

IN THE CIRCUIT COURT FOR FREDERICK COUNTY, MARYLAND

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

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Case No. 10-C-10-001286

*For Judicial Review of the Decision of*  
THE FREDERICK COUNTY BOARD OF  
APPEALS ON MARCH 25, 2010

*In the case of* THE APPLICATION OF  
GLOBAL MISSION CHURCH OF  
GREATER WASHINGTON

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OPINION

This matter came before the Court regarding the Petition of the 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 (hereinafter "the Board") concerning the Board's decision of March 25, 2010 to vacate and remand the matter to the Frederick County Planning Commission (hereinafter "FCPC") consistent with the Board's written opinion. Based upon the Court's review of the Board of County Commissioners of Frederick County and the Frederick County Planning Commission's (hereinafter "Petitioners") Memorandum in Support of Petition for Judicial Review, Global Mission Church of Greater Washington's (hereinafter "GMC") Motion to Dismiss, and Petitioners' response thereto, and consideration of the transcript and written opinion from the Board's decision of March 25, 2010, all pleadings, oral arguments, entire record, and applicable law, the Board's decision is AFFIRMED.

## FACTUAL AND PROCEDURAL BACKGROUND

On December 3, 2008, GMC filed its site plan application with Frederick County. GMC's application proposed a place of worship consisting of a sanctuary with a seating capacity of 1,160 seats, a dining hall with 500 seats, a kitchen, church offices, meeting rooms, education rooms, and a multipurpose hall (hereinafter "Site Plan"). The Site Plan proposed use of an on-site sewage disposal system, including a septic field and septic tank, with a capacity of 4,950 gallons per day (gpd). The proposed kitchen use was limited to congregation activities only, with the use of disposable food service plates and utensils. Commercial use of the kitchen was not proposed and would not be permitted in order to comply with the on-site sewage capacity. GMC met with staff from the County Division of Permitting and Development Review (hereinafter "Staff") at least three times prior to the submission of the original Site Plan to discuss it and have input in advance related to the proposed use, phasing, interagency coordination, site plan requirements, building setbacks, loading space waivers, and other related issues.

After submission of the Site Plan, and in accordance with the County's long-standing practices and the site plan procedures required by the Frederick County Zoning Ordinance, GMC met with Staff and the Health Department to discuss the proposed Site Plan. These meetings were intended to afford GMC the opportunity to respond to comments and receive feedback on Site Plan changes that would be acceptable to Staff. GMC participated in two Technical Advisory Committee (TAC) meetings on January 5, 2009 and April 23, 2009, where comments from the County's on-line HANSEN system related to the Site Plan were discussed. GMC provided written responses to the comments received from the Staff and revised its Site Plan and related documents accordingly. A copy of the HANSEN comments was included in GMC's Pre-hearing Submission to the Board and made part of the Board's record.

A Staff review and assessment of the Site Plan was prepared for the Planning Commission on July 8, 2009 (“July 8 Staff Report”) and it recommended conditional approval of the Site Plan. Before the Site Plan was scheduled for a Planning Commission hearing, a Zoning Text Amendment was passed by the Frederick County Board of County Commissioners (BOCC) and became effective June 15, 2009 (Ordinance 09-21-525). This Ordinance amended sections of the Frederick County Zoning Ordinance affecting places of worship in the Agricultural zoning district, and required applicants for places of worship to submit a statement identifying all proposed accessory uses, including hours of operation, frequency of activity, and average number in attendance for review and approval by the Frederick County Zoning Administrator.

Ordinance 09-21-525 applies to all site plans that had not received final site development approval prior to its effective date. Since GMC had not yet received final approval of their Site Plan, GMC submitted their Request for Accessory Use Determination on June 18, 2009. On July 5, 2009, the Zoning Administrator, Larry Smith, issued his determination that the accessory uses proposed by GMC as part of the Site Plan were recognized, customary, and incidental accessory uses to a place of worship. GMC was the first place of worship in the Agricultural Zone to have to submit an application under the new process. On July 10, 2009, GMC submitted a letter to the Planning Commission accepting and agreeing to comply with the conditions set forth in Zoning Administrator, Larry Smith’s, July 5, 2009 Accessory Use Determination letter.

