

"Federation Corner" column
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Court strikes down approval of Olney development

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On September 10, 2012, Judge Sharon V. Burrell of the Circuit Court of Montgomery County overturned the Planning Board's approval of the Preliminary Plan and Site Plan for the First Baptist Church of Wheaton development project proposed for property located at 3110 Emory Church Road in Olney.

I want to make it clear from the start that neither the Montgomery County Civic Federation as a position of record, nor do I personally, generally oppose the construction of churches in the county. According to the Federal "Religious Land Use and Institutionalized Persons Act" (RLUIPA), churches wishing to develop property in the county, or indeed anywhere in the U.S., must be treated as all other members of the same class (that is, all other owners whose properties have the same zoning). But this case did not turn on the use planned for the building, but on whether the building and associated development--in this case, sidewalks and a large paved parking lot--was in conformance with the area master plan.

This is a significant court ruling because Judge Burrell found the Planning Board, in approving the preliminary plan for this development, could not make the required finding that the project "substantially conforms" to the master plan approved for the area by the County Council. But conformance to the 2005 Olney Master Plan was made even stricter by a prior resolution by the Council relating to the issue of whether public sewer service should be run to the property, on which a prior home structure had relied on a septic system to treat sewage.

On April 8, 2008, the County Council heard a request from the church, which had recently purchased the property on Emory Church Road, to change the sewer category from S-6 "not eligible" to S.3, meaning the property would be eligible to have public sewer line run to it. In Resolution 16-500, the Council maintained the ineligible S-6 sewer category, and stated the property could only advance to category S-3 "conditioned on the Planning Board's approval of a preliminary plan that *conforms* to the intent of the Olney Master Plan" (not merely *substantially conforms*, as usually required). The Council Resolution also required the Planning Board "ensure that" any deleterious environmental impacts (such as reduction in ground water quality) and potential road improvements (such as to Emory Church Road) "are minimized."

The County Sewer Plan also applies specific standards to new or relocating "private institutional facilities" (known as PIFs) that seek the extension of public sewer to property that is not currently eligible for public sewer. The County Sewer Plan states: "For new or relocating PIF uses, service area category amendments may be approved for sites only where [the] required water and/or sewer main extensions will abut only properties which are otherwise eligible for community service under the general policies of the plan."

Judge Burrell opined that in their request to Council for sewer category change the Applicant mischaracterized its eligibility for public sewer under the PIF standards. Applicant stated their property was eligible for public sewer because the proposed sewer main would abut properties "recommended" for public sewer, rather than the correct standard which requires the proposed sewer main to abut only properties that are "eligible" for public sewer. "The evidence of record shows the proposed sewer extension to the [Emory Church Road] Subject Property would abut at least two properties ineligible for public sewer," the judge stated in her opinion.

Now what language does the 2005 Olney Master Plan contain which is relevant to consideration of development on the property at 3110 Emory Church Road? The Plan explicitly recommends that public sewer not be extended to this property. And in her opinion Judge Burrell wrote that "substantial evidence of record confirms that the intent of the Olney Master Plan is to limit imperviousness surfaces (e.g., buildings, parking lots and sidewalks) to approximately 9%."

In approving the church construction plan on September 8, 2011, the Planning Board allowed an imperviousness limit of 17.1%. Yet the Board still found the project "substantially conforms" to the area master plan, which intends that imperviousness be limited to almost half that amount.

In their submission to the Circuit Court, the Planning Board conceded that a finding of "conforms" to the Olney Master Plan (as was required by County Council in this case) is "unquestionably" a more stringent review standard than the imposition of a finding of "substantial conformance" that is normally applied to preliminary plan applications. The Board also admitted that in this case they did not make a finding of fact as to whether the preliminary plan "conforms to" the intent of the Olney Master Plan.

At the 2011 Planning Board hearing on the development plan, neighbors of the property and the South-East Rural Olney Civic Association (SEROCA) told the Board that approval of the project would violate the area master plan. But the Planning Department staff, then under Planning Director Roland Stanley, recommended approval with conditions, and the Board concurred. The only recourse left to the residents was a judicial appeal.

Now, four and one half years after the development proposal became known when the property owner sought the sewer category change from Council, and a full year after the Planning Board approved the project, the court has struck down the approval.

In the end, the issue in this case is not one of a church wanting to move from Wheaton to Olney. It could have been any owner wanting to build a large, private institutional facility on this property and seeking to obtain public sewer where it is prohibited and exceed the imperviousness limit set in the master plan--a service organization, a non-profit association, or even a private art museum.

The unfortunate reality is that this is a case of Montgomery homeowners having to spend more than two years of their lives and tens of thousands of dollars in legal fees to uphold their area master plan, while fighting county officials the entire way.

The views expressed in this column do not necessarily reflect formal positions adopted by the Federation. To submit an 800-1000 word column for consideration, send as an email attachment to theelms518@earthlink.net