

**IN THE CIRCUIT COURT  
FOR FREDERICK COUNTY, MARYLAND**

*Petition of* BOARD OF COUNTY \*  
COMMISSIONERS OF FREDERICK \*  
COUNTY, MARYLAND AND THE \*  
FREDERICK COUNTY PLANNING \*  
COMMISSION \*

*For Judicial Review of the* \*  
DECISION OF THE FREDERICK \*  
COUNTY BOARD OF APPEALS OF \* CASE NO. 10-C-1286  
MARCH 25, 2010 \*

*In the case of* THE APPLICATION OF \*  
GLOBAL MISSION CHURCH OF \*  
GREATER WASHINGTON \*  
CASE NO. B-09-16 \*

\* \* \* \* \*

**MEMORANDUM IN SUPPORT OF PETITION FOR  
JUDICIAL REVIEW OF BOARD OF APPEALS' DECISION**

The Board of County Commissioners of Frederick County, Maryland and the Frederick County Planning Commission, for the reasons set forth below, respectfully request that this Court reverse the decision of the Frederick County Board of Appeals, and affirm and uphold the decision of the Planning Commission denying the application for site plan approval filed by Global Mission Church of Greater Washington.

**I. QUESTIONS PRESENTED FOR REVIEW**

Whether the Board of Appeals erred when it:

1. Considered evidence outside the record during its deliberations;
2. Failed to deny the site plan application, or affirm the Planning Commission's denial of the site plan application; and

3. Exceeded its statutory authority by remanding the matter to the Planning Commission to remedy perceived due process issues that had been cured by the Board's *de novo* proceedings.

## II. STATEMENT OF FACTS

The Planning Commission was first introduced to Global Mission Church of Greater Washington's ("GMC" or "applicant") development proposal when it was discussed in conjunction with the applicant's Water and Sewerage Plan Amendment Request No. WS-08-04 to place multiuse water and wastewater treatment system<sup>1</sup> designations on the GMC property, which is located adjacent to the west side of I-70, north of Old One Hundred Road abutting on the north side of the Montgomery County line.

During the Water and Sewerage Plan hearing, the applicant's testimony was clear that it proposed to start with 1,200 seats and that Phase II would increase the capacity of the sanctuary to 2,000 seats in the future – possibly in 2020. (09/17/08 Transcript at pp. 39-40.)<sup>2</sup> The applicant drilled two wells and requested a 7,500 gallon per day (gpd) withdrawal permit (09/17/08 Transcript at p. 20) from the Maryland Department of the Environment (MDE).

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<sup>1</sup> The Frederick County Water and Sewerage Plan defines multiuse water and wastewater systems as serving one lot or parcel and having capacity (as distinguished from flow) in excess of 5,000 gallons per day (gpd.)

<sup>2</sup> The Transcript of the 9/17/08 Planning Commission hearing was prepared for a pending Circuit Court case, and was part of the Board of Appeals record. The Transcript is included as Ex. 1 hereto, for the Court's convenience.

The applicant had projected a maximum day wastewater flow of 11,600 gallons which could be averaged out over the week to 4,350 gallons (average daily flow) for the 2,000 seat Phase II building proposal. (09/17/08 Transcript at p. 39.) (*See also*, Ex. 2.) The Water and Sewerage Plan application submitted by GMC to the Frederick County Planning Division for the Water and Sewerage Plan amendment did not include a building sketch or site plan.

The Water and Sewerage Plan places upon the applicant the burden of proof to establish that its proposed Amendment was consistent with the Frederick County Comprehensive Plan. GMC failed to satisfy this requirement. At the conclusion of the September 17, 2008 hearing, the Planning Commission determined that the proposal to designate the site for multiuse water and wastewater systems (which is required where system capacity is in excess of 5,000 gpd) was not consistent with the Comprehensive Plan. The applicant has sought judicial review of that decision and the matter remains pending in the Circuit Court (Case No. 10-C-08-003362).

Because the GMC site was not approved for multiuse water and wastewater systems, the capacity of water and wastewater systems to serve the site must remain below 5,000 gpd. In addition, based on the rating of the discharge area (septic field) by the Health Department, the actual wastewater discharge may not exceed 5,000 gallons on any day.<sup>3</sup>

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<sup>3</sup> These are separate requirements, although both involve a 5,000 gallon threshold. The Water and Sewerage Plan requirement focuses on capacity of the wastewater treatment system. The Health Department requirement focuses on the amount of discharge from the system into the ground. If the site is approved for a multiuse system, it would allow retention and storage of maximum day flows and “dosing” of the wastewater discharge over the following days to average out the discharge volume.

Because of the denial of the Water and Sewerage Plan Amendment, in consultation with the Health Department, the applicant agreed to remove from its proposed septic system the holding tank/pump chamber to keep the wastewater system size below 5,000 gpd. (*See*, Ex. 3.)

#### Site Plan Submission/Review

Shortly after the denial of its request to utilize a septic system in excess of 5,000 gallons per day, GMC submitted its site plan application to the Division of Permitting and Development Review (DPDR) on December 3, 2008. A very lengthy Technical Advisory Committee (TAC) meeting on the GMC application occurred on January 5, 2009, during which numerous issues were discussed, including the requirement that both the water and wastewater systems and discharge must remain below 5,000 gpd each day, and that averaging the flow across several days could not be done. In addition to telephone discussions and emails, additional meetings were held between staff and the applicant's representatives to discuss site related issues – including one on February 6, 2009 and March 20, 2009. A second TAC meeting for the GMC site plan was held on April 23, 2009.<sup>4</sup>

During the January 5, 2008, TAC meeting, there was extensive discussion with the Health Department regarding the number of “seats” that could be accommodated by a septic system that was limited to a flow of no more than 4,999 gpd based upon “projected” and “estimated” water usage for this type of use and corresponding anticipated wastewater generation.

