

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS**  
**Stella B. Werner Council Office Building**  
**Rockville, Maryland 20850**  
**(240) 777-666**

**IN THE MATTER OF:**

**REFLECTION PARK, INC.**

Applicant

Haroon Mokhtarzada

Basil Eldadah

Jack Goodnoe

Shahriar Etemadi

Gene Von Gunten

Stephen Crum

David Post

Behan Trock

For the Application

Jody Kline, Esquire

Attorney for the Applicant

\*\*\*\*\*

James Putman

Opposing the Application

\*\*\*\*\*

Before: Lynn A. Robeson, Hearing Examiner

OZAH Case No. CU 21-06/  
BOA Variance Case No. A-6693

**HEARING EXAMINER’S REPORT AND DECISION ON CONDITIONAL USE  
AND RECOMMENDED DECISION IN VARIANCES**

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## **I. STATEMENT OF THE CASE**

Filed on January 21, 2021, Reflections Park, LLC, (hereinafter "Applicant" or "Reflections") seeks a conditional use to establish a Cemetery under §59.3.5.4.A. of the Zoning Ordinance. Zoned R-C (Rural Cluster), the subject property is located at 16621 New Hampshire Avenue, Silver Spring, Maryland, and is further identified as Parcel 911, Tax Map KT 121.<sup>1</sup>

On March 5, 2021, the Board of Appeals referred two variances associated with this application for hearing. Exhibit 26. The Applicant requested a postponement of the originally scheduled hearing to July 30, 2021, to address issues raised by Staff. Exhibit 31. On May 4, 2021, OZAH issued notice of the July 30<sup>th</sup> public hearing and ordered consolidation of the hearings on the variances and conditional use. Exhibit 33. Shortly thereafter (on June 23, 2021), the Applicant submitted a Motion to Amend the application along with amended plans. Exhibits 34, 38. OZAH issued Notice of the Motion to Amend on July 6, 2021, without subsequent objection. Exhibit 41.

Planning Staff issued its report on June 28, 2021. Staff recommended approval subject to the following conditions (Exhibit 39, p. 2):

1. Prior to the issuance of any building permit for the subject Conditional Use, the Applicant must obtain approval of a Preliminary Plan of Subdivision and a Record Plat pursuant to Chapter 50 of the Montgomery County Code. If changes to the approved Conditional Use Site Plan or other plans filed in this case are required at Subdivision, the Applicant must file a copy of the revised site and related plans with OZAH.
2. Prior to the approval of the Preliminary Plan of Subdivision application, the Applicant must obtain approval of the Stormwater Management Concept Plan from the Montgomery County Department of Permitting Services (MCDPS).

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<sup>1</sup>The original application listed the applicant as "Remembrance Park, Inc.". Exhibit 1. The Applicant later changed its name to "Reflections Park" because there was another "Remembrance Park" already operating in Montgomery County. T. 178.

3. The proposed development must comply with the Preliminary Forest Conservation Plan and the conditions of approval.
4. The Applicant must obtain approval of the Final Forest Conservation Plan by the Planning Board, after which time the Applicant must comply with the terms of the Final Forest Conservation Plan.
5. Prior to issuance of access permits, the Applicant must satisfy the provisions for access and improvements as required by the Maryland State Highway Administration ("SHA").
6. While the final amount of dedication will be determined at Preliminary Plan, it is anticipated that the Applicant must dedicate and show on the record plat(s) a minimum right-of-way of one hundred and twenty (120) feet, as measured from the opposite right-of-way line along the Subject Property frontage on New Hampshire Avenue (MD 650).
7. Trip generation for the approved use must not exceed 50 peak hour trips within the weekday morning and evening peak periods.
8. The Applicant must obtain a sign permit from the MCDPS for the proposed freestanding sign. A copy of the sign permit obtained from MCDPS must be submitted to the Hearing Examiner before the sign is installed on the property.
9. Landscaping must be in accordance with the Landscape Plans L2-01 through L2-05, Revision date 06-09-2021.
10. The Applicant must provide for two motorcycle spaces as required by Section 6.2.3.C.
11. Impervious surfaces are limited to no more than 10.0 percent of the subject property as shown on the Impervious Surface Plan dated March 16, 2021.
12. Prior to the start of any clearing or grading on the subject property, the owner of the subject property must enter into an agreement with the Planning Board to limit impervious surfaces within the transition area of the Patuxent River Primary Management Area ("PMA") on the subject property to no more than 10.0 percent, as shown on the Impervious Surface Plan dated March 16, 2021. The agreement must be in a form approved by the M-NCPPC Office of the General Counsel and recorded by deed in the Montgomery County Office of Land Records.

The Planning Board issued its recommendation to approve the application on July 14, 2021, concurring with Staff's recommendations and analysis. Exhibit 44.

OZAH's public hearing proceeded as rescheduled on July 30, 2021. The Applicant presented two witnesses that are principals of Reflections and six expert witnesses. Mr. James Putman appeared in opposition to the application. Relevant testimony from the hearing is summarized below. The record was left open until August 9, 2021, to receive the transcript and architectural modifications of an entrance building from the Applicant, and comments on the modification from Planning Staff and the parties. T. 201. On August 3, 2021, Reflections submitted additional comments on the environmental impact of necroleachate (a liquid discharged from decomposing bodies) on the ground water and the Rocky Gorge Reservoir. Mr. Putman responded to these on August 9, 2021, and the record closed. Exhibits 52, 54.

Upon review of the post-hearing comments submitted, the Hearing Examiner reopened the record to receive a recommendation from the Montgomery County Department of Environmental Protection (MCDEP) on whether the necroleachate from decomposition would harm the reservoir or the groundwater. She requested MCDEP to submit its recommendations by August 30, 2021 and left the record open until September 10, 2021 for the parties to respond. Exhibit 56(a). Before MCDEP responded, OZAH received several letters from individuals opposing the application, citing environmental hazards from necroleachate. Exhibit 57. Reflections requested that these not be included in the record, as they were not under oath and subject to cross-examination. The Hearing Examiner admitted them, subject to OZAH Rule 3.2(d), which gives them less weight than testimony under oath and subject to cross-examination. Exhibit 62. Dr. Linda Smoling Moore submitted written comments to MCDEP for their consideration. Exhibit 65.

MCDEP filed its response and recommendation to the Hearing Examiner's referral on August 31, 2021. Exhibit 66. Both the Applicant and Mr. Putman made further responses and the record closed again on September 10, 2021. Exhibits 67 and 68.

After the record closed a second time, OZAH received a request from Dr. Linda Smoling Moore to re-open the public hearing to allow additional testimony. After responses from the Applicant, the Hearing Examiner denied this request. Exhibit 75. After issuing her order, the Hearing Examiner received more requests from several other individuals to re-open the record, including one from Mr. Putman. Exhibits 76-81. The Hearing Examiner accepts these into the record and by Order of even date herewith, denies these requests and closes the record for a final time.

For the following reasons, the Hearing Examiner finds that the proposed use meets the standards for approval in the Zoning Ordinance, with the conditions imposed in Part IV of this Report.

## **II. FACTUAL BACKGROUND**

### **A. The Subject Property**

The Applicant's expert in civil engineering, Mr. Stephen Crum, testified that the property is located on the on the east side of New Hampshire Avenue approximately 2,760 feet south of Ednor Road and 2,940 feet north of Norbeck Road. T. 141. The Staff Report contains a map showing the general vicinity of the property (Exhibit 39, p. 2, on the following page).

Configured in a "flag-shape", Staff advises that the property consists of approximately 40.4 acres. It's width at the western boundary (adjoining New Hampshire Avenue) is 206 feet; the rear or eastern boundary measures 993 feet wide. Exhibit 3, p. 3. Almost all the property is forested,



Vicinity Map  
Exhibit 39, p. 1

primarily with Tulip Poplars. Most of the property has 8-15% slopes running from west to east, with the highest portion along New Hampshire Avenue. There is a promontory in the middle of the site that is 412 feet above mean sea level. Two unnamed tributaries to the lower Patuxent River Rocky Gorge Watershed run through the site, one from the southwest to northeast and one from the northwest to the southeast. There are no historic resources or rare or endangered species on the property. T. 141-144; Exhibit 39, p. 3. The NRI/FSD identified approximately 0.03 acres of channel wetlands on the property, which will not be disturbed. *Id.* The property drains to the Patuxent River and Rocky Gorge Reservoir. The Staff Report contains an aerial photograph showing the subject property (Exhibit 39, p. 3, on the next page).

## **B. Surrounding Area**

To determine the compatibility of the proposed use with the surrounding area, it is



**Aerial View of Subject Property**  
**Exhibit 39, p. 3**

necessary to delineate the “surrounding area”, which is the area that will be most directly impacted by the proposed use. Once delineated, the Hearing Examiner must assess the character of the neighborhood and determine whether the impacts of the proposed conditional use will adversely affect that character.

Staff and the Applicant agreed on the boundaries of the surrounding area, which are the area within a radius of 2,000 feet of the center of the site (Exhibit 39, p. 4, shown on the next page).





Surrounding Area  
Exhibit 39, p. 3.

Staff characterizes the area as containing a mix of residential and non-residential uses bisected by the property, all in the R-C (Rural Cluster) Zone. The area to the north includes Ednor Local Park, some large religious uses, and some smaller single-family detached homes; the southern portion of the surrounding area has a 22-acre concrete manufacturing plant adjacent, a small subdivision of 44 single-family detached homes, and the Winchester Estates, single-family detached houses on six to eleven-acre lots, to the east. Confronting the property across New Hampshire Avenue is the New Hampshire Greens golf course and subdivision. Exhibit 39, p. 4.

### **C. Proposed Use**

The Applicant proposes to develop a "green burial" cemetery on the subject property, which may also be used for community-serving uses such as hiking and nature trails. Mr. Haroon Mokhtarzada, a principle of Reflections, testified that their mission is to restore mankind's relationship with the cycle of life, death, and renewal so that people will live more conscientious and purposeful lives. T. 32.

Reflections embarked on this project for that reason and two others. Green burial is essentially a return to burials that occurred before we moved to the modern system of caskets and grave liners. Green lowers the burial lowers cost of burials. The average cost of a burial in Maryland is \$10,500.00. This can be very burdensome on many families in the community. The third reason for the project is to promote environmental stewardship. Green burial practices are much more environmentally friendly than the traditional burials because bodies are not embalmed and toxins from casket materials are not present. T. 32-33.

Mr. Jack Goodnoe, an expert in cemetery design, described the differences between traditional burials and "green burials". The major difference is that traditional graves have a vault lined in concrete. The casket itself is made of artificial materials, including polyethylene materials that make up the liner. Green gravesites use either a bamboo or cardboard box, a shroud, or a casket made of raw wood with no glues. This is placed 3½ - 4 feet below the surface because decomposition happens more quickly with exposure to air in the soil rather than at a depth of 5 feet, where the soil is more anaerobic. T. 79. The traditional burial vault is left permanently, the green burial gravesite will become soil itself within a very short time. T. 79. Mr. Goodnoe

submitted a graphic designed to show the differences between green and traditional burials (Exhibit 47):

## A GREENER WAY TO GO

*From preparing bodies to burying them in natural settings, the green burial movement is attempting to make death more environmentally friendly and, in some ways, closer to the way it was in the past. A comparison:*

### STANDARD BURIAL

Burials use formaldehyde embalming and long-lasting caskets. They can easily cost \$10,000.

