

IN RE: <b>PETITION FOR SPECIAL HEARING</b>	*	BEFORE THE
<b>(6603-6605 Pimlico Road)</b>		
15th Election District	*	OFFICE OF
6th Council District		
Bruce A. Goldman & Freda Goldman	*	ADMINISTRATIVE HEARINGS
<i>Legal Owners</i>		
	*	FOR BALTIMORE COUNTY
<b>Petitioners</b>		
	*	<b>Case No. 2020-0132-SPHA</b>

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**OPINION AND ORDER**

This matter comes before the Office of Administrative Hearings (OAH) as a Petition for Special Hearing and Variance filed by Bruce A. Goldman & Freda Goldman, and 6600 Amleigh, LLC (“Petitioners”). The Special Hearing was filed under § 500.7 of the Baltimore County Zoning Regulations (“BCZR”) to:

(1) approve a site plan for a new building of religious worship (synagogue) in accordance with the requirements of the Baltimore County Zoning Regulations (“BCZR”) § 1B01.1.B.1.g (6) including a finding that the restrictions contained in § 1B01.1.B.1.a through § 1B01.1.B.1.e do not apply to the proposed project.

(2) in the alternative to Special Hearing request Number 1, a modification of the Residential Transition Area (“RTA”) under BCZR § 1B.01.1.B.1.c (2), to approve, as shown on the plan to accompany Petition for Zoning Hearing: (a) A new building of religious worship (synagogue, or shul) with the proposed parking lot, storm water management areas, and building within the 50-foot RTA buffer required by BCZR § 1B.01.1.B.1.e (3), and, (b) The proposed parking lot and storm water management areas within the 75-foot RTA setback required by BCZR § 1B.01.1.B.1.e (5), and, (c) The proposed synagogue building with a height in excess of 35 feet within the 100-foot RTA setback required by BCZR § 1B.01.1.B.1.e (5).

(3) A modified parking plan under BCZR § 409.12.B containing 24 parking spaces as shown on the plan to accompany petition for zoning hearing to serve the proposed use on the property which would otherwise require 56 parking spaces.

(4) Such further and other relief as the nature of this case may require.

Variance from:

1. In the alternative to Special Hearing Requests Nos. 1 & 2:
  - a. A Variance from BCZR § 1B01.1.B.1.e.3. to permit an RTA buffer of zero (0) feet in lieu of the 50 feet required.
  - b. A Variance from BCZR § 1B01.1.B.1.e.5 to permit an RTA setback of 10 feet for the proposed parking lot in lieu of 75 feet otherwise required, as shown on the plan to accompany petition for zoning hearing.
  - c. A Variance from BCZR § 1B01.1.B.1.e.5 to permit RTA setback of 13 feet for the proposed storm water management areas in lieu of 75 feet otherwise required, as shown on the plan to accompany petition for zoning hearing.
  - d. A Variance from BCZR § 1B01.1.B.1.e.5 to permit an RTA setback of 20 feet for the proposed synagogue building with a height in excess of 35 feet (permitted by right) in lieu of 100 feet otherwise required, as shown on the plan to accompany petition for zoning hearing, or such lesser relief as may be determined by ALJ
2. In the alternative to Special Hearing request No 3, a Variance from BCZR § 409.6 to permit 24 parking spaces in lieu of 56 required.

The Petition was properly advertised and posted. Substantive Zoning Advisory Committee (“ZAC”) comments were received from the Department of Planning (“DOP”) and from the Department of Environmental Protection and Sustainability (“DEPS”) indicating the project will require presentation to the Development Review Committee (“DRC”) for determination of plan process prior to issuance of any permits for Grading or Construction. Due to the COVID-19 pandemic, a public WebEx hearing was conducted virtually in lieu of an in-person hearing on December 22, 2020, January 25, 2021 and February 8, 2021.

Aaron Loeb appeared in support of the Petition on behalf of Derech Chaim Congregation. Also in attendance was Patrick Richardson, P.E., of Richardson Engineering, the firm that prepared the Site Plan. His *curriculum vitae* was admitted as Petitioners' Exhibit 1 and he was accepted as an expert in engineering, and in the BCZR and the Development regulations. The Plan was admitted as Petitioners' Exhibit 2. Licensed Architect, Donny Ankri, also attended and was accepted as an expert in architecture. Dino LaFiandra, Esq. represented the Petitioners. Numerous community opponents also attended. Christopher Jakubiak, AICP, also attended and was accepted as an expert in Urban and Regional Planning, and in the BCZR. His *curriculum vitae* was admitted as Protestants' Exhibit 4. The community was represented by Michael McCann, Esq.

#### PETITIONERS' CASE

Mr. Richardson explained the Plan in detail. The subject property is zoned DR 3.5, which allows religious structures as a matter of right, provided they meet Residential Transition Area ("RTA") regulations, parking requirements, and other applicable regulations. The property consists of two adjoining residential lots that are a combined .73 acres. The two residential structures would be razed if the Petition is granted. The Plan proposes a 14,400 sq. ft. synagogue and social hall with underground stormwater management facilities, and 24 parking spaces. Mr. Richardson testified that there are no Basic Services Map issues associated with the property. Mr. Richardson identified Petitioners' Exhibit 3 as a site drawing showing that full compliance with the Residential Transition Area setbacks and buffers would make construction of the synagogue impracticable. He testified that if the RTA were fully applied to the site only a small "donut hole" of buildable area would be left. He further explained that the Plan does meet all the non-residential setbacks for the DR 3.5 zone: 50' front, 20' side, and 30' rear (although the plan shows a setback of only 13' from the parking lot depicted at the southeast corner of the lot). He testified that the