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<sup>4</sup> The Code states that one TAC meeting will be held. Fred. Co. Code §1-19-3.300.1(D).

As reflected by GMC's series of letters purporting to change the sanctuary capacity, essentially the 4,999 gpd restriction on water and wastewater capacity was used to "back into" the number of "seats" that would be allowed in the sanctuary or kitchen/dining hall area, taking into consideration the requisite "safety" factors built into the seating/capacity calculations by the MDE/Health Department. (Compare Ex. 4 to Ex. 3.) It was also determined that to stay under the 5,000 gpd flow limits, a commercial kitchen could not be installed and disposable serving and eating utensils and dishes would have to be used in perpetuity to avoid over taxing the wastewater system and discharge area. Notwithstanding these numerous and substantial proffers to decrease the sanctuary seating capacity, revised drawings showing a reduced building size were never submitted.

At the second TAC meeting on April 23, 2009, the issues discussed included Montgomery County's review of the project (because access to the site was via Montgomery County roads), stormwater and erosion control, internal parking lot design, traffic issues related to the Adequate Public Facilities Ordinance (APFO), and miscellaneous planning, lighting, landscaping and forest issues.

#### July 8, 2009 Planning Commission Hearing

The Planning Commission meeting of July 8, 2009, was the first day of the hearing on the GMC site plan application. Staff presented its report. In addition to discussion of the overall size of the proposed structure and the length of the access road and bridge structure required to access the proposed building location, the primary

concerns and questions related to the ability to keep the water and wastewater usage under 5,000 gpd, and how the “allowable seats” calculation was performed.

Questions were raised by the Planning Commission as to how the 5,000 gpd discharge limit could be enforced, and Mr. George Keller, Director, Environmental Health Services, indicated that the Frederick County Health Department would not be able to control or enforce the discharge or occupancy limits.

Recognizing the length of time that would be needed to complete the discussion of the GMC site plan issues, and the number of other items on its agenda that day, the Planning Commission continued the hearing to the following week, July 15, 2009.

#### July 15, 2009 Planning Commission Hearing

When the Planning Commission hearing resumed on July 15, 2009, staff proposed an additional and unique condition to attempt to address the concerns raised by the Planning Commission the week before regarding the size of the proposed structure and the enforceability of occupancy limits intended to keep the wastewater system capacity and discharge below the 5,000 gpd limit. Staff proposed a new condition, which was “Building permit application and approval, including maximum occupant load, must be consistent with these site plan conditions.” This condition was offered by staff because staff did not yet have any details concerning the number of rooms, bathrooms, or kitchen facilities in the building proposed to be built on the site.

The applicant then made its presentation and discussed approvals it had already received from Montgomery County for the access to the site from Old Hundred Road and that the 300 foot long bridge had gone through the Army Corps of Engineers review.

The applicant proffered that it would stay within the 4,999 gpd wastewater requirement, and if its site plan was approved, it would withdraw the legal challenge pending in Circuit Court of the denial of its Water and Sewerage Plan Amendment application.

GMC's attorney indicated that GMC had agreed to downsize its sanctuary seating and not to install a commercial kitchen, but when asked if the footprint of the building had been reduced, he answered that it had not.

Discussion ensued during the July 15, 2009, hearing about GMC's request to the Zoning Administrator for approval of accessory uses, and the recently issued Zoning Administrator's letter approving GMC's proposed uses, which included five services on Sunday, and numerous classes and gatherings during the week. (*See*, Ex. 5.)

Following rebuttal testimony presented by GMC, the Planning Commission asked Mr. Gatrell and Mr. Keller about their evaluation of the water and wastewater usage, as it related to information provided by GMC that day.

Mr. Gatrell said he remembered discussing two worship services with the applicant but did not remember the applicant telling him there would be five services held on the same day of the week.

Mr. Keller stated that the Health Department was provided two dimensional drawings of the footprint of the building and the concept of the sanctuary and dining hall, and he was concerned to just then be finding out there was a three-story education building proposed.

Mr. Keller indicated that, based upon the recently received information about the square footage of the proposed three-story building, the Health Department would need to scrutinize the building permit to assure that the septic area would not be overloaded. Mr. Keller having just recently seen the Zoning Administrator's letter regarding accessory uses stated his intent to look again at the capacity calculations previously performed, because they had not included the three-story education building.

Planning Commission Member Joe Brown expressed his concern that holding five services the same day could result in the discharge exceeding the 4,999 gpd sewer capacity, although the members of the Planning Commission understood that limitations could not be placed on the number of services to be held in the building. Mr. Brown also found it very unusual to have the size of the building addressed after site plan approval – the new condition suggested by staff – because the size of the structure is an essential site plan element.

To allow staff time to look into and address the many concerns raised relating to the size of the proposed building and the limited wastewater capacity, the Planning Commission voted to continue the hearing for up to ninety days to allow staff to obtain additional information, in the hope that the issues could be worked out.<sup>5</sup>

A letter sent by staff to the applicant on July 17, 2009, stated that the hearing on the application had been continued so that certain concerns and issues (listed in the letter) could be further investigated. In addition to the July 17<sup>th</sup> letter summarizing the Planning Commission decision, staff sent a letter dated August 6, 2009, to the applicant containing

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<sup>5</sup> The Planning Commission motion did not direct staff to have additional meetings with the applicant.

a specific list of additional information requested. The additional information staff requested was provided to staff by GMC on September 14, 2009. Staff reviewed the newly received information, met to discuss the items submitted, and reevaluated the proposed site plan and outstanding issues in light of the additional information provided by GMC.

