

LAW OFFICES
POPPLETON, GARRETT & POLOTT, P.C.

MILLER J. POPPLETON, JR. (DC, MD & VA)
DWAYNE L. GARRETT (DC, MD & VA)
ANDREW R. POLOTT (DC & MD)
RICHARD D. MIRSKY (DC & MD)
RICHARD C. STERN (DC & MD)

OF COUNSEL
STUART H. SORKIN, P.C.
BRIAN D. YOKLAVICH

15400 CALHOUN DRIVE
SUITE 140
ROCKVILLE, MARYLAND 20855

(240) 499-2301

TELECOPIER (301) 493-6585

INTERNET: FIRM@pgplaw.com

10560 MAIN STREET
SUITE 111
FAIRFAX, VA 22030-7182

WRITER'S PRIVATE LINE
(240) 499-2310

WRITER'S E-MAIL:
APOLOTT@PGPLAW.COM

October 13, 2004

Montgomery County Planning Board
Maryland-National Capital Park
and Planning Commission
8787 Georgia Avenue
Silver Spring, Maryland 20910-3760

Re: Waiver of Subdivision Regulations Application of Union Cemetery Association of Montgomery County, Inc. (the "Association").

Dear Mr. Berlage and Members of the Planning Board:

Union Cemetery Association of Montgomery County, Inc. hereby requests that the Montgomery County Planning Board waive the requirement of a record plat for the Association's 13.5 acre cemetery property at 3001 Spencerville Road, Spencerville Maryland 20868 (the "Cemetery") as a condition to issuance of a building permit for a new, prefabricated storage shed at the Cemetery. As will be amply demonstrated below, to require the Association to record a plat in this matter would cause undue hardship, and would not materially further the purposes that underlie Montgomery County's land use and zoning ordinances.

Background

The Association, a locally-based, non-profit corporation, and its predecessors have continuously owned and operated the Cemetery since at least the mid 1800's.¹ The Association applied to Montgomery County, Maryland for a building permit on June 11, 2003 to construct a new prefabricated storage shed on the Cemetery as a replacement for the existing storage shed. In due course, the Department of Permitting Services reviewed the Association's application and eventually approved all of the substantive regulated aspects of the project, such as the structural plans and zoning requirements.² Upon Department of Permitting Services approval of the

¹ Use of a significant portion of the Cemetery as a cemetery called "Union Cemetery" appears to date back at least as far as 1859. Various parcels were added over the years (most recently in 1963). In any event, the present-day 13.5 acre Cemetery clearly existed in its current configuration well before enactment of the present Montgomery County Zoning Ordinance applicable to the cemetery use. The present-day Union Cemetery Association was incorporated on or about July 20 1888 and changed to its present name in 1995.

² The Department of Permitting Services initially took the position that building a new storage shed on a footprint different from the existing storage shed would require a Special Exception on the theory that the Cemetery was a

Association's application, it was referred to the Maryland National Park and Planning Commission for what all concerned assumed would be a routine review and sign off.

The Maryland National Park and Planning Commission, acting as the Montgomery County Planning Board, determined that the Cemetery has never been platted. Relying on *Montgomery County Code, Section 50-20*, the Planning Board's Development Review Committee determined that the absence of a record plat for the Cemetery precluded the Planning Board from approving the Association's application.

The Cemetery consists of 13.5 acres of land that is zoned RE-2. It has approximately 1,450 feet of frontage on Spencerville Road. Because the Cemetery predates the present-day Montgomery County Zoning Ordinance that regulates cemetery uses, it operates as a cemetery as a matter of right. The Cemetery is not a nonconforming use, but the Cemetery would require a Special Exception if it were ever extended, enlarged or modified. *See, Montgomery County Code, Section 59-G-2.12(4)*. The properties adjacent to the Cemetery have all been developed with residences or residential subdivisions. The Cemetery consists of overwhelmingly open space, with numerous burial plots, and a bituminous lane providing access. The activities at the Cemetery are limited to interments, installation of memorial/grave markers, receiving visitors at the burial plots and landscape maintenance (primarily mowing).

Other than memorial/grave markers and the access lane, the Cemetery contains only two other structures: a covered gazebo used in cremation ceremonies and the existing shed that is used to store implements, tools and supplies incident to the Cemetery's above-described activities. The existing storage shed is shown in the photograph attached as Exhibit A. It is approximately 17' x 17' (289 square feet) and is approximately 12 feet high. The shed is obviously well over 50 years old, and has become grossly inadequate for storing the tools and equipment required to operate the Cemetery as a modern facility. Moreover, continued maintenance of the existing storage building as an attractive structure is neither cost effective nor feasible, given its obviously outdated design.