estimated height of the structure is 37 feet, which is below the 50' height limit prescribed by BCZR § 300.2 for religious structures, but is higher than the 35' height limit for buildings within the 100' RTA. He explained that the proposed structure is located as close as possible to the center of the combined parcels and that good landscape screening will be planted around the perimeter to reduce visual and noise impacts. He identified Petitioners' Exhibit 4 as the Landscape Concept Plan showing the proposed plantings and explained that the Plan complies with the requirements of the Baltimore County Landscape Manual ("BCLM"). Finally, Mr. Richardson testified that in his expert opinion the Plan meets the RTA exception found at BCZR § 1B01.1.B.1.g (6) because it complies "to the extent possible with RTA use requirements," and is "compatible with the character and general welfare of the surrounding residential premises." He identified Petitioners' Exhibit 5 as a map of what he considered to be the "neighborhood" within the meaning of BCC § 32-4-402.

On cross-examination by Mr. McCann, the witness agreed that an RTA was generated by the residences on all sides of the two lots. He acknowledged that the Plan does not meet any of the RTA setback or buffer requirements. He further acknowledged that although the synagogue itself is centrally sited the parking lot directly abuts the adjacent property to the south. Mr. Richardson agreed that the proposed synagogue and parking lot will occupy approximately 80% of the two combined parcels. The witness had difficulty explaining how petitioners' "neighborhood" boundaries were determined. He also stated that the "surrounding residential premises" referenced in BCZR § 1B01.1.B.1.g (6) are the same as those defined as the "neighborhood" in BCC § 32-4-402.

Petitioners' architect, Donny Ankri, was the next witness. He testified that he has a masters degree in Architecture from the University of Maryland. He testified that he has filed numerous

Administrative Variance petitions in Baltimore County but had only testified at one hearing. He testified that he has, however, testified several times in surrounding jurisdictions. He was accepted as an expert in architecture. He identified Petitioners' Exhibits 6 and 7 as architectural renderings he prepared of the front and side of the proposed shul. He explained that the shul will have a hipped roof with gradual slopes in keeping with the nearby residences. He noted that the building will have an articulated façade with significant architectural detail to provide visual interest and reduce the effect of the building's mass. He further noted that the building is rectangular and that the narrower side of the building will face the street to further reduce the visual impact. He described the floor plans that were admitted as Petitioners' Exhibit 8. He explained that the footprint of the proposed shul is approximately 5800 sq. ft. and that it will be a total of 14,400 sq. ft., consisting of a social hall in the basement, the main sanctuary with 180 seats on the ground floor, and a balcony with an additional 44 seats on the second floor. Adjacent to the social hall is a large kitchen area. He explained that this will be a "warming" kitchen and that there will be no commercial cooking appliances. Also depicted on the drawings are 5 bathrooms, a library, and an office for the rabbi, a classroom, and a children's room. He also testified that the landscaping design will be compatible with the surrounding properties and will provide a visual buffer. Mr. Ankri next identified Petitioners' Exhibits 10 and 11, which are photos of area residences and synagogues. He testified that several of the residences have dimensions on a scale with the proposed shul. Finally, he described six different design elements which, in his view, make the design compatible with the neighborhood: the broad setback from the street; the front façade, which is similar in width to numerous area residences; the hipped roof design; the detailed articulation of the walls; the one story entrance; and, the brick and stucco materials.

On cross examination Mr. Ankri testified that he had worked on the building design with

the shul's building committee. They told him the number of seats (224) needed for the sanctuary. He explained that he had done a series of designs and refinements but had never been asked to submit a design for a smaller shul. He testified that the residences depicted in Petitioners' Exhibit 10 are among those that he considers to be the "surrounding residential premises." He testified that some of these residences were of similar size to the proposed shul. He stated that based on his expertise and his use of Google Earth that he was able to estimate their exterior dimensions with "good certainty." He acknowledged that all but one of the shuls shown in Petitioners' Exhibit 11 are located in Baltimore City. He confirmed that there is no proposal for a commercial kitchen. He specified that there would be no vent hoods or other such commercial elements. He acknowledged that the plan is for all three floors of the building to be actively used. He further acknowledged that there will be a commercially sized dumpster and enclosure. He also agreed that there will likely be large catering trucks making deliveries to the social hall.

When the hearing resumed on January 25, 2021 Petitioners called Aaron Loeb, the co-chair of the shul's building committee. He testified at length about a range of topics. He explained that the shul was established in 2013 and was originally housed in a small residence. He testified that they have a charismatic Rabbi (Rabbi Gross), and that the congregation has experienced steady growth. Since 2015 they have been leasing a 2000 sq. ft. side chapel of the Ner Tamid shul, about a quarter of a mile away from the subject property. He explained that the congregation has grown to approximately 180 member families, some with numerous children. He further explained that this growth necessitated the search for a new facility and that the building committee was formed for that purpose. He explained that in their current leased space they are unable to hold daily prayer meetings or a number of other programs essential to their faith. He explained that as Orthodox Jews that they are prohibited from driving on the Sabbath, and that this therefore limits where their

shul can be located. He further testified that this area of the county is already “heavily developed and densely populated” and that there is a high demand for real estate. He identified Petitioners’ Exhibit 15 as a map showing the locations of the members’ residences, and their proximity to the proposed site. He testified that the vast majority of the member families would be within a quarter to a half mile away.