At no time during the ninety day continuance period did GMC offer to reduce the size of the proposed building or submit any drawings showing a smaller structure. (Ex. 6 - 10/14/09 Draft Transcript at pp. 126-127.)<sup>6</sup>

Based upon the additional information submitted on September 14, 2009 by GMC in response to staff's request, staff was able to reevaluate the site plan application, particularly the building occupancy capacity, and the Health Department was able to recalculate water usage and wastewater generation based on the more complete information GMC provided. Because of the time needed to review and process the additional information and vacation schedules, staff tried, but was unable to arrange a meeting between all staff and all applicant representatives in the time period between September 14 and October 7, when the final staff report was due to be sent to the Planning Commission.

The preliminary floor plans provided by GMC on September 14, reflected a potential building capacity of approximately 5,800 people, which triggered the Office of Life Safety to require a second access/egress point. This additional information also

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<sup>6</sup> As Exhibit 15 to its January 5, 2010 Prehearing Submission to the Board of Appeals, GMC provided a draft transcript of the October 14, 2009 Planning Commission Hearing. While it is not an official transcript of those proceedings, for the convenience of the Court, citations to that transcript are being provided, and the pages cited to are attached as Exhibit 6.

caused the Health Department to determine that the proposed 4,999 gpd septic system would not be adequate to serve the structure. Given the lack of adequate septic capacity to serve the proposed 138,000 sq. ft. building, and the lack of a secondary access/egress point, the staff report for the October 14, 2009 meeting contained a staff recommendation for denial. (*See, Ex. 7.*)

The staff report was provided to the applicant, GMC on Wednesday, October 7<sup>th</sup> – two days earlier than the normal public release date for Planning Commission staff reports, and a full week prior to the Planning Commission hearing date. However, on October 2, GMC’s counsel acknowledged they were aware of the changes to the staff positions via their review of the Hansen comments.

On October 9, 2009, GMC representatives were able to meet with Health Department representatives to discuss the water usage and wastewater discharge computations. GMC representatives brought written information to that meeting which was reviewed in detail with Mr. Keller, but the written materials were taken back by the GMC representatives when they left the meeting.

On the eve of the scheduled October 14, 2009, Planning Commission hearing, GMC filed a written request for a continuance, which was ultimately denied.

#### October 14, 2009 Planning Commission Hearing

During the October 14, 2009, Planning Commission hearing, Bryon Mitchell, Manager, Office of Life Safety, testified that based upon GMC’s proposal for a 1,600-person maximum occupancy, he had no objection to a single access point. However, upon receipt of the preliminary floor plans on September 14, he performed occupancy

calculations which resulted in an occupancy load of 6,400 persons. Mr. Mitchell then met with GMC's representatives on October 8, 2009, and revised the building occupancy load projection down to 5,800. With the occupancy rating of 5,800, he no longer could support a single access point, and a second access would be required. (10/14/09 Transcript at pp. 69-71.)

Mr. Keller testified at both the beginning of the hearing and near the end regarding the septic flow issues. Based upon GMC's prior statements that the sanctuary would contain a maximum of 1,160 seats and a maximum of 500 seats in the dining hall, the calculations projecting the amount of wastewater to be generated fell under the 4,999 gpd discharge which had been approved for the site. Mr. Keller became concerned about these calculations based on the "new" information presented during the July 8 and July 15 hearings, including the three dimensional aspects of the proposed building, which triggered the need for reevaluation by the Health Department. (10/14/09 Transcript at pp. 75-76.) After consultation with MDE, Mr. Keller's best professional opinion was that the wastewater discharge from the proposed 138,027 sq. ft. structure with an occupancy capacity of 5,800 would not remain below the daily maximum 5,000 gallons every day of the week. Mr. Keller explained twice the several methods he used to double check the estimated wastewater generation. (10/14/09 Transcript at pp. 78-81, 273-276.) Mr. Keller emphasized that the applicant has to prove that the system would not be overloaded, and they did not do so. (10/14/09 Transcript at p. 81.) Mr. Keller also testified that when he met with GMC's representatives to discuss his findings, at the end of the meeting the GMC representatives took their written materials with them, indicating

they would send them to Mr. Keller later, but did not do so. (10/14/09 Transcript at pp. 81-83.)

Mr. Keller, under cross examination by GMC's counsel, stated that the original site plan provided to the Health Department to perform septic evaluation did not contain detail regarding accessory uses. (10/14/09 Transcript at p. 142.)

The testimony and exhibits presented by the applicant during the October 14 Planning Commission meeting fell far short on proving that the use of the proposed 138,027 sq. ft. building shown on the site plan would not generate wastewater in excess of 5,000 gpd on any day.

