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August 2, 2020

Mr. Casey Anderson
Chair, Montgomery County Planning Board

Ms. Natali Fani-Gonzalez
Vice Chair, Montgomery County Planning Board

Mr. Gerald R. Cichy
Commissioner, Montgomery County Planning Board

Ms. Tina Patterson
Commissioner, Montgomery County Planning Board

Mr. Partap Verma
Commissioner, Montgomery County Planning Board

Gwen Wright
Planning Director of Montgomery County Planning

Via Email MCP-Chair@mncppc-mc.org and individual email addresses

Re: Request for Reconsideration of Resolution

Dear Mr. Anderson and Members of the Planning Board,

We represent the Macedonia Baptist Church located at 5119 River Road in Bethesda, Maryland ("Macedonia" or the "Church"). As you know, we testified at the Montgomery County Planning Board meeting on July 23, 2020 ("the Planning Board meeting") regarding the proposed revisions to the permit for Bethesda Self Storage Partners LLC to construct a self-storage unit.

In our testimony, we requested an immediate halt to construction at the site and also requested, before activity at the site could continue, that the Planning Board (1) require Bethesda Self-Storage Partners to notify the Historic Preservation Section of possible human remains at the site, (2) require that a copy of any reports, tests, or other documents related to the bones recently discovered on the site be provided to Doctor Michael L. Blakey and our client, (3) require that the bones discovered at the site be made available to Dr. Blakey for independent testing to determine whether the bones are human remains, (4) keep the record open for additional written testimony or other evidence to be submitted by Dr. Blakey after he has conducted any necessary tests and investigation of the bones and any other materials found at the site that Dr. Blakey determines to be relevant, as permitted by Section 4.1 of the Rules of Procedure, The Montgomery County Planning Board, and (5) require Bethesda Self-Storage Partners to work with Dr. Blakey or another independent archaeologist selected by the Macedonia Baptist Church to determine the precise boundaries of the River Road Moses Cemetery.

At the Planning Board meeting, the Planning Board voted 4-1 in favor of a Resolution approving the request to amend the permit, with a new condition (described below). Pursuant to Rule 4.12.1 of The Montgomery County Planning Board's Rules of Procedure, we are petitioning you to reconsider the Resolution adopted at the Planning Board meeting.

We are petitioning for reconsideration for the following reasons:

- The Planning Board's actions at the Planning Board meeting were arbitrary and capricious, and
- The developer has not complied with the additional condition added to the permit as part of the Resolution.

The Planning Board's Actions at the Planning Board Meeting Were Arbitrary and Capricious

The Planning Board's actions at the Planning Board meeting were arbitrary and capricious for several reasons, including (1) several of our requests were never even considered by the Planning Board, including (a) our request for an immediate halt to the construction, (b) our request that Bethesda Self Storage Partners be required to notify the Historic Preservation Section that possible human remains had been found at the site, and (c) our request to keep the record open to allow Dr. Blakey to submit additional testimony or other evidence, (2) all of the testimony provided by us, our client, and members of the community regarding pre-20th century burials at the site was completely disregarded by Director Wright and Timothy Dugan, who represented the developer at the Planning Board meeting, as well as several members of the Planning Board (this is a charitable interpretation of the events, as both Commissioners Fani-Gonzalez and Verma mocked community members and called their testimony about the cemetery's history "confused"), (3) Director Wright unveiled--for the first time during the course of the Planning Board meeting--a new condition to the permit that neither we nor our client nor members of the community had an opportunity to review and provide comments on, and (4) the Planning Board negotiated the scope of the new condition directly with the developer and without the input of our client or members of the community.

It is important to note that all of the actions described above occurred after we, our client, and members of the public were disconnected from the telephone conference portion of the Planning Board meeting, and that we had absolutely no opportunity to participate in any of the activities above. Instead, we were limited to watching a livestream video of some members of the Planning Board, Director Wright, and Mr. Dugan disparage the testimony of our client and the community and agree to allow the construction to proceed without any meaningful changes. Had we and our client been able to participate, we could have corrected erroneous and incomplete factual statements made by Director Wright, Mr. Dugan, and certain members of the Planning Board, asked Mr. Dugan questions about some of the alleged factual assertions he made during the Planning Board meeting, and, most importantly, provided feedback from key stakeholders on the new condition placed on the developer. However, we were denied an opportunity to do all of these things.

We ask at this time that as part of the request pursuant to Rule 4.12.1 of The Montgomery County Planning Board's Rules of Procedure, the Planning Board address the above options and provide an opportunity to address the items discussed without the input of our client or the community.

The Developer Has Not Complied With the Additional Condition Added to the Permit As Part of the Resolution

At the Planning Board meeting, Director Wright proposed an additional condition to be added to the permit. After discussion by the Planning Board, the language of the condition was revised. Although the Resolution has not been made publicly available, the video of the Planning Board meeting indicates that the new condition states as follows:

The Applicant must provide to an archaeologist chosen by the Bethesda African Cemetery Coalition, for review and comment all archaeological reports and documentation prepared pursuant to the October 9, 2019 Phased Final Forest Conservation Plan approval memo, as well as reasonable access to physical artifacts discovered on the Subject Property which are determined to be significant in the best professional judgment of the archaeologists engaged by the Applicant pursuant to this approval. Delivery of the reports and documentation and provision of access fulfills the requirement of this condition.

