which requires that the . . .

"petition include floor plans or other material demonstrating that the proposed dwellings will be appropriate for age-restricted population". By its comments, it was thus evident that a complete and final evaluation of the project had not yet been performed by DPZ, and that it was expecting to review floorplans and other demonstrative materials.

Yet another problem the Staff cited was that the proposed plan failed to show how five dwellings units would be provided as Moderate Income Housing Units. The Staff within *paragraph IV.B.14.* "recommended" that the applicants would need to provide more details to clarify how this requirement would be realized, stating that "it is questionable that Moderate Income Housing Units would be practical based upon the size of the proposed dwelling units". By the context of its report, Staff here too appeared to be expecting further detail from the applicants. Yet the record does not indicate that applicants ever went back to DPZ with this requested information, or that DPZ was given the opportunity to further review the petition after requesting this further information and paperwork.

2. Hearing Examiner Review

On March 5, 2006, Williams' proposal went to a hearing before the Howard County Board of Appeals Hearing Examiner, Thomas P. Carbo, who on April 29, 2006 in a ten-page written Decision and Order denied the conditional use application.[5] A number of the problems referenced in the Technical Staff Report appeared to also bother Master Carbo, who found that the proposed use would not be in harmony with the General Plan for the district pursuant to §131.B.1.a., and that there was not sufficient evidence establishing that the proposed use would not have adverse effects on vicinal properties above and beyond those ordinarily associated with an age-restricted adult housing development in the RR district. He also found that the specific

[5] See Decision and Order, dated April 20, 2007, of Thomas P. Carbo.

criteria for age-restricted adult housing, which criteria is set forth in §131.N.1, was not satisfied because the Applicant failed to show that the project was designed to provide adequate buffering along the perimeter of the site as was required by §131.N.1.i.

In evaluating harmony with the General Plan, Master Carbo found it significant that the General Plan recognizes that this ("active senior") market is typically seeking to "sell their large family home and yard and to purchase a smaller, easier to maintain home with a first-floor bedroom".[6] He was also influenced by the General Plan's recommendation that "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".[7]

He also found significant that with respect to the RR Zone, the General Plan "recommends a more restrained approach to senior housing" than the use proposed by Williams, citing the General Plan where it provides that "The County needs to reconsider senior housing developments that are currently allowed in the Rural West. . ." in that ". . .the West has fewer service available and does not have transit service that could provide access to services".[8]

Indeed, Master Carbo went so far as to state that the units proposed were "well beyond the size of any age-restricted adult dwelling that I have reviewed in the past four years", and that "it is apparent from the evidence that these homes are not designed for the typical active seniors seeking smaller quarters, but for larger households that happen to have one member who is age 55 or older". In essence, Master Carbo found that the product proposed was not that

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[6] See General Plan, p.82, a copy of which is attached hereto as **Exhibit D.**

[7] See General Plan, p.82, a copy of which is attached hereto as **Exhibit D.**

[8] See General Plan, p.82, a copy of which is attached hereto as **Exhibit D.** In this case Williams' proposed use, of course, is requested to be placed directly in the Rural West, at a location which fails to provide the transit service and ability for seniors to easily seek everyday needs and services associated with older persons with needs different from the general population.

which was intended by the County Council when it enacted the General Plan and conditional use regulations.

3. Board of Appeals Hearing

First Night of Hearing

It is apparent from Master Carbo's Decision and Order, as well as the many deficiencies set forth within the Technical Staff Report, that Williams' conditional use petition and plat submitted in the review process failed to meet the requirements necessary to grant the conditional use. Upon the denial by Master Carbo, the appropriate vetting process, providing notice, advertisement, and a public hearing permitting comment on the petition and accompanying plat, had been fully administered under the Regulations.

At this point Williams had the choice of: (1) assembling the requested information and making substantive amendments to his petition or plat, necessarily requiring him to start over in the application process, so that all parties, agencies and reviewing bodies would have an opportunity to fully review the merits of the new amendments, or (2) appealing his original conditional use proposal to the Board of Appeals (for a *de novo* hearing) to determine whether Master Carbo was correct.