With regard to parking concerns, he explained that the primary services would be on the Sabbath, which lasts from sundown Friday through sundown Saturday, and that since the congregation would be walking to services this would alleviate parking pressure. He did acknowledge that “a handful” of congregants arrive by car before sundown Friday and then leave their cars until after sundown Saturday. He testified that there would be daily prayer services in the mornings and evenings that some members would drive to. But he testified that far fewer congregants attend, and that they would attend at different times thereby decreasing the number of persons there at any given time.

Mr. Loeb testified that Derech Chaim had purchased a residential property around the corner on Farrington Road in 2017 but that due to neighborhood opposition had abandoned plans to build there. He explained that Farrington was more of a side street with a narrower right of way, whereas Pimlico Road and Smith Avenue are more major roads. He noted that Pimlico has a 100’ right of way from sidewalk to sidewalk. They therefore see this as a more appropriate location for the shul. Mr. Loeb then explained the process by which Derech Chaim negotiated and obtained a modification of the original restrictive covenants for Plat No. 1 of the “Ranchleigh” subdivision, which limited owners to strictly residential uses of their property. These restrictive covenants were admitted as Petitioners’ Exhibit 12, and the Ranchleigh plat was admitted as Petitioners’ Exhibit 13 (shaded area depicts properties subject to the covenants). He testified that starting in 2018 the

building committee had a series of meetings with the eleven property owners subject to the covenants. He stated that the primary concerns of these neighbors were: privacy screening, elimination of light pollution from the site, trash disposal, and noise. He testified that they agreed to eliminate a proposed playground – although it is unclear just where that would have been located given that the shul takes up nearly all of the parcel. Ultimately Derech Chaim obtained the signatures of seven of the other nine property owners subject to the covenants, with their two lots making it nine of eleven. The Modification Agreement was admitted as Petitioners’ Exhibit 14. Mr. Loeb did not describe what, if any, consideration had been given to obtain these signatures, nor does the document itself. Mr. Loeb also described negotiations he had with the larger neighborhood regarding “programmatic” modifications that Derech Chaim agreed to make: primarily, that the social hall will not be rented to 3<sup>rd</sup> parties on Monday, Tuesday or Wednesday, but that it could be rented on Thursday and Sunday (Friday and Saturday it would be used for Sabbath services). It was further agreed that all activities, other than religious services, would end by 11 p.m. Further, on school days and non-legal holidays the shul agreed that “earlier Shul Shachris Minyanim will be scheduled to end approximately before 8:00 a.m. and later Shul Shachris Minyanim will be scheduled to start after 8:45 ...”. The agreement also provides for the appointment of an “ombudsman” to address neighborhood concerns/complaints arising out of the shul’s operations. It also provides that Rabbi Yosef Berger would mediate and decide disputes arising out of the agreement. This “Agreement” was signed by ten neighborhood property owners, and was admitted as Petitioners’ Exhibit 19. Finally, Mr. Loeb also identified and described a “License Agreement” that Derech Chaim has entered into with a Hebrew School to allow the shul to use the school’s parking lot, as needed, for overflow parking during shul “events.” He acknowledged that the school is almost a half mile from the proposed shul. He further



acknowledged that the License Agreement is terminable at will by either party simply upon giving notice.

On cross examination Mr. Loeb agreed that there are several hundred members of the Derech Chaim congregation. He agreed that there would be a variety of prayer and related services throughout the day, each day. He agreed that only on the Sabbath would there be a prohibition on driving to the shul. He further agreed that the Jewish faith has numerous holidays and that some of these last several days. He agreed that “life cycle events” like bris’, and bar and bat mitzvahs would also happen frequently. He also agreed that the entire congregation, numbering several hundred people, would attend the high holiday services.

He agreed with Mr. McCann that at the time the neighbors signed the Modification of the restrictive covenants – Petitioners’ Exhibit 14 – that they had not seen the Site Plan or Architectural elevations or floor plans. He testified that he was not aware that at least two of the signatories have allegedly changed their minds.<sup>1</sup> He acknowledged that only ten of approximately thirty neighboring property owners signed the “Agreement” set forth in Petitioners’ Exhibit 19. He claimed that others wanted to but were afraid to provoke their neighbors.

On re-direct examination Mr. Loeb agreed that the proposed sanctuary has 224 seats, and that the proposed 2500 sq. ft. social hall can accommodate 160 seated guests, and more if standing. However, he stated that the congregation did not intend to use these spaces concurrently. On re-cross he confirmed that the spaces would not be used at the same time. Mr. McCann then asked that, if this was the case, why did they need a social hall in addition to the sanctuary. Mr. Loeb replied that the sanctuary is a holy space and some of the activities planned for the social hall would not be appropriate in the sanctuary.

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<sup>1</sup> None of the signatories on the Modification testified one way or the other at the hearing.

Mr. LaFiandra then rested Petitioners' case, subject to rebuttal.

