DETAILED SITE PLAN DSP-20002 GIAC SONS BUDDHIST TEMPLE	* *	BEFORE THE DISTRICT COUNCIL
AND	*	
AC-22009, TCP2-018-2023, and an associated variance to remove two specimen trees	* *	

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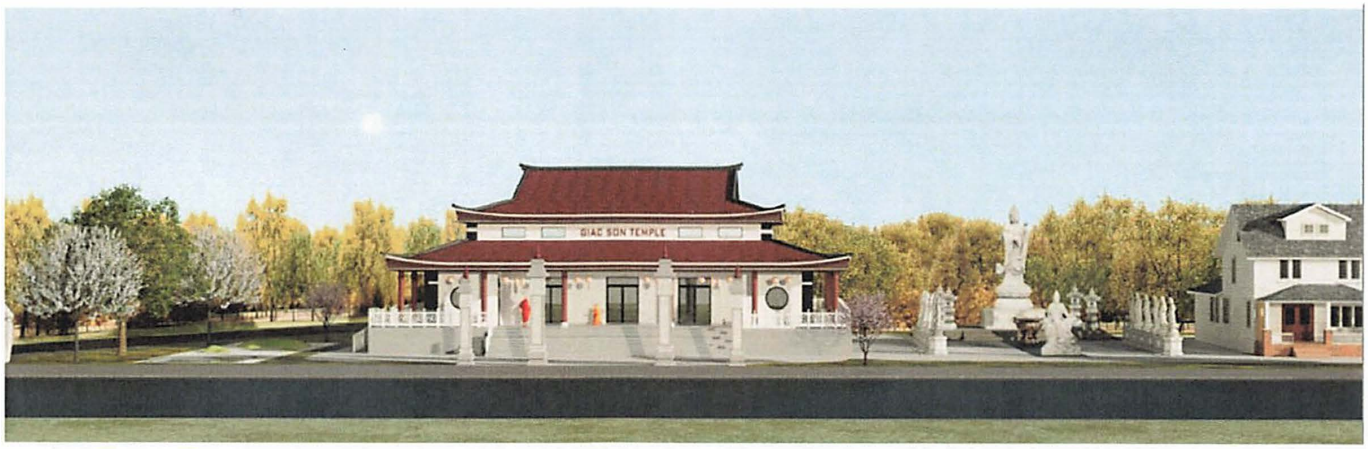
WRITTEN EXCEPTIONS AND REQUEST FOR ORAL ARGUMENT

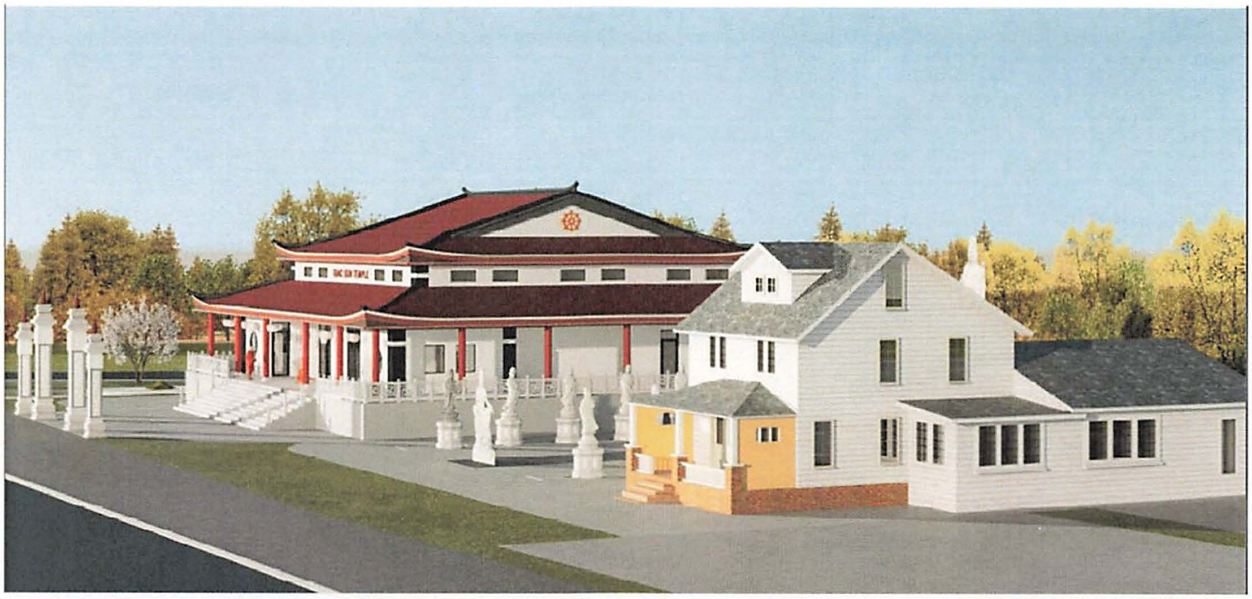
After five years of illegally removing mature woodland, illegally grading, and illegally paving its property, Giac Son Buddhist Temple Corp. ("Applicant") applied for the approval of a Detailed Sit Plan (DSP-20002), a request for Alternative Compliance (AC-23001), a Type 2 Tree Conservation Plan (TCP2-053-07-06), and a tree conservation variance to remove the last 2 specimen trees remaining on the Subject Property to expand the existing Buddhist Temple operations on a 1.64 acre property located at the southeast quadrant of the intersection of MD 197 (Laurel Bowie Road) and Snowden Road ("Subject Property"), Staff Report 1, and depicted below:

Staff PowerPoint 7.

The Applicant proposes to construct a 7,209 square foot building as a new place of worship, a 1,755 square foot praying platform, and a 21,171 square foot parking lot. Planning Board Record 32. The Applicant also proposes to maintain the existing 1,875 square foot single family residence to use as a parsonage. Staff Report 1. Renderings of the Applicant's proposed plans are provided below:



Planning Board Record 613.



Planning Board Record 615.

Leah Washington-Johnson, Teresa Washington, Gabrielle Masten, Jamie Hitaffer, Tim Carter, and Catherine Williams (collectively "Citizen-Protestants") are Persons of Record, participated before the Planning Board, and opposed DSP-20002, AC-22009, TCP2-018-2023, and the associated variance to remove two specimen trees.

The Planning Board approved DSP-20002, AC-22009, TCP2-018-2023, and the associated variance to remove two specimen trees in its Final Resolution (PGCPB No. 2023-98) dated September 28, 2023. Notice of the Planning Board's decision was mailed to all Persons of Record on October 3, 2023. Citizen-Protestants appeal the Planning Board's decision to approve DSP-20002, AC-22009, TCP2-018-2023, and the associated variance to remove two specimen trees, file these exceptions, and request oral argument.

QUESTIONS PRESENTED

1. Whether the Planning Board erred legally when it approved a Detailed Site Plan that provided incorrect property boundaries that improperly included land owned by a neighbor where the discrepancy in the property boundaries would impact the proposed development's compliance with the setback regulations in the R-R zone.

2. Whether the Planning Board erred legally when it approved the Applicant's TCP2 without requiring the Applicant to reforest the portion of the Subject Property that the Applicant illegally deforested, illegally graded, and illegally covered with gravel or asphalt.

3. Whether the Planning Board erred legally when it determined that the Applicant was exempt from the subdivision regulations under Section 24-107(c)(7)(C) when the proposed development exceeds 5,000 square feet.

4. Whether the Planning Board erred legally when it determined the parking requirements based on the purported number of temple members and not based on the number of seats to be provided as required by the Zoning Ordinance.

5. Whether the Planning Board erred legally and factually when it approved the Applicants' tree conservation variance.

6. Whether the Planning Board improperly permitted the Subject Property to be used as a public or neighborhood nuisance when it approved DSP-20002.

EXCEPTIONS

I. The Applicant conceded that the boundary for the proposed development set forth in in DSP-20002 improperly included land owned by Teresa Washington. The Planning Board erred legally and factually when it determined that this error would not impact the proposed development's compliance with the regulations in the R-R zone.

