



MEMORANDUM

TO: Gaithersburg Mayor & City Council

FROM: Miles & Stockbridge P.C.
Scott C. Wallace

RE: DeVol Funeral Home Addition – Concept Plan No. 8415-2020 (the “Concept Plan”)

DATE: September 16, 2020

The purpose of this Memorandum is to respond to questions raised at the August 3rd Mayor and Council Public Hearing on the Concept Plan regarding (1) the zoning treatment of a crematory as an integrated and accessory use to a funeral home as proposed in the Concept Plan, and (2) proximity of the proposed new funeral home to adjacent structures and property lines.¹

1. Zoning Treatment of Funeral Homes with Accessory Crematories

The Concept Plan seeks approval to convert an existing vacant house on property owned by DeVol Funeral Home at 14 East Deer Park Drive, adjacent to its existing funeral home at 10 East Deer Park Drive, into a new funeral home that will have viewing parlors for funeral services and a single retort crematory installed in an approximately 600 square-foot addition to the house. The Concept Plan also consolidates both properties (10 and 14 East Deer Park Drive) into one lot to unify the DeVol campus (collectively, the “Property”). The Property is zoned Corridor Development (CD).

Section 24-1 of the Zoning Ordinance defines “funeral home” as:

Any building in which one or more parlors or rooms are maintained for the temporary resting place of dead human bodies pending final disposition thereof. Such building may also include the following: Space and facilities for the preparation of such bodies for burial or other final disposition; a chapel for the purpose of conducting religious or memorial services or ceremonies (and in which no emergency ambulance service is provided); rooms or space for administrative offices for conducting the business of the home; rooms or space for the housing of equipment, including motor vehicles; living quarters for not more than one family unit who are employees or owners of such funeral home or children of such

¹ In early 2020, the owner of DeVol Funeral Home notified homeowners on Beane Court east of the funeral home by letter of the development plans for the funeral home and crematory. No comments from these homeowners were received by DeVol.

employees or owners. Emergency ambulance service shall not be provided from the building.

A funeral home is a permitted use in the CD Zone pursuant to Section 24-160G.2 of the Zoning Ordinance, which provides that “all uses listed as permitted and not solely as special exceptions or conditional uses in all zoning districts . . .” and not explicitly prohibited are permitted uses in the CD Zone. A funeral home is a permitted use in the C-2 (General Commercial) Zone and is not prohibited in the CD Zone. Therefore, the new funeral home proposed in the Concept Plan is a permitted use in the CD Zone.

City planning staff and the City Attorney have correctly determined that the definition of “funeral home” in the Zoning Ordinance encompasses the operation of a crematory in the funeral home as an accessory use to the funeral home. An “accessory use” is defined in the Zoning Ordinance (Section 24-1) as a “use on the same lot with, and of a nature customary, incidental and subordinate to, the principal use of the main building or lot.” As stated above, the existing house on the Property will be converted to a funeral home with viewing parlors and the crematory will be installed in an approximately 600 square-foot addition to the house. The services conducted in the new funeral home will include services associated with cremations and services that are not associated with cremations. No cremation equipment is proposed to be installed in the existing funeral home and the existing funeral home will continue to be used for funeral services and offices for business operations as a funeral home. The predominant and principal use of the Property (i.e., 10 and 14 East Deer Park Drive) as a funeral home will remain and will not be supplanted by the addition of the crematory. In this regard, Maryland courts have consistently held that when a use does not change the basic nature of the primary permitted use, is incidental to and supports the primary use and is not prohibited by statute, it is permitted as an accessory use. See, e.g., *Eastern Serv. Ctrs., Inc. v. Cloverland Farms Dairy, Inc.*, 130 Md. App. 1 (2000). Accordingly, it is appropriate to permit the crematory as an accessory use to the new funeral home as proposed by the Concept Plan.

The argument made by some in the community that the reference to “final disposition” in the definition is meant to prohibit cremation operations in a funeral home errs in several ways. First, cremation is not a “final disposition” of a body. After cremation, the deceased’s remains are offered to families and responsible parties for disposition in any number of ways, such as internment, placement in a mausoleum, or scattering. Those actions constitute the final disposition of the deceased. Further, while it has been stated in testimony that a cremation may be a “final disposition” in contexts other than zoning, there is no evidence in the record that the City considered such references to “final disposition” when it enacted its definition of a funeral home. Finally, even if “final disposition” includes cremation, the definition of “funeral home” in the Zoning Ordinance is only intended to define what a funeral home as a principal use is for zoning purposes; again, there is no express prohibition on crematories as an accessory use to the funeral home. By contrast, the definition of “funeral home” in the Zoning Ordinance explicitly prohibits emergency ambulance service from the funeral home. Had the City intended to prohibit a crematory as an accessory use in a funeral home, it could have done so in the same

explicit manner as it did for emergency ambulance service. To read into the definition a prohibition on a crematory as an accessory use to a funeral home would be contrary to established principles of statutory construction. In summary, the plain language of the definition does not prohibit cremations if accessory to a building principally used as a funeral home, which is the principal use of the DeVol Property. As stated above, any uses customarily incidental and subordinate to the principal use, and not otherwise explicitly prohibited in the definition of the principal use, are permitted as accessory uses.