#### July 8, 2009 Staff Report and Planning Commission Hearing

The July 8, 2009 Staff Report provided a favorable analysis of the GMC Site Plan and its compliance with the site plan requirements of the Frederick County Zoning Ordinance. Comments from State and County agencies, as well as the office of Life Safety (“Life Safety”) and the Health Department recommended “approval” or “conditional approval” of the Site Plan. The July 8, 2009

Staff Report also recommended conditions to approve the Site Plan, including complying with the well usage and septic capacity limitation according to the specified limitations of use on the site, completion of the Final Forest Conservation Plan prior to Site Plan signature, and complying with Agency comments as the project moves through the development process, addressing minor drafting corrections noted by the Agencies. The July 8, 2009 Staff Report recommended “conditional approval” and concluded by stating “with certain conditions of approval added, the Staff offers no objection to approval.” The Planning Commission considered the Site Plan and July 8, 2009 Staff Report at its public hearing on July 8, 2009, and the hearing was continued by the Planning Commission due to time restraints to July 15, 2009.

During the July 15, 2009 Planning Commission hearing, residents from Montgomery County provided public comments regarding the size of the proposed GMC building and its impact on local wells. The Planning Commission also asked questions of GMC’s consultants regarding the number of Sunday services that were planned, and the ability for the proposed septic system to support the place of worship and its associated accessory uses. During the course of the hearing, a letter was also received from certain elected State and County officials representing Montgomery County, opposing the Site Plan and requesting that the Planning Commission obtain additional information.

At the conclusion of the July 15, 2009 hearing, the Site Plan application was again continued by the Planning Commission for up to 90 days with the request that GMC address questions that were raised at the hearing. Staff indicated that they would provide GMC with “a detailed list of the issues and information requests to attempt to resolve the issues listed.” A letter dated July 17, 2009 was sent to GMC from Staff outlining the issues and concerns.

At the conclusion of the July 15, 2009 Planning Commission hearing, a proffer was made by Gary Hessong, Division Director of Permitting and Development Review, that Staff would meet with GMC to address the questions and concerns that had been raised. GMC's attorney subsequently contacted Staff to schedule a meeting in order to resolve the issues listed in the July 17, 2009 letter, and was advised by e-mail from the Deputy County Attorney, Wendy Kearney, that a meeting would be scheduled once additional information was received from GMC. GMC received a letter from Staff dated August 6, 2009 identifying and requesting the additional information to be submitted.

GMC complied with Staff's August 6, 2009 request and submitted substantial additional information to Staff on September 14, 2009. Among other items requested by the Staff, preliminary floor plans for the entire building were requested and were submitted by GMC, even though floor plans are not required as part of the normal site plan process. The Planning Commission scheduled a subsequent public hearing for October 14, 2009.

After submission of the supplemental information, and prior to the October 14, 2009 meeting, GMC and its attorney made multiple attempts to schedule a meeting with Staff to discuss the Site Plan and answer questions about the additional information requested and submitted. Despite repeated attempts to schedule a meeting, GMC's counsel received an e-mail on September 30, 2009 stating that Staff did not need to meet with the applicant for additional discussion, despite months of previous correspondence to set up the meetings.

#### October 14, 2009 Planning Commission Hearing

Another Staff Report was issued on October 7, 2009 for the October 14, 2009 Planning Commission hearing, which changed the Staff's July 8, 2009 recommendation from conditional approval to denial of GMC's Site Plan based on a reversal in recommendations from Life Safety

and the Health Department. Despite both of their prior recommendations for approval, the agencies reversed their recommendation based on the use of unidentified methodologies. Upon receipt of the October 7, 2009 Staff Report, GMC requested a meeting with Staff, the Health Department, and Life Safety to discuss the basis of the reversal of their positions. GMC was provided a very limited time period to meet with Bryon Mitchell from Life Safety and George Keller from the Health Department on October 8, 2009 and October 9, 2009, respectively. Those meetings were held just three (3) business days before the October 14, 2009 Planning Commission hearing.