The Applicant submitted DSP-2002 with drawings and surveys that inaccurately depicted the size of the Subject Property—in some instances including several feet from the adjacent property to the Northeast (9807 Snowden Road). *See e.g.*, Planning Board Record 739. The Applicant's attorney recognized that "the new survey [of the 9807 Snowden Road property], when compared with the Applicant's submitted survey, reveals a 2-foot discrepancy along the shared boundaries with [the 9807 Snowden Road property]." Planning Board Record 618.

In fact, Citizen-Protestants submitted evidence and provided testimony that the Applicant had illegally appropriated significant portions of the 9807 Snowden Road property for its own use including the removal of woodland on 9807 Snowden Road, the laying of gravel on 9807 Snowden Road, and the erection of a 15-foot Buddha statute on 9807 Snowden Road. *See e.g.*, Testimony of Teresa Washington during the Planning Board' September 7, 2023 hearing at minute 1:56:40; Testimony of Tim Carter during the Planning Board's September 7, 2023 hearing at 2:15:00; *see also* Planning Board Record 736–42. The image provided below outlines in red the portions of the 9807 Snowden Road property that the Applicant has been illegally using:

Planning Board Record 767 (address label for 9807 Snowden Road provided via Paint 3D).

Applicant's attorney also recognized during the Planning Board hearings and in a letter filed in the record that the Applicant has improperly used the property on 9807 Snowden Road. *See e.g.*, Planning Board Record 618.

The Planning Board erroneously dismissed the fatal flaw in the Applicant's DSP application by concluding that "these discrepancies did not cause the subject property to not conform to the required regulations of the R-R Zone." PGCPB No. 2023-98. The Planning Board's conclusion is legally and factually incorrect.

The two-foot discrepancy in DSP-20002's inaccurate drawings causes the proposed parsonage and temple to be located within the required setbacks from the property line.

For places of worship to be located on lots between 1 and 2 acres in size, the minimum setback for all buildings shall be 25 feet from each lot line. *See* Prince George's County Prior Zoning Ordinance (PZO) § 27-441(b), fn 52(A). Here, the Applicant proposes to have a building setback from the 9807 Snowden Road property line of only 26.2 feet based on its initial drawings. *See* Planning Board Record 83. When the two-foot discrepancy is taken into consideration, the proposed building setback will actually be 24.2 feet—less than the required 25-foot setback. A 24.2-foot setback would require a variance under the zoning ordinance, but the Applicant has not applied for any such variance nor did the Planning Board approve any such variance.

Accordingly, the discrepancies shown by the land survey for the 9807 Snowden Road property will cause the proposed development to violate the required regulations for the R-R zone. Therefore, Citizen-Protestants urge the District Council to reverse the Planning Board's decision to approve DSP-20002 or, alternatively, vacate and remand the decision with instructions to confirm whether the proposed development will be within the required 25-foot setback once the 2-foot discrepancy is taken into consideration.

II. The Planning Board erred when it approved the Applicant's Tree Conservation Plan because the Forest Conservation Act requires the Applicant to reforest the portion of the Subject Property that the Applicant illegally deforested, illegally graded, and illegally covered with gravel or asphalt.

The Detailed Site Plan at issue here is the result of the Applicant's flagrant disregard for the laws and regulations in Prince George's County for more than five years. The proposed development would not be possible if the Applicant had followed the

requirements of the County's code and if the Planning Board enforced the mitigation provisions of the Forest Conservation Act.

As recently as 2016 the Subject Property contained more than 10,000 square feet of mature woodland on site, mostly within Parcel 28, as shown in the image below where the Subject Property is outlined in red:

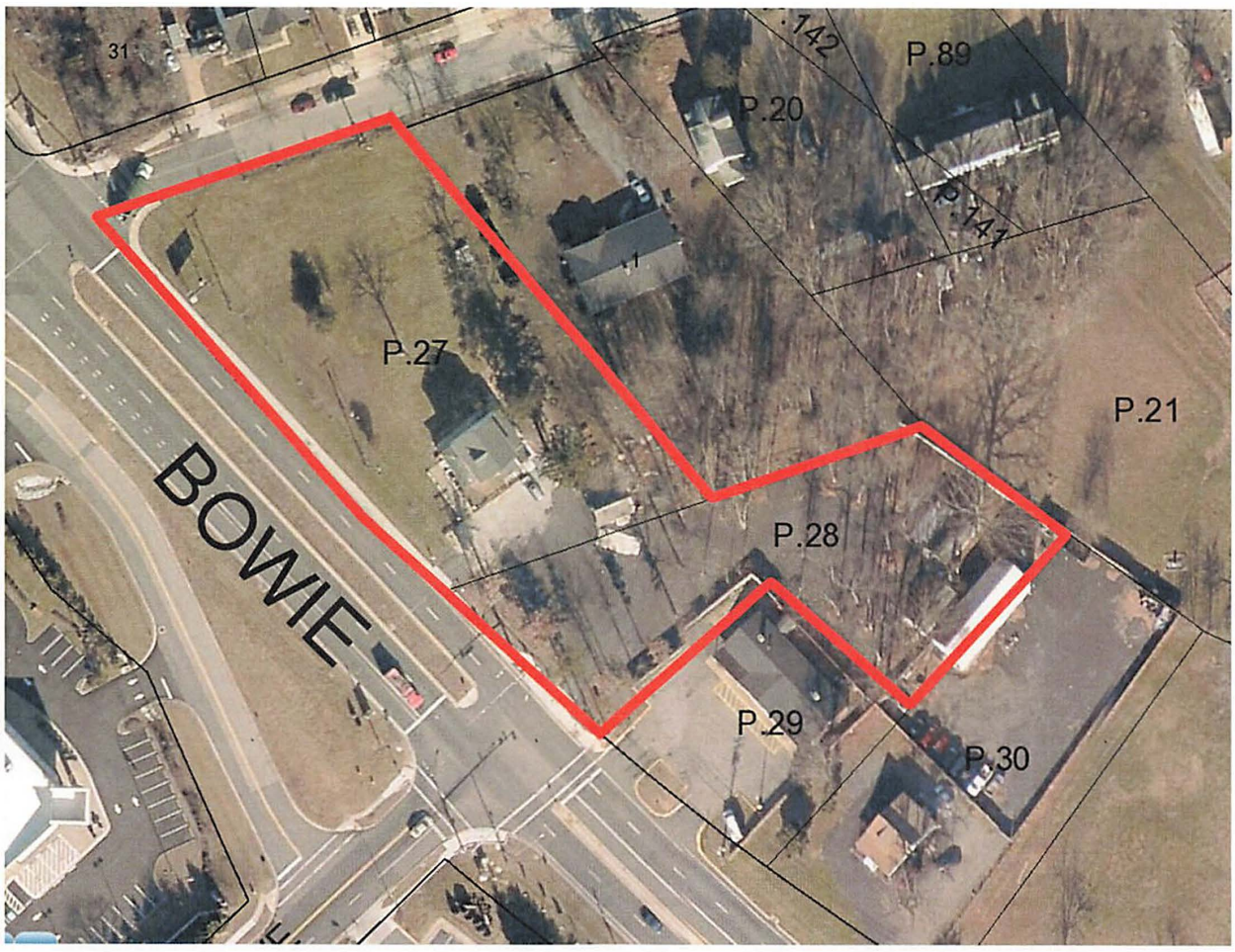
PGAtlas, Supplemental Imagery Layer, 2016 Color – 9 inch (red outlined provided via Paint 3D).

Under the Forest Conservation Act, codified at Subtitle 25, Division 2 of the County's Code, property owners are required to conserve a certain amount of woodland on site—known as the woodland conservation threshold. *See* ZO § 25-121(c). In the R-R

Zone, the woodland conservation threshold is 20% of the net tract area. *See* ZO § 25-121(c). Here, the Subject Property is 1.64 acres and 20% of its net tract area would be 0.32 acres or 13,939 square feet. PGCPB No. 2023-98, page 13. Thus, the Applicant would be required to conserve 13,939 square feet of woodland on the property. *See* PGCPB No. 2023-98, page 13. If the Subject Property was still in the same condition as depicted in the image above from 2016, the Applicant would be required to preserve the existing woodland on site because on-site woodland preservation is the highest priority technique for satisfying the woodland conservation threshold. ZO § 25-122(c). The Applicant would have been required to design the site to focus development away from the existing woodland. Accordingly, if the Subject Property was in the same condition as it was in 2016 and if the Applicant presented the same design proposed in DSP-20002, the Applicant's plan would have been denied because the Applicant would not be permitted to clearcut the woodland to create a parking lot. Instead, the Applicant would likely be able to locate parking on the northern portion of lot 27 because the Applicant would not need large stormwater retention ponds.