As an initial matter, we request that this condition be revised to (1) provide Dr. Blakey and his agents full access to the construction site at any time, and (2) the significance of physical artifacts should be determined in consultation with Dr. Blakey and the archeologists engaged by the Applicant. As detailed below, we have significant concerns regarding the quality and capabilities of the Applicant and its agents.

On July 29, 2020, we wrote to Emily Vaias of Ballard Spahr, whom we understand represents Bethesda Self Storage Partners in addition to Mr. Dugan, to follow up on the statements that Mr. Dugan made during the Planning Board meeting. In that letter, we (1) accepted Mr. Dugan's invitation to allow Dr. Blakey to examine the bones and any other items found at the site in a time and manner mutually agreeable to Ms. Vaias and Dr. Blakey, (2) requested an itemized list identifying all the remains and other items found at the site and their current location, (3) requested an immediate copy of all the archaeological reports prepared to date, along with a copy of future archaeological reports immediately upon receipt, and (4) access to the parcels at issue for purposes of having searches, analyses, and testing conducted to determine whether human remains and associated funerary objects are present on the parcel.

In a July 30, 2020 response to our letter from Ballard Spahr, Ms. Vaias and Constantinos Panagopoulos stated, "No human bone fragments or funerary objects have been found." That statement is inconsistent with photographs taken by members of the Bethesda African Cemetery Coalition and an analysis of those photographs by Dr. Blakey. Photographs show that, on July 28, 2020, the workers at the site unearthed a white, rectangular stone. Based on his review of the photographs, Dr. Blakey has determined that the shape and material of this

stone are consistent with a grave marker. Photographs show additional objects and soil changes which Dr. Blakey cannot make a determination about based on photographs alone. As we have previously requested, Dr. Blakey needs access to the site itself in order to conduct a thorough examination, especially before the Applicant and its agents remove such artifacts.

After finding the white, rectangular stone whose shape and material are consistent with a grave marker, Bethesda Self Storage and its agents did not stop construction. Nor did Bethesda Self Storage notify us, our client, or Dr. Blakey of the discovery. To our knowledge, Bethesda Self Storage also did not notify the Maryland Historic Trust, the State Attorney General, or any other local or state authorities of their discovery. Apparently, Bethesda Self Storage Partners also failed to inform Ballard Spahr of their discovery. Bethesda Self Storage's actions with respect to the possible grave marker violate the terms of the additional condition contained in the Resolution. As such, Bethesda Self Storage's permit should be revoked and work should cease immediately. In addition, Bethesda Self Storage may have violated state law by its actions.

We have additional photographs of bones and potential funerary objects that should be analyzed to determine if the remains are human and the significance of the objects. Once again, Bethesda Self Storage and its agents did not halt construction.

Based on Bethesda Self Storage's repeated disrespect for our client and the descendant community, as well as their blithe refusal to comply with the conditions placed on their permit by the Planning Board, we fear that this item may have been destroyed. It has certainly been divorced from its provenance and separated from the surrounding soil and objects, which significantly impedes Dr. Blakey's ability to fully analyze the item. This damage cannot be undone.

* * *

Thank you for your consideration of our request to reconsider the Resolution. Given the abhorrent behavior that Bethesda Self Storage Partners has engaged in since the Planning Board meeting, we look forward to a prompt and favorable response to this letter, reflecting the above-requested revisions to the conditions placed on the Applicant and its agents.

Bethesda Self Storage Partners LLC, 1784 Capital Holdings LLC, and their counsel are copied on this letter, as is County Executive Marc Elrich.



Best regards,

A handwritten signature in black ink, appearing to read "Joshua D. Odintz".

Joshua D. Odintz
Partner, Baker & McKenzie
Attorney, Macedonia Baptist Church

cc: County Executive Marc Elrich
Kelly McKone (Bethesda Self Storage Partners LLC and 1784 Capital Holdings LLC)
Timothy Dugan, Esq.
Emily Vaia, Esq.
Steven Lieberman, Esq.
Jennifer Semko, Esq.
Alexandra Minkovich, Esq.
Angela Vigil, Esq.

Attachment



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August 28, 2020

Mr. Casey Anderson
Chair, Montgomery County Planning Board

Ms. Natali Fani-Gonzalez
Vice Chair, Montgomery County Planning Board

Mr. Gerald R. Cichy
Commissioner, Montgomery County Planning Board

Ms. Tina Patterson
Commissioner, Montgomery County Planning Board

Mr. Partap Verma
Commissioner, Montgomery County Planning Board

Gwen Wright
Planning Director of Montgomery County Planning

Via Email MCP-Chair@mncppc-mc.org and individual email addresses

Re: Request for Reconsideration of Resolution

Dear Mr. Anderson and Members of the Planning Board,

We represent the Macedonia Baptist Church located at 5119 River Road in Bethesda, Maryland ("Macedonia" or the "Church"). As you know, we testified at the Montgomery County Planning Board meeting on July 23, 2020 ("the Planning Board meeting") regarding the proposed revisions to the permit for Bethesda Self Storage Partners LLC to construct a self-storage unit.