During the meeting with Life Safety on October 8, 2009, Mr. Mitchell advised that he reversed his original position based on the need for a secondary access road because of his calculation of the total occupant load based on every room and space of the building. GMC has cured this defect in its Site Plan, and this aspect is no longer at issue.

During the October 9, 2009 meeting with the Health Department, GMC's design team inquired as to why the Health Department reversed its originally recommended approval of the Site Plan. The design team pointed out that the Site Plan, project size, and anticipated use had not changed, but Mr. Keller responded that the Health Department was reversing its original recommendation because it now believed the allowable septic system capacity would be exceeded. Although Mr. Keller acknowledged that he had used two entirely new methodologies to calculate anticipated flows, he did not provide the Health Department's calculations to support its analysis or conclusion. GMC requested to see the calculations now being used by the Health Department to reverse its earlier approval, and Mr. Keller informed the design team that he had no other calculations indicating the basis for its reversal. At the hearing in this Court on January 19, 2011, the County Attorney, Wendy Kearney, indicated that Mr. Keller realized that he had underestimated how many gallons per day of water would be used for each person, thus when he re-did his

calculations, he discovered that the septic system in the Site Plan was inadequate as it would use more than the allotted 5,000 gpd.

On October 12, 2009, GMC requested a continuance of the October 14, 2009 hearing so it could meet with the Health Department and discuss the additional information requested and the Health Department's analysis in the October 7, 2009 Staff Report. The request for continuance was renewed at the start of the October 14, 2009 Planning Commission hearing and was ultimately denied. At the hearing, based on Staff's recommendations, the Planning Commission voted to deny the Site Plan on the grounds of "the staff report, including the septic capacity and the lack of a second exit." GMC timely filed their Notice of Appeal with the Board on November 2, 2009.

#### GMC's Continued Efforts to Meet with Health Department and PIA Request

After the October 14, 2009 Planning Commission meeting and in anticipation of the hearing before the Board of Appeals, GMC continued its attempts to schedule a meeting with the Health Department to discuss the Health Department's recommendations and possible changes that GMC could make to its Site Plan for the Health Department to find the proposed septic system acceptable. At one point, the Health Department indicated that they were coordinating with MDE to develop a list or chart of information that would need to be provided by GMC in anticipation of any meeting. No such list or chart of information was ever provided to GMC and no meeting with the Health Department ever occurred. GMC filed a Maryland Public Information Act request to access the Health Department's files and analysis. However, as of January 20, 2010, GMC entered the Board of Appeals hearing without being availed an opportunity to meet with the Health Department and without reasonable opportunity to have a meaningful discussion regarding a modification to the Site Plan and the basis for the Health Department's methodologies.

January 20, 2010 Board of Appeals Hearing

The Board recognized GMC's continued attempts and need for ongoing communication as the Chair of the Board stated on the record, "the Information Act material that was provided by the Applicant had in there copies of e-mails from the Health Department to the Applicant as far into November and December, negotiating times as to when they could meet to continue open negotiations on what the septic was" (Vol. III, p. 39-40). At the Board of Appeals hearing, GMC was limited to one hour to present its case so it focused on the Health Department's change of position between the July and October Planning Commission hearings. GMC noted the Health Department's methodology for evaluating and approving the septic system at the July hearing, and questioned their change in methodology and calculations used to deny the septic system at the October 14, 2009 Planning Commission hearing.

David Gatrell, a sanitarian with the Health Department, testified that the published MDE Guidelines to evaluate the sewer flows of the GMC Site Plan were 3-gallon per seat for sanctuary seats and 7-gallon per seat for food service seats. Mr. Gatrell then identified, for the first time, that the Health Department was now using a different adaptation of the MDE Guidelines than what was used to evaluate the GMC Site Plan. During the Board hearing, Mr. Gatrell produced, for the first time, modified MDE Guidelines, which were not dated and contained handwritten notations, and he then testified that they were currently being used by the Health Department (Vol I, p. 194). Mr. Gatrell further testified that another factor he used in evaluating the septic system was the number of church services GMC was going to provide, although this was not discussed with GMC beforehand and no condition was ever placed on the number of church services. Mr. Gatrell asserted that his assessment of the septic system was based on one to two services, but he testified that once he learned there would be five services, he would "negotiate between 6 and 7.5" gallons