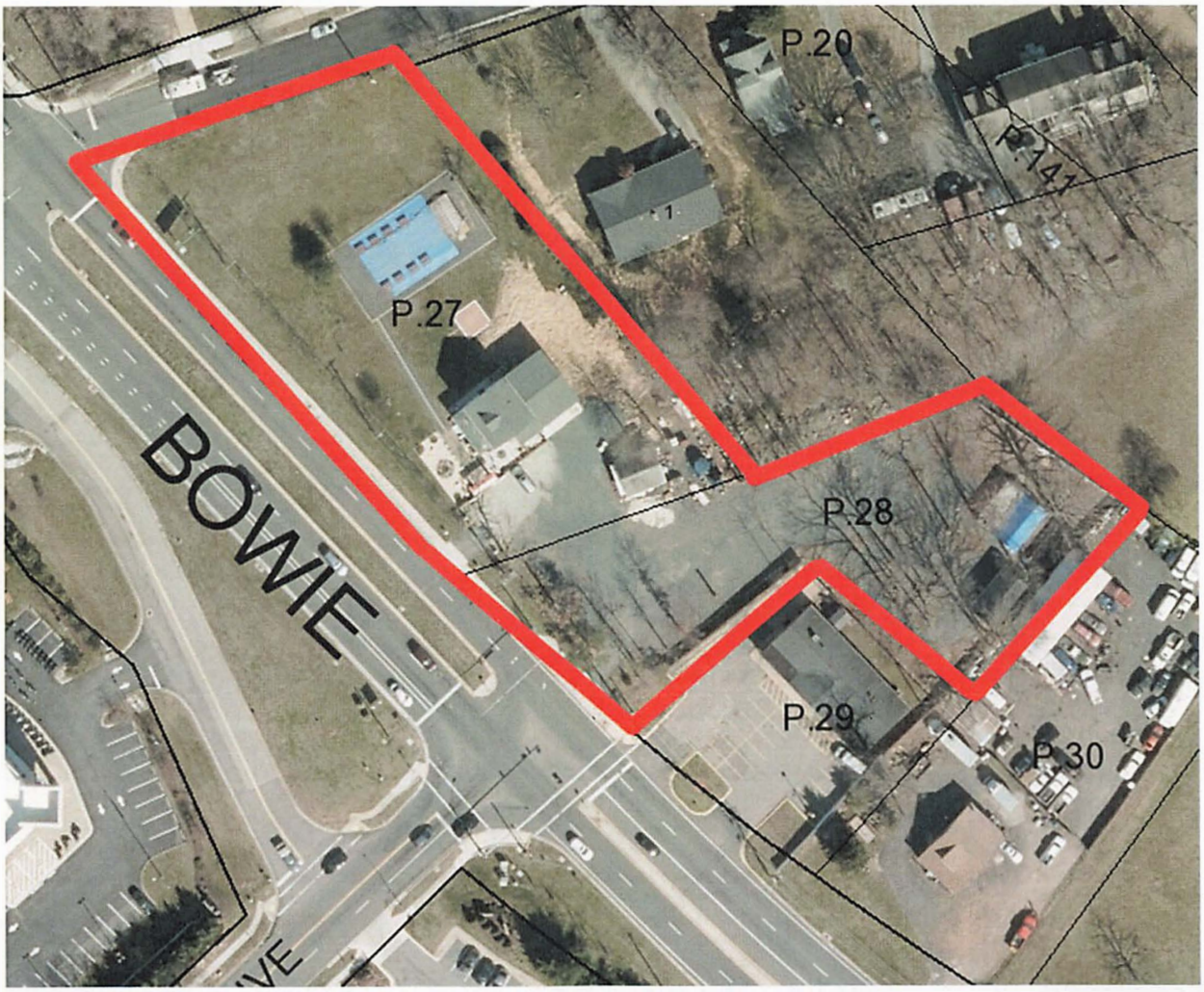
However, that is not what has occurred here because for the past five years, the Applicant has systematically and illegally removed the woodland and trees on the Subject Property and illegally graded the Subject Property. Now, with DSP-20002, the Applicant has asked the County to reward the Applicant's illegal conduct by approving the Applicant for a development that would have otherwise been prohibited.

Since the Applicant gained ownership of the Subject Property in 2017, the Applicant has performed multiple illegal construction activities on the Subject Property in direct violation of the County's laws. The image below demonstrates that by 2018, the Applicant had illegally cleared significant portions of the existing mature woodland on the Subject Property, illegally paved or added gravel over top of the previously wooded areas, and illegally added several structures to the Southeastern corner of Parcel 28.



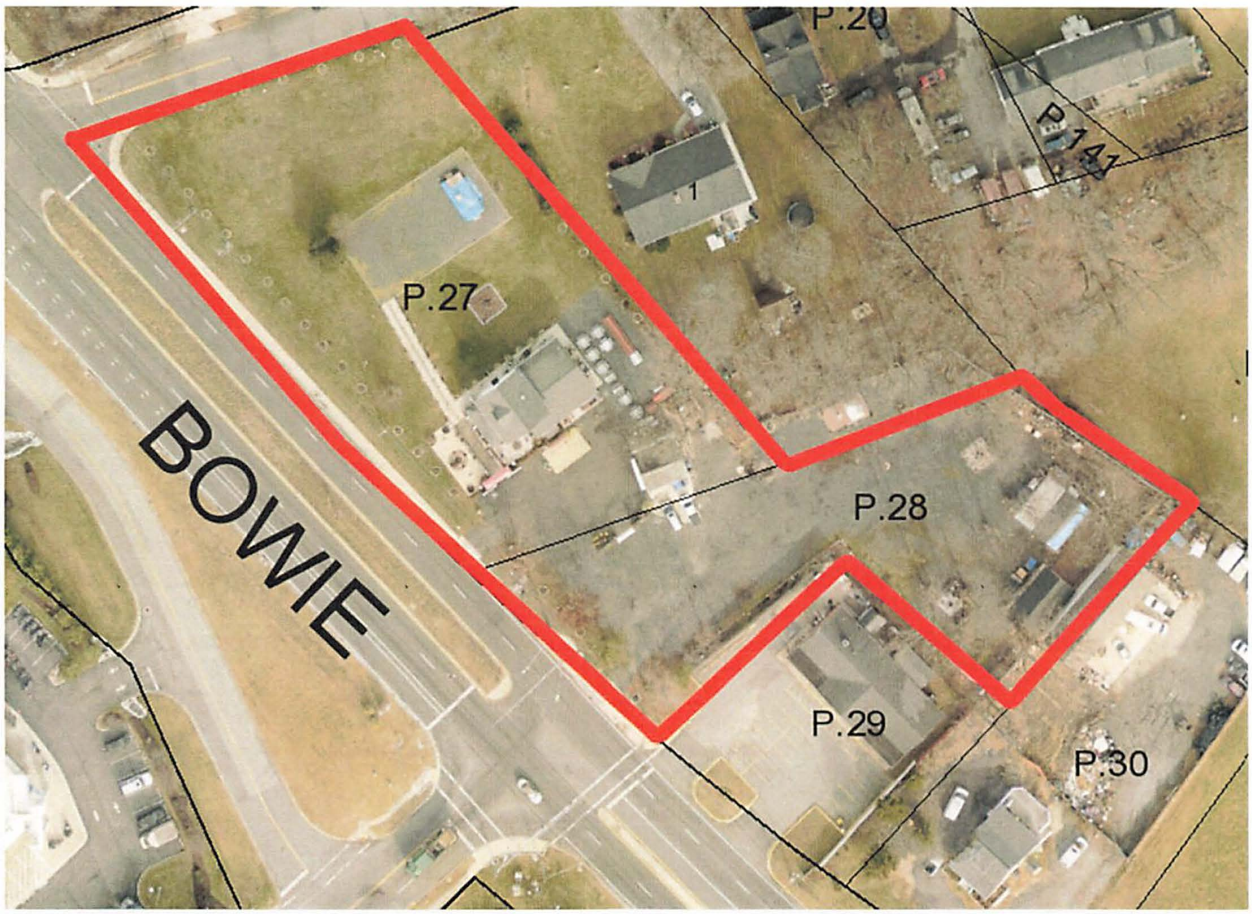
PGAtlas, Supplemental Imagery Layer, 2018 Color – 9 inch (red outlined provided via Paint 3D).