At the Planning Board meeting, the Planning Board voted 4-1 in favor of a Resolution approving the request to amend the permit, with a new condition (described below). That Resolution is dated August 18, 2020. Pursuant to Rule 4.12.1 of The Montgomery County Planning Board's Rules of Procedure, we are petitioning you to reconsider the Resolution dated August 18, 2020.

On August 2, 2020, we wrote to you with a detailed explanation of why we were petitioning for reconsideration of the Resolution. As noted in that letter, we are petitioning for reconsideration for the following reasons:

- The Planning Board's actions at the Planning Board meeting were arbitrary and capricious, and

- The developer has not complied with the additional condition added to the permit as part of the Resolution.

This letter should be treated as including all of the statements from our August 2, 2020 letter, a copy of which is attached.

As stated in our August 2, 2020 letter to you, the Planning Board's actions at the Planning Board meeting were arbitrary and capricious for several reasons.

We reiterate our request that the record from the Planning Board meeting remain open to provide Dr. Blakey with an opportunity to submit additional information about the site and any artifacts or remains that are found on the site.

In our August 2, 2020 letter, we requested that this condition adopted by the Resolution be revised to (1) provide Dr. Blakey and his agents full access to the construction site at any time, and (2) the significance of physical artifacts should be determined in consultation with Dr. Blakey and the archeologists engaged by the Applicant. We reiterate those requests here. Our interactions with the Applicant and its agents since our August 2, 2020 letter have exacerbated our already significant concerns regarding the quality and capabilities of the Applicant and its agents.

Since our August 2, 2020 letter, the Applicant and its agents have refused to provide Dr. Blakey with an acceptable level of access to the site. Moreover, Dr. Blakey has not been provided the opportunity to examine any of the artifacts discovered at the site. On more than one occasion, Dr. Blakey has expressed concern that, based on photographs, funerary objects may have been uncovered at the site. These concerns have been summarily dismissed by the Applicant's agents and the objects in question have not been discussed in the reports prepared by the Applicant's agents. These actions by the Applicant and its agents are inconsistent with the spirit of the condition added by the Resolution and do not engender good faith with the descendant community. Rather, these actions come across as disrespectful of the descendant community and the conditions placed upon the Applicant by the Planning Board, as well as designed to further inflame tensions with the descendant community and prevent the descendant community, the Planning Board, and other parties to determine whether there are human remains or funerary objects located on the site.

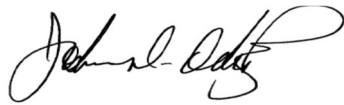
As we have previously requested, Dr. Blakey needs access to the site itself in order to conduct a thorough examination, especially before the Applicant and its agents remove such artifacts.

Based on Bethesda Self Storage's repeated disrespect for our client and the descendant community, as well as their blithe refusal to comply with the conditions placed on their permit by the Planning Board, we believe that the Planning Board should (1) keep the record from the Planning Board meeting open to permit Dr. Blakey to submit additional evidence and (2) reconsider the Resolution dated August 18, 2020. As part of that reconsideration, the Planning Board should revise the condition to explicitly permit Dr. Blakey access to the site, as well as to all remains and objects discovered thereon, so Dr. Blakey can make an independent determination as to whether human remains or funerary objects have been discovered.

* * *

Thank you for your consideration of our request to reconsider the Resolution. Given the abhorrent behavior that Bethesda Self Storage Partners has engaged in since the Planning Board meeting, we look forward to a prompt and favorable response to this letter, reflecting the above-requested revisions to the conditions placed on the Applicant and its agents.

Best regards,

A handwritten signature in black ink, appearing to read "Joshua D. Odintz". The signature is fluid and cursive, with a large loop at the end.

Joshua D. Odintz
Partner, Baker & McKenzie
Attorney, Macedonia Baptist Church

Attachment





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September 16, 2020

Via Email

Matthew T. Mills, Esq.
Senior Counsel
The Maryland-National Capital Park and Planning Commission
Office of the General Counsel
Wheaton Headquarters
2425 Reedie Drive – 14th Floor
Wheaton, Maryland 20902

Re: Request for Reconsideration of Resolution
Montgomery County Planning Board
Thursday, September 17, 2020
Westbard Self Storage Site Plan No. 82017011A MCPB No. 20-062 (07/23/2020)

Dear Mr. Mills,

I represent the Macedonia Baptist Church located at 5119 River Road in Bethesda, Maryland (the "Church"), along with Mr. Joshua Odintz, who has previously explained by letter on August 28, 2020 that the Church is petitioning for reconsideration of the Resolution and to consider any new evidence or events that have taken place.

The purpose of the supplemental exhibit and the proposed testimony is to bring to the Commission's attention the following picture of the construction site:

G. Franklin Rothwell
(1928-2011)

E. Anthony Figg
George R. Repper
Steven Lieberman
Joseph A. Hynds
Martin M. Zoltick
R. Danny Huntington
Joo Mee Kim
Brian S. Rosenbloom
Richard Wydeven
Sharon L. Davis
Jeffrey L. Ihnen
Sharon E. Crane, Ph.D.
Steven P. Weihrouch
Robert P. Parker
Jenny L. Colgate
Leo M. Loughlin
Michael V. Battaglia
Seth E. Cockrum, Ph.D.
Jennifer P. Nock
Michael H. Jones

*Not a member of the D.C.
Bar. Practice limited to patent,
trademark and copyright
matters and cases in federal
courts.