### COMMUNITY OPPOSITION

Numerous members of the community attended both days of the hearing. Several testified at length in opposition to the proposed synagogue. Numerous letters in opposition were also received and placed in the file. Jill and Bruce Blumenthal both testified. They have lived at 6607 Pimlico Road for 34 years. Their home is immediately adjacent to the proposed shul on the north side. Ms. Blumenthal testified that they raised their children there and that they are often visited by their six grandchildren. They are adamantly opposed to this large shul being constructed in the middle of this residential block. They are concerned about the traffic and parking impacts as well as the noise and pedestrian traffic. They are modern orthodox Jews so they are aware of all the Jewish holidays and traditions. Ms. Blumenthal claimed that Mr. Loeb had "low balled" all his estimates concerning the number of persons that would attend the various services. She and her husband belong to the Ner Tamid Congregation, where Derech Chaim is currently renting space. She estimates that approximately 90 men from Derech Chaim attend daily services. She noted that even if only a third of the men in the 180 member congregation attend daily services, that is still 60 people, and there are only 24 parking spaces provided on the site plan. This leaves an overflow of 36 cars that will need to park in the neighborhood each day. She pointed out that there are only 52 Sabbaths each year so there will be parking issues every other day of the year. She noted that the overflow parking lot is a half mile away and expressed doubt that any of the Derech Chaim congregation would actually park there, especially since there are no sidewalks along much of the route. She further noted that the four existing shuls in the immediate neighborhood are all on corner lots and do not have social halls. They are just modified residences. She said that between 50 and 80 members of the one nearby large shul -Mercaz Torah- park their cars on the surrounding streets

each day. She said that if the proposed shul is built it will be like living next to a Home Depot, only the shul will be open even later. She explained that their bedroom, and the rooms their grandchildren sleep in, are on the side of the house directly adjacent to the proposed shul, which will be only 20 feet from the tract boundary. Mr. Blumenthal noted that many of the Jewish holidays involve ceremonies that are quite loud, and that will go late into the night, right next to these bedroom windows. Mrs. Blumenthal identified Protestants' Exhibit 15 as a Petition in opposition to the proposed shul, signed by 85 neighbors. On cross-examination she acknowledged that she was the "driving force" behind the Petition. When asked, she described the "neighborhood" as the "ABC" streets in the Ranchleigh subdivision; meaning: Amleigh, Baythorne, Chelwood, Deancroft, Edenvale, and Farringdon.

Marcia Scherr, who resides at 2325 Farringdon Road, and Michael Lowenstein, who resides at 6613 Amleigh Road also testified in opposition. They raised the same concerns as the Blumenthals. They too are of the Jewish faith and they too believe Mr. Loeb's estimates for attendance are on the low side. They are also concerned about traffic safety for the numerous children in the neighborhood. They testified that speeding is already a problem in the neighborhood, and that much of it stems from members of the various neighborhood shuls who are late for their daily minivan services and speeding to get there. They too pointed to the lack of parking proposed for this shul and are worried that their streets will be overwhelmed by the parking associated with the Derech Chaim shul. They also believe that a large shul and social hall, with late night hours, is not at all compatible with the neighborhood. Of note, Mr. Michaelson testified that his shul also has both a sanctuary and a social hall and that they are often used simultaneously. He stated that, contrary to Mr. Loeb's claim, he believes Derech Chaim will no doubt do the same.

Finally, as noted above, the file in this case contains a slew of letters opposing the proposed shul, as designed. One of these letters is from Dr. David and Mrs. Ruthie Eisenberg. Dr. Eisenberg is a Johns Hopkins physician. He describes numerous public health and safety concerns associated with the proposed shul and social hall. These letters echo the concerns raised by the witnesses at the hearing. In addition they raise concerns about the impacts on their property values they understandably fear will come with the construction of this large shul in the middle of a block in their neighborhood. Dr. Eisenberg laments that “[i]f Derech Chaim succeeds in obtaining the zoning variances it is requesting, our neighborhood will be fundamentally transformed from a peaceful, quiet, residential neighborhood of single-family homes to a very busy, highly trafficked, public area.” In sum, the neighbors would not be opposed to a shul on the scale of the others in the neighborhood (other than Mercaz Torah, the one large shul, which is in Baltimore City), however, they are opposed to the size and scale of the proposed shul and social hall in the middle of a block on an undersized lot.

In addition to these neighborhood residents, Mr. McCann called a photographer/videographer, Michael Brassert, who identified Protestants’ Exhibit 3 A thru F as a series of ground level and aerial photographs he took of the neighborhood. Of relevance to the parking issue, he testified that photos E1 thru E6 are aerial drone photos taken of the Mercaz Torah shul and surrounding streets, and photos F1 thru F8 are ground level photos of the same. These photos depict parked cars lining every space along the streets surrounding this shul. Mr. Brassert testified that he observed that the vast majority of those cars were associated with the shul, including cars parked in front of a “No Shul Parking” sign, which had evidently been erected by the shul in response to neighborhood complaints.

Finally, Christopher Jakubiak, AICP, testified on behalf of the protestants. He has testified numerous times in the Office of Administrative Hearings and the Board of Appeals, as well as in jurisdictions throughout Maryland. He was accepted as an expert in land planning and in the Baltimore County development and zoning regulations. He testified that he had visited the site and reviewed the proposed site plan and Petition for relief in detail. He testified that in his expert opinion the site plan does not meet the requirements of the “new church” exception to the RTA regulations found at BCZR § 1B01.1.B.1.g (6). He testified that the plan does not ensure RTA compliance “to the extent possible,” nor will the proposed shul be “compatible with the character of the general welfare of the surrounding residential premises,” both of which must be met in order to qualify for this exception. He explained that the Petitioners in this case have asked for almost a complete exemption from the RTA regulations. Specifically, no 50’ “ungraded, uncleared, landscaped buffer” is provided on any side of the shul. And the proposed side yard setbacks are only 20’ (or as little as 13’ at the southeast corner of the parking lot), and the rear yard setback only 30’ rather than the 75’ RTA setback required. Furthermore, the proposed building will exceed the 35’ height limit within the 100’ RTA. He noted that even using the maximum square footage available on site for parking, the plan still proposes only 24 spaces when 56 are required for the 224 seat sanctuary alone. And this does not even take into account times when both the sanctuary and the social hall may be used simultaneously.<sup>2</sup> He testified that Derech Chaim simply started with the number of seats they wanted in the sanctuary and designed the building based on that