The proposed new prefabricated storage shed that is the subject of the Association's application for a building permit is shown in Exhibit B. The dimensions of the proposed building are 24' x 36', enclosing 816 square feet. Its height is 10 feet, and it is to be located on the property as shown on Exhibit C.

nonconforming use. After several meetings, the Department of Permitting Services agreed with the Cemetery's position that (i) the Montgomery County Zoning Ordinance explicitly provides that a cemetery use that predates the current Montgomery County Zoning Ordinance is permitted as of right, does not constitute a nonconforming use, and therefore, is not subject to the strict footprint test applicable to nonconforming uses. Once the Department of Permitting Services agreed that it would not evaluate the proposed new storage shed as a nonconforming use, the Department informally advised the Cemetery that the Department would not regard the size difference between the proposed storage shed and the existing storage shed as enlarging, expanding or modifying use of the Cemetery, given the overall context of the situation.

Rationale for Waiving the Plat Requirement

The Board is authorized to grant waivers from Chapter 50 of the Montgomery County Code, including the plat requirements,

... upon a determination that practical difficulties or unusual circumstances exist that prevent full compliance with the requirements from being achieved, and that the waiver is : 1) the minimum necessary to provide relief from the requirements; 2) not inconsistent with the purposes and objectives of the General Plan; and 3) not adverse to the public interest.

Section 50-38(a)(1), Montgomery County Code, 1994 as amended.

Practical Difficulties Created By The Platting Requirement

In the instant circumstance, creating the documentation necessary for completion or waiver of the various plans required for a plat, even under the minor subdivision procedure in *Section 50-35A*, creates significant practical difficulties for the Association in continuing to operate the Cemetery cost effectively.

First, the cost of developing the plans for the plat would far exceed the actual construction cost of the shed itself. The Association investigated the costs of developing the plans for a plat in 1999 and received an estimate from Macris Hendricks and Glasscock, P. A. at that time of \$29,800.00. As noted above, the Association has budgeted \$13,000 for this construction. The estimate for the plat is in excess of three-quarters of the Association's annual operating budget.

Second, the Association must continue to store equipment offsite, and transport equipment to the cemetery during the time period it takes to develop the plat require for the plat. Additionally, the time to complete the plat is uncertain. In particular, the time to resolve the issue of required dedication of right of way would be extensive, involving an inventory and certification of burial sites, consideration of the State of Maryland's right of way study for Spencerville Road, and application of Department of Transportation policies regarding cemeteries.

Request For Waiver Is The Minimum Necessary To Provide Relief

Unlike a typical request for a variance, the Association is seeking no relief from any physical requirement from the building code or the substantive provisions of the subdivision regulations. As noted earlier, the Department of Permitting Services has already determined that the proposed storage shed is otherwise in compliance with the site and zoning requirements required by Code. The Association is not asking for any other requirement of the Code to be

relaxed or modified. Therefore, the Association respectfully submits that its request meets the requirement from *Section 50-38(a)(1)* that the waiver not exceed the minimum that is necessary to provide relief.

No Adverse Impact On Public Interest

Often, in granting a waiver of the physical site conditions or other regulated standards of subdivision, the Planning Board must consider whether it would be permitting an activity or practice that is inconsistent with the goals of the General Plan. In the present case, a waiver of the plat requirement would involve no conflict with the goals of the General Plan, such as specific recommendations for parcel use or restrictions on further development in the neighborhood. Here, the underlying project would involve construction of a storage shed in furtherance of a use that is entirely consistent with the General Plan.³

Granting a waiver of the plat requirement in this case would not adversely affect the public interest. Typically, compliance with the subdivision and plat process serves the public interest by allowing the government to systematically evaluate, project and plan for the effects of development, and to thereby most effectively address such issues as increased density, traffic, storm water runoff, and demand on other public facilities that will likely accrue from whatever development is permitted. In the usual case, the fundamental character of subdivision, which generally introduces more people and activity into an area that formerly was less populated, requires the government to undertake systematic land use planning. The subdivision process also produces various other benefits, such as the establishment of accurate parcel and lot boundaries.

