BEFORE THE

COUNTY BOARD OF APPEALS FOR BALTIMORE COUNTY

Case No. 06-180-SPHA

Benjamin A. and Kayren P. Governale, *Owners*

W/S Glenbrook Drive, 569' N of the c/l Blenheim Road
10th Election District
3rd Councilmanic District

PETITIONERS'/OWNERS' POST-HEARING MEMORANDUM

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Benjamin A. and Kayren P. Governale (referred to collectively as the "Petitioners" or the "Owners") by and through their undersigned legal counsel, hereby submit this Post-Hearing Memorandum in accordance with the direction of the County Board of Appeals for Baltimore County ("Board") at the conclusion of the hearing held on the above-referenced appeal, in lieu of closing argument.

STATEMENT OF THE CASE

This case involves the appeal, by one neighbor, Mr. Jeffrey Peek ("Peek") and the Baltimore County Office of People's Counsel ("People's Counsel") (collectively, the "Protestants") of the *Findings of Fact and Conclusions of Law*, issued by the Zoning Commissioner for Baltimore County ("Commissioner") on December 2, 2005 (the "Order")[1] approving the "configuration, height and location of the existing radio operator

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[1] Petitioners' Exhibit No. 24

antenna" on the Owners' property at 39 Glenbrook Drive (the "subject property").

Mr. Governale, the holder of an "Extra Class" amateur radio license, has been licensed by the Federal Communications Commission ("FCC") for forty-five (45) years. After making an extensive search of properties in northern Baltimore County, looking for a home on a lot that would accommodate his amateur radio activities, the Owners purchased the subject property. After experimenting with a variety of radio antenna configurations, Mr. Governale designed an amateur radio antenna system that was necessary to meet his need for effective transmission and reception of amateur radio signals. Mr. Governale next visited the Baltimore County Department of Permits and Development Management to obtain any permit necessary for the proposed accessory amateur radio antenna system. Mr. Governale was advised that the antenna support structure required a permit rather than the antennas[2] themselves. The permit was obtained and the self-supporting accessory structure [permitted to a height of 100 feet as shown on the permit] was erected at a height of 99 feet above the ground, upon which are located three antennas – one at 99 feet, one at 95 feet and one at 91 feet above the ground.

Sometime after the monopole structure was erected and the antennas mounted, a complaint was filed with Baltimore County Code Enforcement alleging that the accessory structure was taller than the 50 feet allowed. After Code Enforcement personnel visited the subject property, the Owners were issued a Correction Notice which alleged that because the antenna that is located at a height of 91 feet above the ground extended

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[2] Counsel is advised by the experts in this case that for radio, the plural of antenna is antennas. In entomology (the study of insects), the plural of antenna is antennae.

horizontally to within 65 feet of the closest property line, it could not be higher than 65 vertical feet above the ground. Based on the obvious ambiguity in the wording of the *Baltimore County Zoning Regulations* ("BCZR") defining the maximum height for a radio operator antenna, and the illogical measurement of vertical height based on a horizontal distance, the Owners filed a Petition for Special Hearing requesting an interpretation of "BCZR § 426A.E, giving full consideration and pre-emptive weight and authority to the Federal Communication Commission statutes, rules, regulations, policies and interpretations applicable to the radio operator antenna, its height and location on the subject property" to permit "the continued configuration, height and location of the existing, radio operator antenna on the subject property." In the alternative, the Owners filed a Petition for Variance to allow, *inter alia*, the existing radio operator antenna "with a height of 91 feet, each in lieu of 65 feet, which is the horizontal distance from the closest point of the array from the nearest property line."

After accepting testimony and evidence at the public hearing on the Petitions as filed, the Zoning Commissioner issued his Order, approving the configuration, height and location of the existing radio operator antenna on the subject property and dismissing the requested variance relief as moot. Thereafter, an appeal was filed by Mr. Peek and a separate appeal was filed by People's Counsel.