Rachel M. Echols
Daniel R. McCallum
Daniel L. Shores
Brett A. Postal
Aydin H. Harston, Ph.D.
Christopher A. Ott
Monica Chin Kitts
Jennifer B. Maisel
Mark T. Rawls
Spencer J. Johnson
Eric D. Blatt
Nicole M. DeAbrantes
Davide F. Schiavetti*
Caitlin M. Wilmot
D. Lawson Allen
Anjali Jenna Teigen
Richard E. Waterman, Jr.*
Patrick Moon
Emily N. Sandhaus
Alvin Lee
Grant B. Lukas

Of Counsel
Harry F. Manbeck, Jr.

Matthew T. Mills, Esq.
September 16, 2020
Page 2



Matthew T. Mills, Esq.
September 16, 2020
Page 3

Here is a larger-size copy. Please focus on the object in the red circle. (I have superimposed the circle and arrow.)



The photograph was taken by a representative of the Bethesda African Cemetery Coalition (the "Coalition") on August 24, 2020. The photograph reflects construction taking place on Parcels 191 and 242, and shows the lead archaeologist for the self-storage company in the front and center of the picture. Behind him is what appears to be a tombstone. Where is the tombstone today? And why have the developers continued to haul away truckload after truckload of dirt and debris to a landfill since August 24, 2020?

This photograph is plainly relevant to the reconsideration request. It shows what appears to be a tombstone that has been uncovered on the property. Does the Applicant have the object? Has the Applicant's archaeologist examined the object? If the answers to either of these two questions is no, then we submit that the Applicant is in violation of the permit conditions.

Ignoring this evidence would be arbitrary and capricious and a violation of the law. It would also be wrong.



Matthew T. Mills, Esq.
September 16, 2020
Page 4

Very truly yours,

A handwritten signature in blue ink, appearing to be 'S. Lieberman', written over the text 'Very truly yours,'.

Steven Lieberman

cc: Jenny Colgate, Esq.
D. Lawson Allen, Esq.
Joshua Odintz, Esq.
Jennifer Semko, Esq.
Angela Vigil, Esq.
Alexandra Minkovich, Esq.
Marsha Coleman-Adebayo, Ph.D.
Segun Adebayo



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September 9, 2020

By Email

The Montgomery County Planning Board of
The Maryland-National Capital Park and Planning Commission
2425 Reedie Drive
Wheaton, Maryland 20902

Re: Applicant's Response to the August 2, 2020 and August 28, 2020 Macedonia
Baptist Church ("Macedonia" or the "Church")¹
Request for Reconsideration
of the Planning Board's Approval of Site Plan Amendment Application
No. 82017011A (the "Application")

To the Montgomery County Planning Board:

On behalf of Bethesda Self Storage Partners, LLC (the "Applicant"), we respectfully advise that the Church fails to provide evidence of any error of fact or law made by the Planning Board in approving the August 18, 2020 Site Plan Amendment Resolution (the "Resolution"), due to any mistake, inadvertence, surprise, fraud or other good cause, which is the standard for granting a Petition to Reconsider, pursuant to the Planning Board's Rules of Procedure, Rule 4.12.1. Accordingly, as explained more fully below, we respectfully suggest that those Planning Board members, who comprise the majority who voted in favor of the Resolution, decline to move to consider reconsideration.

Preliminarily, the Church does not allege any errors of fact or law related to the Planning Board's approval to revise the rear and front building setbacks nor the Board's approval to confirm the land area for the Parcel 1 dedication. They were the issues relevant to the Application. The Church continues to argue that: it does not want the Applicant to use its property for its legal purpose; it disagrees with the Applicant's experts and Planning Board Staff; and it wants the project stopped. The Planning Board heard and weighed the Church's arguments during its three hour hearing on July 23, 2020

¹ The Planning Board's Site Plan Amendment Resolution and other correspondence refers to the Bethesda African Cemetery Coalition. Unless advised otherwise, we are including the Bethesda African Cemetery Coalition with the Macedonia Baptist Church. Thus, the defined terms "Macedonia" and "Church" are intended to include the Bethesda African Cemetery Coalition. Where the context requires, "Church" includes the Church's attorneys.



and through written testimony. The Planning Board rendered a decision based on the substantial evidence in the Record provided by all interested parties.

This letter is organized as follows:

1. There Are No Errors of Fact Based Upon Mistake, Inadvertence, Surprise or Fraud Underlying the Planning Board's Resolution.	2
2. The Site Plan Hearing Was Conducted Lawfully.	6
3. The Church Misunderstands Condition No. 15	9
4. Conclusion. No Motion to Reconsider	9

1. **There Are No Errors of Fact Based Upon Mistake, Inadvertence, Surprise or Fraud Underlying the Planning Board's Resolution.**

The Planning Board's most recent Resolution is based on the project's three-year history which we will recount briefly here, only to show that there has been no change in facts and certainly no surprise. The Planning Board mailed its Site Plan and its Preliminary Plan Resolutions on January 12, 2018 (the "2018 Approvals"). The Board was well aware of the facts surrounding the Moses Cemetery, including the information available through the Westbard Sector Plan research, studies and deliberations and the allegations of the Church and others. The facts remain unchanged since 2017/2018, even though the Church does not agree with them.