The applicant disagreed with the Health Department's estimates of maximum daily water usage and discharge for the proposed site, and its use of data provided by GMC regarding actual water usage at the applicant's current and much smaller facility in Silver Spring. So GMC hired an "expert" to prepare a report and give an opinion. Under cross examination, GMC's "expert," Greg Klebanoff admitted that despite having 90 days and the ability to do so, he did not take water meter readings at the existing Silver Spring facility to record actual maximum day usage. (10/14/09 Transcript at p. 127.) Neither did Mr. Klebanoff perform any analysis or projection of water usage/discharge for a 138,000 sq. ft. building with potential occupancy of 5,800 people. (10/14/09 Transcript at p. 127.) Mr. Klebanoff's entire report was based on the shaky assumption that maximum occupancy would be limited to 1,160 persons in the sanctuary and 500 in the dining area and that water saving fixtures would be the cure-all. (10/14/09 Transcript at pp. 105, 115-116.) Mr. Klebanoff indicated he did not do any calculations of water

usage related to the sixty-seven meeting rooms in the education building. (10/14/09 Transcript at p.128.)

GMC's architect, Gerald Wilcox, spoke about his experience designing many religious facilities, and admitted that this was the first time that he had been required to look at the simultaneous occupancy of a religious facility, as it related to wastewater discharge. (10/14/09 Transcript at pp. 109-110.) When questioned by others, Mr. Wilcox identified other projects he or his firm had designed, in northern Virginia, both of which were served by public water and sewer. (10/14/09 Transcript at pp. 122-125.) In short, GMC's architect had no experience designing large structures with limited capacity septic systems.

Many members of the public testified in opposition to the GMC site plan on the basis of the impact such a large building would have on the ecosystem. Testimony was also provided regarding the number of current church members and the goal of expansion, which undermined the probability that daily wastewater discharge would not exceed 5,000 gpd after the building was put into use. (10/14/09 Transcript at pp. 226, 228.)

The Planning Commission was obviously concerned about the ability of the proposed sand mound septic system to adequately treat the wastewater, inspection and the future integrity of the septic system, as well as the consequences of septic failure. Mr. Keller's responses to commission members' questions indicated that if properly installed and not overburdened, a sand mound system would provide proper filtration, but the Health Department did not have an adequate inspection program, and a gross failure

of the proposed sand mount could cause an eruption and the waste could wash into the stream. (10/14/09 Transcript at pp. 262-268.)

The essential issue was and remains “just how many people are going to be in the church” and “there’s no real sure way of knowing.” (10/14/09 Transcript at p. 269.) It became apparent to Commissioner Brown that the only way to assure the 5,000 gpd discharge limit would never be exceeded was to “downsize the building.” (10/14/09 Transcript at p. 272.)

The Planning Commission recognized its inability to create enforceable occupancy limitations for the proposed 138,027 sq. ft. building, other than the Fire Safety Code’s 5,800 person occupancy limit, and the potentially disastrous consequences that would arise from an overload of the septic system, which by design and soil limitations could accommodate no more than 5,000 gallons on any day. Commission Hagen summed up the Planning Commission’s concerns:

[H]aving the conversation where we keep pretending this 4,999 gallon [limit]...there’s no way – no one will enforce it. No one could enforce it. It will be used beyond that capacity even from the very beginning. It’s kind of a shell game that we’re playing and somebody has to say ... that the emperor has no clothes.

(10/14/09 Transcript at pp. 336-337.)

In addition, the applicant did not persuade the Commission that the required secondary access could be constructed. (10/14/09 Transcript at pp. 154-156, 158-159, 330-336.) Though there was discussion of an additional access point on the northern end

of the property, and an assertion by the applicant that it could be constructed without affecting property already covered by a Forest Resource Easement.

After the public hearing, the Planning Commission denied the application for site plan approval. As shown herein, the record amply supported the denial of the site plan application by the Planning Commission based upon inadequate septic system capacity.

January 20, 2010 Board of Appeals Hearing

Following an initial debate over whether the Board of Appeals (“Board”) would review the Planning Commission decision “on the record” and limit its review to whether the Planning Commission erred when it denied GMC’s site plan application, the Board decided to proceed with a *de novo* hearing, and also granted GMC’s request for additional time to present its case – sixty minutes – to be allotted as desired by each party to its presentation and rebuttal. (Vol. I, pp. 10-47.)<sup>7</sup>

GMC as the applicant again bore the burden to establish it was entitled to site plan approval. GMC, through counsel, started its presentation by focusing on the Health Department’s change of position between the July and October Planning Commission hearings and alleging that the “Health Department changed its methodology for evaluating the septic system.” (Vol. I, p. 70.) GMC’s counsel then suggested that the Health Department initial evaluation (pre-July) and finding that the septic system was adequate was correct, and that the later finding of inadequacy was incorrect. (Vol. I, pp. 71-72, 74.)

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<sup>7</sup> The Board of Appeals hearing transcript was prepared in three volumes – citations will be made to each Vol. I, Vol. II, or Vol. III and include page references.

GMC's Architect, Jared Wilcox, then testified about the several years of analysis done to determine the viability of putting a religious facility on the property, (Vol. I, pp. 78-81), although there were no formal plans submitted to the County until December 3, 2008.

Mr. Wilcox indicated that early on there had been some conversations with County staff concerning the secondary access, and the concept plan for the secondary emergency access. (Vol. I, pp. 83-85.)

Mr. Wilcox then spoke to the septic system issue, the soil testing, sizing of the septic field, and the use of the MDE guidelines by the Health Department to evaluate the proposed septic system adequacy, and a letter from GMC's engineer to the Health Department confirmed GMC's understanding on or about January 2009, regarding the wastewater flow calculations. (Vol. I, pp. 88-90.) (Ex. 4.)