First Night Submission of Amendments

But Williams did neither. Rather, dissatisfied with the Decision and Order of Master Carbo, he appealed his decision to the Howard County Board of Appeals, but also submitted on July 11, 2006 (the first night of the hearing) an amended conditional use plan to be reviewed at the same time, which included wholesale changes. Among others, the changes included sketches of four new models of units (never before introduced), additional notes concerning design characteristics, changes and notes regarding setback, movements of units, changes to the

location and type of landscape, buffering, and other substantive modifications never before seen.

Ruling on Substantive Amendments

It is plain by the record transcript that this amendment, containing additional sheets[9] and details, was not presented to the Board of Appeals prior to the hearing on July 11, 2006. According to the transcript, Chairman Sharps, when the amended plat was introduced that evening, asked, "Is this an amendment to what we . . . ?", to which question Applicants' counsel stated,"It's a clarification. That's all it is, merely a clarification".[10]

An intriguing discussion ensued after Williams attempted to put forward the amended proposal. An objection was placed on record opposing Williams' right to go forward.[11] Chairman Sharps asked why the many changes were not substantial. After some discussion, the Chairman requested that the various modifications be noted for the record, so that the Board could make a decision as to whether they were substantive. Counsel for Williams categorized the changes into four separate areas, some of which included changes to descriptions, changes to setbacks, changes to unit placement, changes to width of buffer, changes to type of landscaping buffer, and additional information provided in the form of unit sketches, design characteristics, design details, and other additional information.[12]

When the Chairman called for a vote on whether the amendments were substantive, there appeared to be confusion on whether amendments were permitted in a *de novo* hearing.[13] Referring to Master Carbo's decision, Board Member Hayes explained that the change in the

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[9] See Transcript, p.5.
[10] See Transcript, p.5.
[11] See Transcript, p.30.
[12] See Transcript, p.30-31.
[13] See Transcript, p.42.

size of the units was a "major point" to Master Carbo, "so that's significant".[14] Referring to the different information now before the Board, he said, "I think that would have, I think you may have gotten a different decision from him".

Board Member Simpkins appeared to agree. Referring to the different information before the Board, he said, "To me, it is different. The circumstances appear differently than I perceived them to be before this".[15]

Chairman Sharps then significantly discussed how he assumed one thing when he reviewed the pre-hearing submission, and now understood a different thing after receiving the modifications, saying

> "but the clarity was certainly not there. Because I wasn't clear until I've heard most of the testimony from Mr. Hikmat, and the description, and we have two other pages in order to that, so for someone to have to come in to give us two additional sheets to clarify what you were discussing, wow, maybe this would have been a whole new case had this been done at the Hearing Examiner's level".[16]

Later in the discussion, Board Member Hayes, in discussing the changes, said:

> But I think its substantive because, and again I'm reading from the Hearing Examiners page 8, he says "because the genus are more akin to a large family home, it impacts it with regard to noise, traffic, odors, there are significant things and these are critical to, to the review of this, of a Conditional Use, particularly under the circumstances here. We have all adjacent areas there that are three acre lots. This is going to be a rather dense and intense development here and I don't want to get into this, but then there's the lot 2 above which is not spoken for at the given moment.

Yet, remarkably, *after all of this discussion indicating that there were significant changes*, and that the Hearing Examiner may have come to different decisions had he had further information, the Board decided to allow the hearing to proceed under the mistaken premise that they could permit the Protestants to absorb the changes by the time the Board met

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[14] See Transcript, p.43.
[15] See Transcript, p.43.
[16] See Transcript, p.44.

for the next hearing date.[17] Remarkably, they voted to proceed on, which as argued below was a *mistake of law.*

Testimony of Witnesses

The full transcript of witness testimony over the five nights of hearings has been made part of the record. Applicable references to the transcript are cited within this memorandum.

Decision By Board

On February 1, 2007, the Board of Appeals issued its Decision and Order, which granted Williams' petition for a conditional use for age-restricted adult housing in an RR-DEO Zoning District. A timely appeal to this Court followed.

D. LEGAL ARGUMENT

1. Burden of Proof and Burden of Persuasion

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 the applicant for a conditional use must provide all evidence and proof necessary to comply with each and every provision and requirement under §131. As argued below, this burden Williams failed to meet.