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<sup>2</sup> It is clear that the DOP was not informed of the proposed Social Hall when they reviewed the Petition and Site Plan, neither of which references this aspect of the proposal. The DOP ZAC comments specifically state that “prior to the issuance of any permits, *building elevations* and signage details should be submitted to the Department of Planning for review and approval.” Had the DOP been aware of this proposed 2500 sq. ft. Social Hall (depicted in the floor plans submitted as Petitioners’ Exhibit 8) they no doubt would have commented on the parking requirements associated with it. Even without this material information the DOP did not recommend approval of the requested relief, they merely remained neutral.

number – with no consideration given to the RTA or parking requirements, or to whether it is compatible with the neighborhood.

With respect to compatibility under BCZR § 1B01.1.B.1.g (6), Mr. Jakubiak differentiated between the “surrounding residential premises” referenced in this sub-section, and the broader “neighborhood” definition found at BCC Section 32-4-402(a). He identified Protestants’ Exhibit 5 as a map he had created showing the larger “neighborhood” and the smaller “surrounding residential premises.” He explained that, as shown in Exhibit 5, only the 12 homes immediately surrounding the proposed shul are what should be considered the “surrounding residential premises” under a proper interpretation of this RTA exception. He further explained that these homes are all on large residential lots that were created in the 1950s. He noted that there are substantial setbacks from the street and between the homes, with extensive mature landscaping surrounding the homes to create a very suburban feel. He specifically noted that there is a contiguous band of mature trees along the rear yards of the homes on Pimlico Road and Amleigh Road that back to each other. He stated that according to the proposed site plan a large section of these trees behind the proposed shul would need to be removed, thereby destroying this contiguous greenspace. He further explained that these surrounding homes are only two stories whereas the proposed shul will be nearly 40’ high, with a very “vertical” impact. He further explained that this large surface parking lot was completely incompatible with the surrounding properties, which have typical suburban driveways. In sum, he testified that the large, vertical mass of this building and adjacent parking lot are simply not compatible with the surrounding homes. He further explained that this intense use of the property for a large shul and social hall would have a significant adverse impact on the character and general welfare of the surrounding residences. For these reasons the

plan does not, in his expert opinion, meet the requirements for an exception under BCZR § 1B01.1.B.1.g (6).

Mr. Jakubiak then explained how he had delineated the “neighborhood” depicted on Protestants’ Exhibit 5. Referring to BCC Section 32-4-402(a) he explained that Pimlico Road and Smith Avenue are primary collector roads and are therefore two of the boundaries. The other two boundaries are created by natural features, a stream and forest area. He observed that all but one of the other shuls in the neighborhood are in converted residences so they are inherently more compatible with the neighborhood than the large shul and social hall proposed in this case. He noted that the only large shul was in the City, and that if it were in the county that shul would likewise fail to meet the RTA requirements, and it too would be incompatible with the neighborhood under the BCC and BCZR. In closing, Mr. Jakubiak testified that the proposed shul could conceivably be compatible with the neighborhood if it were on a lot with sufficient square footage to actually meet “to the extent possible” the RTA and parking regulations.

On cross-examination by Mr. LaFiandra, he explained that “to the extent possible” means that you design the plan so that it meets the legislative purposes of the RTA as much as possible. Meaning you don’t start with the building you want and then ask for as much relief as the building and parking footprint requires. He agreed that if a given site plan meets the compatibility requirements of BCZR § 1B01.1.B.1.g (6) then it automatically would satisfy the neighborhood compatibility requirements of BCC § 32-4-402(a). He stated that he had not based his opinions on any case law. And he specifically acknowledged that he was not familiar with the opinion and holding in *Jesus Christ is the Answer Ministries, Inc. v. Baltimore County, Md.*, 915 F.3d 256 (4<sup>th</sup> Cir. 2019).

## REBUTTAL CASE

In rebuttal Mr. Loeb disputed some of Mrs. Blumenthal's testimony concerning their attempted meetings and conversations. He also testified that Derech Chaim's model is nothing like Mercaz Torah's. He explained that Derech Chaim is supported by its members whereas Mercaz has no membership and caters to the larger Baltimore metropolitan area and is supported by program sponsors. Mr. Loeb testified that Derech Chaim will have far fewer services and programs and will not have nearly the volume of people on a daily basis. He said that Mr. Lowenstein's and Mrs. Blumenthal's estimate that 60-90 men would attend daily services at Derech Chaim were deceiving because those numbers would be spread over several different time slots. He also reiterated that there would be no traffic impacts between 8 a.m. and 8:45 because of the "blackout" provision in the neighborhood agreement. He identified Petitioners' Exhibit 20 as a Petition signed by community members in support of Derech Chaim's proposed shul plan. He identified Petitioners' Exhibits 21 and 22, respectively, as Mercaz Torah flyers advertising events, and the Mercaz calendar of events. Finally Mr. Loeb identified Petitioners' Exhibit 23 as a letter and proposed lease between Ner Tamid and Derech Chaim. He explained that, as these documents show, Derech Chaim is currently leasing space at Ner Tamid on a month to month basis since their previous lease agreement expired in September 2020. Ner Tamid has offered to extend that lease for a maximum of 18 months.