By 2020, the Applicant had illegally removed more trees from Parcel 28, illegally removed trees located on the eastern side of the existing single-family residence, illegally graded significant portions of land to the east and north of the existing single-family residence, illegally added impervious surfaces to the west of the single family residence, and illegally constructed a walkway and large rectangle covered in impervious surfaces on the northern portion of the Subject Property as can be seen in the image below.



PGAtlas, Supplemental Imagery Layer, 2020 Color – 6 inch (red outlined provided via Paint 3D).

Since 2020, the Applicant has illegally expanded the impervious surface area on Parcel 28 and has in fact illegally extended the area of impervious surfaces into a neighboring property after illegally removing woodland on the neighboring property and illegally placing gravel overtop of the cleared land. *See e.g.*, Planning Board Record 618, The Applicant has also illegally increased the amount of impervious surface located to the east of the existing single-family residence by illegally adding gravel over top of the previously vegetated land and illegally added structures to the east of the existing single-family residence a shown in the image below.



PGAtlas, Latest Imagery Layer (red outlined provided via Paint 3D).

Subtitle 25 sets forth clear punishments and mitigation techniques required when a property owner, like the Applicant, violates the Forest Conservation Act. For example, a violation for the Forest Conservation Act "is subject to a fine of up to $9.00 per square foot of woodland area destroyed." ZO § 25-120(c)(4). The County is permitted to "take corrective action to restore or reforest an area" and if the County does so, "the property owner or permittee shall pay all costs associated with the restoration work that may include but not be limited to re-grading, afforestation, and reforestation." ZO § 25-120(c)(5). When mitigation is required, "priority shall be given to restoration of the area destroyed." ZO § 25-120(c)(6). Furthermore, when specimen trees have been damaged or destroyed, "the mitigation to be provided shall be equal in value to the restoration or replacement cost as calculated using the latest edition of the 'Guide for Plant Appraisal' published by the Council of Tree and Landscape Appraisers. Priority shall be given to restoring the tree(s) if possible, then replanting the area with trees that total the cost of the tree(s) lost if sufficient space is available for replanting." ZO § 25-120(c)(6)(D).

Here, the Applicant illegally removed over 10,000 square feet of woodland on the Subject Property, PGCPB No. 2023-98, page 12, which should have resulted in a fine up to $90,000. Furthermore, the Applicant should have been required to restore the disturbed woodland by regrading the area and reforesting the site. The Applicant did not provide any justification for why it could not restore the portion of the Subject Property that was illegally deforested and illegally graded between 2017 and 2023. *See e.g.*, Planning Board Record 128–32. The Planning Board provided no reasoning for why the Applicant should

not be required to restore the portion of the Subject Property that was illegally deforested aside from a statement that a parking lot currently occupies the space.

Accordingly, the Planning Board erred legally when it approved the Applicant's Tree Conservation Plan without requiring the Applicant to perform any mitigation efforts like paying a fine or restoring the illegally deforested portion of the Subject Property. Instead, the Planning Board merely required the Applicant to acquire the same amount of woodland conservation credits that would be required if the Applicant never committed any violations. In other words, the Planning Board did not enforce any consequences on the Applicant for their repeated illegal conduct.

Additionally, it is unknown how many specimen trees the Applicant removed between 2017 and 2023, but the Planning Board recognized that the two remaining specimen trees on the Subject Property have "critical root zones [that] have been previously impacted extensively with grading and compaction associated with two existing sheds, a barn, and the existing asphalt parking lot." PGCPB No. 2023-98. Instead of requiring the Applicant to perform the mitigation required by ZO Section 25-120(c)(6)(D), the Planning Board approved the Applicant for a variance to remove the last two remaining trees.

The Planning Board's decision to approve the variance request without requiring the mitigation described by ZO Section 25-120(c)(6)(D) is legally erroneous because the mitigation is required to be provided. *See* ZO § 25-120(c)(6)(D) ("mitigation to be provided **shall** be equal in value to the restoration or replacement cost…") (emphasis provided).

For all of these reasons, the District Council should reverse, or alternatively vacate, the Planning Board's decision to approve TCP2-018-2023 because the Planning Board failed to enforce the mitigation techniques required under ZO Section 25-120. If the District Council reverses or vacates the Planning Board's approval TCP2-018-2023, it must also reverse or vacate the Planning Board's approval of DSP-20002 because DSP-20002 relies on TCP2-018-2023.

III. The Planning Board erred legally when it determined that the Applicant was exempt from the subdivision requirements under Section 24-107(c)(7)(C) because the proposed development exceeds 5,000 square feet.

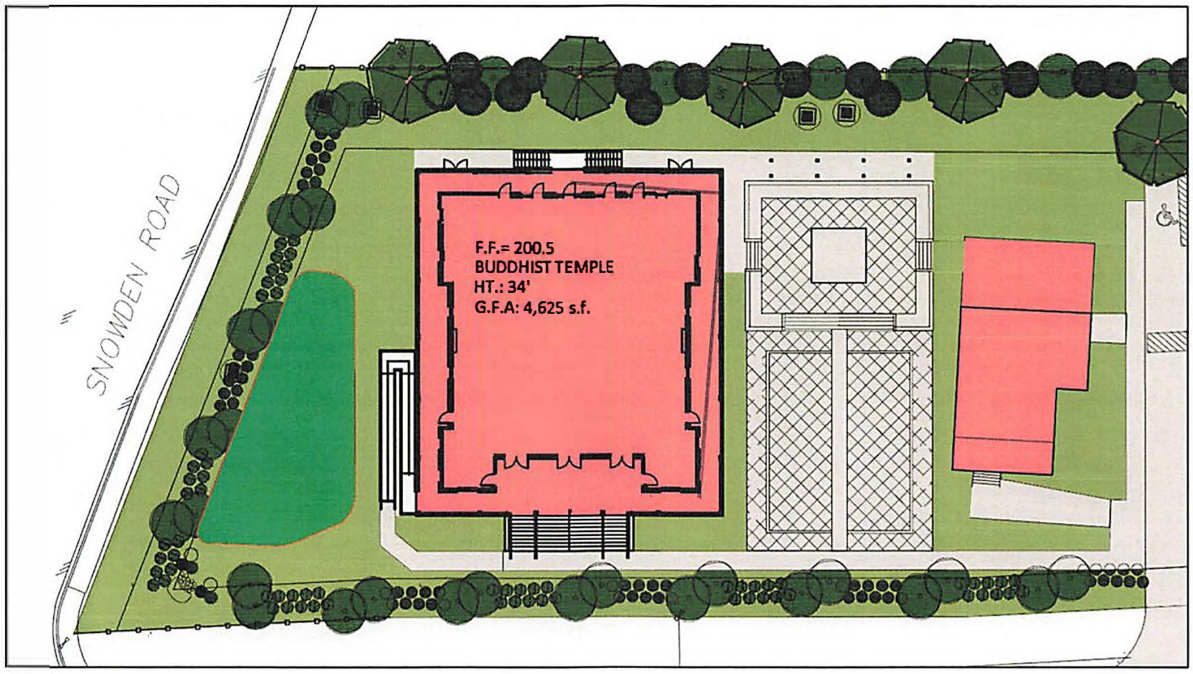
For any subdivision of land by deed of a lot prior to January 1, 1982, subsequent development proposals are exempt from the Subdivision requirements if "the development proposed is in addition to a development in existence prior to January 1, 1990, and does not exceed five thousand (5,000) square feet of gross floor area." PZO § 24-107(c)(7)(C).