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[17] See Transcript, p.47.

2. Standard of Review

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". Homes Oil Co. v. MDOE, 135 Md. App. 442, 462 (2000); Dept. of Health v. Walker, 238 Md. 512 (1965).

Substantial evidence requires such relevant evidence as a "reasonable mind might accept as adequate to support a conclusion", Bullock v. Pellham Woods Apartments, 283 Md. 505, 512 (1978). It must be sufficiently reliable to afford principled decision making. See,e.g.,Travers v. Baltimore Police Department, 115 Md. App. 395, 411 (1977); Port Wardens of Annapolis v. Md. Captains Yacht Club, 261 MD. 48, 58 (1971). Agencies "are required to state the bases for their findings of fact. The findings are then subject to judicial review under the substantial evidence standard. If agency findings are based on unreliable evidence, the agency's action is reversed". Travers, supra. "Reliable evidence in the record" must support the Board's findings. Port Wardens, supra, at 58. 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). The reasonableness of the conclusions contained in the Board's Opinion is to be determined by the facts, as reflected in the record, from which those conclusions are drawn,

rather than from the conclusions themselves. Stansbury v. Jones, 372 Md. 172, 812 A.2d 312 (2002); People's Counsel v. Maryland Marine Mfg. Co., 316 Md. 491, 560 A.2d 32 (1989).

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

As the record makes clear, 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.

Protestants objected to these changes, arguing at the hearing 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. They argued that such changes also constituted a new proposed plan *never* yet reviewed by the appropriate agencies. And they 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.

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. The amendments to the petition and plan 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.

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 just those areas where Williams later amended his plan on the first night of the hearing.

For example, Master Carbo viewed the original proposal as containing 6000 square foot, two story detached dwelling units, which were depicted on the plan presented to him. He found that these large units with expansive second floors were well beyond the size of any age-restricted adult dwelling that he had reviewed in the past four years, and that it was apparent that these homes were not designed for the typical active senior seeking smaller quarters. He noted that the Plan did not specify the number of bedrooms or the use to which the large second floor space might be put. He considered the fact that the units were larger and designed to accommodate more occupants than the typical age-restricted adult dwelling. And, he reasoned that because the units were more akin to a large family home, their impact with regard to noise,

traffic, and odors would likely be greater that those ordinarily associated with an age-restricted adult housing project.

Master Carbo also did not have before him the changes made to landscaping and buffering. The plan before him provided forest conservation buffering of one width, while the amended plan going before the Board of Appeals had a different landscaping proposal which replaced natural tree buffering with new landscaping to be supplied. Master Carbo denied the conditional use plan based upon the buffer proposed in the plan coming before him, which he found was insufficient to screen the visual wall of units which would stretch some 1300 feet and would be visible to the vicinal residential properties to the east. To the extent the proposed use plan was changed for the Board of Appeals, moving units and altering landscape buffer areas and types, the changes had to be substantive given the result that the Board of Appeals apparently found such changes sufficient to satisfy the structuring and landscaping requirements which Master Carbo found were not satisfied.

Beyond the Rules of Procedure of the Board of Appeals, 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.

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

Williams failed to meet his burden of proof and persuasion for §131B.1. in that he failed to provide substantial evidence and information, based upon a preponderance of evidence, that

his proposed conditional use plan *will* be in harmony with the land uses and policies indicated in the Howard County General Plan. Specifically, §131.B.1. provides:

> The Hearing Authority shall have the power to permit conditional uses, provided the following general standards are met:
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> 1. 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 in which it is located. In evaluating the plan under this standard, the Hearing Authority shall consider:
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> 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
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> 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.

The word "will" in this regulation means "must" or "shall" for purposes of construction. The regulation positively requires that the proposed use be in harmony with the General Plan, and that it be proven so. There is no room for "mights" or "maybes" here.

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.

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.[18]

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[18] 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

Williams' plan fails to prove that the units 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. In fact, the record of this case plainly shows that these units are as large or larger than family homes active seniors would be selling.