On cross-examination by Mr. McCann, Mr. Loeb stated that Derech Chaim hadn't decided whether to extend the lease.<sup>3</sup> He acknowledged that the "Agreement" (Petitioners' Exhibit 20) does not place any limit on the number of services Derech Chaim can hold each day. He further acknowledged that the only way they intended to comply with the 8 a.m. to 8:45 a.m. "blackout"

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<sup>3</sup> This seems improvident given that even if the petitioned relief was granted it would still presumably take at least 18 months for the proposed synagogue to be ready for occupancy.



provision was by scheduling the preceding service to begin at 7. Mr. Loeb testified that Derech Chaim has not decided whether or not they are going to sign the proposed 18 month lease with Ner Tamid. In response to further questioning from Mr. McCann he testified that they are looking for other “temporary emergency options” for their shul but that the Pimlico Road site is the only long term plan they have. Mr. Loeb testified that Derech Chaim members are currently able to lease the Ner Tamid social hall for their life cycle events at a reduced rent, but that they don’t often do so because that hall is too large.

### DECISION

This is both a very hard case and a very easy one. It is hard because it is clear that the Derech Chaim Congregation are deeply devout and committed to their religious beliefs, tenets, and traditions; so their requested zoning relief is not lightly denied. Yet it is clear from the record evidence that it must be denied, because the proposed plan simply does not come close to meeting the requirements of the Baltimore County Code and Zoning Regulations. The legal decision is therefore an easy one. This will be shown by addressing the alternative requests for relief in order. The request for RTA exception under BCZR § 1B01.1.B.1.g (6)

Synagogues and other buildings for religious use are permitted by right in all of the DR zones, provided that they meet the RTA, setback, and parking regulations. The stated legislative purpose of the RTA regulations is to provide for “adequate buffers and screening” between residential properties and dissimilar residential buildings or other dissimilar uses, including religious buildings. The need for these salutary regulations is made clear by cases such as this one. Were it not for these regulations county residents would be forced to live cheek by jowl with much more intense uses, which would significantly impact both their quality of life and their property values. The validity and importance of zoning regulations such as these was recognized by the

Supreme Court almost a century ago in *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

The g(6) exception provides a safety valve allowing for some reasonable deviation from the RTA regulations for “a new church or other building for religious use.” But only if:

“the proposed improvements are planned in such a way that compliance, to the extent possible with RTA use requirements, will be maintained and that said plan can otherwise be expected to be compatible with the character and general welfare of the surrounding residential premises”

The proposed improvements in this case do not come close to meeting these standards. Mr. Richardson, the engineer who prepared the plan, candidly testified that if the RTA requirements were applied to this site the remaining buildable area would be a mere “donut hole” in the middle of the combined lots. Petitioners’ own Exhibit 3 depicts this graphically. The reason for this is simple. Petitioners are trying to build way too large a building for this .75 acre lot in the middle of a residential block. As the site plan shows, this proposed 14,400 sq. ft. shul would replace two existing residences; one of which is 1,457 sq. ft. and the other is 1,832 sq. ft. Further, even using every available square foot of space the plan provides only 24 parking spaces when 56 are required – for the sanctuary alone- and this does not even account for the 2500 sq. ft. social hall.

The Blumenthals are understandably chagrined by this proposal, having lived quietly next door for the last 34 years. Their testimony, and that of the other neighbors cannot be ignored, and their established neighborhood should not be fundamentally altered for the sole benefit of the Derech Chaim Congregation. These neighbors are no doubt correct that the Derech Chaim shul would profoundly impact both their daily quality of life and their property values. The vehicular and pedestrian traffic, and the noise and trash generated by a congregation of several hundred people are substantial impacts. Further, the expert testimony of Mr. Jakubiak was unequivocal. He was the only planning expert to testify, and his knowledge of the county code and zoning

regulations was superior to that of Petitioners' engineer, as would be expected based on the different focus of their professions. Mr. Jakubiak explained in great detail why this proposed plan fails to meet the compatibility and general welfare requirements of BCZR § 1B01.1.B.1.g (6). His testimony was thoroughly recounted above and will not be repeated here.

The alternative request for a modification of the RTA under BCZR § 1B.01.1.B.1.c (2)

This sub-section of the RTA regulations provides that

c. Variance of RTA.

(1) Notwithstanding the provisions of Section 307, the hearing officer, upon the recommendation of the Departments of Public Works, Planning, Environmental Protection and Sustainability, Permits, Approvals and Inspections, Recreation and Parks, or Economic and Workforce Development, may determine the amount of RTA in cases where a single tract is more than two acres, is vacant, or contains no more than one single-family detached, semidetached or duplex dwelling.

(2) The RTA for a tract may be modified as directed by findings pursuant to § 32-4-402 and the hearing officer's hearing under Article 32, Title 4, Subtitle 2 of the Baltimore County Code. However, the hearing officer may not reduce the amount of RTA unless the officer specifically finds and determines that such a reduction will not adversely impact the residential community or development on the land adjacent to the property to be developed.

Baltimore County Code Section 32-4-402 provides, in turn, as follows:

§ 32-4-402. - COMPATIBILITY.