Numerous experts have identified Parcels 175 and 177 as the location of the Moses Cemetery. The Applicant never owned Parcel 175. The Applicant deeded Parcel 177 to the Maryland-National Capital Park and Planning Commission in 2019, pursuant to the 2018 Approvals. The Planning Board now owns and can oversee the treatment of Parcel 177.

Both then and now, there have been allegations that human remains and funerary artifacts might have been located or relocated elsewhere, *i.e.*, outside of the boundaries of Parcels 175 and 177.

The Planning Board's 2018 Approvals require the Applicant not only to comply with Maryland criminal law (The Applicant is bound to comply in any case.), but also to notify the Planning Board's Historic Preservation Division if any human remains or funerary objects were found. The Planning Board's 2018 Approvals are evidence that they were and are fully aware of the above facts. Please read the following excerpts from two conditions of the 2018 Approvals:

No. 20 Parcel 177: (a) The Applicant must convey to M-NCPPC in fee simple at no cost to M-NCPPC Parcel 177. . . . (c) The Applicant



must not perform any ground disturbing work of any kind . . . on Parcel 177

No. 21: If human remains or funerary objects are encountered at any time on any properties subject to Preliminary Plan 120170280 (Parcels 242, 191, 217 and 177, on Tax Map #HM13, Bethesda, Maryland), the Historic Preservation Section of the Montgomery County Planning Department must be notified immediately

Further conditions were imposed as part of the Final Forest Conservation Plan for Sheeting and Shoring, pursuant to a letter dated October 9, 2019 entitled "Phased Final Forest Conservation Plan #120170280/820170110, Westbard Self Storage, Phase 2 of 3 (Sheeting and Shoring)," as follows:

The Applicant must hire a Professional Archeologist who is qualified to recognize human remains and funerary objects (referenced in Preliminary Plan Condition No. 21) to monitor the drilling work associated with the tiebacks in the northwest corner of the foundation which is closest to the cemetery.

- a. If human remains or funerary objects are encountered at any time on any properties subject to Preliminary Plan 120170280 (Parcels 242 , 191, 217, and 177, on Tax Map #HM13, Bethesda, Maryland), then the Historic Preservation Section of the Montgomery County Planning Department must be notified immediately.
- b. Even if no material of interest is found, the Professional Archeologist must maintain and provide reporting of their observations including photographs of the related construction activity, to the Historic Preservation Section of the Montgomery County Planning Department within two weeks of completion of the related construction activity.

The above requirement is repeated in the notes on Sheet C-01 of the Site Plan certified on January 10, 2020. The Applicant has complied with, and continues to comply with, the conditions. There are no new facts to suggest otherwise.

The Planning Board's imposition of Condition No. 15 of the August 18, 2020 Site Plan Amendment Resolution is evidence that the Planning Board considered all of the written and oral evidence provided in the course of the Site Plan Amendment Application process, including the oral and written testimony provided before and during the July 23, 2020 Site Plan Amendment Application public hearing. Condition No. 15 reads as follows:



15. The Applicant must provide to an archeologist chosen by the Bethesda African Cemetery Coalition, for review and comment, all archeological reports and documentation prepared pursuant to the October 9, 2019, Phased Final Forest Conservation Plan approval memo, as well as reasonable access to physical artifacts discovered on the Subject Property which are determined to be significant in the best professional judgement of the archeologists engaged by the Applicant pursuant to this approval. Delivery of the reports and documentation and provision of access fulfills the requirement of this condition.

Consistent with the spirit of the Maryland Public Information Act, the Board directed the Applicant (and the Applicant agreed to do so) to send to the Church copies of the Applicant's Archaeologist's reports, and to provide reasonable access, off site, to objects that the Applicant's Archaeologist has preserved from its investigations, as set forth more particularly in the above-quoted Condition No. 15. The requirement is a practical and more convenient means for the Church to obtain public record information that is otherwise available through the Maryland statute. Also, it reflects that the Church's concerns were considered.

Yet, the Church urges that the Planning Board's decision was the product of fraud, surprise, mistake, or inadvertence based upon the following information:

- (1) A photograph of an excavated rectangular stone; and
- (2) Reports of Dr. Michael Blakey's speculation that the excavated rectangular stone might be a funerary object.

The Church's allegations fall far short of establishing that the Planning Board failed to anticipate the fact that excavation for the new building would unearth earth, rocks, and other materials, and that it might even expose human remains or funerary artifacts.

Premised on a photograph and Dr. Blakey's speculation, the Church continues and urges that the Applicant's Archaeologist is not up to the task, as follows:

(1) arising from mistake or inadvertence, or even incompetence, the Applicant's Archaeologist does not have the expertise or competence to analyze the excavations, and may have already misidentified the rectangular stone or will misidentify other objects, despite the Applicant's Archaeologist being a respected professional who has worked on significant projects including Alexandria's Contrabands & Freedmen Cemetery Memorial; and

(2) arising from fraud, whether civil or criminal, the Applicant's Archaeologist: (a) is unburdened by any personal or professional integrity; (b) is violating Maryland's criminal statute; and (c) is disregarding the Planning Board Resolutions' conditions of approval.