Testimony of Mr. Hikmat and others speaking for the plan does not show otherwise. Extremely large units with expansive second floors have been proposed throughout. While various alternative unit diagrams were added to the plan (at the hearing too late), Mr. Hikmat made clear that it would be builders or buyers choice as to unit type[19]. The Board's Decision on harmony appears to ignore this issue (so important to the Hearing Examiner), mentioning only in a separate section that "Mr. Hikmat stated that market conditions would determine the actual sizes of the proposed dwellings", a statement which seems to avoid rather than decide this important policy issue.

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' 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-

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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.

[19] See Transcript, p.19 (". . .people will have a choice between the four or similar houses, so that's potentially what would be there.").

story houses (5600 square feet) with extensive upper stories cannot be in harmony with the policy. Again, Williams was required to prove[20] they were in harmony to satisfy his burden under §131 B.1. He did not do so. The Board's Decision suggests this policy is not frustrated in this instance because the General Plan language was general and left details of such matters to future legislation. But this does not answer the strict issue involved, where policy is plainly involved and expressed, 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.[21]

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). Of course, 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,[22] 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,

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[20] 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.

[21] 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 hereto as **Exhibit E**, where the Board "viewed the language of the General Plan" to base its harmony decision, despite that language recommending future enactment.

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

books, clothing, toiletries, hair cuts, etc. The only road to these services, Route 32, is a level "F" road.

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.

As pointed out by Staff, the regulations officially define "Age-restricted Adult Housing" as:

> A development that contains independent dwelling units with full kitchens that is designed for and restricted to occupancy by households having at least one member who is 55 years of age or older. (Emphasis added).

As the Staff pointed out, because this is a separate use category, "it is implied that Age-restricted Adult Housing is meant to have inherent distinctions from other by-right dwellings, such as single-family detached dwellings. These distinctions should be clearly evident based on design and/or floorplans". And as the burden was on Williams to prove clearly evident distinctions from other by-right dwellings, the lack of any such proof on the record indeed disproves his case. And, as stated above, it is irrelevant that several alternative single-story floorplans were provided (too late), when the choice of builder or customer might very easily result in all units being multi-story 5600 square foot units resembling large by-right single-family dwellings.[23]

Protestants Robert Mentle, Nina Stedman, Gene Cyprich, Katie Murphy, and others testified that these large proposed units are not in harmony with the General Plan in this neighborhood, and that these expansive and expensive multi-story structures are inconsistent

[23] Providing "a range" of four separate sketches for units is a red herring, and is irrelevant since there is no way to tell which, if any, of the smaller versions would be built, or how many.

with the policy and concept of downsizing. But the Williams' plat and plan also reveal as much.

A separate policy from the General Plan, that of affordability (General Plan, p.77-80), was also not properly addressed by Williams. 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 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.

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 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. Specifically §131B.2. provides:

> The proposed use at the proposed location will not have adverse effects on vicinal properties above and beyond those ordinarily associated with such uses. In evaluating the plan under this standard, the Hearing Authority shall consider whether:
>
> a. 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.
>
> b. 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.
>
> c. 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.
>
> d. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate.

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. Under this local ordinance 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, Protestants were not required to prove the existence of adverse effects on vicinal properties (though they did).[24] Rather, Williams was required to prove the negative, that no adverse effects exist to any degree, or that every adverse effect which does exist does not go above and beyond the ordinary adverse effect

[24] 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.

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. And Williams, by not 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

Williams' proposed use would adversely impact safety. The only traffic study introduced into evidence was provided by Protestants. Petitioners' expert witness Calajero offered the opinion that no traffic study was necessary at this time, and presented only ITE trip-generation data. Calajero stated that he had no evidence that the proposed plan (which contemplates room for four vehicles at each residence) would not 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.

William Taylor testified[25] as to the potential impact on safety of the proposed development. Taylor offered a traffic study into evidence. Taylor testified that the portion of Rt. 32 which intersects Linden Church Road is a service condition level "F" highway, the highest use level. Taylor testified that there are other roads in the district, such as Rt. 97, which are less heavily trafficked and consequently have a lower level service condition. Agreeing with this position, Petitioner Robert Williams testified that Rt. 32 is a "failure",[26] and conceded, "Route 32 is a dangerous road".[27] 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.