A standard grave site, often landscaped and well-maintained, features a large headstone made of granite or flat bronze. Fertilizer and pesticides are used on the grass.

Below ground, a casket made of steel, finished wood and copper rests inside a concrete vault capped by a thick concrete lid.

A green grave site is a natural setting, more closely resembling a forest floor.

### NATURAL BURIAL

The natural, or green, burial method starts with the body preparation, which uses no embalming fluid or a nonformaldehyde-based formula. Green burials can cost less than \$2,000.

If there's a headstone, it's a rock or a piece of rough-cut limestone that's flat on one side to identify the deceased. Some methods use GPS coordinates to spot a grave's location.

Caskets are made of wood, plywood, bamboo, cardboard, cornstarch or wicker. Sometimes a shroud or quilt may be used to wrap the body.

Source: Nathan Butler

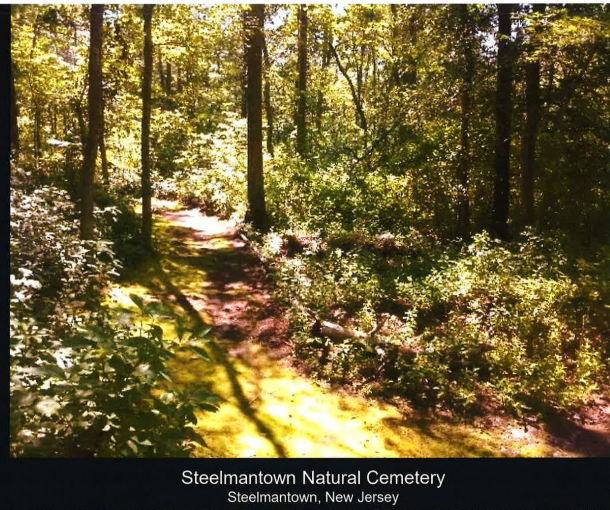
STEPHEN J. BEARD / The Star

Exhibit 47  
OZAH Case No: CU 21-06

On the surface, traditional cemeteries have manicured landscaping that is treated with herbicides, pesticides, and fertilizers, all of which become more leachate than would ever be emitted by a green burial "casket". The surface of traditional cemeteries also has upright tombstones. Green burial cemeteries have natural landscape, such as a meadow or a forest floor, which needs maintenance primarily to prevent invasive species. Memorialization of the grave takes many forms. It can be a small metal disk in the ground that cannot be seen and may be



mowed over, or a flat stone marker. At times, the memorial may be remote, such as one listed on a rock at a separate location. T. 80. Mr. Goodnoe submitted pictures of green burial grounds in different areas of the country. Characteristics from two of those are shown below (Exhibit 47):



Dr. Basil Eldadah, a principal of Reflections,<sup>2</sup> testified that the graves themselves are typically 4 feet by 10 feet in area, although the grave itself would be closer to about 3' x 7' in area and 4 feet in depth. Each grave, however, would be able to claim the 4' x 10' surface area, with at most 600 graves per acre. T. 43; Exhibit 39, p. 10. These dimensions are a "happy medium"

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<sup>2</sup> Dr. Eldadah testified that he has a medical degree and some specialty training in internal medicine and clinical pharmacology. He also has a Ph.D in neuroscience and currently works for a large biomedical research funding agency. T. 41.

between shallow graves that may invite animals or emit smells, but also not too deep as to slow decomposition of the body.

Dr. Eldadah testified that the Green Burial Council, which is a nonprofit organization that promotes green burial options throughout the U.S., provides certification and guidance for green burial cemeteries. Six hundred graves per acre is their recommendation for maximum grave density because it allows for lighter use of the land and is more consistent with environmental stewardship and that is what they propose. T. 43.

Green burials use only natural, readily biodegradable materials for shrouding or containing the body. Depending on the family's wishes, a body may be contained in a shroud of biodegradable materials, such as cotton or linen, or a simple plywood box. Some caskets are made of willow or bamboo. T. 44.

These types of burials do not use concrete liners or vaults because they retard decomposition of the body and are not environmentally friendly. According to Dr. Eldadah, the production of concrete used in grave liners and vaults releases a tremendous amount of carbon into the atmosphere. Conventional caskets are made of metal or hardwoods and are not environmentally friendly either, as they have varnishes and adhesives that are toxic. T. 45. The lack of embalming is also environmentally beneficial. Embalming uses formaldehyde, which is toxic to funeral workers and morticians who handle those chemicals. There is a higher rate of certain neurologic conditions in people who routinely conduct embalming. T. 45.

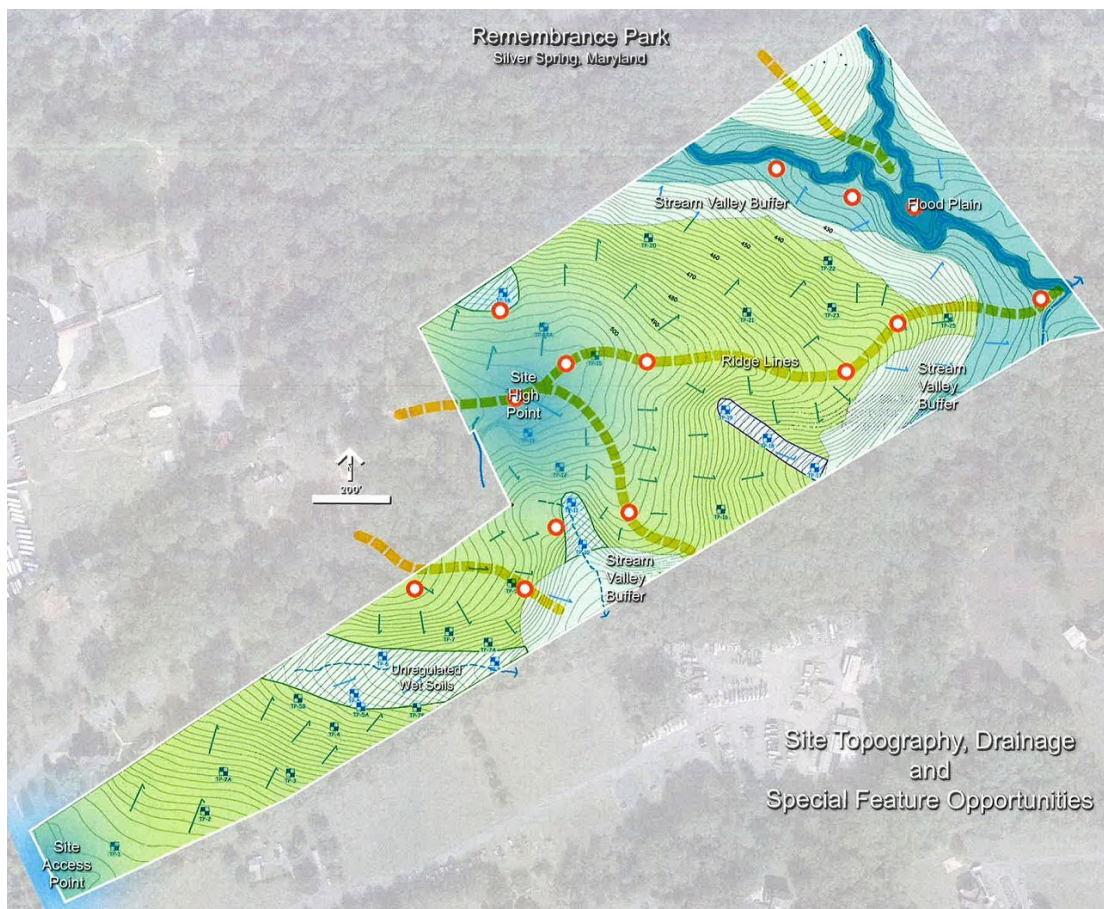
### **1. Conditional Use Site Plan**

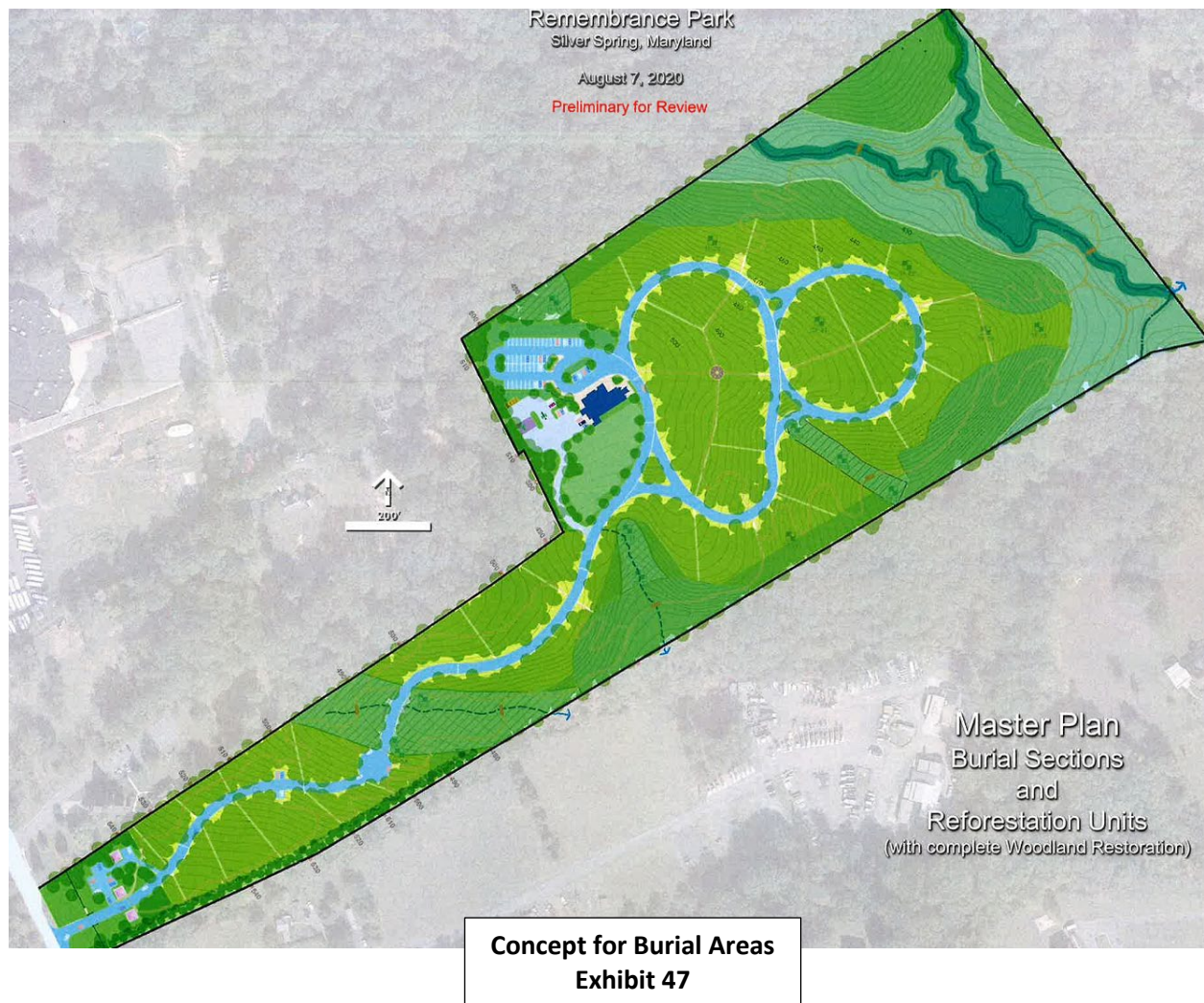
Mr. Goodnoe described the site design. Currently, the subject property is 100% wooded, primarily with tulip poplars, which are soft wood. These are usually transitional species until



the area becomes covered with hardwoods. The cemetery will speed this transition.