There is no evidence of misfeasance or malfeasance by the Applicant's Archaeologist. To the contrary, the Applicant's Archaeologist is a well-respected professional. In reality, the above-referenced rectangular stone is not a headstone. The Applicant's Archaeologist physically inspected the stone. He did not simply view a photograph. In the Week 9 Report (July 27-July 31, 2020), it is reported that the rectangular stone is only one of approx. 30-40 curb stones of varying sizes excavated at the time, and that there are no markings or inscriptions. Such Week 9 report includes photographs of some of the numerous stones.

The consideration by the Maryland Historical Trust bolsters the fact that the Planning Board considered the facts, because the Maryland Historical Trust relies upon the same facts. As recently as August 6, 2020, after first being contacted by the Church, the Maryland Historical Trust concluded that the Applicant is not required to consult with the Director of the Maryland Historical Trust. Their letter (Attached) concludes as follows:

The documentation and information provided with your August 2 letter appears to establish that parcels 242, 217 and 191, and the BSSP's [Bethesda Self Storage Partners] development thereon, are disassociated with the historic River Road Moses Cemetery inasmuch as the Cemetery is documented as having been located on parcels 175 and 177. As such, and based upon the best available information, BSSP is not the owner of a burial site with respect to parcels 242, 217 and 191 concerning which it is required to consult with the Director of the Maryland Historical Trust pursuant to Md. Code Ann., Real Prop. § 14-121.1.

As of the date of this letter, the Applicant's Archaeologist has issued twelve (12) reports, spanning April 27, 2020 to August 21, 2020, all of which have been provided to the County, M-NCPPC and the Church. No human remains or funerary objects have been discovered.

The County's inspectors and the State's Attorney's investigators have been to the site and are comfortable with the Archaeologist's operations and the care underway to assure that no funerary objects or human remains are overlooked.

The Planning Board based its decisions on substantial evidence. Such facts were not, and are *not*, the product of fraud, surprise, mistake, or inadvertence. The Church fails to establish grounds for reconsideration. The facts underlying the Planning Board's Resolutions are not the product of fraud, mistake, inadvertence, surprise, or any other good cause. The Planning Board's Resolution is, as it must be, based on substantial evidence. And it is. (*Please see, Md. Board of Public Works v. Hovnanian's Four Seasons at Kent Island*, 425 Md. 482, 42 A.3d 40 (2012), footnote 15.)



2. **The Site Plan Hearing Was Conducted Lawfully.**

The Church fails to explain how the Planning Board conducted the July 23, 2020 public hearing so as to engender errors of law, including arbitrary and capricious actions and decisions.

The Church implies that it is an error of law, requiring Planning Board reconsideration, because the Planning Board did not verbally identify and discuss every one of the Church's demands. The Church's demands were, and are, as follows:

- 1) The Applicant halt construction immediately;
- 2) The Applicant notify the MNCPPC Historic Preservation Section that the Applicant has found possible human remains; and
- 3) The Planning Board leave the Record open so that Dr. Michael Blakey may submit additional testimony or other evidence. (The Church urges that the record should be left open to receive the fruits of Dr. Blakey's research following his being provided full access and control over the Subject Property for an archaeological dig.)

The Church also urges that it is an error of law, requiring Planning Board reconsideration, because of the following actions or inactions:

1. The Planning Board "completely disregarded" the testimony about pre-20th century burials.
2. The Planning Board considered the Planning Staff's additional condition of approval, Condition No. 15, without vetting the language with the Church.
3. The Planning Board discussed (although the Church alleges that the Planning Board "negotiated") the language of Condition No. 15 with the Applicant's Attorney.

The Planning Board's proceedings were not unusual, even accounting for the format of a virtual setting. As evidence, we cite the thousands of cases over which the Planning Board has presided for many years. Interested parties are allowed to testify. After hearing the public testimony, Staff presentations, and Applicant presentations, the Planning Board conducts its deliberations. The Planning Board might ask questions of the Planning Staff, the Applicant or any other party, at the members' discretion.

The Planning Board's Rules of Procedure address the conduct of its proceedings, under Chapter IV, "Rules of Procedure for Public Hearings." Section 4.2, Presiding Officer, provides in part that "The Chairman is the presiding officer at any hearing held by the Planning Board and has broad discretion to conduct hearings in any manner that permits the development of a complete administrative record and provides a reasonable



opportunity for interested Persons to be heard." Following the Staff presentations, the Applicant's presentation, and public testimony, the Chairman has the statutory authority to call or not call anyone to respond to the matters under consideration. The same applies to all of the Planning Board members. Section 4.7.5, "Board Questions," provides in part that "Board members may ask questions at any time during a public hearing." Thus, the Planning Board members may ask questions of anyone at any time. To whom the Planning Board may direct questions is the Planning Board member's prerogative. The objective is "the development of a complete administrative record and provides a reasonable opportunity for interested Persons to be heard." Rules of Procedure, Section 4.2.

No Rules of Procedure provision exists that requires the Planning Board to verbally identify and discuss every one of the Church's demands, nor those of every other person who submitted written and/or oral testimony. Apart from the Rules of Procedure, Maryland statutes and caselaw do not require that the Planning Board discuss and include every demand in its Resolutions.