(d) Compatibility objectives. Subject to subsection (c) of this section, development of property shall be designed to achieve the following compatibility objectives in accordance with the guidelines in the comprehensive manual of development policies:

(1) The arrangement and orientation of the proposed buildings and site improvements are patterned in a similar manner to those in the neighborhood;

(2) The building and parking lot layouts reinforce existing building and streetscape patterns and assure that the placement of buildings and parking lots have no adverse impact on the neighborhood;

(3) The proposed streets are connected with the existing neighborhood road network wherever possible and the proposed sidewalks are located to support the functional patterns of the neighborhood;

(4) The open spaces of the proposed development reinforce the open space patterns of the neighborhood in form and siting and complement existing open space systems;

(5) Locally significant features of the site such as distinctive buildings or vistas are integrated into the site design;

(6) The proposed landscape design complements the neighborhood's landscape patterns and reinforces its functional qualities;

(7) The exterior signs, site lighting and accessory structures support a uniform architectural theme and present a harmonious visual relationship with the surrounding neighborhood; and

(8) The scale, proportions, massing, and detailing of the proposed buildings are in proportion to those existing in the neighborhood.

Again, the record evidence and the site plan provide no basis for a finding that the proposed RTA modifications “will not adversely impact the residential community or development on the land adjacent to the property to be developed.” The site plan proposes a nearly complete waiver of the RTA provisions, which would have a profoundly adverse impact on the adjacent properties. Further a cursory review of the compatibility factors in BCC Sec. 32-4-402 reinforce the

incompatibility of the proposed site plan. At a minimum, the plan conflicts with sub-sections (1), (2), (6) and (8) above.

There is some disagreement between the parties about the proper boundaries of the “neighborhood” in this case. Petitioners’ Exhibit 5 delineates what they believe is the neighborhood. Their boundaries encompass a slightly larger area than the Protestants’, whose proposed boundaries are delineated in Protestants’ Exhibit 5. I find that the Protestants’ delineation more accurately complies with BCC Sec. 32-4-402(a) because Smith Avenue and Pimlico Road are “primary collector streets” (Smith Avenue may actually be an arterial street), and Protestants’ other two boundaries are Western Run Park, a “major natural feature” to the south; and, to the east the boundary is a greenway between the Ranchleigh and Dixon Hill developments. However, even if Petitioners’ neighborhood boundaries were used it would not change the compatibility analysis. While this proposed shul may well be compatible *somewhere* in the neighborhood – such as on a much larger lot- it is *not* compatible in this proposed location.

#### The proposed Variance relief

In the event their Special Hearing relief is denied, Petitioners request alternative relief in the form of four separate variances: (a) an RTA buffer of zero (0) feet in lieu of the required 50 feet; (b) a 10 foot RTA setback for the parking lot in lieu of the required 75 feet; (c) a 13 foot RTA setback for the storm water management area in lieu of the required 75 feet; and, (d) a 20 foot RTA setback for the synagogue with a height in excess of 35 feet in lieu of the required 100 feet.

The general rule is that “the authority to grant a variance should be exercised sparingly and only under exceptional circumstances.” *Mueller v. People’s Counsel for Baltimore County*, 177 Md. App. 43, 71(2007). This is because “a variance is an authorization for that which is prohibited by a zoning ordinance.” *Cromwell v. Ward*, 102 Md. App. 691, 699 (1995). And because “citizens

[of a given county or municipality] are entitled to strict enforcement of the existing zoning regulations.” *Salisbury Bd. Of Zoning Appeals v. Bounds*, 240 Md. 547, 555-56 (1965). Therefore, “[t]he burden is on the applicant to show facts to warrant a variance,” and “the specific need for the variance must be substantial and urgent and not merely for the convenience of the applicant.” *Mueller v. People’s Counsel for Baltimore County*, 177 Md. App. at 70.

Under BCZR Sec. 307, and Maryland common law, in order to be entitled to variance relief the Petitioners must satisfy a two-step legal analysis, summarized as follows:

- (1) It must be shown the property is unique in a manner which makes it unlike surrounding properties, and that uniqueness or peculiarity is what necessitates the requested variance relief; and
- (2) If variance relief is denied, Petitioner will experience a practical difficulty or hardship.

*Cromwell v. Ward, supra*. Finally, “unless there is a finding that the property is unique, unusual, or different, the process stops here and the variance is denied without any consideration of practical difficulty or unreasonable hardship.” *Mueller, supra*, 177 Md. App. at 70.

There is nothing unique about the two parcels in this case. To the contrary they are part of a plat of virtually identical suburban lots that make up the Ranchleigh subdivision. They are rectangular lots with no remarkable topography. It is not the lots that trigger the requested variance relief; it is the large shul, surface parking lot and stormwater systems that require the variances. Therefore, the analysis stops here. And even if the next prong were considered, the facts here are that the variance request is “merely for the convenience of the applicant.” *Mueller, supra*, 177 Md. App. at 70. While I certainly understand that Derech Chaim would like to construct this 14,400 sq. ft. shul at this location, the law does not allow me to grant these requested variances. To the contrary, the neighboring property owners are entitled to “strict enforcement of the existing zoning regulations.” *Salisbury Bd. Of Zoning Appeals v. Bounds*, 240 Md. 547, 555-56 (1965).

Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. § 2000cc.

RLUIPA looms like the “elephant in the room” over every zoning or development case involving a religious institution. Yet it is also often the case that the statute is scarcely mentioned during the zoning or development hearing. That was the case here. In fact, the only reference to this federal law was when Petitioners’ counsel asked Mr. Jakubiak whether he had factored into his analysis the case of *Jesus Christ is the Answer Ministries, Inc. v. Baltimore County, Md.*, 915 F.3d 256 (4<sup>th</sup> Cir. 2019). Mr. Jakubiak stated that he was unaware of this case, and that he had not relied on any specific case law to inform his opinions in this case.