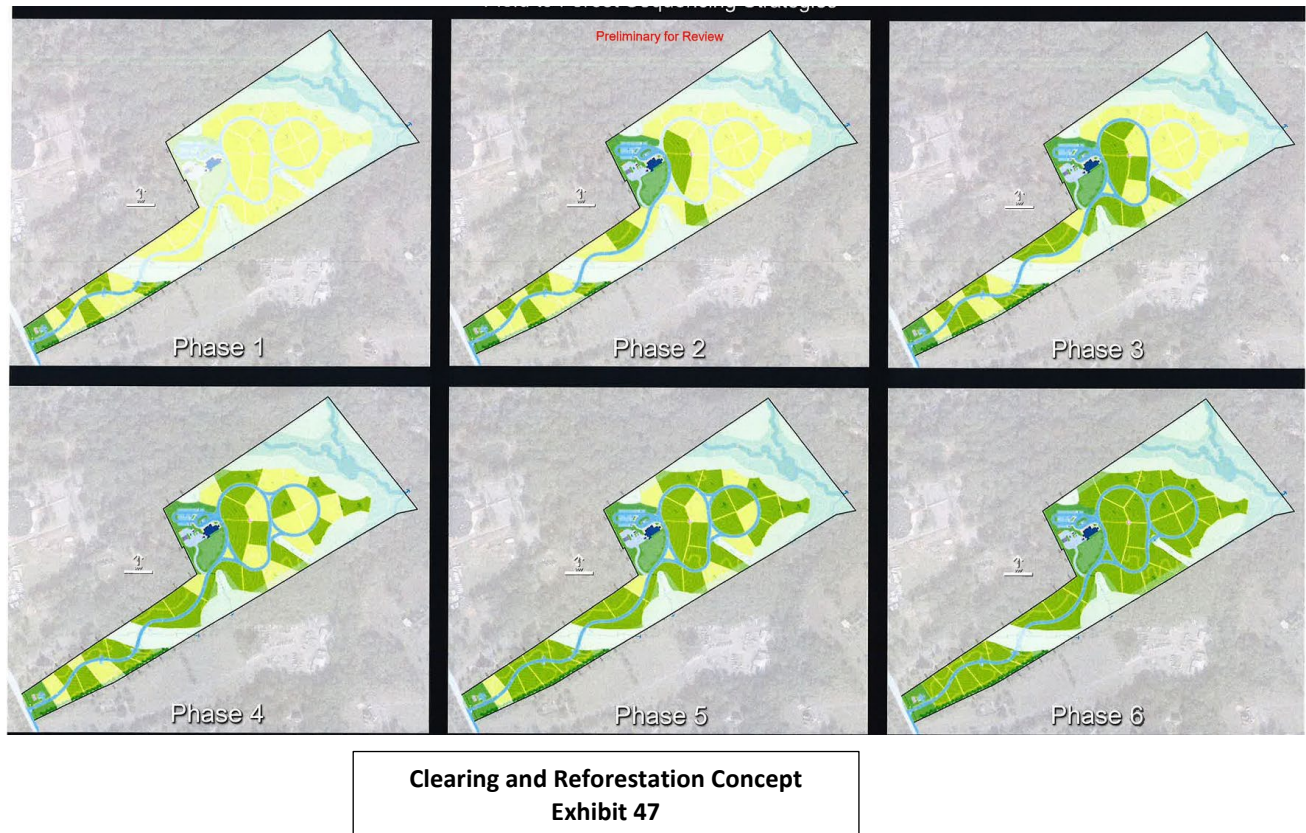
According to him, development is guided by the unique natural characteristics of the site. The topography of the subject property is diverse with a distinct hilltop near the middle and an articulated stream to the northeast. They have designed development outside all environmentally protected areas, such as drainage areas and streams, which will be left in their natural condition. T. 81-82. These protected areas provide the important function of having permanent open space, trail systems, and overlooks so that the cemetery functions more like a park. T. 81-82. They have identified areas on the edges of promontories that will have good views and can be used for meditation, rest points, etc. T. 84. Graphics of the site topography, drainage and conceptual burial areas are shown below and on the next page (Exhibit 47):





The drive aisle incorporates the natural topography. The curved design is not just aesthetically pleasing, but a way of reducing the grading required. Full maturity of the site, including vegetation, is very long term—it is a 200-year plan that will be developed in multiple phases. T. 85. After burial sites are developed, they will be reforested with tree species that include native hardwoods. A graphic depicting the phasing of clearing and reforestation is shown on the following page (Exhibit 47). The conditional use site plan (shown on page 17) delineates the outer boundaries of the burial areas. Exhibit 38(b).



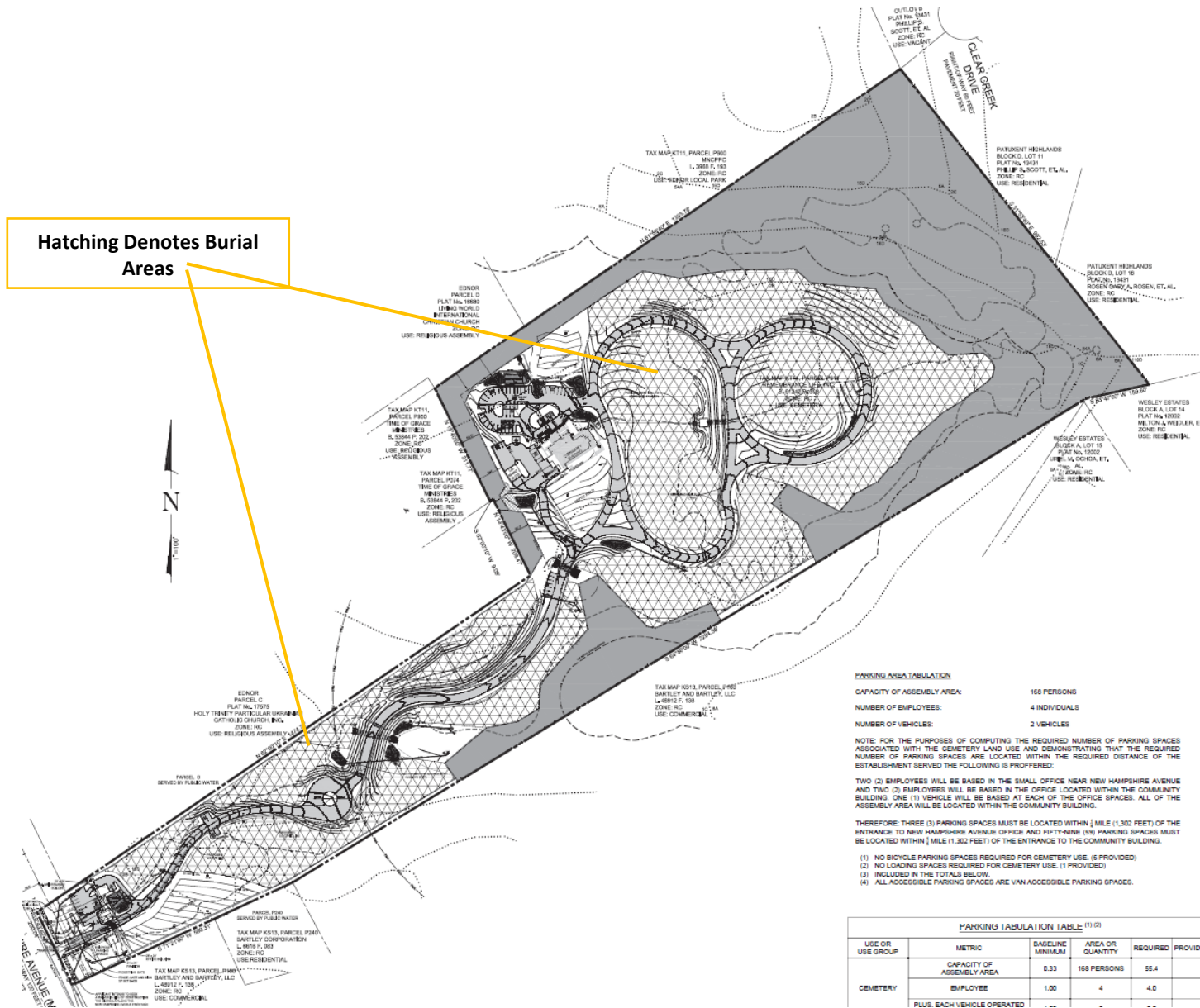


Dr. Eldadah described the phasing of buildings. Their intention is to create a natural looking place that looks more like a park than a cemetery. As you enter the property, they propose a line of trees that maintains the rural character of the area. Beyond that will be an entrance gate designed to complement the natural setting. T. 59. The first buildings constructed would be a pagoda (open-air), that can be used for gatherings, a small administrative office, and a storage/maintenance shed. These will be immediately behind the entrance gate. An elevation of the pagoda from the Staff Report (Exhibit 39, p. 6) is shown on page 18.

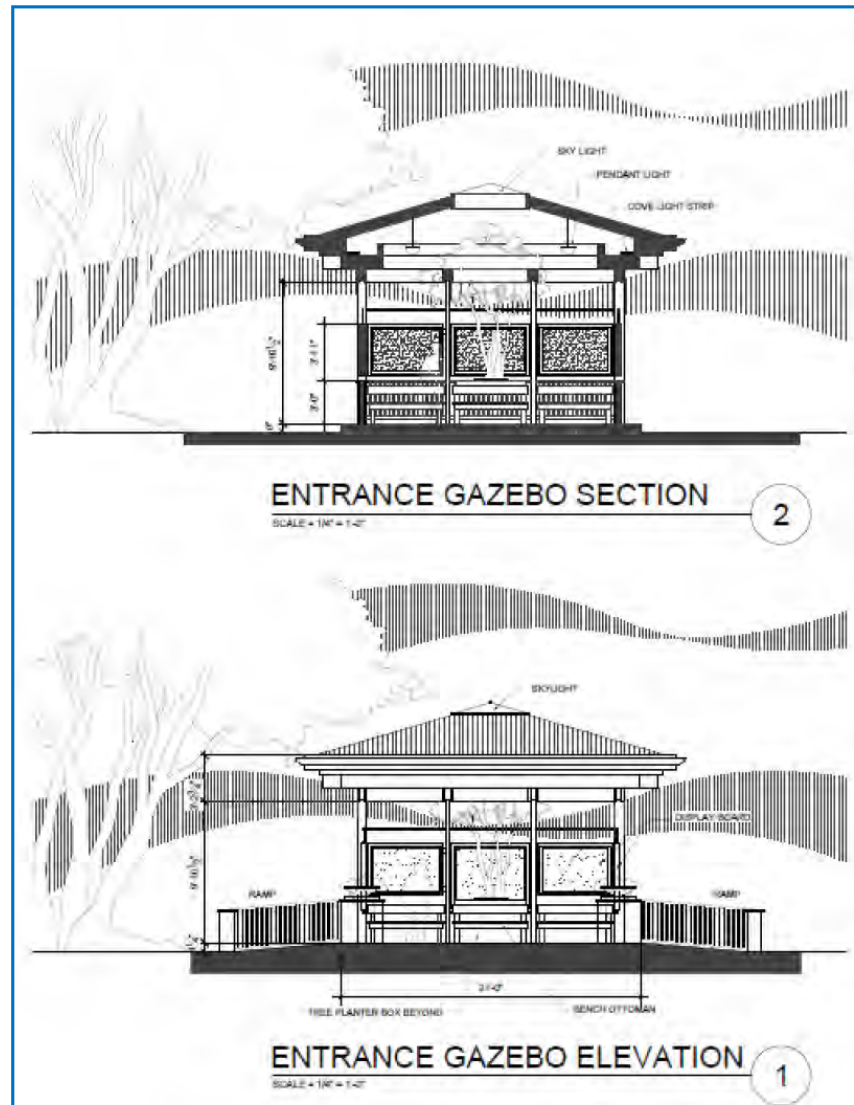
Approximately 900 hundred feet beyond these buildings, the drive proceeds through the center of the property to a cul-de-sac where there will be burial areas on both sides of the road. He believes that this will be the only burial area for the first five years of operation. T. 60

The second phase will proceed from the area surrounding the cul-de-sac and





Conditional Use Site Plan  
Exhibit 38(b)



Gazebo Elevations  
Exhibit 39, p. 6

continue along the drive to the northeast, where they propose to construct a larger community building with associated parking and a larger maintenance shed. T. 61. An elevation of the community building is shown on the next page (Exhibit 39, p. 8). The Staff Report summarizes the area of the buildings proposed for the property (Exhibit 39, p. 8, also on the next page).