The Cemetery's waiver request clearly does not present a typical situation. Replacement of a 50-plus year old 17' x 17' storage shed with a modern 24' x 36' storage shed will do nothing whatsoever to increase either the density or intensity of use at the Cemetery. A larger, modern storage shed will not result in increased trips or use of the cemetery, and, if anything, will reduce traffic by enabling the Cemetery to effectively store its tools, implements and supplies, rather than constantly transporting those it cannot effectively store on site. Even assuming the Association were to leave the foundation of the existing storage shed entirely intact, the proposed new storage shed would, even so, create, at most only 816 square feet of new impervious surface, which is plainly inconsequential in the context of a 13.5 acre parcel (considerably less than two tenths of one percent additional surface coverage), and as such would be highly unlikely to have any measurable adverse impact whatsoever on water quantity or quality or storm water management. There is no pressing public need to more precisely establish the boundaries of the Cemetery. All of the neighboring properties have been subdivided, and Spencerville Road has been recently widened and improved where it abuts the Cemetery, so there is little if any lost benefit to the public with regard to more precisely establishing the Cemetery's boundaries from the waiver of the plat requirement.

³ The Cemetery's current use is not inconsistent with its current RE-2 zoning classification, since an RE-2 zone is the only one that would qualify the Property to receive a Special Exception for an expanded, enlarged or modified cemetery use. See, *Montgomery County Code, Sections 59-C-1.3 and 59-G-2.12(4)*.

The plat process under *Montgomery County Code, Section 50-35A* would require a forest conservation plan, as well as storm water, landscaping, and lighting plans. However, the Association's proposed storage shed does not anticipate that any trees will be removed and includes no exterior lighting. Any change the proposed storage shed might cause to the Cemetery's existing topography or landscaping would be inconsequential, at most. The visual impact of the proposed new storage shed would be significantly mitigated by its being located a substantial distance away from structures on neighboring properties.

Finally, any enlargement, expansion or modification of the Cemetery's use would, as noted above, require a special exception, at which point the Association would almost certainly have to undertake the platting/subdivision process. Although the Association recognizes the possibility that the Cemetery might obtain exemptions/waivers that could reduce the cost and delay inherent in the plat and subdivision process for purposes of obtaining approval of the building permit application now at issue, the cost and delay that would be involved in documenting eligibility for such exemptions/waivers would be almost as great as developing a plat, and if the Cemetery ever does need to apply for a Special Exception, it would, most likely, have to essentially repeat the platting/subdivision process again, even if it goes through the platting process solely to obtain the building permit for its proposed storage shed.

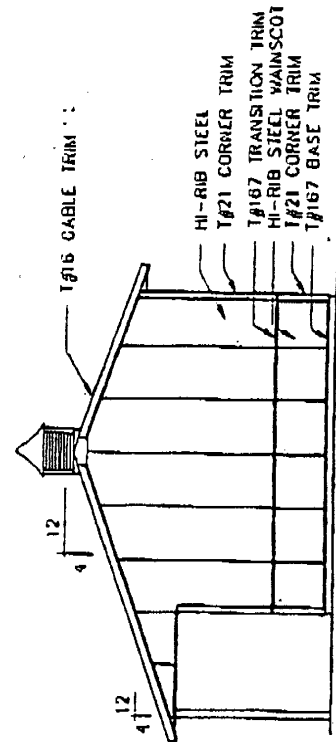
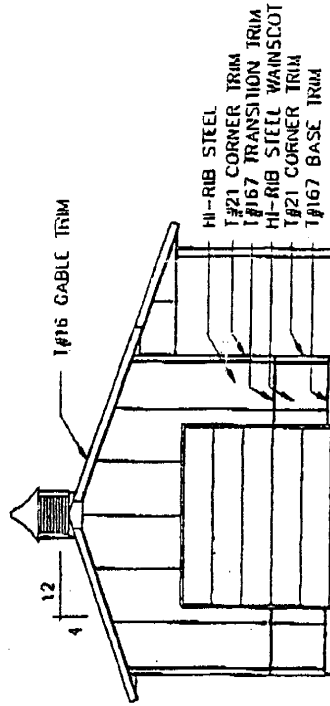
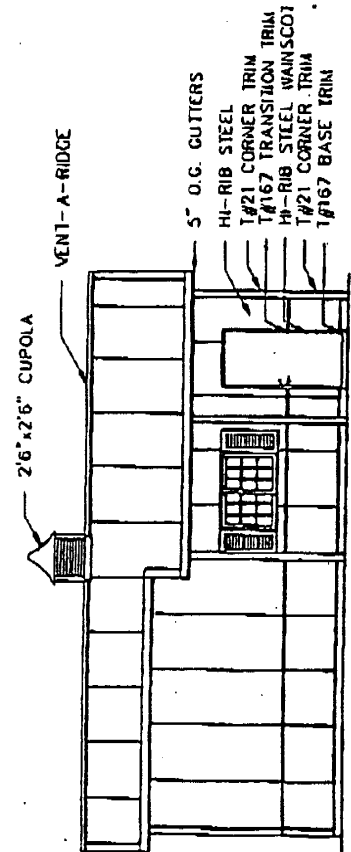
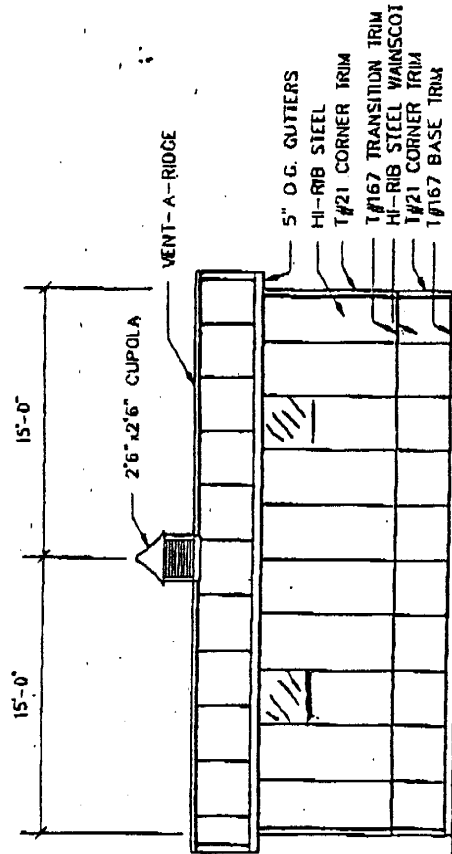
Shed To Be Constructed on Parcel of Property Which Predates Zoning Ordinance