Mr. Wilcox's testimony confirmed that the number of dining hall seats and number of sanctuary seats that GMC proposed were derived to fit within the Health Department's calculations. (Vol. I, p. 94.) Mr. Wilcox was then questioned about the October 14, 2009, Staff Report (Ex. 7) and the Health Department's comments therein.

While Mr. Wilcox expressed general disagreement with the Health Department's conclusions, upon cross-examination Mr. Wilcox conceded he did not have much experience designing buildings to meet septic system constraints, though his firm had previously designed a 50,000 sq. ft. religious facility that used a septic system. (Vol. I, pp. 107-108.)

Mr. Wilcox confirmed that while the January 12, 2009 letter to the Health Department (Ex. 3) identified the number of dining hall and sanctuary seats allowed: (1) the building plans had not been revised, (2) the occupancy would not be limited to 1,600 people, and (3) no sewage flow had been allotted to the 67 classrooms in the three-story education building. (Vol. I, pp. 109-110, 113, 115-116, 119.)

Although Mr. Wilcox spoke several times about the MDE guidelines and how they functioned, he later stated his firm hired specialty consultants for septic issues, and that he was not licensed to design septic systems. (Vol. I, p. 134.)

GMC then called Mr. David Gatrell, a sanitarian with the Frederick County Health Department, and questioned him regarding the calculations used to estimate wastewater generation by churches. Mr. Gatrell testified that he had not been told by GMC that it planned to have five services on one day plus other activities during that same time. Mr. Gatrell testified that the numbers he originally used to estimate the discharge for the GMC project (prior to the July Planning Commission hearings) were based on one or two services, not five. (Vol. I, p. 200.) Mr. Gatrell became aware of the five services in July 2009 during the Planning Commission hearings when the letter from the Zoning Administrator approving the accessory uses was placed in the record. (Vol. I, pp. 217-218.) (Ex. 5.) Mr. Gatrell had also been unaware that the plans included the potential for sixty-seven meeting rooms in the three-story education building (Vol. I, p. 219), or that the site was to be used from 7:00 a.m. until 3:00 p.m. on Sundays. (Vol. I, p. 230.) Mr. Gatrell indicated that based on what he learned during the July Planning Commission hearings, he would use 6-7½ gpd per sanctuary seat to estimate flows and that based on

those numbers, the projected flow would exceed the 5,000 gpd flow limit. (Vol. I, pp. 206-210, 218-219.) Storage of peak discharge, flow equalization and dosing of the wastewater discharge was not an available option because of the prior denial of GMC's request to have the property designated for multiuse systems (over 5,000 gpd). (Vol. I, pp. 221-225.)

GMC also called Mr. George Keller, Director, Environmental Health Services, with the Frederick County Health Department to testify. Mr. Keller is Mr. Gattrell's supervisor, and formerly worked with the Maryland Department of the Environment.

Mr. Keller's testimony was consistent with his testimony before the Planning Commission, wherein he described how he had estimated the wastewater discharge for the project, and performed a second separate calculation based on the data provided by the applicant in September of the water usage at its existing facility, as a way to "double check" his initial estimate. Both methodologies resulted in the conclusion that based on the size of the project and uses described in the request to the Zoning Administrator, the wastewater system proposed would not be adequate.

Mr. Keller confirmed that based upon all the information available to him at the time, he could not certify the adequacy of the proposed water and sewage facilities. (Vol. II, p. 23.) While GMC's counsel took issue with the Health Department's change in recommendation between the July and October meetings, Mr. Keller explained that prior to the July Planning Commission hearing the Health Department had only been provided a two-dimension "foot print" drawing by GMC, that he was unaware of the proposed three-story building, that the projections had only been based on sanctuary and dining

hall seats and two services, and that no wastewater flow for the three-story education building had been considered. (Vol. II, pp. 28-31.)

Mr. Keller also indicated that the actual data regarding the existing facility's usage provided by GMC in September was valuable and provided a second way to "double check" the prior estimates. (Vol. II, pp. 32-33.)

Mr. Keller also testified about the two hour meeting he had with GMC representatives on October 9<sup>th</sup>, prior to the Planning Commission October meeting and that the GMC representatives would not leave the additional information they reviewed together with him for further consideration. (Vol. II, pp. 13-14.)

Under cross-examination, Mr. Wilcox, GMC's architect agreed that the three-story building usage had not been included in the discussions with the Health Department regarding wastewater capacity. (Vol. I, pp. 113, 115-116.)

With regard to the need for a second emergency access, GMC presented testimony of Mr. Wilcox to the effect that a second access could be provided through an adjacent parcel also owned by GMC. (Vol. I, pp. 138-139.)

Because a subpoena had been issued compelling Mr. Bryon Mitchell's (Frederick County Office of Life Safety) attendance, the Board asked Mr. Mitchell to explain why he initially did not require a secondary access. Mr. Mitchell explained that the proffer of 1,120 sanctuary seats and 400 dining hall seats was at the upper limit of the capacity that he would allow only one point of ingress and egress. When GMC submitted the floor plans in September, and Mr. Mitchell was able to calculate the potential building capacity of 5,800 people, the second emergency access was required. (Vol. II, pp. 61-64.)

When GMC's representative was asked whether they would agree that the building occupancy would never exceed 1,120 people at one time, they declined to do so. (Vol. I, p. 110.)

While the issue of the ability to provide a secondary access was fairly debatable from the evidence, the issue of the adequacy of the septic capacity was not.