On December 5, 2006, this Board conducted a day-long hearing on the *de novo* appeal, accepting testimony and evidence from those present. People's Counsel did not attend or participate in the proceedings before this Board, electing instead to submit a

written, *Prehearing Memorandum*. In lieu of closing argument, the Owners and Mr. Peek[3] were requested to submit Post-Hearing Memoranda.

THE EVIDENCE

Bruce E. Doak, PLS - Property Description, Applicable Zoning Regulations and Measurements

The Owners presented Bruce E. Doak, a registered surveyor in Maryland and acknowledged zoning expert. Accepted without objection as an expert in Baltimore County zoning matters, Mr. Doak testified that he and his firm were retained to prepare the plat which accompanied the zoning petitions ("Plat") and that it depicts accurately the improvements located on the subject property and a "not-to-scale" drawing of the existing self-supporting (described as "monopole")[4] structure and antennas located thereon, as well as all other information required by applicable zoning checklists for preparation of such drawings. The Plat was accepted as Petitioners' Exhibit No. 2.[5]

The subject property was described by Mr. Doak as an irregularly shaped panhandle lot, of approximately 2.2 acres which slopes from the front to the rear which is zoned RC-6. Improvements on the subject property noted by Mr. Doak were the Governale's existing home, as well as the accessory tower and antennas. As to the accessory amateur radio

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[3] Mr. Peek is a licensed member of the Maryland Bar.

[4] Counsel is advised by the experts in this case that, in the communications world, a "monopole" routinely refers to a round and solid structure, like a wooden telephone pole. The structure on the subject property is a lattice style. The ususal nomenclature for the appropriate category, including the category in the building code, is "antenna support structure."

[5] The entire Zoning Commissioner's file as transmitted to this Board was previously moved and accepted without objection as Petitioners' Exhibit No. 1.

operator antenna use, Mr. Doak testified that such accessory use is permitted, pursuant to BCZR § 426A, in any zone in the County.

With respect to the complaint filed with Baltimore County, Mr. Doak testified that based on his knowledge after reviewing Code Enforcement's file, the original complaint by Mr. Peek alleged that the amateur radio antenna on the subject property was taller than the fifty (50) feet allowed by BCZR § 1B01.1A.18b[6], applicable to property zoned Density Residential (DR). Although the DR zones are associated with the more densely populated areas of the County, the height of the antenna specified in that section is measured with respect to the vertical distance [height] "above grade level." *Id.*

Next, with reference to the Plat [Petitioners' Exhibit No. 2], Mr. Doak described the location of the tower as 100 feet from the rear property line, 102 feet from each side property line and 147 feet from the dwelling at its closest point. The antennas were described as being 91, 95 and 99 feet above the ground, as depicted on the drawing on the left hand side of the Plat. With respect to the 65 foot dimension shown from the end of the antenna located 91 feet above the ground, Mr. Doak testified that based on one Zoning Office reviewer's reading of BCZR § 426A.E, the measurement had to be included as it was the height limit of that antenna. Mr. Doak acknowledged that at all points along the

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[6] BCZR § 1B01.1A.18b provides "[w]ireless transmitting and receiving structures, provided that any such structure: is a radio antenna in conjunction with transmitting and receiving facilities used by a resident amateur radio operator possessing an amateur radio operator's license issued by the Federal Communications Commission; if it is an independent structure, shall be subject to the same requirements as are applied to buildings under Section 400; if it is a rigid-structure antenna, shall be no higher than 50 feet above grade level and with no supporting structure thereof closer than 10 feet to any property line; and does not extend closer to the street on which the lot fronts than the front building line."

subject antenna, it is located 91 feet above the ground.

Mr. Doak then testified as to his familiarity with the provisions of the *Baltimore County Zoning Regulations* ("BCZR") that are applicable in this case and his application of those regulations and others in his professional practice. Three, separate provisions of the BCZR were identified by Mr. Doak and accepted into evidence as follows:

> ***Radio Operator Antenna*** - Definition: "A wireless antenna used in conjunction with radio transmitting and receiving facilities used by a resident amateur radio operator possessing an amateur radio operator's license issued by the Federal Communications Commission."[7] BCZR § 101

BCZR § 426A[8] - ***Radio Operator Antennas***:

A. A radio operator antenna and related equipment, including any supporting structure, is considered an accessory structure or use and is permitted by right in any zone if the radio antenna and the related equipment meets the requirements of this section.