Development is defined as "any activity that materially affects the condition or use of dry land, land under water, or any structure." PZO § 27-107.01(a)(66.1). Gross floor area includes "the total number of square feet of floor area in a 'Building'" and "the total floor area of 'Accessory Buildings' on the same 'Lot.'" PZO § 27-107.01(a)(105). Gross floor area excludes "uncovered steps and porches." PZO § 27-107.01(a)(105). Gross floor area is to be measured starting with "the exterior faces of walls, columns, foundations, or other means of support or enclosure." PZO § 27-107.01(a)(105).

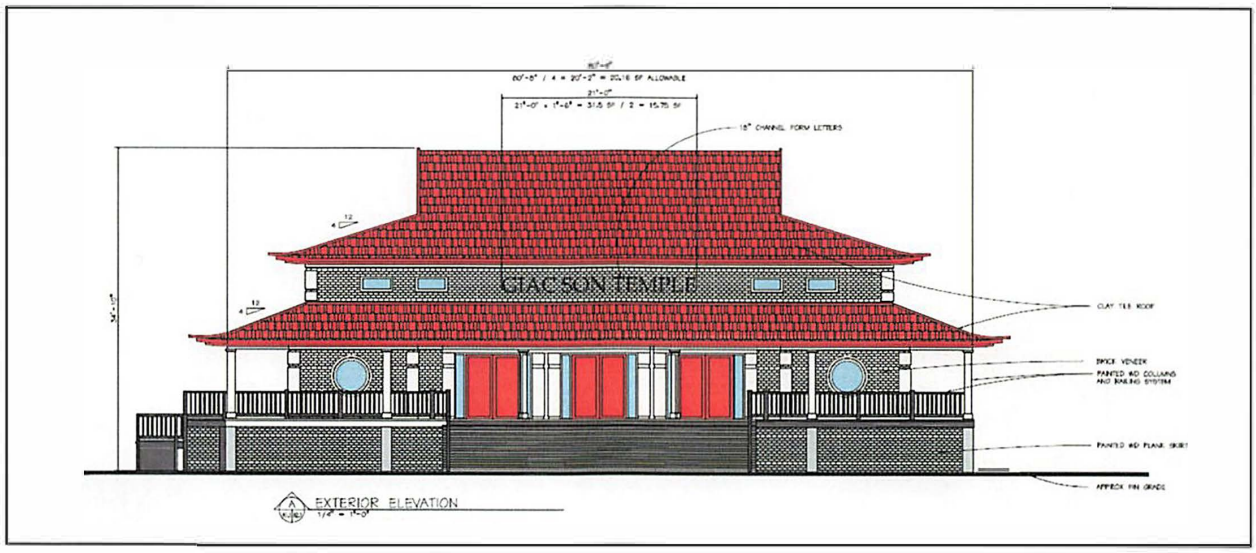
Here, the Applicant proposes to build a Buddhist Temple that includes interior space as well as wrap-around covered porches. The Applicant's proposed development has a

gross floor area greater than 5,000 square feet and therefore is not exempt from the subdivision regulations.

The Applicant erroneously asserts that the proposed temple will have a gross floor area of only 4,625 square feet. *See* Planning Board Record 141. However, the images below shows that the Applicant erroneously measured the gross floor area by excluding the floor area within the covered porch as the black outline shows that the space used to measure gross floor area does not extend to the edge of the roof even though the covered walkways largely extend to the edge of the roof.



Planning Board Record 432.



Planning Board Record 430.

Unlike uncovered porches that are excluded from gross floor area measurements, covered porches within the foundation of the building or included within support beams like the covered porches depicted above, should be included in the gross floor area measurement. The Applicant testified that the proposed building footprint (which includes the covered porches) is 7,209 square feet—well above the 5,000 square foot limit for the exemption from the subdivision process. Planning Board Record 141; PZO § 24-107(c)(7)(C). Therefore, the Planning Board erred legally when it determined that the Applicant was exempt from the subdivision process under PZO Section 24-107(c)(7)(C) because the Applicant erroneously excluded the covered porches from its gross floor area measurement and the actual gross floor area of the proposed building is certainly over 5,000 square feet.

Even if the Applicant properly measured the gross floor area of the proposed building, the Applicant still does not qualify for an exemption under PZO Section 24-

107(c)(7)(C) because the gross floor area of the **development** exceeds 5,000 square feet. The Applicant can only qualify for an exemption under PZO Section 24-107(c)(7)(C) if "the development proposed...does not exceed five thousand (5,000) square feet of gross floor area." PZO § 24-107(c)(7)(C). Prince George's County defines development as including "any activity that materially affects the condition **or use** of dry land, land under water, or any structure." PZO § 27-107.01(a)(66.1). Here, the Applicant is not only proposing activities that materially affect the condition of dry land for the construction of a Buddhist Temple. The Applicant is also proposing to activity that materially affects the use of a structure on the Subject Property-namely changing the use of the existing single-family residence to a parsonage. Furthermore, gross floor area measurements are required to include the total floor area of "Accessory Buildings" on the same "Lot" like the existing single-family residence to be used as a parsonage. PZO § 27-107.01(a)(105).

Accordingly, the gross floor area of the proposed development here is not limited to the square feet of the proposed temple but also includes the square feet of the existing single-family structure to be used as a parsonage. When the gross floor area of the total development is considered, the Applicant's proposed development has a gross floor area of at least 6,500 (4,625 square feet for the Temple and 1,875 square feet for the existing single-family residence). *See* Planning Board Record 141.

For all of these reasons, the District Council should vacate the Planning Board's decision to approve DSP-20002 because the Applicant does not qualify for an exemption

from the subdivision process under PZO Section 24-107(c)(7)(C) because the Applicant's proposed development exceeds the 5,000 square foot limitation.

IV. The Planning Board erred legally when it determined that the parking requirement should be calculated based on the purported membership of the Buddhist Temple and not based on the anticipated attendance at the Buddhist Temple during major events.

The Planning Board erroneously determined that the required parking for the Subject Property should only be 45 spaces (43 spaces to accommodate the 160 members of the temple and 2 spaces to accommodate the parsonage). *See* PGCPB No. 2023-98, page 8.

Under the PZO, Churches or similar places of worship are required to provide 1 parking space for ever 4 seats in the main auditorium and 1 parking space for every 4 seats in other rooms occupied at the same time as the auditorium. PZO § 27-568(a).

Here, the Applicant failed to provide the Planning Board with the number of seats to be provided onsite (either within the main auditorium or in other rooms occupied at the same time as the auditorium). Instead, the Applicant proposed 43 parking spaces based on the number of members (160). The Planning Board has no authority to calculate the amount of parking based on the number of members instead of the number of seats.

Furthermore, the clear legislative intent behind the minimum parking requirements for places of worship is to provide 1 parking space for every 4 people who may attend services on site at any given time. Here, the Applicant testified during the June 22, 2023 Planning Board hearing that it intends to host many large events on site where the Applicant

anticipates several hundred attendees and possibly over 1,000 attendees. *See* Testimony of Ram Shrestha during the Planning Board's June 22, 2023 hearing at minute 4:24:55 (stating that in Buddhist Temples, "even if you have limited seat[s] during such events, there will be 200, 300, maybe [like] you said, 1,000" people attending). Although the Applicant asserts that it has acquired agreements with two nearby properties for overflow parking during the large events, the Applicant has only stated that the overflow parking would be sufficient to serve only the 160 members of the temple. *See* PGCPB No. 2023-98, page 8; Planning Board Record 90. Conversely, if the Applicant were to provide parking for the number of people the Applicant actually anticipates will attend services on the property, the Applicant would need to provide well over 100 parking spaces—far more than is being proposed onsite or in the overflow locations.

Accordingly, the Planning Board erred legally when it calculated the number of required parking spaces for the proposed place of worship based on the number of members and not the number of seats to be provided as required by PZO Section 27-568(a). As a result, the number of seats provided by the Applicant will be wholly inadequate to serve ensure that illegal parking around the Subject Property does not occur.

Therefore, the District Council should vacate the Planning Board's decision to approve DSP-20002 with only 45 parking spaces and remand with instruction to the Applicant to provide evidence regarding the number of seats provided on site or, alternatively, the number of people anticipated at its large events.

V. The Planning Board erred legally and factually when it approved the Applicant's Forest Conservation variance.

The Planning Board erred legally when it approved the Applicant's request for a variance to remove the two remaining specimen trees on the Subject Property.