per sanctuary seat to estimate flows (Vol. I p. 204-05). Mr. Gatrell further testified that the MDE Guidelines are a guideline and that it is the standard practice of the Health Department to negotiate the actual usages with an applicant. Specific to GMC's project, Mr. Gatrell admitted that he was part of the original discussions and negotiations to use the highest amount of 7.5 gpd per dining hall seat versus 3 gpd per sanctuary seat. Mr. Gatrell confirmed that it is through those discussions and negotiations that the Health Department came to the resolution as to what methodology to use.

The Board also heard testimony from George Keller, Director of Environmental Health Services with the Frederick County Health Department. Mr. Keller testified that he created the two new methodologies used to determine that GMC's septic system was not adequate, specifically the actual water usage and maximum building occupancy methodologies, through consultation with Staff and the MDE. Those methodologies were identified without explanation and without any engineering or other industry recognition or support in the October 7, 2009 Staff Report. Mr. Keller indicated that the new methodology was an "application of best professional judgment" in that the 3 gpd sanctuary seat did not specifically address the number of services or ancillary uses (Vol. II p. 6). Further, he admitted there was no track record on using this type of methodology, acknowledging that "it is not a standard in any Health Department guidelines" (Vol. II p. 7).

Mr. Gatrell testified that he explained the new methodology in the October 7, 2009 Staff Report and the HANSEN Comments, and that his explanation was given as part of oral testimony at the October 14, 2009 Planning Commission hearing. However, a review of those comments and Planning Commission testimony offer no explanation of where the methodologies came from, how they were developed, what, if any, recognized engineering principles they were based upon, or how they were actually used to calculate flows and what the calculations were. Further, Mr. Gatrell admitted on the record that at no time prior to the October 14, 2009 Planning Commission hearing

did the Health Department sit down with GMC and explain to them the new methodology and how it was applied to their septic system. Mr. Keller also testified that neither he nor his staff had ever used this methodology before (Vol. II p. 9-10). Mr. Keller agreed with Mr. Gatrell that the usual and customary practice of the Health Department, in reviewing the adequacy of a proposed system, is to sit down and work cooperatively with the applicant to come up with a site design and configuration, and that all options related to the GMC site design had not been exercised (Vol. II p. 38-39).

After a lengthy discussion of all evidence presented and upon consideration of both the Planning Commission record and the evidence presented to the Board, the Board determined that the Planning Commission denied GMC due process. The Board determined that GMC had been denied a meaningful and adequate opportunity to address the Health Department's and Life Safety's concerns. The Board determined that the Planning Commission should have granted GMC's request for a continuance so that it could work with the respective agencies toward the approval of the Site Plan, if possible. As negotiations with the Health Department were understood to be "ongoing," the Board concluded that GMC "should have been allowed to complete negotiations and at least reach an understanding if not an impasse with the Health Department before the Planning Commission went ahead and tried to make a decision" (Vol. III p. 40). The Board reversed the denial of the Site Plan, vacated the Planning Commission's October 14, 2009 decision, and remanded the case to the Planning Commission for further proceedings. Subsequently, the Board of County Commissioners of Frederick County, Maryland and the Frederick County Planning Commission petitioned this Court for judicial review of the Board's decision.

### QUESTIONS PRESENTED

1. Whether the Board erred when it allegedly considered evidence outside the record in its deliberations?
2. Whether the Board erred when it failed to deny GMC's Site Plan application or when it failed to affirm the Planning Commission's denial of GMC's Site Plan application?
3. Whether the Board exceeded its authority by remanding GMC's Site Plan application to the Planning Commission?

### STANDARD OF REVIEW

A Circuit Court's scope of review of a decision of an administrative agency is narrow, recognizing that the agency has expertise in a particular area and ordinarily should be free to exercise its discretion as such. *Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 395, 396 A.2d 1080 (1979), citing *Finney v. Halle*, 241 Md. 224, 216 A.2d 530 (1966). The court's statutory role upon review of a decision of an agency goes very little beyond its inherent power of review to prevent illegal, unreasonable, arbitrary, or capricious administrative action. *Hartford Mem'l Hosp. v. Health Servs. Cost Review Comm'n*, 44 Md. App. 489, 410 A.2d 22 (1980).