The Cemetery has grown to its present size through seven separate conveyances, the first conveyance occurring in 1859 and the most recent in 1963. A survey of the Cemetery was completed in 1998. The surveyor confirms that the parcel of property on which the storage shed will be situated was conveyed to the Cemetery before the adoption of the County Zoning Ordinances. The property clearly was used as a Cemetery prior to adoption of the Zoning Ordinance, and such use continues to this day. The replacement of a storage shed is not an expansion, enlargement or modification of such use. The surveyor information will be supplied with the application.

Conclusion

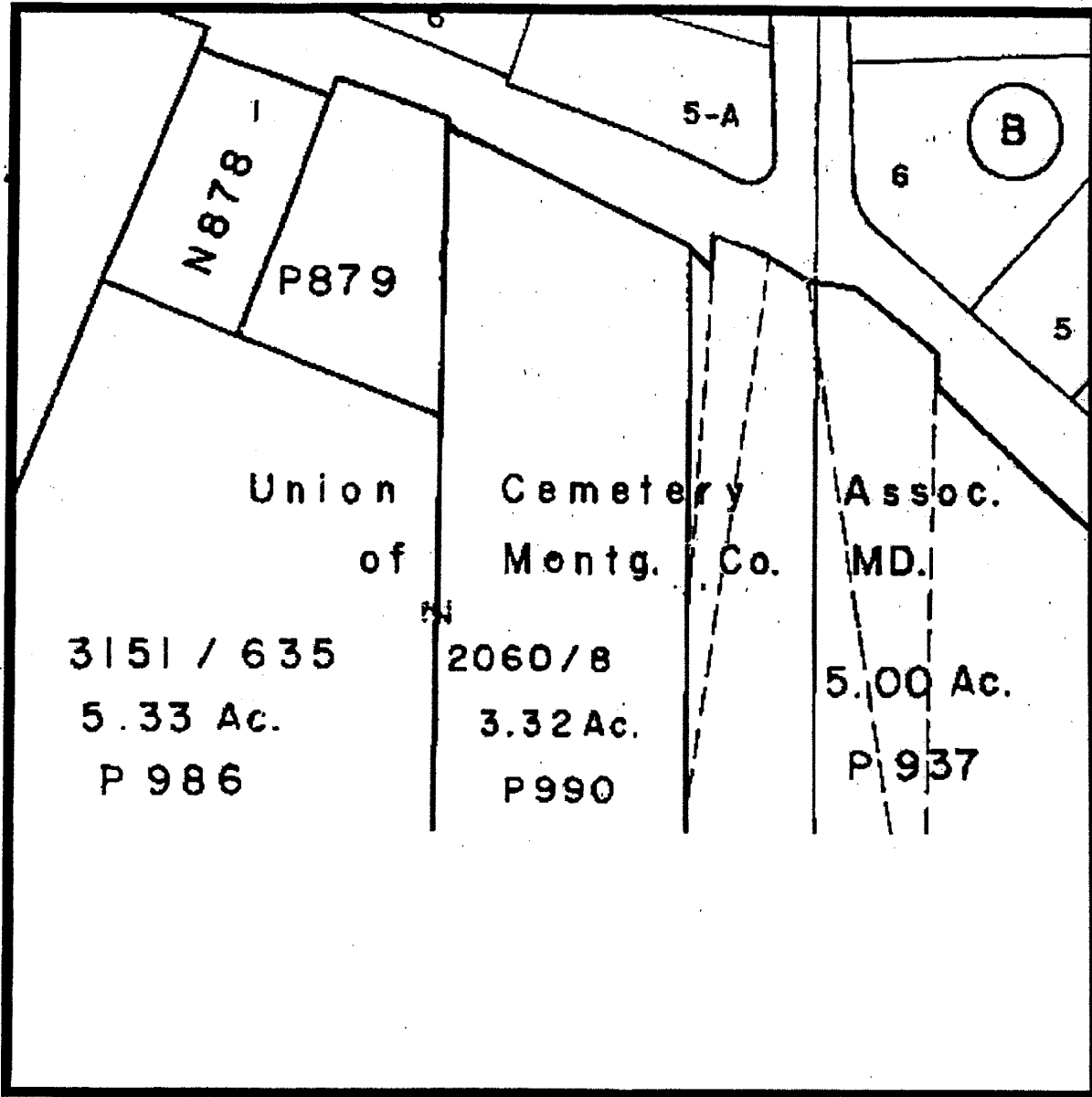
The Association has applied for a building permit that would allow it to construct a 24' x 36' storage shed on the Cemetery. The project in question would be more than adequately regulated through Montgomery County's building permit process, and the modest size of the project simply does not warrant the expense and delay that would be required for the Association to produce the documentation necessary for a plat. The cost of creating a recordable plat would be grossly disproportionate to the cost of the proposed storage shed and the cost and delay

JOB #64-3208-P





District - 05 Account Number - 00280553



Property maps provided courtesy of the Maryland Department of Planning ©2001 - 2002.
For more information on electronic mapping applications, visit the Maryland Department of Planning
web site at www.mdp.state.md.us/webcom/index.html

agreement. Any necessary cross-easements, covenants or other deed restrictions necessary to perpetuate previous approvals must be executed prior to recording the record plat.