B. A radio operator antenna shall be operated by an amateur radio operator who is licensed by the Federal Communications Commission and whose domicile is on the lot where the antenna and the related equipment is placed.

C. A supporting structure for a radio operator antenna may not be located within 20 feet of any property line.

D. A radio operator antenna may not extend closer than the front building line to any street on which the lot fronts.

E. A radio operator antenna may not be higher than the lesser of 100 feet or the horizontal distance to the nearest property line above grade level.

As part of Mr. Doak's analysis for the Board, BCZR § 426.5, governing the location

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[7] Petitioners' Exhibit No. 3.

[8] Petitioners' Exhibit No. 4

and height restrictions for wireless telecommunications towers and antennas was introduced into evidence as Petitioners' Exhibit No. 5. Drawing upon his familiarity with the BCZR, Mr. Doak advised that the term "height" is not defined therein, but that BCZR § 101 provides that were a term is not otherwise defined, the ordinarily accepted definition as set forth in the most recent edition of Webster's Third New International Dictionary of the English Language is to be used.[9] A copy of the Webster's definition of "height" was submitted as Petitioners' Exhibit No. 6. Mr. Doak, after reviewing the definition, stated without contradiction that the ordinary meaning of "height" (according to Webster) relates to the highest point of an object or the distance from the bottom to the top, but never its width or horizontal distance.

Mr. Doak contrasted BCZR § 426.5D which specifies how height is to be measured as well as the maximum height permitted for wireless telecommunications facilities, with BCZR § 426A.E which specifies only the maximum height for radio operator antennas. For wireless telecommunications facilities, height is measured "from the base of the tower to the tip of the tower or the tip of the highest antenna on the tower, whichever distance is greater." BCZR § 426.5D.

Applying his extensive experience with wireless telecommunications facilities to radio operator antennas, Mr. Doak opined, without contradiction, that the height of an antenna and its supporting structure were of concern with respect to their location from

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[9] BCZR § 101: "Any word or term not defined in this section shall have the ordinarily accepted definition as set forth in the most recent edition of Webster's Third New International Dictionary of the English Language, Unabridged. [Bill No. 149-1987]"

property lines. If the antenna or tower were to fall, the intent of the height limitation and required setback is to ensure that they fall on the property on which they are located and do not strike any buildings located thereon. In his expert opinion, Mr. Doak testified that the antennas located on the subject property were set back from adjoining property lines at least as far as they are tall. Mr. Doak's unchallenged testimony was that all supporting structures for the antennas are more than 20 feet from all property lines [including the back-up generator] and the antennas are not located closer to Glenbrook Drive than the Governale's home.

With respect to the criteria generally applied to zoning special hearing petitions, Mr. Doak testified that the existing antennas, given their location, will have no impact on the health, safety or general welfare of the community; if they fall, they will all fall on the Governale property. The existing antennas and the support structure occupy a small portion of the subject property and will, therefore, not overcrowd the land, nor will they create any potential hazard, nor impact negatively public services. Mr. Doak testified that the existing accessory uses/structures do not interfere with adequate light or air nor, based on the small footprint, is there any impact on the impermeable surface or vegetative retention requirements. Moreover, Mr. Doak noted that radio operator antennas, permitted in all zones, have been determined by the County Council to be consistent with the BCZR and the RC-6 zone.

Applying the Office of Zoning reviewer's application of BCZR § 426A to the existing antennas, Mr. Doak opined that because the BCZR do not prohibit more than one accessory use on a residential property, the existing 99 foot tall tower and the antennas

located at 95 and 99 feet could remain and the Governales could construct a second tower, 65 feet tall, to locate the longest antenna at the top of it. That antenna would then be 65 feet above ground.