Mr. Gattrell and Mr. Keller both opined that the 5,000 gallon per day flow limitation was not sufficient for the project as described in the floors plans. (Vol. I, pp. 206-210; Vol. II, p. 23.) In addition as summed up succinctly by a member of the public, Meg Menke, in her testimony:

I'm going to ask you -- it's late, you've heard a lot of numbers. I'm going to ask you to write down four numbers if you would. The first one is 1,160, the second number is 6, the third number is 2,320 and the fourth number is 3.

You all recognize 1,160, that's the size of the sanctuary. The number 6, is the number that Mr. Gattrell said tonight he would use as the factor, the multiplier, if he had known that there were going to be five or more services in the building. So if you multiply 1160 by 6, you get 6,960-gallons of sewage per day for the septic system. We're square?

The second number -- third number, 2,320 -- I heard that from you, Madam Chair. You said that that was in writing, the proffer that the Applicant had made tonight. I'm not sure when it was made, some time in writing since the October meeting, that they would agree to limit the capacity of the building to that number of people per day. I didn't see it in writing but I heard you say it, so I take it to be true. So let's multiply that number by 3-gallons. You get 6,960.

Either way, the Applicant has not met the burden of proof that they can keep the sewage flow beneath 4,999-gallons. The excess is 40-percent higher than the permit -- than the limit. How many days a year are they going to go 50-percent higher, 60-percent higher, 70-percent higher? 2,320 people per day is probably what the building

will serve on a typical Sunday but on Christmas, it will be double that.

(Vol. II, pp. 170-171.)

As observed by Board member Peppe, despite ample opportunity to prepare for the hearing and obtain an expert on the septic issue, not a “scintilla” of evidence was presented by GMC which would establish that the wastewater/septic capacity of 5,000 gpd would be adequate to serve the proposed building. (Vol. III, p.72.)

### III. STANDARD OF REVIEW

In this case, the applicant appealed the Planning Commission’s denial of its site plan to the Frederick County Board of Appeals (“Board”). Following a *de novo* hearing, the Board of Appeals vacated the Planning Commission decision and remanded the case to the Planning Commission for further proceedings.

Where there are two administrative decisions, the Court will review the latter one, the Board of Appeals’ decision, to determine whether there is substantial evidence to support the Board’s decision. *Hikmat v. Howard County*, 148 Md. App. 502, 813 A.2d 306 (2002), *Board of County Commissioners for St. Mary’s County v. Southern Resources Management, Inc.*, 154 Md. App. 10, 837 A.2d 1059 (2003).

The Court first examines whether the agency applied the correct legal principles, then whether there is substantial evidence to support the factual findings, and the third analysis is of how the agency applied the law to the facts. *Hikmat*, 148 Md. at 522, *Board v. Southern*, 154 Md. App. 10, 837 A.2d 1059 (2003). “Whether reasoning minds

could reach a conclusion from facts in the record is the essential test.” *Board v. Southern*, 154 Md. App. at 24.

If the Board’s decision is based upon incorrect legal standards, or there is insufficient evidence to support the decision, it is considered to be arbitrary and capricious and “must be reversed.” *Board v. Southern*, 154 Md. App. at 25.

The agency must decide the issues before it whether it proceeds purely *de novo*, substantially *de novo* or on the record. *Board v. Southern*, 154 Md. App. at 29.

Under the Frederick County Code, Section 1-19-3.230(D), the Board of Appeals may “reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from and make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken.” This authority is derived from the Ann. Code of Md., Art. 66B, §4.07.

#### IV. ARGUMENT

##### A. Denial of Due Process Finding was in Error.

While the Board of Appeals found that the Planning Commission, by denying the applicant’s request for a continuance, denied the applicant “due process,” (Op., p. 14)<sup>8</sup>, the Board failed to recognize that by conducting its review *de novo*, it had in fact “cured” any possible error by the Planning Commission in that regard.<sup>9</sup>

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<sup>8</sup> Citations to the Board of Appeals Findings and Decision will be shown as (Op., p. \_\_\_\_). The Findings and Decision are attached as Ex. 8.

<sup>9</sup> Petitioners do not concede that the Planning Commission hearing impaired respondent’s due process rights.

Finding “that the FcPc should have granted the Applicant’s request for a continuance . . . .” (Op., Vol. I, p. 14) was no longer significant because the applicant, GMC, had ample time to prepare for and present its application *de novo* to the Board of Appeals.

Moreover, the Board lost sight of its role to decide the matter based on the evidence adduced at its *de novo* hearing, when it instead determined that the “FcPc should have continued the case to give the Health Department and the applicant an opportunity to either reach a mutually acceptable septic plan, or in the event that no such approved plan could be attained, allow the applicant an opportunity to exhaust its administrative remedies by seeking a review of the Health Department’s decision by way of an appeal in accordance with the Code of Maryland Regulations (if available).” (Op., p. 14.) That determination was not supported by the Planning Commission record or the testimony before the Board, nor was it within the Board’s statutory authority. The Board has no authority to require the Health Department to reevaluate the application.

The unrefuted testimony presented to the Board by Mr. George Keller, of the Health Department, was that he did meet with GMC’s representatives on October 8, 2010 (prior to the Planning Commission Hearing) and that he went through the information they brought to the meeting – line by line – for two hours. (Vol. II, pp. 13-14) Mr. Keller was prevented from further analysis of the information brought to the October 8<sup>th</sup> meeting by GMC’s representatives because they took the information with them and never provided copies to Mr. Keller as promised. (Vol. II, p. 14.) Thus the evidence showed that if the October 8 meeting was not a “meaningful opportunity,” it was because

the applicant refused to provide its information to Mr. Keller to evaluate prior to the October 14<sup>th</sup> Planning Commission hearing.