Nonetheless, it is unreasonable to conclude that the Planning Board harbored any uncertainty about, much less ignored, the Church's position. Over the course of a nearly three hour hearing, during which about thirty (30) witnesses testified, many of whom reinforced the Church's position, it would be unreasonable to conclude that the Planning Board misunderstood the Church's position. Moreover, the Church's attorney himself clearly explained it.

Near the very beginning of the approximately three hour hearing, the Church's attorney, Joshua Odintz, testified immediately after the first speaker, Ms. Debbie Spielberg. Ms. Spielberg testified as the representative of the Hon. Marc Elrich, County Executive of Montgomery County. In his July 21, 2020 letter, the County Executive suggested the following conditions:

- 1) allow an archaeologist chosen by the descendant community to have an opportunity to review the process of excavation and make suggestions that would improve the process and increase the certainty of any determination as to whether or not remains are present
- 2) that a small number of residents (suitable for the site), or their designees, be allowed to be present on site so that they can observe the soil as it's being removed and to be able to see what is revealed beneath that soil.

After Ms. Spielberg's testimony, and during Mr. Odintz's testimony, the Planning Board asked Mr. Odintz what was the Church's position with regard to the County Executive's suggestions. Mr. Odintz began to reply that the Church would find such



conditions acceptable, but he asked for a moment to discuss the question with the Church. Mr. Odintz then paused to confer with the Church. Afterwards, Mr. Odintz advised that the County Executive's suggestions were unacceptable. He pressed on that the Church demands that construction be halted and that the Church's archaeologist, Dr. Michael Blakey, be accorded full access to the site to conduct an independent archaeological dig. The demands are repeated in the Church's August 28, 2020 letter: "(1) provide Dr. Blakey and his agents full access to the construction site at any time; and (2) the significance of physical artifacts should be determined in consultation with Dr. Blakey and the archaeologists engaged by the Applicant."

Based upon the Planning Board's discussion with Mr. Odintz, it is unreasonable to conclude that the Planning Board was acting illegally when, at the end of the hearing, the Planning Board did not ask the Church about the condition, then under consideration, that Applicant be required to send the Applicant's Archaeologist reports to the Church and to afford the Church's archaeologist reasonable access to objects found during the course of the Applicant's Archaeologist's investigation, but not affording the Church's archaeologist full, independent, access, to the Subject Property. The Planning Board had already asked the Church whether the County Executive's suggestions were acceptable, whereby the Church would not have full, independent access, and the Church answered that they were not acceptable.

The Planning Board's questioning of the Applicant's Attorney addressed the impractical problem of requiring the Applicant's Archaeologist to preserve everything excavated: concrete blocks, pipes, timber, and rocks, rather than preserving what the Applicant's Archaeologist determined to be significant, in his professional judgment. The Planning Board decided to require the Applicant's Archaeologist to preserve what was significant based on the Applicant's Archaeologist's "best professional judgment."

The Planning Board's questions directed to the Applicant's Attorney also addressed the impractical and dangerous problem of "a small number of residents (suitable for the site), or their designees, be allowed to be present on site so that they can observe the soil as it's being removed and to be able to see what is revealed beneath that soil." The Planning Staff advised against such access also. Earlier during the hearing as part of Mr. Odintz's testimony, the Church expressly disagreed with the same suggestion made by the County Executive. The Church's position grows from its demand that construction be stopped and that an independent archaeological dig be conducted, and nothing short of that. The Planning Board's not re-asking the Church a question about on site resident observers is not an arbitrary or capricious exercise of the Rules of Procedure.

The Planning Board properly rejected the Church's demands to order the Applicant to halt construction and to yield to a *private* party, the Church, physical access and possession of the Subject Property, to oversee the Applicant's Archaeologist, and to



conduct its own archaeological dig. The Applicant holds an inherent right to exclude others from its property. (*Please see, Nollan v. California Coastal Commission*, 483 U.S. 825, 839, 107 S. Ct. 3141, 3150, 97 L.Ed. 2d 677, 691 (1987); and *Knick v. Township of Scott*, ___ U.S. ___, 139 S. Ct. 2162, 204 L.Ed. 2d 558 (2019).)

The Applicant has and is complying with the reporting requirement set forth in the 2018 Approvals. The Applicant has complied with, and even exceeded compliance with, the condition as it was expanded by the Final Forest Conservation Plan for Sheeting and Shoring. The Applicant is complying with the condition as further augmented through Site Plan Condition No. 15. However, no human remains or funerary objects have been found. All of the Applicant's Archaeologist's reports have reported the same, "No funerary items, human remains, or evidence of grave features were observed during monitoring." All of the reports have been provided to the Church.

3. **The Church Misunderstands Condition No. 15**

The Church misunderstands the Applicant's attempted extension of an olive branch. Following the July 23, 2020 Site Plan public hearing, the Applicant invited Dr. Michael Blakey to meet with the Applicant's Archaeologist and even to visit the site, with some reasonable conditions. Among them, Dr. Blakey would *not* be permitted to undertake his own independent archaeological dig. For the reasons explained earlier, the extension of such an olive branch is not, and cannot lawfully be, imposed by the government, (nor was it imposed). In the instant context, the government cannot order that the Church, a private party, have access to the Subject Property, private land. The Church's refusal to accept the Applicant's olive branch does not constitute grounds for the Planning Board to reconsider its August 18, 2020 Resolution.