If this Board does not interpret BCZR § 426A as did the Zoning Commissioner and in accord with the ordinary meaning of "height," Mr. Doak testified that, based on topographic conditions and the Petitioners' need to transmit at certain frequencies for effective and reliable communication, the subject property is unique when compared to other RC-6 zoned property. Referring to Petitioners' Exhibit No. 2, Mr. Doak testified that the alternative variance relief requested was the minimum necessary to ensure justice to the Petitioners and other property owners, and that strict compliance with one County reviewer's interpretation of BCZR § 426A would unreasonably prevent the use of the subject property for a use that has been specifically permitted by the County Council.

On cross-examination, Mr. Doak was asked if an antenna located at a height above ground less than 100 feet could extend across the property line. In response, Mr. Doak testified that such would be a trespass onto the property of another, even though it was in the air.

Benjamin A. Governale — W3LL — Qualifications/Building Permit/Needs for Effective Communication

Mr. Governale testified that he has been a licensed amateur ("ham") radio operator

since 1962, whose current "Amateur Extra" license[10] issued by the FCC extends until 2012.[11] As a retired U.S. Coast Guard Commander, Mr. Governale was a degreed electrical engineer for the Black & Decker corporation for more than 32 years. Prior to purchasing the subject property in the mid-1970s, Mr. Governale conducted what he described as an exhaustive search for a home and property that would, in addition to family considerations, fulfill his need for reliable and effective amateur radio communications. His search evaluated properties on factors which included [in addition to the standard real estate factors such as schools, shopping, distance to work] topographic considerations, distance from airports and distance from commercial communication towers, etc. He and his wife purchased the subject property and the parcel immediately to the rear.

The radio operator antennas are located on the Governale's home lot and it would not be feasible to locate them on the parcel they own to the north due to its significantly lower topography and extensive forest cover, which would reduce greatly his ability to transmit and receive amateur radio communications.

Although his designation is as an "amateur" radio operator[12]:

- Mr. Governale is a member of the American Radio Relay League;
- His station is designated a National Weather Service certified severe weather reporting station;

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10 Petitioners' Exhibit No. 11

11 It is further renewable. 47 CFR 97.21(a)(3).

12 A complete description of Mr. Governale's memberships, activities and emergency public service as an amateur radio operator is contained in a *Supplemental Information* submission made to this Board directly by Mr. and Mrs. Governale and transmitted with this Memorandum.

- Mr. Governale and his station are part of the Baltimore County Amateur Radio Emergency Service ("RACES"), administered by the Baltimore County Department of Homeland Security – qualification for RACES included fingerprinting and a complete background investigation;

- Mr. Governale was the sole RACES operator during Hurricane Ernesto and the sole operator for the Harford County Emergency Operations Center during their recent Weapons of Mass Destruction drill, as well as an operator for same drill conducted by Baltimore County; and

- Mr. Governale does not conduct or permit any commercial communications from his station or the antennas located on the subject property[13].

Prior to erecting the antenna tower, Mr. Governale personally made application for any and all permits necessary. After describing the proposed antennas, he was advised by County permit officials that the permit application should list a "monopole radio tower" and that the tower could not be more than 100 feet tall and that it must be located at least 100 feet from all property lines. Mr. Governale prepared the required plot plan[14] and submitted the permit application which was then reviewed and approved by all County review agencies before Building Permit No. B551665[15] was issued. That permit was issued on April 6, 2004. Mr. Governale constructed the proposed tower and antennas – the permit remains valid today, having never been revoked or rescinded.

The plot plan submitted with the permit application showed the location of the proposed support structure as 103 to 105 feet from the respective property lines. After

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13 *See*, 47 CFR Sec. 97.113, introduced as Petitioners' Exhibit No. 12.

14 Petitioners' Exhibit No. 13

15 Petitioners' Exhibit No. 8

construction was completed and Mr. Doak's survey conducted, the monopole is actually 100 feet from the rear property line which is a common property line with the parcel that the Governale's own to the north. In all respects, the required setbacks are met.