On appeal from an administrative agency, the Circuit Court is charged with reviewing the decision of the agency in a three-step process:

first, the reviewing Court must determine whether the agency recognized and applied the correct principles of law governing the case ... [then, after] it is determined that the agency did not err in its determination or interpretation of the applicable law, the reviewing Court next examines the agency's factual findings to determine if they are supported by substantial evidence ... [and] finally, the reviewing Court must examine how the agency applied the law to the facts.

*Bd. of County Comm'rs for St. Mary's County v. Southern Res. Mgmt., Inc.*, 154 Md. App. 10, 23, 837 A.2d 1059 (2003). Accordingly, as an initial step, the Court's role is to "determine whether the

agency interpreted and applied the correct principles of law governing the case and no deference is given to a decision based solely on an error of law; the court may substitute its own judgment.” *Lee v. M-NCPPC*, 107 Md. App. 486, 492, 668 A.2d 980 (1995).

With regard to reviewing findings of fact, the Court of Appeals of Maryland has held that substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Jordan Towing, Inc. v. Hebbville Auto Repair, Inc.*, 369 Md. 439, 451, 800 A.2d 768 (2002) (citations omitted). The test requires review of the record as a whole to determine whether it supports the agency’s findings and conclusions. *Div. of Labor v. Triangle*, 366 Md. 407, 416, 784 A.2d 534 (2001). When reviewing a final decision of an administrative agency, the court determines only the legality of the decision and whether there was substantial evidence from the record as a whole to support the decision. *Dep’t of Labor v. Woodie*, 128 Md. App. 398, 406, 738 A.2d 334 (1999); *Bd. of Educ. v. Paynter*, 303 Md. 22, 35, 491 A.2d 1186 (1985).

With substantial evidence and an absence of fraud, agency decisions are presumed valid. *Dep’t of Labor v. Woodie*, 128 Md. App. at 406. The administrative agency’s decision is considered *prima facie* correct, and the Circuit Court must view the decision in a light most favorable to the agency. *Motor Vehicle Admin. v. Lindsay*, 309 Md. 557, 525 A.2d 1051 (1987); *Carriage Hill Cabin John, Inc. v. Maryland Health Res. Planning Comm’n*, 125 Md. App. 183, 212, 724 A.2d 745 (1999) (other citations omitted). “Whether reasoning minds could reach a conclusion from facts in the record is the essential test.” *Bd. of County Comm’rs for St. Mary’s County v. Southern Res. Mgmt., Inc.*, 154 Md. App. at 24, 837 A.2d 1059 (2003).

The Circuit Court must uphold an order of an administrative agency if it is not based upon an erroneous determination of law and if the agency’s conclusions reasonably may be based upon the facts proven. *Montgomery County v. Buckman*, 333 Md. 516, 519 at n. 1, 636 A.2d 448 (1994).

The reviewing court should uphold the agency's decision if it is sustainable on the agency's findings and for the reasons stated by the agency. *United Parcel Serv., Inc. v. People's Counsel*, 336 Md. 569, 577, 650 A.2d 226 (1994) (citations omitted); *Harford County v. Preston*, 322 Md. 493, 505, 588 A.2d 722 (1991).

### DISCUSSION

#### I. DID THE BOARD ERR WHEN IT ALLEGEDLY CONSIDERED EVIDENCE OUTSIDE THE RECORD IN ITS DELIBERATIONS?

The Board did not err in considering evidence outside of the record in its deliberations, as the documents considered were not dispositive in the present matter. Petitioners allege the Board considered two documents on January 28, 2010, after closing the record on January 20, 2010. One document, identified by Board member Peppe during the Board's January 28, 2010 meeting, was a 2006 Maryland Department of the Environment Guidance Document on Wastewater Capacity Management Plans, and the other document was an excerpt from an Environmental Protection Agency publication entitled Chapter 3: "Establishing treatment system performance requirements" (hereinafter "the documents").