4. **Conclusion. No Motion to Reconsider**

The Planning Board members have dutifully and properly conducted a lawful hearing, and made lawful determinations. There was no mistake of fact. There was no error of law. The Planning Board is not authorized to reconsider its Resolution on unsubstantiated grounds. To do so would be an impermissible change of mind.²

² Please see: *Calvert County Planning Commission v. Howlin Realty Mgmt.*, 364 Md. 301, 772 A.2d 1209 (2000); *Board of Zoning Appeals v. McKinney*, 174 Md. 551, 199 A. 540 (1938) and *Halici v. City of Gaithersburg*, 180 Md. App 238, 949 A.2d 85 (2007)



We respectfully suggest that those Planning Board members, who comprise the majority who voted in favor of the Resolution, decline to move to consider reconsideration.

Respectfully submitted,

A handwritten signature in blue ink that reads "Timothy Dugan".

Timothy Dugan

Enclosure:

August 6, 2020 Maryland Historic Trust Letter

cc:

Matthew T. Mills, Esq.	Ms. Gwen Wright	Mr. Robert Kronenberg
Hon. Marc Elrich	Mr. Elza Hisel-McCoy	Mr. Marco Fuster
Mr. Kelly McKone	John M. McVey, Esq.	Mr. Brad Fox
Emily Vaias, Esq.	Constantinos G. Panagopoulos, Esq.	Jennifer Semko, Esq.
Joshua D. Odintz, Esq.	Steven Lieberman, Esq.	Alexandra Minkovich, Esq.
Angela Vigil, Esq.	Ms. Debbie Spielberg	Hon. John McCarthy

Larry Hogan, Governor
Boyd Rutherford, Lt. Governor



Robert S. McCord, Secretary
Sandy Schrader, Deputy Secretary

Maryland DEPARTMENT OF PLANNING MARYLAND HISTORICAL TRUST

August 6, 2020

Ms. Emily J. Vaia
Ballard Spahr LLP
12th Floor
1909 K Street, NW
Washington, DC 20006-1157
vaia@ballardspahr.com

Re: The River Road Moses Cemetery

Dear Ms. Vaia,

Thank you for your letter of August 2, 2020, responding on behalf of Bethesda Self Storage Partners, LLC ("BSSP") to our letter of July 7, 2020 regarding the potential that BSSP's current development project at 5204 River Road in Bethesda might affect what is historically known as the River Road Moses Cemetery. I appreciate your detailed discussion of the history of the Cemetery and of its location in the early 20th century relative to current property parcel locations, and for providing copies of the weekly archeological monitoring reports related to the development activities.

As documented in your letter and its attachments, and in the referenced works of David Rotenstein's 2018 *The River Road Moses Cemetery: A Historic Preservation Evaluation*, and David Kathan, Amy Rispin, and L. Paige Whitley's 2018 Washington History article titled *Tracing a Bethesda, Maryland, African American Community and Its Contested Cemetery*, the historically documented location of the River Road Moses Cemetery is associated with current parcels 175 and 177; these parcels are located north and west of those being developed by Bethesda Self Storage Partners LLC ("BSSP"), parcels 242, 217 and 191. The Ottery 2017 report, also referenced in your letter, assessed the association between parcels 175 and 177 and the River Road Moses Cemetery. This report, based entirely on archival and cartographic research, concludes that there is "ample evidence" that the River Road Moses Cemetery was located on parcels 175 and 177, and that this association was well known beyond the cessation of interments in the River Road Moses Cemetery in the mid-1940s.

Even though the Cemetery is documented as having existed on lands other than those being developed by BSSP, you noted in your letter that all excavation associated with BSSP's

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Emily J. Vaias
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development activities on parcels 242, 217 and 191 has nevertheless been monitored by archeologists with Thunderbird Archeology for any evidence that Cemetery burials were located beyond the property boundaries of parcels 175 and 177. Seven weekly reports from Thunderbird Archeology's monitoring archeologist were provided as attachments to your letter. All seven monitoring reports document disturbed soil profiles resulting from the mid-twentieth century development of the area, and none document observation of any evidence of funerary items, human remains, or evidence of grave features. Three fragments of bone were observed and recovered during the seven weeks of monitoring and each was identified as non-human faunal bone by consulting forensic anthropologist and human skeletal expert Dr. Dana Kollmann of Towson University.

The documentation and information provided with your August 2 letter appears to establish that parcels 242, 217 and 191, and the BSSP's development thereon, are disassociated with the historic River Road Moses Cemetery inasmuch as the Cemetery is documented as having been located on parcels 175 and 177. As such, and based upon the best available information, BSSP is not the owner of a burial site with respect to parcels 242, 217 and 191 concerning which it is required to consult with the Director of the Maryland Historical Trust pursuant to Md. Code Ann., Real Prop. § 14-121.1.

Sincerely,

A handwritten signature in black ink, appearing to read "Elizabeth Hughes", with a long horizontal flourish extending to the right.

Elizabeth Hughes, Director
Maryland Historical Trust

cc: Reverend Segun Adebayo
Joshua Odintz, Esq.
Dr. Alexandra Jones
Boyd Sipe