Mr. Governale described the height of the antenna from grade to be 99 feet and that there are no guy wires necessary to support any portion of the improvements. Using Petitioners' Exhibit No. 1, Mr. Governale described the function and limitations of each of the three antennas as follows:

- at the height of 99 feet is the 432 MHZ array; this array permits communications in the UHF band; trees and buildings act as obstruction to the line of sight communications at these frequencies.

- at the height of 95 feet is the 144 MHZ array; like the previously described array, communications are transmitted and received in the VHF band.

- at the height of 91 feet is the 7 MHZ array (the "7 **MHZ antenna**"), which operates in the High Frequency ("HF") or "Short Wave Band"; the antenna design goal for this frequency is recommended to be 1.0 to 1.5 wavelengths above ground for the lowest frequency used; in this case, the design goal (one wavelength above ground) would be 140 feet. However, given the topography of the subject property and the distance from commercial towers, the 91 foot height renders communications from this array marginally acceptable.

Mr. Governale then described the factors which were used in locating and designing the antennas as:

- surrounding obstructions, such as buildings, trees, etc.

- the ability to transmit/receive on the frequencies used with an antenna at a height necessary to avoid such obstructions, foliage, etc.; transmitting above these obstructions permits the amateur to communicate more effectively, at lower power levels – Mr. Governale's station transmits at approximately 100 watts, approximately 1/500th the power of WBAL's signal.

- it is located as far as possible from adjacent residences without encroaching on setbacks or easements; his 34-foot high home provides an effective screen for the bottom 60 feet of the supporting structure; in anticipation of the installation of these antenna, years ago the Owners planted the existing line of spruce trees.

- the subject property slopes to the southwest, south and northwest and these slopes allow low angle transmission signals to travel effectively.

- higher angle signals are not affected by the elevated slope to the southeast and, looking to the northeast, the line of sight is relatively flat – favoring line of sight communications.

- the attributes of topography and location of the subject property were not duplicated on other properties considered and therefore a much higher antenna would have been necessary on the other properties considered, which would have necessitated a variance for antenna height.

- the antenna support structure has a gray, steel finish to make it harder to see from a distance as depicted in the photographs submitted as Petitioners' Exhibit No. 7 A-C.

In order to continue to transmit and receive radio communications in accordance with his licensed activities and responsibilities, Mr. Governale needs to maintain the 7 MHZ antenna at a minimum height of 91 feet. Any interpretation of BCZR § 426A that would require it to be lower to the ground, below even its existing, marginal capability, would compromise and impair Mr. Governale's needs for effective and reliable communications. In his considered and uncontradicted opinion, a lower height would not be a reasonable accommodation of those needs. Moreover, lowering the 7 MHZ antenna could potentially result in a conflict with electronic devices in the Governale or neighboring homes which, as Mr. Governale described, considered with the need to transmit above trees and obstructions, are precisely the reasons why FCC regulations

permit amateur radio antennas, absent a conflict with FAA regulations, to be as high as 200 feet without further regulation.[16]

If asked to apply the height calculation for wireless communication towers [BCZR § 426.5D] to his 7 MHZ amateur radio antenna, Mr. Governale determined that it's height under that formula would be 97.1 feet as demonstrated graphically in Petitioners' Exhibit No. 15. During his direct testimony, Mr. Governale was called upon to demonstrate the zoning reviewer's method of calculating height by standing in the witness box and advising this Board as to his "height" — to which he responded 5'9". Mr. Governale was then requested to stretch his arms out, horizontally and parallel to the floor, and then advise this Board as to his height — which he testified remained at 5'9".

With respect to potential neighbor perception, Mr. Governale produced a colored copy of a portion of the State tax map showing his property and that of his neighborhood.[17] Mr. Governale identified each of the colored parcels and related them to a signed Petition of support which described verbatim the relief requested and to written letters of support from each of his neighbors for the requested zoning relief.[18] It should be noted that some of the neighboring properties were sold to new owners between the time of the hearing before the Zoning Commissioner and this Board's hearing. The new owners signed the

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16 47 CFR Sec. 97.15(a).