"To approve a variance, the [Planning Board] shall find" that:

(A) Special conditions peculiar to the property have caused the unwarranted hardship;

(B) Enforcement of these rules will deprive the applicant of rights commonly enjoyed by others in similar areas;

(C) Granting the variance will not confer on the applicant a special privilege that would be denied to other applicants;

(D) The request is not based on conditions or circumstances which are the result of actions by the applicant;

(E) The request does not arise from a condition relating to land or building use, either permitted or nonconforming, on a neighboring property; and

(F) Granting of the variance will not adversely affect water quality.

ZO § 25-119(d)(1).

Here, the Planning Board erred legally when it concluded that the Applicant satisfied ZO Section 25-119(d)(1)(A)-(D), and (F).

1. **ZO Section 25-119(d)(1)(A): The Planning Board erred legally when it concluded that the Applicant satisfies Criterion A because the Planning Board failed to conduct the requisite three-step analysis of the alleged uniqueness of the Subject Property, any nexus between allegedly unique aspects of the Subject Property and the relief requested, and the alleged unwarranted hardship.**

ZO Section 25-119(d)(1)(A) requires the Planning Board to conduct a three-step analysis. First, the Planning Board must determine that the Subject Property is unique. *See e.g., Dan's Mountain Wind Force, LLC v. Allegany Cnty. Bd. of Zoning Appeals*, 236 Md. App. 483, 494 (2018) (finding that the term "conditions peculiar to the property" in Md. Code, Land Use, Section 4-206(b)(2) requires a showing of uniqueness); *see also, Montgomery Cnty. v. Rotwein*, 169 Md. App. 716, 727 (2006) (finding that the term "conditions peculiar to a specific parcel of property" in Montgomery County Code, Section 59-G-3.1(a) requires a showing of uniqueness). Second, if the Planning Board identifies unique characteristics of the Subject Property, the Planning Board must consider whether the unique characteristics of the Subject Property have a nexus with the relief being requested. *Dan's Mountain Wind Force, LLC v. Allegany Cnty. Bd. of Zoning Appeals*, 236 Md. App. 483, 496 (2018). Third, only if the Planning Board finds that the Subject Property is unique and the uniqueness has a nexus with the relief requested, then the Planning Board must consider whether the alleged uniqueness will cause the Applicant an unwarranted hardship if the variance request is denied.

a. The Planning Board erred legally when it determined that the Subject Property is unique based solely on the existence of two specimen trees on the edge of the Subject Property and without comparing the Subject Property to any nearby property.

The Planning Board erroneously concluded that the Subject Property is unique because of "the specimen trees themselves." PGCPB No. 2023-98, page 14. The Planning Board did not identify any other unique conditions on the Subject Property. However, the conditions that allegedly make the Subject Property unique cannot include environmental features that the Forest Conservation Act is designed to protect, like specimen trees. Such an interpretation would be contrary to the legislative intent of the Forest Conservation Act to preserve woodland in the County. Furthermore, the Planning Board's interpretation would render Criterion A meaningless because every applicant for a Forest Conservation Variance would satisfy Criterion A because every applicant for a Forest Conservation Variance would have environmental features that the Forest Conservation Act is designed to protect.

Furthermore, the uniqueness prong of the variance test requires the Applicants to prove, and the Planning Board to find, that the alleged special conditions on the Subject Property are not shared by other nearby properties—that "the plight of the owner [is] due to unique circumstances and not to general conditions in the neighborhood." *Marino v. City of Balt.*, 215 Md. 206, 219 (1957). "It must be shown that the hardship affects the particular premises and is not common to other property in the neighborhood." *Easter v. Mayor and City Council of Baltimore*, 195 Md. 395, 400 (1950). "[T]he property whereon structures

are to be placed (or uses conducted) [must be]—in and of itself—unique and unusual in a manner different from the nature of surrounding properties such that the uniqueness and peculiarity of the subject property causes the zoning provisions to impact disproportionately upon that property." *Cromwell v. Ward*, 102 Md. App. 691, 694 (1995); *see also Dan's Mountain Wind Force, LLC v. Allegany Cty. Bd. of Zoning Appeals*, 236 Md. App. 483, 492 (2018).

The only way to determine whether certain conditions on the Subject Property are in fact peculiar or unique to the Subject Property is to compare the Subject Property to other properties. Here, however, the Applicant failed to present any evidence comparing the Subject Property to any other property and the Planning Board failed to make any such comparison in its Final Resolution. Therefore, the Planning Board' decision to approve the requested variance is contrary to law because nothing in the record satisfies the proposition that the special conditions identified by the Applicants are in fact unique or peculiar conditions compared to surrounding properties.

b. The Planning Board failed to consider whether the allegedly unique conditions have a sufficient nexus to the relief requested.

As stated in *Dan's Mountain*:

> [T]he unique aspect of the property must relate to—have a nexus with—the aspect of the zoning law from which a variance is sought. Without the nexus requirement, a motivated sophist could always find similarities or differences or differences between any two properties so as to defeat or support a uniqueness finding. Every property is similar to every other property in some respect (for example, "there are some living things on this property"). And every property can be distinguished from every other property in some other respect (for example, "this property contains

> exactly x number of trees and y number of woodrats"). Rather than semantic tricks, the proper question is whether the property is unique in the way that this particular aspect of the zoning code applies to it.

236 Md. App. at 496. A unique aspect of a property is only unique in the context of a variance application if that particular unique aspect is what is preventing adherence to the ordinance.

> Where a property's physical peculiarities do not cause the landowner to suffer disproportionately due to application of the zoning enactment in question, the property is not "unique" in the law of variances. For example, if a property has physical characteristics that might justify variance relief from drainage or sewage regulations, those attributes probably would have no bearing on how the property is affected by an ordinance establishing the maximum height for a fence.

Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore County, 407 Md. 53, 82 (2008). A variance needs a nexus between the relief sought and the unique aspect.

Here, the Planning Board failed to consider or articulate whether the allegedly unique conditions on the Subject Property have a sufficient nexus with the relief requested. *See* PGCPB No. 2023-98, pages 14–15.

c. The Planning Board erred legally when it determined that the Applicant would experience an unwarranted hardship if the variance were denied.

The term "unwarranted hardship" is synonymous with the undue hardship standard applied in use variance applications and requires a showing that:

> the land cannot yield a reasonable return if used only in accordance with the [] restrictions of the ordinance and that a variance must be permitted to avoid confiscatory operation of the ordinance . . . the mere fact that

> some use other than that permitted under an applicable zoning ordinance would be more profitable than any use which is permitted thereunder is not enough to invalidate a use restriction, if the property can reasonably be used for some purpose for which it is adapted.

Belvoir Farms Homeowners Ass'n, Inc. v. North, 355 Md. 259, 277 (1999). The Applicant must also explain how the need for the variance is "substantial and urgent and not merely for the convenience of the applicant, inasmuch as the aim of the ordinance is to prevent exceptions as far as possible." *Belvoir Farms*, 355 Md. at 276. Specifically in the context of TCPs, the unwarranted hardship factor "must relate in some way to use of the 'entire' property and that the deprivation must relate to something that is 'reasonable and significant.'" *West Montgomery Co. Citizens Ass'n v. Montgomery Co. Planning Bd. of MNCPPC*, 248 Md. App. 314, 347 (2020) (citing *Assateague Coastal Trust*, 448 Md. 112, 127 (2016)).

Here, the Planning Board's interpretation of the unwarranted hardship requirement is legally erroneous because an Applicant cannot experience an unwarranted hardship if it can make reasonable use of its property without the requested variance. Here, if the Applicant were denied the requested variance, it would not be denied reasonable use of its property because the Applicant already uses the Subject Property as a Buddhist Temple and the variance is requested only to enable the expansion of the uses on the Subject Property. *See e.g.*, *Citrano v. North*, 123 Md. App. 234, 242 (1998) (finding that a property owner was not denied reasonable use of the property when variance to build a deck was denied because deck was the expansion of an existing reasonable use – a residence). As

such, the Planning Board's interpretation of the unwarranted hardship requirement is legally erroneous because it fails to require the Applicant to articulate why the proposed development "cannot yield a reasonable return" without the variance. *Belvoir Farms*, 355 Md. at 277.