**Figure 6: Community Building Section and Elevation**

**Table 1: Proposed Buildings**

Buildings	Phase	Size	Height
Small Maintenance Building -southwest	Phase I	20' x 26' (520 SF)	24 ft
Small Office Building-southwestt	Phase I	26' x 24' (624 SF)	24 ft ±
Entry Pavilion/Gazibo- southwest	Phase I	21' x 21' (441 SF)	24 ft ±
Community Building-northwest	Phase II	6,000 SF ±	50 ft ≤
Maintenance building northwest	Phase II	32' X 32' (1024 SF)	24 ft ±

Exhibit 39,p. 8

Staff describes the use of the community building (from the Applicant's Statement of Justification) as (Exhibit 39, p. 8):

...the community building is intended to serve a variety of functions and will include (a) an assembly hall, (b) meeting rooms (c) office space (for management), (d) bathrooms, (e) warming kitchen, (f) storage space, (g) outdoor terrace, (h) outdoor play structure for youth, (i) loading dock and (j) dumpster/enclosed waste storage area.

The community building will be used for funeral services ranging up to 150-200 people, educational programs and workshops about its mission, seminars on nature and the environment, and use by community groups. *Id.*

## **2. Operations**

### *a. Hours of Operation*

Dr. Eldadah described the daily operations. Hours of operation will typically be daily between 8:30 a.m. and sunset. The grounds will be open to the public during these times much like a park. They expect burials to occur outside of normal peak hour traffic times—between 9:30 a.m. and 3:30 p.m. T. 63.

### *b. Staffing*

According to Dr. Eldadah, Reflections anticipates that initial staffing will be low—one employee and an executive director on site. As build-out continues, they will have up to seven employees, including both administrative and landscaping employees. T. 64; Exhibit 38, p. 10.

### *c. Proposed Activities.*

The primary activities on the site will be related to burials, including family visits before the burial, which would be during normal operating hours. T. 65-66. They estimate that they will have one burial a week starting out and then grow to three to four burials a week between peak traffic periods during the week and on weekends. The length of the internal drive permits cars attending funerals to stack on-site without impacting New Hampshire Avenue. T. 66.

In addition to those activities, they plan to have activities that take advantage of the natural resources on the property. These would include small classes (subject to the same traffic conditions of approval), meetings of environmental groups interested in green burials and the

mission of their organization, lectures, and seminars. They intend this to be a resource for the community. T. 67.

### **3. Parking**

#### *a. Parking: Number of Spaces*

At full build-out, the Applicant proposes to provide 79 parking spaces. Twenty of these will be provided in the first phase near the entrance office and along the drive. Sixteen parking spaces are located at the visitor's center, the office, and the maintenance building near the property entrance. Ten parking spaces are provided at two locations along the long driveway, and 53 spaces are provided near the 6,000 square-foot multi-purpose building. Exhibit 39, p. 18.

#### *b. Parking Waiver:*

Section 59.6.5.2.B of the Zoning Ordinance requires parking spaces to be located within a ¼ mile of the "establishment to be served". Staff concluded that the Applicant requires a waiver from the requirement of Section 6.2.5.B, which requires parking spaces to be located within ¼ mile of "an entrance to the establishment." Staff considered the entrance of the "establishment to be served" to be the smaller buildings closest to New Hampshire Avenue. Therefore, according to Staff, the spaces at the large community building would need a waiver from this requirement. *Id.*, p. 19.

### **4. Landscaping and Lighting**

#### *a. Landscape Plan*

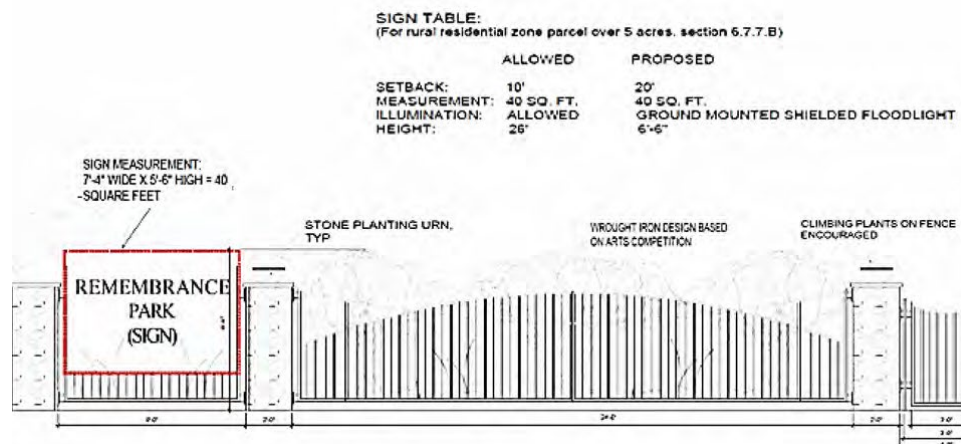
Mr. David Post, the Applicant's expert in landscape architecture, testified that the landscape plan calls for a mixture of shade and evergreen trees that are mostly native. These buffer the existing church to the north and the houses on the south. Along New Hampshire

Avenue, they have added landscaping to buffer the view from the roadway. Right now, the property is 100% wooded. The trees replanted will be native to this area and may include Tulip Poplars but will also include other species more typical of a hardwood forest. T. 167. Because there is little reforestation/afforestation required due to the lower levels of disturbance, the Applicant is volunteering to plant to the native trees described. T. 167.

*b. Lighting and Signage*

Mr. Crum testified that the footcandles at the property line will not exceed 0.1 at any location. Lights are located on the drive aisle leading to the community building. They do not propose to light the two loop roads that serve only the cemetery because that area is intended to operate between dawn and dusk. Because the community building may be used after dark, they have providing enough lighting to negotiate the driveway safely. All lights use full cut-off lenses to reduce glare. T. 157. Staff advises that Reflections proposes 34 pole-mounted lights throughout the developed area (buildings and driveway) and none in the burial areas. Exhibit 39, p. 22.

Reflections also proposes a 40-square foot sign at the cemetery entrance, illuminated by two ground-mounted accent lights, shown in the Staff Report (Exhibit 39, p. 24):



#### **D. Environmental Issues**

The Planning Board has approved a Preliminary Forest Conservation Plan (PFCP) for the proposed use, which will establish a forest conservation area and prohibit disturbance of a small (0.3 acres) wetland on the property.) Exhibit 84. Staff reports that there are no impacts to streams, wetlands, floodplains or associated buffers and that development complies with the January 2000 Planning Board's *Environmental Guidelines--Guidelines for Environmental Management of Development in Montgomery County* (Environmental Guidelines). Exhibit 39, p. 25.

The major issue in this case is whether necroleachate from decomposing bodies will adversely affect the groundwater in the area and the Rocky Gorge Reservoir, a drinking water supply for the Maryland Metropolitan D.C. area. This issue is discussed in Part III.B of this Report

#### **E. Community Response**

Mr. James Putman appeared in opposition to the cemetery, citing the concerns referenced above. In particular, he is concerned that the leachate could contain certain chemotherapy agents that can adversely impact DNA if even in tiny amounts if they are present in drinking water. He also objecting to approving this by conditional use, which does not require involvement of the Montgomery County Department of the Environment.<sup>33</sup> His concerns, the Applicant's response, and the recommendation of MCDEP are explained in detail below.

After the record closed in the public hearing, the Hearing Examiner received many communications asking that she re-open the record. On September 29, 2021, she issued an order

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<sup>33</sup> While the conditional use process does not require the involvement of the MCDEP, the Hearing Examiner referred the necroleachate issue to them for analysis and recommendation. Exhibit 66.

denying these requests, finding that notice was adequate. She received several additional requests from individuals, alleging that they hadn't received notice. By Order of even date herewith, the Hearing Examiner re-opened the record to include these requests, the Planning Board's final Resolution approving the PFCP (Exhibit 84), and her Order denying these requests the requests to reopen the public hearing. Exhibits 76, 77, 79, 82, 84. These communications after the hearing expressed concern about groundwater contamination, the impact on wells in the area, and a possible decrease in property values if the conditional use is granted. *Id.* The record closed on October 11, 2021.

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific to a use (in Article 59.3 of the Zoning Ordinance) and general (*i.e.*, applicable to all conditional uses, in Division 59.7.3 of the Zoning Ordinance). The specific standards applied in this case are those for a cemetery, contained in §59.3.5.4.A of the Zoning Ordinance.

Weighing all the testimony and evidence of record under a "preponderance of the evidence" standard (*Zoning Ordinance*, §7.1.1.), the Hearing Examiner concludes that the conditional use proposed in this application, with the conditions imposed in Part IV of this Report and Decision, satisfies all the specific and general requirements for the use. She also recommends granting the variances and parking waiver requested by the Applicant.

#### **A. Necessary Findings (Section 59.7.3.1.E)**

The general findings necessary to approve all conditional uses are found in Section 59.7.3.1.E. of the Zoning Ordinance. Standards pertinent to this approval, and the Hearing



Examiner's findings for each standard, are set forth below.<sup>4</sup> The general standards for approval fall into four main categories:

1. Substantial Conformance with the Master Plan;
2. Adequate Public Services and Facilities;
3. No Undue Harm from Non-Inherent Adverse Effects; and
4. Compatibility with the Neighborhood

***E. Necessary Findings***

***1. To approve a conditional use application, the Hearing Examiner must find that the proposed development:***

***a. satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended;***

Conclusion: Staff advises that there no prior approvals applicable to this property. This criterion is inapplicable.

***b. satisfies the requirements of the zone, use standards under Article 59.3, and to the extent the Hearing Examiner finds necessary to ensure compatibility, meets applicable general requirements under Article 59.6;***

Conclusion: This subsection reviews the development standards of the R-C Zone contained in Article 59.4 (with approval of the variances requested); the specific use standards for a cemetery contained in Article 59.3; and the development standards for all uses contained in Article 59.6. Each of these Articles is discussed below in separate sections of this Report and Decision (Parts III.B, C, D, and E respectively). The Hearing Examiner find that the application meets these standards as explained therein.