Moreover, allowing funeral homes with accessory crematories in commercial and mixed-use zoning like the CD Zone is consistent with how funeral homes are treated for zoning purposes in multiple jurisdictions in the region. By way of example:²

- Montgomery County permits a funeral home with accessory cremation services as a conditional use in several single-family residential zones and as a permitted use in the County's General Retail Zone.
- Frederick County allows funeral homes with accessory cremation services in several commercial and mixed-use zones.
- Frederick City allows funeral homes with accessory cremation services in several commercial and mixed-use zones.
- Anne Arundel County allows funeral homes with accessory cremation services in several commercial zones.

In summary, the determination that crematories are permitted as accessory uses to funeral homes under City law is well supported by both the clear and unambiguous language of the Zoning Ordinance, applicable case law, and the practice of multiple nearby jurisdictions.

2. Proximity to Adjacent Residential Uses

In response to questions raised regarding proximity of the addition to surrounding structures and property lines that will be constructed for the crematory, the Project's civil engineering consultant prepared the attached aerial showing distances to surrounding property lines and structures. See Exhibit "1". The closest residential property line is approximately 146 feet from the addition and the closest residential structure is a multi-family building located, at its closest corner, approximately 190 feet from the addition. By comparison, we note that Pumphrey Funeral Home, located at 7557 Wisconsin Avenue in downtown Bethesda, has operated a crematory in the rear of the funeral home for many years. The area of the funeral home that houses the retort is approximately 20' from an adjacent multi-family building and is substantially closer to several other residential and commercial buildings than the addition for

² Information about the zoning treatment of cremation facilities in other jurisdictions is based on a review of the applicable zoning ordinances and/or discussions with public agency staff.

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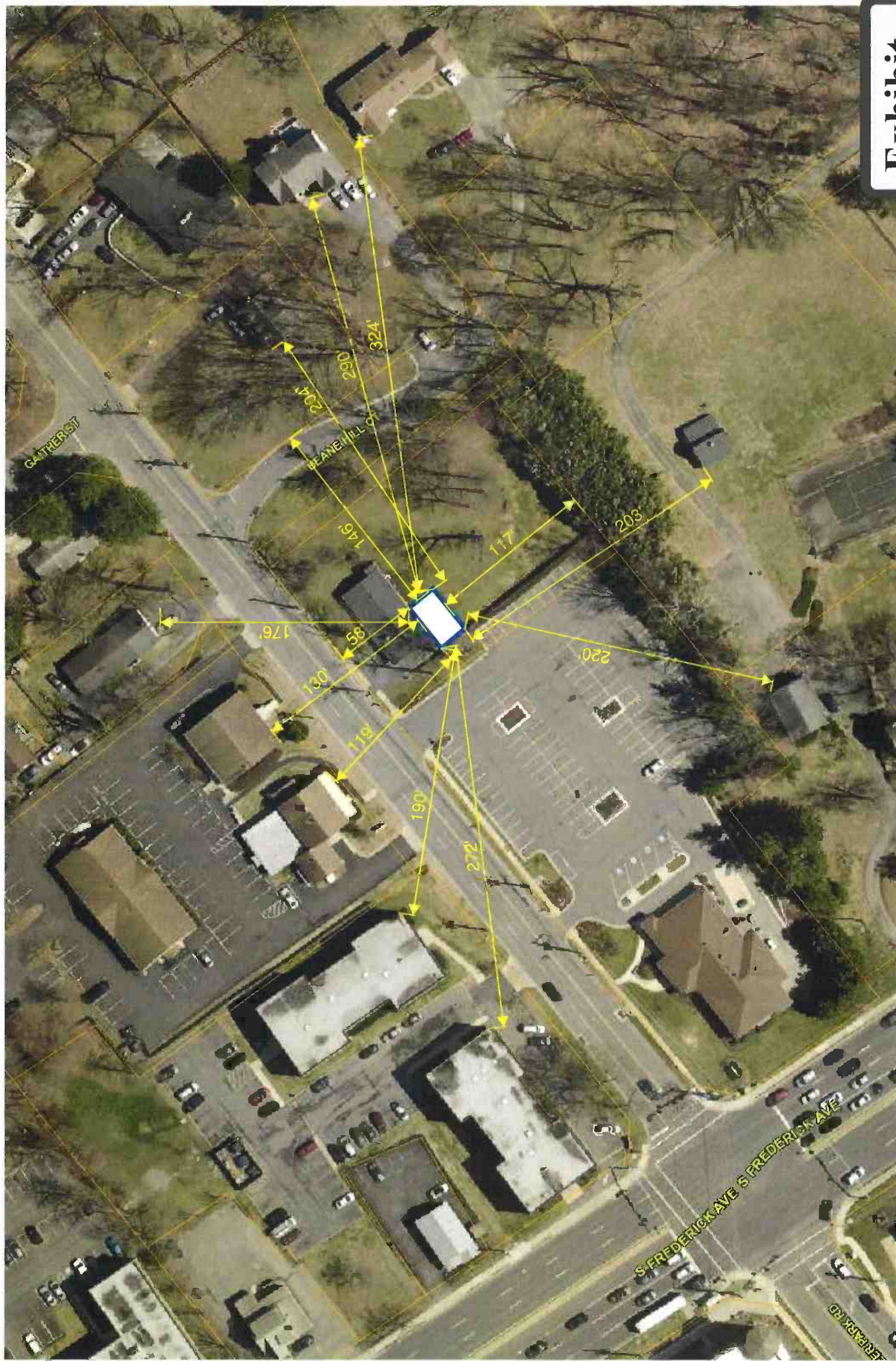
the crematory proposed in the Concept Plan. See attached Exhibit "2". In addition, development plans have been filed with the County Planning Board for redevelopment of the two multi-family buildings shown within approximately 70-130 feet from the Pumphrey crematory.