The Board of Appeals appeared to ignore the fact that the applicant had three months between the time of the Planning Commission denial of its site plan and the Board of Appeals hearing to further examine and discuss the Health Department's methodology, to appeal the Health Department's determination to the Maryland Department of the Environment (MDE), or to revise its site plan to reduce the size of the development, yet chose to do neither.

The Board's decision was, in effect, a remand to the Health Department to reconsider its decision, an action beyond the scope of the Board's statutory authority, and reversible error.

Having denied the request to review the Planning Commission decision "on the record," and deciding it would proceed with a *de novo* hearing (Vol. I, pp 35-38), by statute, the Board was then obligated to step into the shoes of the Planning Commission and make a decision to approve or disapprove the pending site plan based on the record created during its *de novo* hearing. (Ann. Code of Md., Art. 66B, §4.07, Frederick County Code, §1-19-3.230(D))

GMC again had the burden to establish to the Board of Appeals that it satisfied the requirements to obtain site plan approval, but despite this second opportunity, clearly failed to meet its burden of proof on the septic facility adequacy issue.

B. The Board of Appeals Erred When it Failed to Deny the Site Plan Application.

It is beyond question that on appeal to the Board of Appeals of the Planning Commission denial of its site plan, the applicant retained the burden to prove it met all the criteria and was entitled to site plan approval. *Grasslands Plantations, Inc. v. Frizz-King Enterprises, LLC*, 410 Md. 191, 214, 978 A.2d 622, 635 (2008).

In this instance, GMC had a second chance, via the *de novo* hearing before the Board of Appeals that it argued in favor of, to prove that the proposed structure, a 138,027 square foot building containing 1,160 sanctuary seats, 500 dining hall seats and 67 classrooms would not on any day discharge in excess of 5,000 gallons of wastewater.

It is undisputed that to obtain site plan approval, Frederick County Code, Section 1-19-3.300.4(C) requires that the Health Department certify the adequacy of the proposed water and sewage facilities for the proposed development, which the Health Department was unable to do based upon all information available to it from and after the Planning Commission's July 15, 2009 hearing.<sup>10</sup>

The Planning Commission properly denied the applicant's request for site plan approval because the Health Department did not find the proposed septic facilities to be adequate. Without this approval or certification by the Health Department, the Board of Appeals correctly noted that: "the Planning Commission had no authority to approve the site plan." (Op., p. 10.)

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<sup>10</sup> While the applicant contended that the County staff used the wrong version of Section 1-19-3.300.4(C) in its staff report, the Board of Appeals correctly determined that "[r]egardless of which provision is applied, one of the conditions of site plan approval is that the Health Department certify, or approve the septic facilities for the project. This condition was not met." (Op., p. 9.)

Consistent with their testimony before the Planning Commission, during the Board's hearing, the Health Department's representative, George Keller, testified that in his best professional judgment the proposed septic facilities would not be adequate to serve the proposed development (Vol. II, p. 23), Mr. Gatrell also with the Health Department, confirmed that the wastewater usage would exceed 5,000 gpd allowed. (Vol. I, p. 219.)

Therefore the Board of Appeals, based upon the testimony presented, had no ability to approve the pending site plan, no basis to vacate the Planning Commission's denial, and no reason to remand the matter to the Planning Commission, since it could not approve the application either. (County Code, §1-19.3.300.4(C).)

During the Board of Appeals hearing, the applicant took issue with the "methodology" used by the Health Department, likely because the outcome was unfavorable to it. However, there was no evidence in either the Planning Commission or Board of Appeals records that GMC took an appeal of the Health Department's determination to the Maryland Department of the Environment (MDE) pursuant to the Code of Maryland Regulations. (COMAR 26.04.02.10.) Having failed to avail itself of its opportunity to have the Health Department's decision reviewed by the Maryland Department of the Environment, GMC was unable to have the septic system adequacy issue resolved by the Board of Appeals.

The Board of Appeals acknowledged its inability to address the methodology utilized by the Health Department to determine septic adequacy (Op. at 10) and that under the County Code the Planning Commission "had no authority to approve the site

plan.” (Op. at 10) The Board however, failed to take the only action available to it by statute, to either affirm the Planning Commission’s denial of the site plan, or to make its own decision to deny the site plan pursuant to §1-19-3.230(D) of the County Code.

Because the applicant failed to establish that its proposed septic facilities were adequate and obtain the Health Department’s certification to that effect, the Board of Appeals had no viable option under its statutory authority than to deny the site plan or affirm the Planning Commission’s denial of the site plan.

Neither §1-19-3.230 or Art. 66B, §4.07 give the Board of Appeals the authority to remand the matter to the Planning Commission, and the Board of Appeals has absolutely no authority to direct the Health Department to reconsider its decision.

The Board of Appeals decision to remand the matter to the Planning Commission is based upon an incorrect application of the law and must be reversed. *Board v. Southern*, 154 Md. App. at 23-24.

Based upon the testimony and evidence presented to the Board of Appeals and the requirements of §1-19-3.300.4(C) that the Health Department certify the adequacy of the septic system prior to site plan approval, the Board had no option but to deny GMC’s site plan application.

C. The Board of Appeals Erred in Obtaining and Reviewing Information Outside the Record After the Record was Closed.

Having decided to close the record on January 20<sup>th</sup>, the consideration of additional documents by the Board on January 28<sup>th</sup> was in error. *Temminck v. Board of Zoning*

*Appeals*, 205 Md. 489, 109 A.2d 85 (1954); *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981).