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[25] See Transcript, p. 168-210.
[26] See Transcript, p. 357.
[27] See Transcript, p. 358.

Taylor testified that the relevant portion of Rt. 32 already is one of the most congested and dangerous highways in Howard County and the state of Maryland. This was not challenged or disputed. Taylor also conducted a study whereby he and others observed the daily traffic flow at the intersection of the proposed site and the access to Rt. 32. Taylor calculated that the proposed site would lead to an increase of 665 daily round trips. Taylor testified that the impact of an additional 665 daily round trips by residents of a 55+ condominium development will exacerbate and further add to the existing traffic congestion and safety problems. There are approximately 151 households in the community, the addition of 50 condominiums would increase the traffic congestion within the community and at the intersection of Linden Church Road and Rt. 32 by 33%. Taylor testified that the proposed 50 condominium units would add in excess of one-half of the annual growth rate of Route 32. All of Taylor's testimony was without contradiction and no traffic study was entered into evidence by Williams.

Taylor further testified that the intersection at Rt. 32 and Linden Church Road is not a typical "T" intersection but is known as an unconventional arterial intersection design or more specifically a "Continuous Green T Intersection". The continuous green T design specifications include a median which separates the opposing lanes of traffic for the left turn arterial traffic. The currently installed intersection design does not have a median separating the left turn traffic from Linden Church Road from the opposing northbound Route 32 traffic. Taylor testified that such intersections are rare in the state of Maryland, being used only in a few other states such as Florida, North and South Carolina. Taylor further stated that the unfamiliarity of this intersection design by most Maryland drivers creates unique hazards. The omission of a separating median currently creates a very hazardous situation. Other Protestants testified to seeing near-miss head on collisions due to this design. Williams offered no contrary evidence

regarding the hazards of the intersection. Indeed Robert Williams confirmed Protestants' testimony by stating that the intersection was "the craziest intersection anyone could ever . . .",[28] and that "Route 32 has never had an entrance that was acceptable".[29]

Taylor further noted that National Highway Traffic Safety Administration states that "[d]riving within intersection environments requires complex speed-distance judgments under time constraints. This scenario for intersection operations can be more problematic for older drivers and pedestrians than their younger counterparts. The single greatest concern in accommodating older road users, both drivers and pedestrians, is the ability of these persons to negotiate intersections safely".

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.

b. Testimony Relating to Physical Condition

Numerous Protestants testified as to the size and characteristics of their vicinal properties and lots, most of which are three acres or greater, and several pictures of vicinal properties and structures were introduced as Exhibits. The Protestants testified that due to the clustering of the proposed structures the project would not be compatible with the neighborhood. 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

[28] See Transcript, p. 359.
[29] See Transcript, p. 357.

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).

The prominence of the this unique clustering and massing effect, with an arrangement of the units in a line 20 feet or less apart, 80' wide and 30' tall, 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", was one such unique adverse impact that Williams was required to deal with under §131 B.2.b. 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.

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' engineer, Mr. Hikmat, testified that there would be street lighting in the project and lighting associated with the proposed community center and tennis courts. Hikmat was unable to identify the number of lighting elements that would be included in the project. Hikmat testified that a determination as to the specific level of lighting that would result would be made at a later date in consultation with the County regarding the site development plan. Hikmat testified that he believed there were two or three street lights at the intersection of Rt.

32 and Linden Church Road[30] although he could not identify the location of the street lights on the map he submitted, because he had only visited the site during daylight. It appears that such street lights are relatively distant from the proposed site.

It is relevant that the question of lighting was addressed in the Petition. Question No. 7 asked: "Will the conditional use generate physical conditions such as noise, dust, fumes, odors, lighting or vibrations which would be discernible from abutting and vicinal properties?" Petitioners answered: "No. The proposed uses are residential in character, use, style and location, and therefore, are no different than the other residential uses in the area." Protestants contended that such answer was evasive since there is no street lighting within the community except near the intersection with Rt. 32. Petitioners thus provided inaccurate information to the Department of Planning and Zoning and deprived the Department of the opportunity to evaluate the effects of lighting in preparing the technical staff report.