We hope this Memorandum is responsive to the questions addressed.

Attachments

cc: Gregory Mann
Jasmine Forbes
Robert DeVol
Carol Lynn Green, Esquire

Exhibit
1



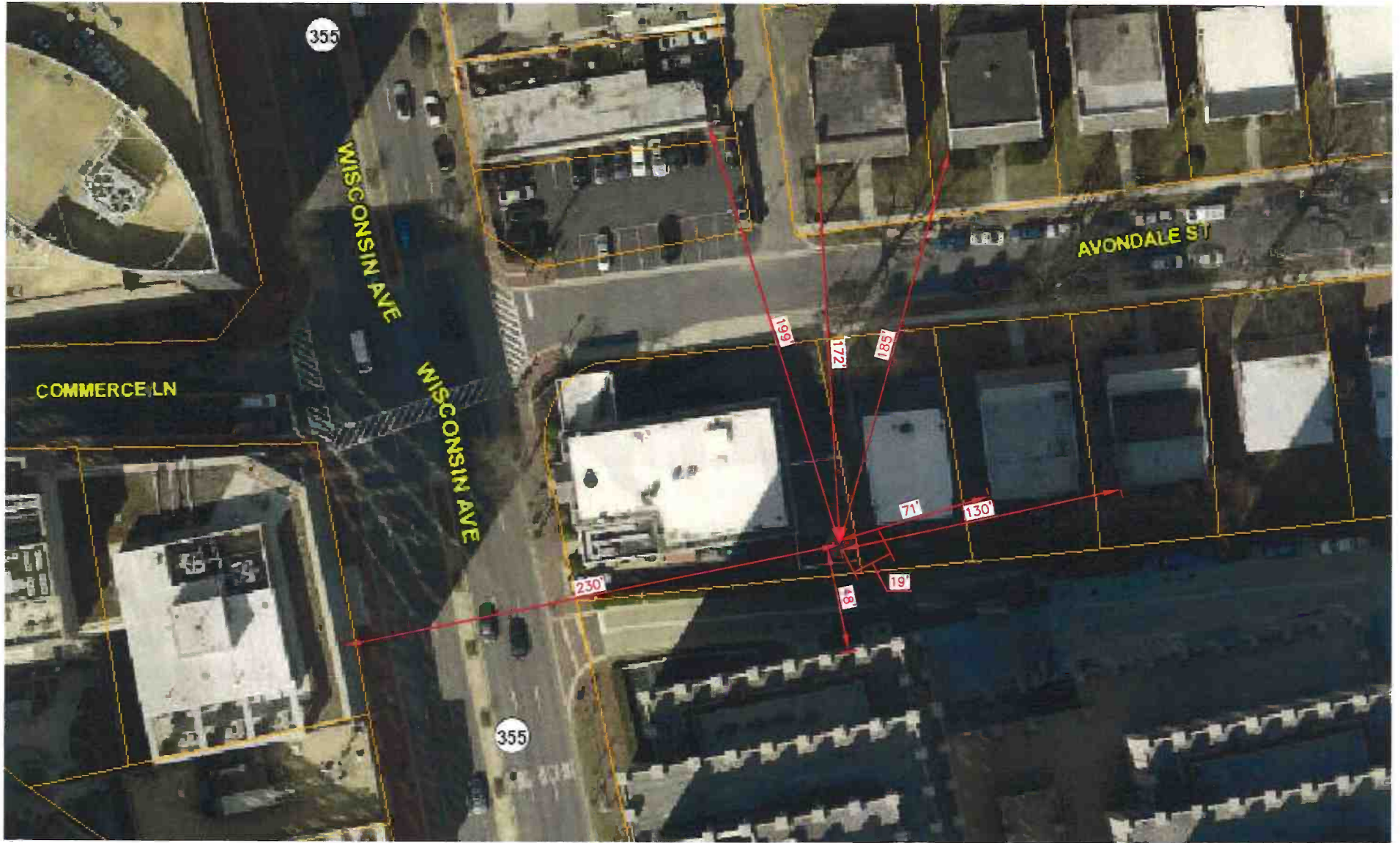


EXHIBIT - ROBERT A PUMPHREY FUNERAL HOMES
SCALE: 1"=40'