2. ZO Section 25-119(d)(1)(B) and (C): The Planning Board erred legally when it determined that the Applicant satisfies Criteria B and C based solely on generalized statements that other properties have allegedly been granted Forest Conservation Variances.

Criteria B and C require the Applicant to demonstrate that "enforcement of these rules will deprive the applicant of rights commonly enjoyed by others in similar areas" and "granting the variance will not confer on the applicant a special privilege that would be denied to other applicants." ZO § 25-119(d)(1)(B), (C). These criteria are "interrelated, they can be, and often are, considered together." *Assateague Coastal Trust*, 223 Md. App. 631, 650 (2015), aff'd 448 Md. 112 (2016). To satisfy these criteria, the Applicant must demonstrate that the regulations deprive the Applicant of the right to use its property in a way that other properties commonly enjoy and thus would not be a special privilege. *See e.g.*, *Assateague Coastal Trust*, 223 Md. App. at 650. The Applicant must demonstrate that it would be deprived of a discrete property right—like the right to develop a property for a zoned use, the right to create a pier needed to exercise a property owner's water rights, or the right to make property improvements needed for meaningful use of the property. *See e.g.*, *DCW Dutchship Island, LLC*, 439 Md. at 633; *Assateague Coastal Trust*, 448 Md. at

126; *Chesley*, 176 Md. App. at 432. The Applicant does not have a right to be exempt from the requirements of the law under the FCA.

Here, the Planning Board's interpretation of Criteria B and C is legally erroneous because it does not require the Applicant to demonstrate that it would be deprived of a property right if it were denied the variance. Instead, the Planning Board erroneously concluded that generalized statements that other properties have been approved for variances are sufficient. PGCPB No. 2023-98, page 15.

Even if prior examples of the County's failure to enforce the requirements of the Forest Conservation Act were sufficient to satisfy Criteria B and C, the Applicant must, at the very least, provide details about the other variances that have been granted. For example, how often have the variances been approved? Where were they approved? By whom were they approved? What factors were relevant in the prior approvals. Without this basic information the Planning Board had no basis to determine whether or not the requested variance was similar to those previous approved and thus the Planning Board had no factual basis to determine whether granting the variance would deprive the Applicant of a right commonly enjoyed by others or grant the Applicant a special privilege.

3. **ZO Section 25-119(d)(1)(D): The Planning Board erred legally when it determined the alleged hardship was not self-created even though it was the Applicant who illegally removed the woodland near the specimen trees, illegally placed gravel around the specimen trees, and illegally graded the site.**

Criterion D requires the Planning Board to find that "the request is not based on conditions or circumstances which are the result of actions by the applicant." This criterion

is commonly referred to as the self-created hardship criteria. *See e.g.*, *Chesley v. City of Annapolis*, 176 Md. App. 413, 437 (2007). A self-created hardship occurs when the need for the variance is "created by the owners of the property and not by the property itself" or by "the hardship impact, if any, of the zoning ordinance on the property." *Chesley*, 176 Md. App. at 437. The critical issue "in determining whether a hardship is self-created is whether the property owner could have avoided the need for a variance." *DCW Dutchship Island, LLC*, 439 Md. at 623.

Here, the Planning Board erroneously concluded that "the existing site conditions or circumstances... are not the result of actions by the applicant." PGCPB No. 2023-98, page 15. However, as established *supra* in Section II, it was the Applicant who illegally removed the existing woodland on the Subject Property where the specimen trees are currently located, it was the Applicant who illegally graded large swaths of the Subject Property which now necessitates significant stormwater management retention ponds, and it was the Applicant who illegally placed gravel or asphalt on top of the critical root zone of the remaining specimen trees.

Furthermore, the Applicant has not requested that the specimen trees be removed because they are located within the development footprint. The Applicant requests permission to remove the specimen trees because they may pose a safety hazard if the Applicant is permitted to raze the buildings near the trees. Even though the specimen trees are White Oak trees which have "good to medium construction tolerances" the two remaining on the Subject Property only pose a safety hazard during the construction

process here because "both trees' critical root zones have been previously impacted extensively with grading and compaction associated with two existing sheds, a barn, and the existing asphalt parking lot." PGCPB No. 2023-98, page 14. In other words, it was the Applicant's actions (the grading and compaction caused by the illegally constructed parking lot) which cause the Applicant's need for the requested variances.

Thus, the Planning Board erred legally and factually when it concluded otherwise.

4. ZO Section 25-119(d)(1)(F): The Planning Board erred legally when it determined that granting the variance will not adversely affect water quality when the Health Department stated that the proposed development would likely negatively impact the quality of the ground water.

A legislative intent behind the FCA is to protect woodland and significant trees during the development process because "forests are the most beneficial use of protecting water quality due to their ability to capture, filter, and retain water, as well as absorb pollution from the air." Md. Nat. Res. § 5-102(a)(1)-(2).

ZO Section 25-119(d)(1)(F) requires the Planning Board to find that the "granting of the variance will not adversely affect water quality." Approval from other agencies and compliance with other environmental laws "does not automatically establish that a proposed construction project meets [variance] standards." *See Assateague Coastal Trust*, 223 Md. App. at 652.

Here, the Planning Board determined that the granting of the Applicant's requested variance will not adversely affect water quality based solely on the fact that the Applicant will be required to conform with Stormwater Management Requirements and Sediment

and Erosion Control requirements. However, this alone is not sufficient. *See Assateague Coastal Trust*, 223 Md. App. at 652.

Such a finding is particularly flawed because the Health Department found that "The property is located in the recharge area for the Patuxent aquifer, a groundwater supply that serves the Beltsville Agricultural Research Center, Patuxent Wildlife Research Center and the City of Bowie. Conversion of green space to impervious surface in this recharge area could have long term impacts on the sustainability of this important groundwater resource." Planning Board Record 419.

Thus, the Planning Board erred legally when it determined that the variance would not negatively affect water quality in light of the Health Department's findings.

For all of these reasons, the District Council should reverse or, alternatively, vacate the Planning Board's decision because the Planning Board erred legally when it determined the Applicant satisfied ZO Section 25-119(d)(1)(A)-(D), and (F) and the Planning Board's decision is not supported by substantial evidence.

VI. The Planning Board erred legally when it approved DSP-20002 because doing so would permit the premises to be used as a public or neighborhood nuisance.

ZO Section 14-172 prohibits a "person...having charge or management of....any premises [from causing or permitting] such premises to be used...as a public or neighborhood nuisance." ZO § 14-172(a). The definition of a "person" includes "a representative of any kind, any corporation, partnership, firm, association, joint venture, or other legal entity." ZO § 14-171(a)(5). The Planning Board falls into this broad definition

of "person." The Zoning Ordinance does not define the term "having charge or management off" but Meriam Webster's Online Dictionary defines "charge" as "management, supervision" (i.e., has *charge* of the home office)[1] and defines management as "the act or art of managing : the conducting or supervising of something (such as a business)."[2] As the Planning Board is tasked with overseeing the planning, development, and use of properties in Prince George's County, *see e.g.*, MD Land Use Art. § 20-202, the Planning Board has charge or management over the Subject Property.

Therefore, under ZO Section 14-172, the Planning Board is prohibited from permitting the Subject Property to be used as a public or neighborhood nuisance. However, when the Planning Board approved DSP-20002, it, in effect, permitted the Subject Property to be used as a public or neighborhood nuisance.

A "public nuisance shall mean any residential or commercial premises used:...€ As a neighborhood nuisance as defined by this Section; or (F)To endanger life, health, or safety, or obstruct the quiet enjoyment and reasonable use of the property of persons in a particular area..." ZO § 14-171(a)(7).