A thorough RLUIPA analysis is beyond the scope of this Opinion and Order. However, in my view a couple things are clear. First, the facts of this case are readily distinguishable from those in the *Jesus Christ is the Answer* case. In both cases, religious buildings were permitted “by right,” provided the site plan met setbacks and other requirements. And both cases involve the same RTA provisions of the BCZR. But in that case the petitioner’s second site plan *met* virtually all the RTA setbacks, and in that case the petitioner was merely converting the existing residence into a small church – not razing two residences and constructing a 14,400 sq. ft. shul, with surface parking lot and storm water management facilities, and virtually no RTA compliance. Therefore, the Fourth Circuit held that the petitioner had a “reasonable expectation” that the site plan would be approved, and that the County’s denial of the petition had “substantially burdened” the church’s practice of religion in violation of RLUIPA. *Id.*, 915 F.3d at 260-262.

The instant case is controlled by *Andon, LLC v. City of Newport News*, 813 F.3d 510 (4<sup>th</sup> Cir. 2016). There, as here, the church had entered into a contingent lease knowing that it would need substantial variances from the applicable setback regulations. The Fourth Circuit held in that case that the church did *not* have a *reasonable* expectation that the variances would be granted,

and therefore the substantial burden was self-imposed. *Id.*, 813 F.3d at 515. Recently, in *Canaan Christian Church v. Montgomery County*, 2020 WL 5849479, Sept. 30, 2020, the District Court of Maryland (Chung, J.), rejected a similar “substantial burden” claim on the grounds that the petitioner did not have a reasonable expectation that they would be granted the water and sewer changes needed to build their church. The court quoted *Andon* extensively in reaching its decision, stating:

RLUIPA was not intended “to undermine the legitimate role of local governments in enacting and implementing land use regulation,” nor is it an “automatic exemption to religious organizations from generally applicable land use regulations.” *Andon*, 813F.3d at 516. To find otherwise here would “usurp the role of local government in zoning matters ... and impermissibly would favor religious uses over secular uses,” *Id.*

*Canaan Christian Church* at \*17.

The *Andon* court also refused to premise a RLUIPA claim on the church’s alleged lack of viable alternative sites, explaining that:



exercise”).

Indeed, the Supreme Court recently emphasized this unremarkable proposition, explaining that “the reasonable expectations of an acquirer of land must acknowledge legitimate restrictions affecting his or her subsequent use and dispensation of the property.” *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 (2017).

Finally, in a thorough and reasoned opinion the Baltimore County Board of Appeals reached this same conclusion in combined cases, No. 15-239-SPH and 15-276-SPH, *Congregation Ariel Russian Community Synagogue*; namely, that the synagogue did not have a *reasonable* expectation that they would be granted relief from the RTA and other applicable regulations. *See*, Opinion and Order at pps. 94-119. In my view the instant case, like the *Congregation Ariel* case, is controlled by *Andon* and its progeny, not by the holding in *Jesus Christ is the Answer*. There are many sites in Baltimore County where the proposed 14,400 sq. ft. shul and social hall could be built in harmony with the BCZR, or at least where it would comply “to the extent possible” with the RTA while also remaining “compatible with the character and general welfare of the surrounding residential premises.” But this location is simply not such a place.

THEREFORE, IT IS ORDERED this 2<sup>nd</sup> day of **March, 2021** by this Administrative Law Judge, that the Petition for Special Hearing seeking relief to approve a site plan for a new building of religious worship (synagogue) in accordance with the requirements of the Baltimore County Zoning Regulations (“BCZR”) § 1B01.1.B.1.g (6) including a finding that the restrictions contained in (a) through (e) do not apply to the proposed project, specifically in this instance. In the alternative to Special Hearing request No. 1, a modification of the Residential Transition Area (“RTA”) under BCZR § 1B.01.1.B.1.c (2), to approve, as shown on the plan to accompany petition

for zoning hearing. A new building of religious worship (synagogue) with the proposed parking lot, storm water management areas, and building within the 50-foot RTA buffer required by BCZR § 1B.01.1.B.1.e (3). The proposed parking lot and storm water management areas within the 75-foot RTA setback required by BCZR § 1B.01.1.B.1.e (5). The proposed synagogue building with a height in excess of 35 feet within the 100-foot RTA setback required by BCZR § 1B.01.1.B.1.e (5). A modified parking plan under BCZR § 409.12.B containing 24 parking spaces as shown on the plan to accompany petition for zoning hearing to serve the proposed use on the property which would otherwise require 56 parking spaces. Such further and other relief as the nature of this case may require and is hereby DENIED.

IT IS FURTHER ORDERED that the Petition for Variance seeking relief From BCZR § 1B01.1.B.1.e.3. to permit an RTA buffer of zero (0) feet in lieu of the 50 feet required; from BCZR § 1B01.1.B.1.e.5 to permit an RTA setback of 10 feet for the proposed parking lot in lieu of 75 feet otherwise required; from BCZR § 1B01.1.B.1.e.5 to permit RTA setback of 13 feet for the proposed storm water management areas in lieu of 75 feet otherwise required; and from BCZR § 1B01.1.B.1.e.5 to permit an RTA setback of 20 feet for the proposed synagogue building with a height in excess of 35 feet in lieu of 100 feet otherwise required; and in the alternative to Special Hearing request No 3, a Variance from BCZR § 409.6 to permit 24 parking spaces in lieu of 56 required is hereby DENIED.

Any appeal of this decision must be made within thirty (30) days of the date of this Order.

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Signed  
PAUL M. MAYHEW  
Managing Administrative Law Judge  
for Baltimore County

PMM/dlm