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<sup>4</sup> Although §59.7.3.1.E. contains six subsections (E.1. through E.6.), only subsections 59.7.3.1.E.1., E.2. and E.3. apply to this application. Section 59.7.3.1.E.1. contains seven subparts, a. through g.

## **1. Substantial Conformance with the Master Plan**

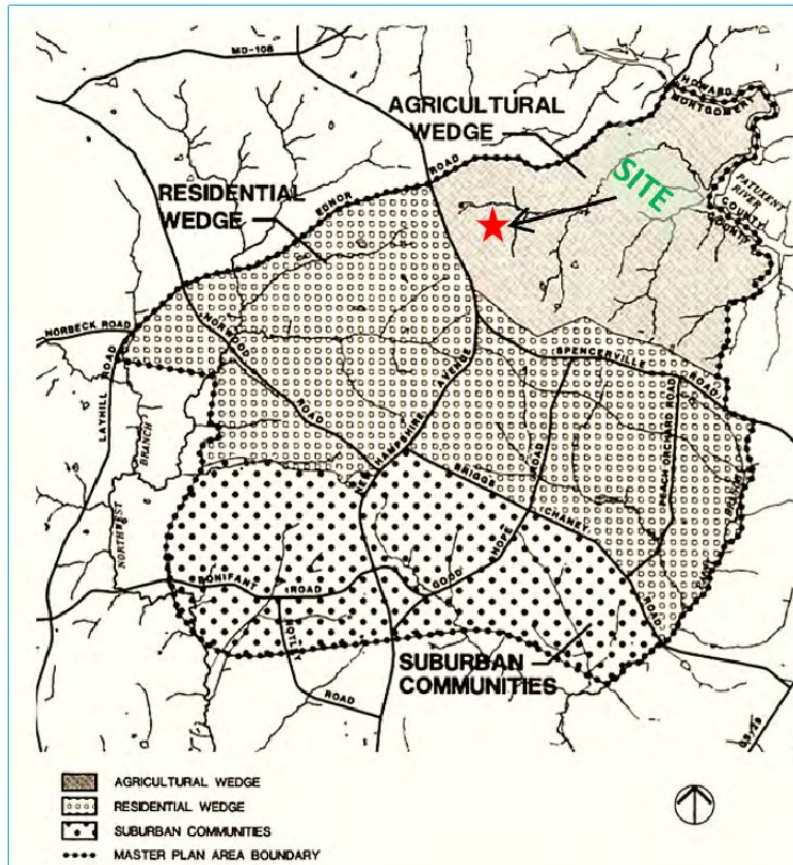
### ***c. substantially conforms with the recommendations of the applicable master plan;***

The subject property is guided by the recommendations of the *1997 Cloverly Master Plan* (Cloverly Plan) and the *1993 Functional Master Plan for the Patuxent River Watershed* (Functional Plan). Exhibit 39, pp. 10-14.

The “fundamental” goals of the Cloverly Plan were to support the existing character of its communities and to protect the Patuxent Watershed. *Cloverly Plan*, p. 13. To that end, it recommended retaining the low-density zoning already in place and recommended guidelines to mitigate non-commercial aspects of conditional uses (formerly special exceptions). *Cloverly Plan*, p. xii. According to Staff, the purpose of these guidelines is to steer non-residential uses to commercial areas and to preserve the suburban/rural character of the areas outside the commercial nodes. *Id.* Divided north/south by New Hampshire Avenue, the plan outlined two suburban “communities” in the southern portion of the Plan area, two “residential wedges” north of those, and an “agricultural wedge” covering the northern area of the Plan. The subject property is located within the agricultural wedge. The Plan’s “primary purpose” for the agricultural wedge is to preserve open space. *Id.*, p. 9. The areas described are shown in Staff Report (Exhibit 39, p. 11, on the next page).

To preserve the existing rural character of the area, the Plan also recommends a 100-foot setback from New Hampshire Avenue to maintain the existing rural character of the area. *Cloverly Plan*, p. 32.

Staff summarized the goals for the Agricultural Wedge as follows (Exhibit 39, p. 11):



Cloverly Master Plan  
Designated Communities  
Cloverly Plan, p.

The Master Plan maintained a low-density zoning for the area to help protect the watersheds as well as to reinforce the character of the Agricultural Wedge Community. It also expressed concern that special exceptions, institutions, places of worship, and other large developments could adversely affect the rural character and water quality...Most of the property is within the Patuxent PMA, which was limited by the 1993 *Functional Master Plan for the Patuxent River Watershed* to 10 percent imperviousness.

The Functional Master Plan designates the property within the Patuxent Primary Management Area (PPMA), which is subject to the Planning Board's *Environmental Guidelines*. The PPMA on the property includes land within 660 feet of streams, divided into the stream valley buffer and a "transition" area. Because the larger buildings are within the PPMA transition area,

12.8% of that area will be impervious, although impervious area amounts to 9.77% if averaged over the entire property. *Id.*, p. 13. Exhibit 38(z).

Staff concluded that the application conforms to both the Cloverly and Functional Master Plans and, in fact, preserves the existing rural character better than residential development, which would have more impervious area. The smaller buildings to the east are setback "about" 100 feet from New Hampshire Avenue, conforming to the Cloverly Plan's recommendations to preserve the existing character along the road frontage. Exhibit 39, p. 12.

Staff also concluded that the proposed use met the goals of the Functional and Cloverly Plans because the smaller buildings are located closest to the road, in keeping with the residential neighborhood. The larger buildings were set further back on the much wider portion of the site. Siting the larger buildings outside the PMA on the narrow portion of the property would force them closer to the road and would be less in keeping with the existing rural/residential character of the area. For this reason, Staff recommended that impervious caps be calculated based on the entire property rather than simply the PPMA, subject to the condition that the Applicant limit imperviousness to 10% of the property's area.

Conclusion: The Hearing Examiner agrees with Staff that the use conforms to both the Cloverly and Functional Master Plans. By locating the buildings with the most mass well away from New Hampshire Avenue, the conditional use preserves the residential/rural character of the area. In addition, the conditional use plan provides far more open space, far less clearing and far less impervious area than required for standard residential development in the R-C Zone. This better preserves the existing character of the Agricultural Wedge and the environmental goals of the Functional Master Plan. No party discussed the impact of necroleachate in the context of Master

Plan conformance, as both master plans address watershed protection primarily using tools such as establishing low-density zoning, preserving open space, minimizing impervious area and other environmental restrictions. The Hearing Examiner addresses this necroleachate issue in terms of compatibility with the surrounding area, in Part III.A.4 of this Report.

## **2. Adequate Public Services and Facilities**

***f. will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:***

***i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; or***

***ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; and***

This property will need approval of a preliminary plan and review of the adequacy of public facilities will occur then. Exhibit 39, p. 8. Nevertheless, Mr. Shariar Etemadi, the Applicant's expert traffic engineer, testified that the use is not subject to testing under the Local Area Transportation Review (LATR) Guidelines because, as conditioned, it will generate fewer than 50 person trips. Staff proposes a condition prohibiting activities, such as large funerals,

from occurring during the peak periods of 6:30 a.m. to 9:30 a.m. and 4:00 p.m. to 7:00 p.m.

Exhibit 39, p. 2.

Staff found that other public utilities were adequate. The property is will be served by public water and a septic system. *Id.*, p. 30. Staff advises police and fire facilities are adequate to serve the use. *Id.*

Conclusion: Based on this uncontroverted evidence, the Hearing Examiner finds that the Applicant has preliminarily demonstrated that public facilities will be adequate and available to serve the use, subject to the conditions in Part IV of this Report. The final determination will be made during review of the preliminary plan.

### **3. No Undue Harm from Non-Inherent Adverse Effects**

***g. will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories;***

***i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;***

***ii. traffic, noise, odors, dust, illumination, or a lack of parking; or***

***iii. the health, safety, or welfare of neighboring residents, visitors, or employees.***

Staff identified the following inherent effects of a cemetery: (1) grave sites, (2) equipment storage buildings, (3) office and meeting rooms, (4) traffic generated by funeral attendees and employees, (5) potential for queuing vehicles on the site, (6) a gathering hall/prayer chapel, (7) signage, and (8) outdoor lighting.

Staff identified one non-inherent physical characteristic of the proposed use—the flagged shaped lot, which necessitates two variances and a parking waiver. While non-inherent, Staff concluded that this did not justify denial of the application. Regardless of the shape of the lot, Staff found that the operations and impact of the use on the surrounding area were inherent, and the use was compatible with the surrounding area. Exhibit 39, p. 31.

Conclusion: This standard requires the Hearing Examiner to identify inherent and non-inherent adverse effects of the proposed use on nearby properties and the surrounding area. Inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations.” *Zoning Ordinance*, §1.4.2. Inherent adverse effects, alone, are not enough to deny a conditional use. Non-inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site.” *Id.* A conditional use may be denied if it will have non-inherent adverse effects, alone or in combination with inherent effects, that cause “undue” harm to the surrounding neighborhood.

Conclusion: The Hearing Examiner agrees with Staff that the unusual configuration of the lot is non-inherent. However, the shape does not drive any non-inherent adverse impacts of the use and in fact, forces the Applicant to locate the major buildings farther from New Hampshire Avenue, in keeping with the Cloverly Plan. Nor does the shape of the lot determine the opposition's primary concern in this case, which is the possible impact of the cemetery on the Rocky Gorge Reservoir and groundwater in the area.

#### **4. Compatibility**

Section 59.7.3.1.E.1 includes the standards of approval below:

***d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the [master] plan.***

***e. will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area;***

##### **a. In General**

Staff concluded that the conditional use met these standards (Exhibit 39, p. 28):

With the recommended conditions, the proposed use will be in harmony with the general character of the neighborhood. The proposed use will be operated in such a manner that it will not interfere with the orderly use, development and improvement of surrounding properties. The Conditional Use Plan provides for sufficient off-street parking with 79 spaces, 43 more than the minimum required, spread out at various locations on the property substantially minimizing the possibility of spill over traffic and parking.

The proposed Conditional Use is not likely to result in any notable negative impact on the residential neighborhoods, in terms of increased traffic and noise.

##### **b. Impact of Necroleachate**

Because the impact of necroleachate emitted from cadavers is not covered by the *Environmental Guidelines*, Staff did not comment on this. Mr. James Putman, a member of the Patuxent River Watershed Protective Association, did raise this issue at the public hearing.

Mr. Putman opposes the application due to the possibility that necroleachate will seep into the groundwater or flow to the Rocky Gorge Reservoir, a drinking water supply for 800,000



people in Montgomery County and a back-up drinking supply for the Maryland/D.C. metropolitan area. T. 11. According to an article submitted by Mr. Putman, "necroleachate" is liquid that emanates from the body after death. T. 46. Mr. Putman described "necroleachate" as a substance slightly thicker than water that leaches from bodies that have been placed directly in the ground. T. 17-18.

Mr. Putman expressed concern that nearby properties that have large percentages of impervious area will cause large stormwater flows onto this property, saturate the ground, and drag pollutants from the necroleachate down to the on-site streams that feed the reservoir. T. 13.