Several Protestants testified that the proposed plan would have an adverse affect at the proposed location greater than other areas of the district because i) the neighborhood has no street lighting other than at the intersection of Rt. 32 and Linden Church Road, ii) the neighborhood has a remarkably clear skyline that is of value to the residents' quality of life and property values, and iii) the lighting scheme ultimately adopted will have an adverse effect on the neighborhood because of the lighting around the proposed community center, the proposed tennis courts, and lighting of the clustered houses. 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

[30] Actually, the three street lights are at the off ramp from Rt. 32, only illuminating the proximate off ramp from Rt. 32.

effects or comparisons with any other locations within the zone, thus failing to satisfy the requirements of §131B.2.a.

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

Petitioners expert witness William 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 testified that the system would be subject to various State and County regulatory schemes and that permits would have to be obtained. Sheesly stated that the sewage system (and hence the project) could not be completed unless such 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). Sheesly's 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 therefore concedes 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.

By contrast, Murray Snyder an engineer and Navel Academy instructor, testified for Protestants that he had reviewed the documents filed by Petitioners. Snyder testified that due to the limited information and relatively early stage of testing the documents were entirely insufficient to evaluate the effects of the proposed disposal system to determine whether such effects would be greater at the proposed site than other areas in the district.

Several Protestants testified that there is no public water or septic in the entire neighborhood, and that the proposed common septic system would have an adverse affect greater than in other areas in that wells on vicinal properties would be affected by the amount of water used by the proposed system, and that water quality would similarly be affected by such system. This testimony was uncontradicted.

Williams failed to meet his heavy burden to prove no greater adverse effects under §131 B.2. 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".[31] As to water balance in the community, he told Chairman Sharps, "I can't make that determination yet . . .".[32] And he "in all candor" could not determine water availability for any unit or bedroom quotient,[33] which secured 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,"[34] 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".[35] Yet, remarkably, even

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[31] See Transcript, p. 110.
[32] See Transcript, p. 125.
[33] See Transcript, p. 126.
[34] See Transcript, p. 127.
[35] See Transcript, p. 128.

without the evidence needed to make the §131 B determination, the Board erroneously granted Williams' proposal.

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

a. §131 N.1.i Was Not Satisfied

Specifically, §131.N.1.i mandates:

> e. 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.

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.[36] Presuming, by contrast, the units to be of the 1800 square foot variety, Williams' engineer, Mr. Hikmat, quickly admitted that would not be compatible with residential development in the vicinity.[37]

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

[37] 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.

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 the sufficiency of the buffering or the compatibility of the many peripheral units.[38] Again, the burden of proof rested entirely on Williams to show substantial evidence and compliance. This he failed to do.

As mentioned above, the Board improperly shifted the burden, contrary to §131 G, stating 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. Hence, by law, the Board's Decision should be reversed and vacated.

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[38] 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 hereto as **Exhibit E.**

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). Williams failed to provide the specific evaluations for all units "with the petition".

a. §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.[39] 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.

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

Though mistakenly presumed by Williams to be one and the same, there is a recognized distinction between the RR Zoning District and the RR-DEO Zoning District. This is important for two reasons. First, §131 N.1, while specifying a number of separate residential zoning district variations, does not include RR-DEO amongst its listing. Second, the Board's

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

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.

To the extent this district or zone involves the separate density exchange option, it is indeed a separate category for review purposes. A plain reading of §131N.1 does not include the RR-DEO District as one where an age-restricted adult housing 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. Moreover, even if arguendo the RR-DEO District were considered one and the same as the RR District, it is obvious that the Board failed to analyze the proposal for Schultz v. Pritts purposes to take account of the full RR zone, instead wrongly constraining its review only to a more restricted RR-DEO District.[40] As such, the Board utilized the wrong test, 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.

[40] The Board's Decision and Order, at p. 11-12, indicates the Board's restricted review, "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).

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on this 6th day of August, 2007, a copy of the foregoing *Protestants' Rule 7-207 Memorandum* was sent, via first class mail, postage prepaid, to:

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