- (5) **Plat of Correction.** A plat may be recorded under the minor subdivision procedure to correct inaccurate or incomplete information shown on a previously recorded subdivision plat. The plat may correct drafting or dimensional errors on the drawing; failure to include a required note, dedication, easement or other restriction; incorrect or omitted signatures; and/or other information normally required to be shown on a recorded plat. All owners and trustees of the land affected by the correction must sign the revised plat. In addition, the plat of correction must clearly identify the original plat that is being replaced and contain a note identifying the nature of the correction.
- (6) **Plats for Certain Residentially Zoned Parcels Created by Deed Prior to June 1, 1958.** While recognizing the single residential parcel exemption of Sec. 50-9(e), an owner may voluntarily submit a plat to record such a parcel under the minor subdivision procedure provided that the parcel is developable for only one single-family, detached dwelling unit.
- (7) **Plats for Existing Places of Worship, Private Schools, Country Clubs, Private Institutions and Similar Uses Located on Unplatted Parcels.** A plat may be recorded under the minor subdivision procedure provided:
 - a. The requirements for adequate public facilities, under Sec. 50-35(k), are satisfied prior to plat recordation;
 - b. Any required street dedications are shown on the record plat;
 - c. Forest conservation and stormwater management requirements, if applicable, are satisfied prior to recording the plat;
 - d. If located in a special protection area, as shown on the approved and adopted mater plan, all applicable special area protection requirements and guidelines, including the approval of a water quality plan, are satisfied prior to recordation of the plat; and
 - e. A landscaping and lighting plan including the parking lot layout is submitted for staff approval prior to recording the plat.
 - f. If the property is the subject of an approved special exception, all conditions of the special exception approval remain in full force and effect.