Board member Peppe referred to the documents when providing his comments at the January 28, 2010 meeting, however, the documents were not admitted or provided to the other Board members prior to their vote, and they were not referred to or relied on by the Board members in their final decision to remand GMC's Site Plan to the Planning Commission. Board member Peppe repeatedly stated on the record that he was not providing testimony with regard to the documents (Vol. III p. 33). When the Board made its final decision to remand the Site Plan for further consideration by the Planning Commission, the Board members did not refer to or rely on the documents Peppe referenced as a basis for their decision, and Senior Assistant County Attorney

Michael Chomel properly advised the Board not to refer to those documents in its motion to remand the case as they were not part of the record.

The final motion to vacate the October 24, 2009 Planning Commission decision and remand the case back to the Planning Commission made no mention of the documents. Although precedent motions made by members of the Board did contemplate remanding the matter to the Planning Commission with instructions to consider these documents, those motions did not pass and the Board ultimately did not include any reference to the documents in the final motion to vacate and remand approved by the Board. Further, mere reference by a Board member to documents that were never provided to the other Board members does not mean that the Board, in coming to its final decision, relied upon those documents.

Even if the Board had decided to rely on the documents, Petitioners never objected to Board member Peppe's statements and references to the documents at that time. The Court of Appeals of Maryland provided in *Schultz v. Pritts*, 291 Md. 1, 7, 432 A.2d 1319 (1981),

when an administrative agency relies upon evidence submitted after the close of a hearing, there may be no due process violation when the parties are aware that the evidence will be considered but make no objection . . . Under such circumstances, the requisite procedural fairness has been accorded because there was an opportunity to challenge the original evidence . . . or to request the opportunity to challenge the newly acquired evidence before the agency reached its decision.

Therefore, even if the Board had relied on the documents in reaching their decision, the time to object was before the Board rendered its decision. While Petitioners timely filed a Motion to Reconsider with the Board, alleging, among other things, that the Board erred in considering additional information after the record was closed, the Board did not make a successful motion to consider Petitioners' Motion to Reconsider. There is no basis for a claim of reversible error, thus, this Court affirms the Board's decision.

II. DID THE BOARD ERR WHEN IT FAILED TO DENY GMC'S SITE PLAN APPLICATION OR WHEN IT FAILED TO AFFIRM THE PLANNING COMMISSION'S DENIAL OF GMC'S SITE PLAN APPLICATION?

The Board did not err in failing to deny GMC's site plan application or in failing to affirm the Planning Commission's denial of GMC's site plan application because GMC was denied due process and a reasonable opportunity to obtain the Health Department's approval of its proposed septic system. The Board elected to reverse the Planning Commission's denial of GMC's Site Plan application, vacate the Planning Commission's decision, and remand the case to the Planning Commission for further proceedings. This decision was within the Board's statutory authority, was clearly supported by the evidence before the Board, and the Board properly applied the principle of fundamental due process to which GMC was entitled.

The Court of Appeals of Maryland held in *Hyson, et al. v. Montgomery County Council, et al.*, 242 Md. 55, 64-65, 217 A.2d 578 (1966) and *Union Investors, Inc. v. Montgomery County, Maryland, and Huneke*, 244 Md. 585, 588, 224 A.2d 453 (1966), that when an administrative agency is performing a quasi-judicial function by resolving disputed questions of adjudicative facts, fundamentals of due process apply. The Court of Special Appeals of Maryland, in *Boehm v. Anne Arundel County, Maryland, et al.*, 54 Md. App. 497, 512, 459 A.2d 590 (1983), adopted Professor Schwartz's position regarding due process requirements in administrative adjudicatory hearings, providing that

more is required of agencies than minimal compliance with the "hear the other side" principle. When due process requires a hearing, it requires many of the elements of a "trial-type" hearing. . . . The rights required by due process before an administrative agency typically include the right to: (1) notice, including an adequate formulation of the subjects and issues involved in the case; (2) present evidence (both testimonial and documentary) and argument; (3) rebut adverse evidence, through cross-examination and other appropriate means; (4) appear with counsel; (5) have the decision based only upon evidence introduced into the record of the hearing; (6) have a complete record, which consists of a transcript of

the testimony and arguments, together with the documentary evidence and all other papers filed in the proceeding.