The documents referred to and produced by Board member Peppe – Maryland Wastewater Management Plan, 2006, and unspecified EPA documents, were not part of the record, and none of the parties had the opportunity to review, comment on, or cross-examine the proponent of that information. (Vol. III, p. 33.) In addition, none of the other Board members had the opportunity to review this information; they could only rely on Mr. Peppe’s representations and assertions regarding those documents.

In *Temminck*, under very similar circumstances, the Court reversed the Board of Appeals’ decision and remanded the matter “for further hearing when the report . . . may be introduced in evidence, and the parties may produce any further evidence and have the right of cross-examination.” 205 Md. At 497, 109 A.2d at 89.

Petitioner timely filed a Motion to Reconsider with the Board asking it to remedy the error committed on January 28, 2010, when Board member Peppe held up copies of documents he had found purporting to be regulations from 2002 and 2006 (Vol. III, pp. 33-35, 84) relating to the septic issue. Another Board member asked to see the documents Mr. Peppe had (Vol. III, p. 97) and discussion ensued about whether those documents were part of the record. Thereafter Member Clapp initiated a motion to have the Health Department consider those documents identifying them by title. (Vol. III, p. 99.) After the Board’s counsel cautioned against referring to the extra record documents, the motion was amended to contain a more general and vague reference to those documents. (Vol. III, pp. 100-112.)

The Board's opinion contains only a general reference to the extra judicial documents in its direction that the Planning Commission give "due consideration to all current and applicable Federal, State, and local laws, rules, regulations and guidelines." (Op. p. 15.)

While the remedy provided in *Temminck* was a remand for further hearing, in this instance a further hearing is not warranted or appropriate. As indicated herein, the Board of Appeals and the Planning Commission both lack authority to override the Health Department's determination or to direct the Health Department on how it evaluates the septic capacity.

In addition to the other errors, the introduction of extra record evidence requires the reversal of the Board's decision.

D. The Evidence in the Record and the Statements of Board of Appeals Members during Deliberations Compel Denial of the Applicant's Site Plan.

A review of the transcript of the Board's deliberations on January 28, 2010, leads to the inexorable conclusion that GMC's request for approval of its site plan must be denied.

One by one, three of the five board members indicated that the applicant failed to meet the burden of proof to establish the proposed septic facility was adequate for its proposed development of the property.

Member Clapp stated succinctly "the site plan could not have been approved without the approval of the Health Department. So I can't say the Health Department – or the Planning Commission made an error in denying the site plan approval . . . ." (Vol.

III, p. 24.) Member Clapp also acknowledged that the Board had no authority to override the Health Department's decision on the septic capacity. (Vol. III, pp. 36-37.)

Member Michalski opined that denial was appropriate either on the Planning Commission record or on the record created during the Board's hearing. (Vol. III, pp. 45, 60-61.)

Even Member Clapp who argued in favor of a remand to the Planning Commission, conceded that he could not approve the application on the record before him. (Vol. III, p. 60.)

Member Peppe hit the nail on the head when he spoke about the voluminous record, the ample time provided to GMC to present its evidence to the Board, and that despite ample time to prepare for the Board's hearing (Vol. III, pp. 71-72), the applicant simply failed to put forth expert testimony on the septic issue, "not a scintilla, not a word was brought forward by the applicant on this subject." (Vol. III, p. 72.) Mr. Peppe clearly stated he would support a denial. (Vol. III, p. 114.)

Disregarding these clear statements by a majority of the members of the Board that denial of the site plan was appropriate, by a 3-1-1 vote, the Board decided to remand the matter to the Planning Commission and the Health Department for further discussion and proceedings.<sup>11</sup> The Board erred by not denying the site plan, based upon uncontroverted testimony of the Health Department representatives that the proposed septic facilities were inadequate to serve the propose building depicted on the site plan.

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<sup>11</sup> There was no indication in the record as to why Member Duke abstained from voting.

## V. CONCLUSION

The Board's fifteen page opinion, makes clear that it understood the issue – the adequacy of the septic facility, and that the Health Department was the entity charged with the duty and responsibility to make the septic facility adequacy determination.

Despite holding its own *de novo* hearing, the Board of Appeals' opinion focuses on discretionary procedural matters relating to the Planning Commission hearings, resulting in the decision remanding the matter to the Planning Commission and for the Health Department to continue discussion.

The Board of Appeals erred when it:

1. considered information outside the record;
2. failed to deny the site plan or affirm the Planning Commission decision on the record *de novo* proceedings;
3. went beyond its statutory authority by remanding the matter to the Planning Commission to remedy perceived due process issues already cured by the Board of Appeals *de novo* proceeding.

The Board of County Commissioners and the Planning Commission respectfully request that this Court reverse the Board of Appeals decision and affirm the Planning Commission decision denying the GMC site plan application.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY, that on this \_\_\_\_\_ day of July, 2010, a copy of the foregoing Memorandum in Support of Petition for Judicial Review of Board of Appeals' Decision was mailed first-class, postage prepaid, to: David A. Severn, Esq., Danny B. O'Connor, Esq., and Ashley Mancinelli, Esq., Severn, O'Connor & Kresslein, P.A., 50 Carroll Creek Way, Suite 340, Frederick, MD 21701, attorney for Global Mission Church.

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Wendy S. Kearney, Deputy County Attorney