Mr. Putman is also concerned that necroleachate could infiltrate the reservoir because the soil substrate in this area is fractured shale. He testified that the body sheds about 20-30 liters of "slurry" after death. Some will be treated in the ground, but some may reach the reservoir after hitting the shale substrate. T. 14.

Mr. Putman is particularly concerned about some of the newer chemotherapy medicines that are genotoxic. These work by interfering with cell DNA and cell division in both cancer and healthy cells. Some of these medicines do not biodegrade. According to Mr. Putman, a *European Journal of Pharmacology* article entitled, "Cytostatic Pharmaceuticals as Water Contaminants" (European Journal Article) reports that these drugs cause DNA mutations even at very low levels. The EU has classified them as hazardous waste without even having considered them in the context of a cemetery in a watershed that supplies drinking water. T. 14.

He quoted from a report by Eco, R.I., an ecology newsletter, which says (T. 14):

Cytotoxic chemotherapy drugs exit cancer patients as active and dangerous chemicals. Septic systems and wastewater treatment plans cannot remove 90

percent of them. So these dangerous chemicals migrate into lakes, rivers, and ponds and eventually into the drinking water supplies.

His concern about necroleachates also stems from a lack of federal regulation. According to him, the FDA and EPA each claim that the other is responsible for addressing the hazardous waste aspects of these drugs and neither has addressed the issue. Nor do the Montgomery County Planning Board's *Environmental Guidelines*, address the issue. In his opinion, a lot more study is needed before taking a risk like placing this project within a mile from the Patuxent River.

T. 14. Mr. Putman expressed some skepticism of WSSC's opinions about groundwater contamination. In his opinion, while a "phenomenal" organization, they are also political and will never say publicly that they cannot treat whatever goes into the reservoir. T. 137.

Mr. Putman's concerns extend to a possible impact on groundwater and wells in the area.

T. 15. He believes the R-C Zone was designed and established for residential use and conditional uses keep "creeping in", infringing on environmental standards. T. 15.

Dr. Eldadah disagrees with Mr. Putman's concerns. He testified that decomposing bodies do not generate the volume of leachate posited by Mr. Putman and the amount of soil underneath each grave is more than sufficient to absorb and treat the leachate before reaching the water table. According to him, soil is an excellent medium for decomposition of all organic compounds and that is a basis for green burials. It is the most natural and efficient way to return the body to earth. T. 49. Soil acts as a natural filter and promotes the degradation of any compound, including inorganic compounds. T. 56. Organic compounds tend to be the most readily biodegradable. Because the graves will be at least 6 feet above the seasonal high-water table, every grave has about 240 cubic feet of soil to filter the leachate. As a comparison, the

amount of necroleachate that will filter into the soil is equivalent to pouring about two-thirds of a cup of liquid over a medium sized potted plan. T. 50.

In addition, Dr. Eldadah testified, the necroleachate disperses over time. It takes approximately 4-5 months for bodies to decompose naturally, so the filtration does not happen all at once. If decomposition takes about four months, that is equivalent to about a quarter of a teaspoon per day per cubic foot of soil—a very tiny amount is being filtered each day. They have located the gravesites a significant distance away from the water sources that run through the back of the property. T. 50-51.

Dr. Eldadah disputed the relevance of the European Journal Article submitted by Mr. Putman. According to him, the article focused on effluents from hospital patients who are undergoing active cancer treatment in hospitals, septic systems and other waste disposal systems that flow to a water supply. The article does not mention burial grounds, either traditional or green, as a source of these drugs. T. 116.

Dr. Eldadah questions Mr. Putman's assumption that cytotoxic drugs remain in the body after death. The Dana Farber Cancer Center, which is an internationally known cancer center in Boston, suggest that chemotherapeutic agents remain in the body for up to 2 to 3 days. Typically, a cancer patient will survive much longer than their last cancer treatment and will not be under active chemotherapy. Instead, they will likely be in palliative care or hospice. T. 116. Therefore, he believes that the chemotherapy drugs will have left the body before it is buried. The article stresses that the danger from these agents is really from our wastewater systems. T. 116.

In supplemental comments, Dr. Eldadah asserts that the amount of any cytotoxic agents that might possibly enter the reservoir would be in such small quantities that they would not

pose a risk to the drinking water. To estimate the potential for harm to the drinking water supply, Dr. Eldadah calculated the concentration of one chemotherapy drug for which safety standards have been set. His calculations concluded that concentrations in the Rocky Gorge reservoir would be less than 0.01 grams per day. Safety standards in California, where the drug is regulated, identifies less than 1 gram of the drug as a "No Significant Risk" level.

Mr. Goodnoe testified that he has dealt with concerns about contamination of the water table many times. He has designed 120 green burial cemeteries and there has been no demonstration that any cemetery caused ground water and well contamination. T. 91-92. He cited to several studies that found no impact from various cemeteries.

Mr. Gene von Gunten qualified as an expert in environmental health specializing in septic systems. He worked for Frederick and Montgomery Counties as an environmental health specialist for 38 years. T. 120. This included evaluation, permitting, and managing water and septic systems, evaluated sites for soil testing, plan review, permitting, and inspections. He also works with homeowners whose septic systems have failed. T. 120. At the time of his retirement, he was manager of the Well and Septic section at the Montgomery County Department of Permitting Services. T. 121.

Mr. von Gunten described the soil testing performed on the property. This included numerous excavations with a backhoe to about 12 feet in depth. After examining the soils, they found no sign of any shallow groundwater that would have been of concern for a gravesite area. T. 125. This was followed up by additional testing by Montgomery County Department of Permitting Services (MCDPS). MCDPS asked them to perform the same tests used for septic systems at about 12 additional sites. MCDPS also found no signs of any shallow ground water

that would be of concern. DPS informed the Planning Department that the grave site placement was acceptable. T. 127.

In Mr. von Gunten's opinion, there is very little concern here about bacterial and viral components of the remains. T. 130. The purpose of the limited use standard requiring test pits was to ensure that there is adequate soil buffer beneath the graves, so the leachate created by decomposition of human remains is adequately filtered and does not pose a threat to the drinking water aquifer. T. 124. He opined that the process required for a green burial reduces the threat to the groundwater because it does not use toxins introduced by the vault, the casket, and embalming. In supplemental comments, he stated that total pollutant loads from green cemeteries are well under those associated with traditional cemeteries and residential development. Green cemeteries contribute 20 gallons of liquid; traditional cemeteries generate 17,000 gallons of liquid, and houses on two-acre lots would generate 45,000 gallons of liquid from septic systems. Exhibit 63. Because there will still be some leachate from a green cemetery, the buffer remains a "useful tool." T. 124.

Mr. von Gunten opined that the literature clearly supports that soil is an excellent media for attenuation and reduction of those components, especially fine-grained soils that are unsaturated. Those are the type of soils on the subject property. T. 128. While the substrate ultimately is shale, the shale on this site is weathered to the point where the soil has a loamy or clay-loam consistency which makes it an excellent filtration for the bacteria and the viruses. On this property, the soil is more than 12 feet thick. That provides the excellent filtration they are seeking. T. 129. In his opinion, the shale layer on this site is approximately 18-25 feet below the ground. T. 129-130. While all liquid will eventually end up in the shale substrate, the bacteria

and viruses are rendered harmless in a few inches of soil, and the Applicant is providing four to six feet. Due to these conditions, in his opinion, the "vast majority" of the effluent will enter the aquifer and very little or none will enter the "body flow" into the Patuxent River and then to the reservoir. T. 134.

The Hearing Examiner referred the matter to MCDEP, who in turn consulted with WSSC, which has jurisdiction over the reservoir. Upon review of literature and comments submitted by both sides, as well as additional data, MCDEP found that "the cemetery poses little risk to the reservoir." Exhibit 66. WSSC echoed this finding. Exhibit 66(a). Noting concluded that a green burial cemetery may provide more protection of the drinking supply than traditional cemeteries, WSSC stated: "Overall, we think this proposed project poses little risk to Patuxent reservoir quality." *Id.* Stating that the reservoir already absorbed contaminants from animal feces, WSSC advised that chemical treatments to groundwater before distribution are "highly effective", and that "substantial dilution" of these contaminants would occur due to the distance between the streams on the property and the entry point to the reservoir. *Id.* WSSC further reports that there are already approximately 50 cemeteries in the watershed, without reported impact. *Id.*

WSSC's comments also included some recommendations: (1) that burial sites be located outside areas subject to flooding, (2) that the site be cleared progressively in smaller areas or phases and replanted, (3) that erosion and sediment control measures be implement during all clearing, and (4) that small streams on the property should be protected with a riparian buffer. Exhibit 66(a).

MCDEP confirmed (based on the test pits dug) that soils consist of unsaturated shale weathered up to the consistency of a loam or clay-loam consistency, which makes it an

'appropriate' media for the attenuation and reduction of bacteria and viruses that would be present in human remains." Exhibit 66. It also concluded that the amount of soil beneath the grave sites were sufficient to treat the amount of necroleachate from each body. *Id.* Among the materials MCDEP considered was a "White Paper" authored by an employee of the Baltimore County Bureau of Environmental Health and Sustainability, that used data from septic systems to apparently to recommend new regulations for burial grounds. While acknowledging that the amount of effluent from cadavers is well under the amount of effluent from a septic system, MCDEP found the comparison to septic systems "fair". Based on the test pits dug, MCDEP concluded the soils present could support a gravesite. *Id.*

As to cytotoxic drugs, MCDEP advises that its research showed that that only 2% of cadavers have any amount of these drugs in the body at the time of burial. Exhibit 66.

**c. Overconcentration of Conditional Uses**

Staff concluded that the proposed use would not result in an overconcentration of conditional uses within the surrounding area. It advised that there are five special exceptions within the surrounding area, three of which are accessory apartments. The other two are a landscape contractor and riding academy, given the residential nature of these special exceptions, the proposed use would not represent an over concentration of uses in the surrounding area. Exhibit 39, p. 28.

**d. Conclusion**

Conclusion: No party argues that the cemetery will be incompatible with the surrounding area, except for the possible impact of necroleachate. The record supports Staff's findings that there are sufficient parking spaces and stacking to handle funerals and community activities on-site.

Testimony indicates that, when not in active use for these purposes, the cemetery will be maintained as a park-like setting where members of the public can take advantage of the natural pathways throughout. Lighting meets all requirements of the Zoning Ordinance.

Upon review of the articles submitted by the parties, the agency recommendations, expert and non-expert testimony of the parties, the Hearing Examiner finds that the cemetery does not pose a significant risk to the drinking supply in the Rocky Gorge reservoir. Mr. von Gunten testified that the large majority of necroleachate will not enter base flow to the reservoir. Instead, the leachate will be adequately treated by the soil before entering the ground water. WSSC, which has jurisdiction over the reservoir, advises that the contaminants will not adversely impact drinking water because of the significant dilution that would occur after entry into the flow, the distance from the stream on the property to the point of entry at the reservoir, and the effectiveness of chemicals used to treat the water before distribution to customers. WSSC noted that the reservoir already absorbs contaminants from animal feces and cemeteries exist in the watershed. Both Mr. Von Gunten, the WSSC, and MCDEP noted that cemeteries already exist in the watershed without known impact, and Mr. Goodnoe, who has designed 120 cemeteries across the U.S., testified he has had no reports of groundwater contamination.