In the present matter, at the hearing on January 10, 2010, the Board expressed their concern about the lack of communication between the Health Department and GMC after the October 7, 2009 Staff Report was issued. The Board Chair commented that the testimony from the Health Department was that discussions regarding septic systems are typically open negotiations, yet in this particular instance, GMC was not given the opportunity to discuss the changes that were made in the Health Department's October 7, 2009 Staff Report (Vol. III p. 39-40). The Board discussed its due process concerns and agreed with GMC that "if given additional time to work with the Staff, additional time would have been provided that would have clarified occupancy, and its impact on the septic system" (Op. p. 11). This Court agrees.

The Board summarized the frustration GMC experienced with the Health Department, stating that

[f]or nearly ten months, [GMC] had worked with the Health Department to obtain approval of its septic facilities. With only 10 days notice (at most), [GMC] learned for the first time of the complete reversal of the Health Department's position. It had no meaningful opportunity to discuss or explore further with the Health Department any of the factors which led to this reversal or any means by which it might regain the prior approval.

(Op. p 11-12). This Court agrees that the evidence presented supported the Board's conclusion that GMC was denied due process, reasonable notice, and an opportunity to respond. When GMC initially submitted its Site Plan application, it met with the Health Department to review the MDE Guidelines and discuss the methodology to be used to evaluate the adequacy of its proposed septic system. It was the use of the recognized and accepted MDE Guidelines and methodology, and the negotiated conditions agreed to between the Health Department and GMC that resulted in the Health

Department's certification of adequacy and its recommendation of conditional approval in the July 8, 2009 Staff Report.

Using the published MDE Guidelines, the Health Department looked at the number of seats in the sanctuary and compared them to the number of seats in the dining hall to determine whether the capacity of GMC's on-site septic system was adequate. This use of sanctuary and dining hall seating to determine the average gallons per day use to be expected for the facility was appropriate under the MDE Guidelines. The Health Department originally calculated the expected daily flows using 3 gpd per sanctuary seat and 7.5 gpd per dining hall seat when it initially determined the adequacy of GMC's septic system.

Between July 2009 and October 2009, during the 90-day continuance of the Planning Commission hearing, the Health Department changed the methodology and calculations they used to evaluate GMC's septic system. The Health Department did not notify or advise GMC of the changes. GMC first became aware of the changes when they received the Health Department's October 7, 2009 Staff Report. The Health Department identified two entirely new evaluation methods as their justification and support for the reversal of their prior decision and their refusal to certify the adequacy of GMC's septic system. At the Planning Commission's hearing on October 14, 2009, Mr. Keller admitted that prior to October 14, 2009, he did not discuss or explain to GMC how the actual water data and maximum building occupancy load calculations would be applied (Vol II, p. 9). Mr. Keller further admitted that the Health Department had never used that particular methodology before.

GMC presented evidence to the Board of a complete absence of a meeting, communications, and negotiations with the Health Department after the July 15, 2009 Planning Commission hearing (Vol. II, p. 13). The lack of communication and the change in methodology used by the Health

Department to certify the adequacy of the system made it impossible for GMC to effectively respond at the October 14, 2009 Planning Commission hearing. Additionally, GMC was never asked, prior to the July 15, 2009 Planning Commission hearing, to provide the number of church services it planned to have. Had the Health Department asked, GMC would have responded to that request, but GMC was not aware that information regarding the number of church services GMC planned to have would be needed for the Health Department's review of GMC's Site Plan application. The Board agreed that if GMC was given additional time to work with the Staff, additional information would have been provided and that would have clarified occupancy concerns and its impact on the septic system, and that this opportunity was never afforded.

The Board further opined that for ten months, GMC had worked with the Health Department to obtain approval of septic facilities and with only 10 days notice, GMC learned of the reversal of the Health Department's position. The Board found that GMC had no meaningful opportunity to discuss or explore further with the Health Department any of the factors which led to its reversal or any means by which GMC might regain the prior approval. The Board found that the Planning Commission should have granted GMC's request to continue the October 14, 2009 hearing to permit GMC and the Health Department to resume their discussions and negotiations with regard to whether GMC could satisfy the requirements of the Health Department.