Here, Citizen-Protestants submitted ample evidence to the record demonstrating that the Applicant has continued to use the Subject Property in a manner that endangers the life, health, or safety, or obstructs the quiet enjoyment and reasonable use of the properties nearby the Subject Property. For example, many citizens testified that the illegal woodland

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[1] Available at https://www.merriam-webster.com/dictionary/charge.
[2] Available at https://www.merriam-webster.com/dictionary/management.

clearing, grading, and paving conducted by the Applicant has caused significant stormwater runoff to leave the Subject Property and inundate nearby properties. *See e.g.*, Testimony of Jeffrey Hitaffer during the Planning Board's June 22, 2023 hearing at minute 3:23:15. Several property owners testified that they experienced flooding inside and outside their homes and that the flooding caused significant property damage as a result of the Applicant's actions. *See e.g.*, Testimony of Jeffrey Hitaffer during the Planning Board's June 22, 2023 hearing at minute 3:23:40. Citizens testified that they never had issues with flooding until the Applicant completed its illegal woodland clearing, grading, and paving activities. Citizens also submitted many images to the record demonstrating this flooding which are reproduced below:

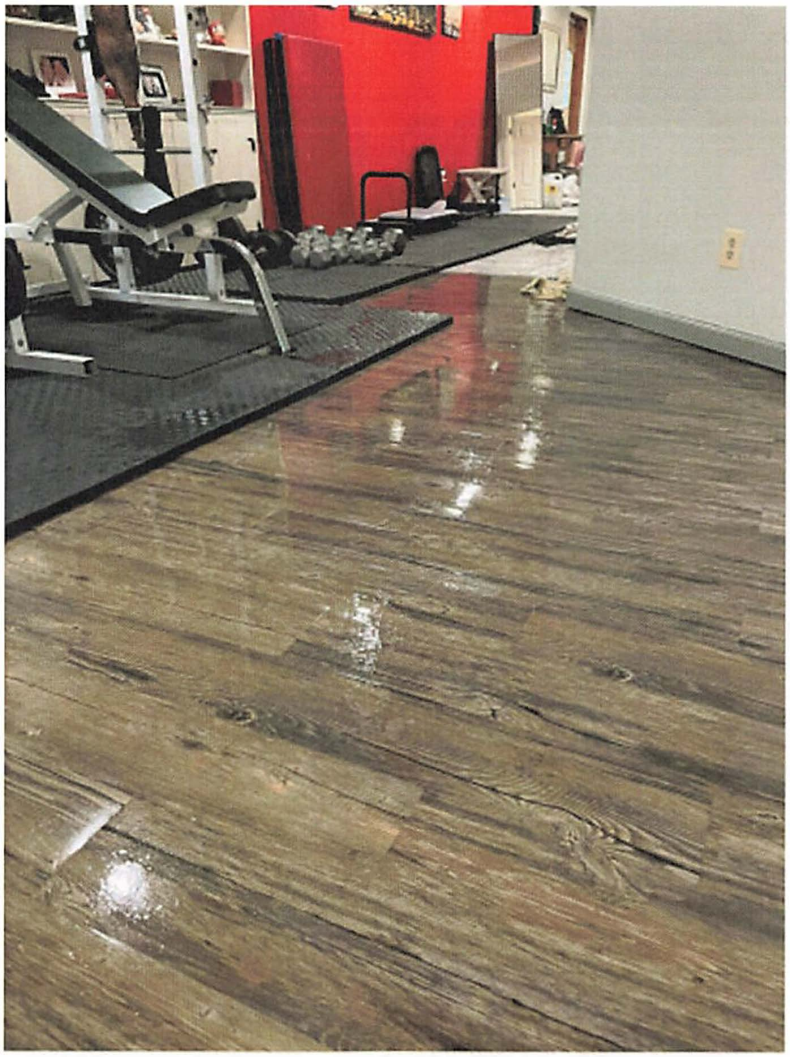
Planning Board Record 450.

Planning Board Record 436.

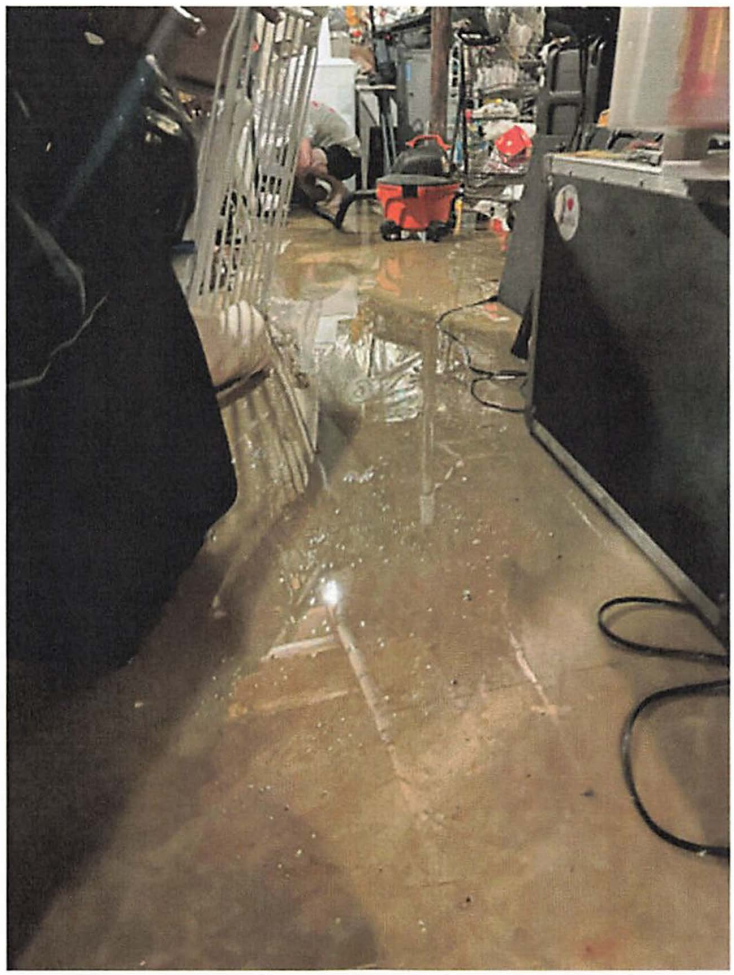
Planning Board Record 433.

Planning Board Record 437.

Planning Board Record 438.



Planning Board Record 447.



Planning Board Record 448.

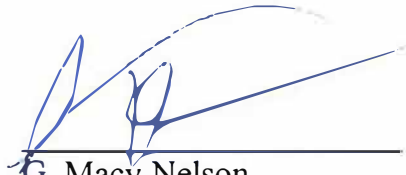
Citizens also testified that the Applicant frequently hosts outdoor activities creating sounds that have been measured over 92 decibels 1,000 feet away from the Subject Property—well above the county limit. *See e.g.*, Jeffery Hitaffer's Testimony during the Planning Board's June 22, 2023 hearing at minute 3:24:00. The Applicant testified that it intends to continue its outdoor activities and possible increase their frequency when the new temple is constructed. Gabrielle Masten testified that the loud noise significantly impacts her ability to enjoy her property due to PTSD. *See e.g.*, Gabrielle Masten's

Testimony during the Planning Board's September 7, 2023 hearing at minute 2:21:15. Ms. Masten also testified that her child is prone to seizures and that the excessive noise from the Subject Property exacerbates his condition—making it more likely for him to experience seizures even with noise canceling headphones on. *See e.g.*, Gabrielle Masten's Testimony during the Planning Board's June 22, 2023 hearing at minute 3:18:55; *see also* Gabrielle Masten's Testimony during the Planning Board's September 7, 2023 hearing at minute 2:21:15.

Citizens testified that the Applicant's large outdoor activities bring significant amounts of traffic and result in many cars illegally parking on Snowden Road. *See* Testimony of Gabrielle Masten during the Planning Board's June 22, 2023 hearing at minute 3:19:30. The Applicant testified that it hopes more people will attend its outdoor events after the proposed temple is constructed. *See* Testimony of Ram Shrestha during the Planning Board's June 22, 2023 hearing at minute 4:24:55 (stating that in Buddhist Temples, "even if you have limited seat[s] during such events, there will be 200, 300, maybe [like] you said, 1,000" people attending).

Therefore, for all of these reasons, the Planning Board erred legally when it approved DSP-20002 because the Applicant's proposed use of the property will continue and exacerbate its existing public nuisance by potentially exacerbating stormwater runoff and flooding issues and increasing the frequency and size of the Applicant's large outdoor events that cause excessive noise and illegal parking on Snowden Road.

Respectfully submitted,



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I HEREBY CERTIFY that on this 2nd day of November 2023, a copy of the foregoing Exceptions and Request for Oral Argument was served as follows:

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