Nor does the record support a finding that cytotoxic drugs will enter the reservoir in any amount sufficient to harm the drinking water supply. Mr. Putman raises the possibility that cytostatic chemotherapy agents will contaminate the reservoir supply and, his argument continues, potentially have the impact of altering DNA of those whose drinking water comes from the reservoir. This possibility is simply not supported by the material in the record, including articles that he submitted.



Dr. Eldadah correctly points out that the article from the European Journal of Pharmacology addresses sources of this drug that (1) generate far greater volumes of cytostatic agents, (2) are discharged generally from patients actively receiving the medication, and (3) focuses on the effect on aquatic life rather than the drinking water.

Mr. Putman dismisses this as a sincerely held "belief" that does not constitute evidence. However, the article from the European Journal of Pharmacology, submitted by Mr. Putman, is consistent with Dr. Eldadah's, MCDEP's and WSSC's analyses:

In the case of lifetime consumption of tap water which contains ultra-low concentrations of cytostatic drugs, it seems that the risk for human health is negligible (citations omitted). Their trace levels are not sufficient to induce acute magnitude lower than those known to cause toxicological and pharmaceutical effects (citations omitted), *e.g.*, a normal chemotherapeutic dose administered for bleomycin is equal to 20-30 mg/m<sup>2</sup>, while its concentration found in potable water samples was 1.3 x 10<sup>-5</sup> mg.l (citations omitted).

The only evidence in this record is that no more than trace levels might possibly enter the reservoir. Mr. Eldadah submitted calculations of the amounts of these agents that may enter the reservoir, well under the safety standard for a regulated chemotherapy drug. MCDEP advises that only two percent of cadavers contain any amount of cytotoxic drugs, and Mr. von Gunten testified that the vast majority of the leachate will not water flow to the reservoir.

Nor does this record support Mr. Putman's concern that necroleachate will adversely affect the groundwater. Mr. Von Gunten, an expert environmental health specialist, who oversaw the well and septic program in Montgomery County, testified that as little as a few inches of appropriate soils will treat bacteria and viruses contained in the necroleachate. Both Mr. von Gunten and MCDEP found that the test pits dug confirm that the sandy, loamy soil

underneath are a good medium for treatment. While the effluent will reach the shale substrate, it will be treated by the soil before entering the ground water. T. 134.

The "White Paper" submitted by both Dr. Moore and the Applicant also supports conclusion as well. It cites to a United Kingdom Environment Agency study indicating that appropriate soils and the "unsaturated zone" are the "most important line of defense" against groundwater contamination. Exhibit 65.

Significantly, a review of the literature submitted demonstrates that the burial sites proposed here meet many of the recommended depths, soil coverage, soil types, and site conditions recommended in the various articles, although these vary somewhat between jurisdictions. The grave sites meet all the recommended regulations proposed by the Baltimore County Department of Environmental Protection and Sustainability, except that no formal hydrogeologic study has been prepared. However, this record includes expert testimony that there is more than adequate soil to treat the necroleachate before entering the groundwater, that the shale substrate is 18-25 feet below the surface, and that all graves will be an average of six feet above the seasonal high-water table.

The WSSC included several recommendations designed to ensure protection of water quality of stream on the site. The evidence demonstrates that the Applicants' phased clearing and reforestation, depicted in Exhibit 47, already meets WSSC's recommendation that clearing and reforestation occur as gravesite areas are developed. As evidenced by the same exhibit, burial sites are located outside drainage areas that would be prone to flooding. The streams and wetlands will remain undisturbed in Forest Conservation Easements. To the extent necessary, the Hearing Examiner imposes a condition requiring the Applicant to provide an assessment of the existence of riparian buffers along on-site streams to the Planning Board during review of the preliminary plan and

final forest conservation plan. She also will require the Applicant to implement sediment and erosion controls during all clearing and grading on the property.

Mr. Putman takes issue with the comparison to septic systems, arguing that septic systems treat effluent with two anaerobic treatment compartments that then discharge onto a larger drain field. The Hearing Examiner doesn't find this persuasive as the record demonstrates septic systems generate far larger volumes of waste than the green burial sites proposed.

Finally, while Mr. Putman posits several weather-related disasters such as earthquakes that could dislodge the cadavers, this is somewhat speculative. The denial of a conditional use must be based on a *probability* rather than a *possibility* of adverse impact. *Miller v. Kiwanis Club of Loch Raven, Inc.*, 29 Md. App. 285, 296 (1975) (Board could not deny special exception based on possibility that water table would be lowered with no evidence that the feared conditions presently exist or probably will exist.) These are generalized allegations related to climate change, but do not provide any evidence as to these will happen on this property and what the effects might be. All burials areas proposed are outside drainage areas and floodplains and there is no evidence that such catastrophes, including earthquakes, will occur on this property. Mr. Putman also raises concerns, again speculative, that stormwater from the concrete plant and other impervious surfaces will flow over the gravesites and dislodge the cadavers. Mr. von Gunten gave an expert opinion that the run-off from these properties would impact on the graves on this property because they are down-grade from the subject property. T. 134. He also concluded that any run-off coming from neighboring property would be mitigated by the woodlands on the subject property. T. 135.

For the above reasons, the Hearing Examiner finds that necroleachate from decomposing bodies will not adversely affect the drinking water supply or the groundwater in the surrounding area.

Zoning Ordinance §59.7.3.1.E.1.e asks whether the proposed conditional use, in combination with other conditional uses in the surrounding area, will "tip the scales" and cause

the area to transition away from its existing residential character. The Hearing Examiner agrees with Staff that three of the conditional uses (accessory dwelling units) have minor impacts and are residential in nature. The riding academy is an agricultural use consistent with the Master Plan's designation of an "Agricultural Wedge (*See, Zoning Ordinance, §59.3.1.6*) and there is no evidence that the sole landscape contractor conditional use has altered the neighborhood. This standard has been met.

***3. The fact that a proposed use satisfies all specific requirements to approve a conditional use does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require conditional use approval.***

Conclusion: Mr. Putman urges the Hearing Examiner to deny the conditional use based on this provision. As noted, the Hearing Examiner finds that the far greater weight of probative evidence, including expert testimony and agency analysis, supports approval of the proposed cemetery.

#### **B. Development Standards of the Zone (Article 59.4)**

To approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the R-C Zone, contained in Article 59.4 of the Zoning Ordinance. Staff concluded that the proposed use did meet the standards, except for the lot width at the front building and front lot lines, as summarized in the table below (Exhibit 39, p. 15, on the next page. The Applicant requests a variance from the minimum width required at the front building and front lot lines.

Conclusion: The Hearing Examiner recommends approval of the variances requested in Part III.E of this Report. With the two variances, and having no evidence to the contrary, the Hearing Examiner finds that conditional use meets the development standards of the R-C Zone.

**Table 2: Development Standards**

<b>4.3.4.B RC Zone</b>	<b>Required</b>	<b>Provided</b>
<b>Minimum Lot Area</b>	5 ac	40.22 ac (Net)
<b>Minimum Lot width:</b> <ul style="list-style-type: none"> <li>▪ at front lot line</li> <li>▪ at front building line</li> </ul>	300 ft 300 ft	<b><i>214.0 ft (Variance Requested)*</i></b> <b><i>205.8 ft (Variance Requested) *</i></b>
<b>Maximum Building Coverage</b>	10 percent or 175,198 sf	0.6 ± percent or 11,263 square feet total
<b>Minimum Building Setback</b> <b>Principal Building:</b> <ul style="list-style-type: none"> <li>• front</li> <li>• Side Street Setback</li> <li>• side</li> <li>• rear</li> </ul>	50 ft N/A 20 ft 35 ft	50 ft N/A 20 feet 35 ft
<b>Maximum Building Height</b>	80 ft	≤ 80 ft
<b>Minimum Building Setback Accessory structure:</b> <ul style="list-style-type: none"> <li>• front</li> <li>• side street</li> <li>• side</li> <li>• rear</li> </ul>	80 ft N/A 15ft 15 ft	80 ft N/A 15 ft 15 ft
<b>Minimum Setback for parking and loading</b>		50.9 ft
<b>Maximum Building Height</b> <ul style="list-style-type: none"> <li>• Principal Building</li> <li>• Accessory Building</li> </ul>	50 ft 50 ft	50 ft 50 ft
<b>Parking</b>		
<b>Min Vehicle Parking spaces 59-6.2.4</b> <i>(See Table 4 below under: D Parking)</i>	56	79

**Exhibit 39, p. 15**

### **C. Use Standards Specific to a Cemetery (Section 59.3.5.4.A.2.)**

The specific use standards for approval of a cemetery are in Section 59.3.5.4.A.2 of the Zoning Ordinance.

- a. The proposed location must be compatible with adjacent land uses, and will not adversely affect the public health, safety, and welfare of the inhabitants of the area.***

**Conclusion:** For the reasons discussed above, the Hearing Examiner has already found that the use is compatible with adjacent uses and that necroleachate from graves will not adversely harm the reservoir and the groundwater.

***b. Screening under Division 6.5 is not required; however, all grave sites must be sufficiently set back from surrounding properties to establish a buffer.***

Staff concluded that most of the burial areas will be screened by forest conservation easements, and remaining perimeter areas will have substantial landscaping and existing forest to further minimize views. Given the large size of the property and the distance from adjacent dwellings, Staff concluded that this standard has been met. Mr. Post testified that additional landscaping would buffer adjacent uses from the parking area associated with the community center.

Conclusion: A review of the conditional use site plan confirms Staff's analysis. There are significant forest conservation areas to the west and to some extent, north and south of the burial areas. The Hearing Examiner finds that this standard has been met for the reasons stated by Staff.

***c. Where the subject property is located in an area not served by public water and sewer, water table tests must be conducted to assure that there is adequate filtration of drainage between burial depth and the level of high-water table.***

Staff concluded that the soil testing performed by the Applicant, with the oversight of the Montgomery County Department of Permitting Services, met this requirement.

Conclusion: The testing required and overseen by the Department of Permitting Services has been described, and additional test pits were done at their request. The Montgomery County Department of Environmental Protection reviewed the soil data and concurs that there is adequate space between the burial depth and the seasonal high-water table to treat the leachate and that exists soils have capacity to do so. The Hearing Examiner finds that this standard has been met.

- d. In the AR, R, and RC zones, a family burial site is allowed only as an accessory use on a residentially developed property and may only be approved on a lot or parcel that is appropriate to the circumstances and is a minimum of 25 acres in size. A family burial site must be set back a minimum of 100 feet from any abutting property in a Residential zone and a minimum of 50 feet from any existing or master-planned street. The use of any property for a family burial site must be recorded in the land records of Montgomery County. A family burial site is not restricted by Section [3.1.5](#), Transferable Development Rights.***

Conclusion: The Applicant does not propose a family burial site. This provision is inapplicable.

- e. In the AR zone, a cemetery may be prohibited under Section [3.1.5](#), Transferable Development Rights.***

Conclusion: This property is not in the AR Zone; this standard is inapplicable.

#### **D. General Development Standards (Article 59.6)**

##### **1. Parking Standards (Article 59.6.2.)**

Division 59.6.2. of the Zoning Ordinance establishes parking standards for all uses and specific standards for conditional uses. Staff concluded that the parking standards have been met, although a waiver was required from the requirement that all spaces be ¼ mile from the “establishment to be served.” *Zoning Ordinance*, §6.2.5.B.