Between the July and October hearings, GMC attempted to meet with the Health Department and Staff to discuss their concerns about the Site Plan and address a request to alter the size of the building, and clarify the capacity of the septic system. Even after the October 14, 2009 Planning Commission hearing, members of GMC's design team attempted to provide the Health Department with additional information and expressed their desire to reach a resolution to the Health Department's concerns. However, the Staff and Health Department's refusal to meet with

GMC's representatives continued after the Planning Commission's hearing and continued throughout the Board of Appeals' hearing.

The Board conducted a *de novo* review, but it could not "cure" the lack of due process caused at the Planning Commission level by the Health Department's continued refusal to meet with GMC. Despite attempts made by GMC up until the time of the Board of Appeals' hearing in January, the Health Department would not discuss the case with GMC and failed to provide the basis of its calculations. A limited meeting with Life Safety and the Health Department ten days before the October 14, 2009 hearing was all that was offered and was not sufficient.

A Public Information Act was submitted by GMC to the Health Department so GMC could gain information, and even that file contained no written explanation of the methodologies used by the Health Department to deny GMC's septic system. The Board made it clear that it recognized that until the Health Department could meet with GMC and finalize the negotiations regarding the septic capacity, no one, including the Planning Commission and the Board of Appeals, could approve the Site Plan. The Board expressed its frustration with the process and the inability of GMC to receive the same deference and open negotiations with the Health Department after the issuance of the October 14, 2009 Staff Report as they did prior to the July 15, 2009 hearing. The Board concluded that GMC did not have the opportunity to make their case sufficiently in October, due to the due process violations they incurred. This Court agrees and affirms the Board's decision.

### III. DID THE BOARD EXCEED ITS AUTHORITY BY REMANDING GMC'S SITE PLAN APPLICATION TO THE PLANNING COMMISSION?

The Board has broad decision-making authority under the State and local Code, and did not exceed that authority. Pursuant to the Annotated Code of Maryland, Article 66B, Section 4.07, the Board may

(i) [w]holly or partly reverse the order, requirement, decision, or determination from which the appeal is taken; (ii) [w]holly or partly affirm the order, requirement, decision, or determination from which the appeal is taken; (iii) [m]odify the order, requirement, decision, or determination from which the appeal is taken; or (iv) [i]ssue a new order, requirement, decision or determination.


The Board reversed the Planning Commission's denial of GMC's Site Plan application and vacated that decision, remanding the case to the Planning Commission for further proceedings. The Board's decision was within their statutory authority and was supported by the evidence presented before the Board.

The Court of Special Appeals of Maryland, in *Board of County Commissioners for St. Mary's County v. Southern Resources Management, Inc., et al.*, 154 Md. App. 10, 837 A.2d 1059 (2003), held that they would have affirmed the Board of County Commissioners' decision had the Board remanded the matter to the Planning Commission. In that case, the Board reversed the Planning Commission, so the Court of Special Appeals had to vacate the Board's decision and remand it to the Board to either remand the case to the Planning Commission or conduct the proceedings itself. *Id.* at 39. The Board of County Commissioners of St. Mary's County is equivalent to the Frederick County Board of Appeals in the present matter. Thus, in the present matter, the Board did have the authority to remand the matter to the Planning Commission and the Planning Commission should refer the case to the Health Department to approve the Site Plan application.

CONCLUSION

For the reasons set forth herein and based upon a complete review of (i) the entire record, (ii) the pleadings filed by the parties, (iii) the oral arguments, and (iv) the applicable law, this Court finds that the Board's decision should be upheld and the present matter remanded to the Frederick County Planning Commission and it is this 10<sup>th</sup> day of March, 2011, by the Circuit Court for Frederick County, Maryland

**ORDERED**, that the decision of the Frederick County Board of Appeals is **AFFIRMED**.

  
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G. Edward Dwyer, Jr.  
JUDGE  
Circuit Court for Frederick County

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SANDRA K. DALTON  
CLERK \_\_\_\_\_  
BY \_\_\_\_\_