Staff has interpreted the Zoning Ordinance to mean that all parking spaces be within ¼ mile from the smaller buildings near New Hampshire Avenue. While the Hearing Examiner questions whether the Ordinance instead intended to require parking spaces to be within ¼ mile of the different buildings on-site, she has no evidence in this case to decide. She agrees with Staff that the waiver is appropriate because it permits parking to be located away from New Hampshire Avenue and provides closer access to the buildings on-site. The Hearing Examiner does not set out all detailed parking requirements, which are numerous and listed in the Staff

Report. Having absolutely no evidence to contravene Staff's findings that the use complies with these requirements, the Hearing Examiner finds that these standards are met for the reasons stated in the Staff Report. Exhibit 39, pp. 18-22.

## **2. Landscaping and Screening**

Division 6.4 and 6.5 of the Zoning Ordinance set minimum technical standards for site landscaping, which are intended to "preserve property values, preserve and strengthen the character of communities, and improve water and air quality." §59.6.4.1. Planning Staff concluded that the revised landscaping plan submitted (Exhibits 38(p), (q), (r), and (t) meet all requirements.

Conclusion: Staff considered all the requirements in its Staff Report and concluded that they have been met. Exhibit 39, pp. 22-24. Further, Section 3.5.4.A.2.b states that screening under Section 6.5 "is not required." Based on this uncontroverted evidence that all screening requirements have been met, and finding the screening proposed to be compatible with the surrounding area, the Hearing Examiner that the proposed conditional use meets these requirements.

## **3. Outdoor Lighting**

Section 59.6.4.4.E of the Zoning Ordinance contains the following standard for conditional uses in residential zones:

***Outdoor lighting for a conditional use must be directed, shielded, or screened to ensure that the illumination is 0.1 footcandles or less at any lot line that abuts a lot with a detached house building type, not located in a Commercial/Residential or Employment zone.***

The Applicant submitted a photometric plan demonstrating that footcandles at the property line would meet this requirement, which Staff confirms. Exhibits 38(u), (v). Staff



concluded also that lighting was sufficient to provide safety and was compatible with the surrounding area. Exhibit 39, p. 31.

Conclusion: From this uncontroverted evidence, the Hearing Examiner finds that the lighting on the property will be at residential levels compatible with the surrounding area and adjacent uses.

#### **4. Signage**

The Applicant proposes one sign on the entrance gate to the subject property (pictured on page 22 of this Report), that will be illuminated. Staff advises that the sign meets the square footage limits in the Rural Residential Zones. Exhibit 39, p.24.

Conclusion: The building plans submitted by the Applicant (Exhibit 21) confirm Staff's assessment. Based on this uncontroverted evidence, the Hearing Examiner finds that the sign proposed meets the standards required.

#### **E. Variance**

Necessary findings for approval of a variance include (Section 59.7.3.2.E):

***Granting the variance may only authorize a use of land allowed by the underlying zone. To approve a variance, the Board of Appeals must find that:***

- 1. denying the variance would result in no reasonable use of the property; or***
- 2. each of the following apply:***
  - a. one or more of the following unusual or extraordinary situations or conditions exist:***
    - i. exceptional narrowness, shallowness, shape, topographical conditions, or other extraordinary conditions peculiar to a specific property;***
    - ii. the proposed development uses an existing legal nonconforming property or structure;***
    - iii. the proposed development contains environmentally sensitive features or buffers;***
    - iv. the proposed development contains a historically significant***

- property or structure; or***  
***v. the proposed development substantially conforms with the established historic or traditional development pattern of a street or neighborhood;***
- b. the special circumstances or conditions are not the result of actions by the applicant;***
  - c. the requested variance is the minimum necessary to overcome the practical difficulties that full compliance with this Chapter would impose due to the unusual or extraordinary situations or conditions on the property;***
  - d. the variance can be granted without substantial impairment to the intent and integrity of the general plan and the applicable master plan; and***
  - e. granting the variance will not be adverse to the use and enjoyment of abutting or confronting properties.***

The Applicant requests a variance from the minimum width of the front building and front lot lines. The minimum width required for both is 300 feet. *Id.* Mr. Stephen Crum, the Applicant's expert in civil engineering, testified that the need for the variance arose from the unusual flag-shaped configuration of the lot. After dedication, the conditional use plan will have a front lot line width of 214 feet and a front building line width of 205.6 feet. T. 153. According to Staff, the Applicant will need a variance of 94.1 feet from the minimum front building line width and 86 feet from the front lot line width. Exhibit 39, p. 31. Mr. Crum testified that Applicant has made no changes to the configuration of the lot that caused the existing situation. T. 155. Without the variance, the applicant will not be able to obtain a building permit for the property. T. 155.

Staff recommended approval of the variance because the property's configuration is "exceptional" and "extraordinary" due to the very narrow flag stem that suddenly expands to a width nearly five times the width of the stem. Staff found no other property configured in this

manner in the R-C Zone between Ednor Road and Md 198. Exhibit 39, p. 32. Staff also advises that the current configuration was created by deed in 1945, pre-dating the creation of the R-C Zone, and therefore was not created by the Applicant. The practical difficulties standard has been met because the Applicant would have to acquire land to achieve full compliance with the Zoning Ordinance. Staff also found that the variance would not negatively impact neighbors because it is an existing condition.

Conclusion: The Hearing Examiner finds that Staff's analysis and recommendation that approval of the variances meet the applicable standards. Based on this uncontested evidence, the Hearing Examiner recommends approval of the variance for the reasons stated in the Staff Report.

#### **IV. Conclusion and Decision**

As set forth above, the application meets all the standards for approval in Articles 59.3, 59.4, 59.6 and 59.7 of the Zoning Ordinance. Based on the foregoing findings and conclusions, the Hearing Examiner recommends approval of BOA Case No. A-6693, requesting variances from the minimum width of the front building and lot lines in the R-C Zone, and hereby **GRANTS** the Applicant's (1) request for a waiver of the minimum distance required by the parking regulations, and (2) the application for a conditional use under Section 59.3.5.4.A. of the Zoning Ordinance to build and operate a cemetery at 16621 New Hampshire Avenue, Silver Spring, Maryland, subject to the following conditions:

1. Physical improvements to the Subject Property are limited to those shown on the Conditional Use Plan (Exhibits 38(a) through (g)), Landscape Plan (Exhibit (p), (q) (r) and (t), building plan (Exhibit 21), and Photometric Plan (Exhibit 38(u)).
2. No more than seven employees may be on the property at any one time.
3. Hours of operation are between 8:30 a.m. to sunset, seven days a week.

4. The Applicant must remove all pulse generator components of implanted cardiac pacemakers, including batteries, from cadavers prior to burial.
5. Gravesites must be located within the area depicted on the Conditional Use Plan (Exhibit 38(b)).
6. The Applicant must obtain approval of BOA Case No. A-6693 prior to approval of a preliminary plan of subdivision.
7. During preliminary plan review, the Applicant must submit to the Planning Board an assessment of whether riparian buffers exist along on-site streams.
8. Sediment and erosion control measures must be implemented during all clearing and grading on the property, including gravesite areas.
9. Trip generation for the approved use must not exceed 50 peak hour trips within the weekday morning and evening peak periods.
10. The Applicant must obtain a sign permit from the MCDPS for the proposed freestanding sign. A copy of the sign permit obtained from MCDPS must be submitted to the Hearing Examiner before the sign is installed on the property.
11. Prior to the issuance of any building permit for the subject Conditional Use, the Applicant must obtain approval of a Preliminary Plan of Subdivision and a Record Plat pursuant to Chapter 50 of the Montgomery County Code. If changes to the approved Conditional Use Site Plan or other plans filed in this case are required at Subdivision, the Applicant must file a copy of the revised site and related plans with OZAH.
12. The proposed development must comply with the Preliminary Forest Conservation Plan and the conditions of approval therein.
13. The Applicant must obtain approval of the Final Forest Conservation Plan by the Planning Board, after which time the Applicant must comply with the terms of the Final Forest Conservation Plan.
14. Prior to issuance of access permits, the Applicant must satisfy the provisions for access and improvements as required by the Maryland State Highway Administration ("SHA").
15. Impervious surfaces are limited to no more than 10.0 percent of the subject property as shown on Exhibit 38(z).

16. Prior to the start of any clearing or grading on the subject property, the owner of the subject property must enter into an agreement with the Planning Board to limit impervious surfaces within the transition area of the Patuxent River Primary Management Area ("PMA") on the subject property to no more than 10.0 percent, as shown on Exhibit 38(z). The agreement must be in a form approved by the M-NCPPC Office of the General Counsel and recorded by deed in the Montgomery County Office of Land Records.
17. The Applicant and any successors in interest must obtain and satisfy the requirements of all Federal, State, and County licenses, regulations, and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the conditional use premises and operate the conditional use as granted herein. The Applicant and any successors in interest shall at all times ensure that the conditional use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements, including the annual payment of conditional use administrative fees assessed by the Department of Permitting Services.

Issued this 11<sup>h</sup> day of October 2021.



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Lynn A. Robeson  
Hearing Examiner

#### RIGHT TO APPEAL

Any party of record may file a written request to appeal the Hearing Examiner's Decision by requesting oral argument before the Board of Appeals, within 10 days issuance of the Hearing Examiner's Report and Decision. Any party of record may, no later than 5 days after a request for oral argument is filed, file a written opposition to it or request to participate in oral argument. If the Board of Appeals grants a request for oral argument, the argument must be limited to matters contained in the record compiled by the Hearing Examiner. A person requesting an appeal, or opposing it, must send a copy of that request or opposition to the Hearing Examiner, the Board of Appeals, and all parties of record before the Hearing Examiner.

Additional procedures are specified in Zoning Ordinance §59.7.3.1.f.1. Contact information for the Board of Appeals is:

Montgomery County Board of Appeals

100 Maryland Avenue, Room 217  
Rockville, MD 20850  
(240) 777-6600  
<http://www.montgomerycountymd.gov/boa/>

**PLEASE NOTE THE FOLLOWING BOARD OF APPEALS FILING REQUIREMENTS DURING THE COVID-19 PANDEMIC:**

Persons submitted requests for reconsideration, requests for a public hearing, or requests for oral argument/appeal regarding a conditional use decision by OZAH are also required to dual file their request, and should email a scanned copy (or photograph, if a scanner is not available) of their submission to [BOA@montgomerycountymd.gov](mailto:BOA@montgomerycountymd.gov) and then either mail the signed hard copy, **via U.S Mail**, to the following address: Montgomery County Board of Appeals, 100 Maryland Avenue, Room 217, Rockville, MD 20850 or make an appoint to hand-deliver the request between the hours of 10:00 a.m. and 4:00 p.m. on Tuesday and Thursday.

If you have questions about how to file a request for oral argument, please contact Staff of the Board of Appeals.

The Board of Appeals will consider your request for oral argument at a work session. Agendas for the Board's work sessions can be found on the Board's website and in the Board's office. You can also call the Board's office to see when the Board will consider your request. If your request for oral argument is granted, you will be notified by the Board of Appeals regarding the time and place for oral argument. Because decisions made by the Board are confined to the evidence of record before the Hearing Examiner, no new or additional evidence or witnesses will be considered. If your request for oral argument is denied, your case will likely be decided by the Board that same day, at the work session.

Parties requesting or opposing an appeal must not attempt to discuss this case with individual Board members because such *ex parte* communications are prohibited by law. If you have any questions regarding this procedure, please contact the Board of Appeals by calling 240-777-6600 or visiting its website: <http://www.montgomerycountymd.gov/boa/>.

Notifications sent to:

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