17 Petitioners' Exhibit No. 9

18 Petitioners' Exhibit No. 14. This exhibit contains copies of the letters from neighbors submitted to the Zoning Commissioner which Mr. Governale testified had not been rescinded. Also included in this exhibit is a letter from the Petitioners as owners of the parcel to the north of the subject property.

Petition or submitted a letter in support of the relief requested.

Describing what his neighbors see when looking at the antennas, Mr. Governale described the tower (the "most visible feature") as a "pencil against the sky" having a "majestic appearance." Mr. Governale contrasted that view with what he and his neighbors who live in the Phoenix/Jacksonville area have with respect to the numerous, existing wireless telecommunications towers in their community. Those facilities are taller and many are adjacent to or in the direct line of sight of nearby residences. A series of photographs of these wireless towers was submitted by Mr. Governale as Petitioners' Exhibit No. 16.

Mr. Governale testified that if this Board were to calculate the height of the 7 MHZ antenna by a horizontal measurement of its width, such a determination would:

- run afoul of the federal law requiring that local laws and regulations provide reasonable accommodation for amateur radio operators;
- affect, disproportionally, the communications effectiveness from the subject property, including at times prohibiting completely some of the communications, based upon the signal propagation studies conducted for the subject property; and
- impinge on his federally protected needs as a licensed amateur radio operator.

In summary, Mr. Governale testified that the granting of the requested relief would not have any adverse impact on the health, safety or general welfare of the public and, to the contrary, his radio operator antennas permit him to assist the public and emergency agencies. These public benefits were described by Mr. Governale as precisely why federal law and regulation with which he is required to be familiar mandate that local laws and ordinances provide reasonable accommodation of the needs of amateur radio/ham

operators.

On cross-examination, Mr. Governale acknowledged that he had previously used a temporary, wire antenna stretched between trees which permitted limited communications in the 28MHz band. In responding to a question from Mr. Peek about the 140 foot, optimal height for the 7 MHZ antenna, Mr. Governale indicated that he considered applying for a variance to obtain that optimal performance but the signal propagation studies he had performed indicated that the 91 foot height would accommodate his need, even if only marginally.

Christopher D. Imlay, Esquire – Communications Law Expert

Christopher D. Imlay, Esquire, a partner at Booth, Freret, Imlay & Tepper in Washington DC, testified as to his educational and professional background in representing clients with respect to Federal communications law for the majority of his professional career to date and teaching continuing legal education seminars regarding telecommunications law.[19] Mr. Imlay is also general counsel to the American Radio Relay League, a national association of more than 160,000 amateur radio operators in the United States. After review of his extensive professional qualifications, Mr. Imlay was accepted without objection as an expert in communications law.

Mr. Imlay detailed the decision of the FCC entitled *Memorandum Opinion and Order in PRB-1*, released September 19, 1985.[20] Mr. Imlay, who was indirectly involved in that decision, noted that the FCC held that there is a "strong federal interest in promoting amateur communications" and that "a limited preemption policy [of state and local

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19 Mr. Imlay's Resume was accepted as Petitioners' Exhibit No. 17

20 Petitioners' Exhibit No. 18

law/regulation] is warranted." *PRB-1* at ¶ 24. While the FCC did not suggest precise language to be adopted in local ordinances regarding radio antenna height, the FCC held that any such ordinances involving location, screening or height of antennas must be designed to "accommodate reasonably amateur communications, and to represent the minimum practicable regulation" to accomplish the local government's legitimate, governmental purpose. *PRB-1* at ¶ 25.

In Mr. Imlay's considerable experience in representing amateur/ham radio operators, zoning setback regulations in residential areas are related to the height of the antenna above the ground. Moreover, the height limitation is normally applied to the antenna support structure or monopole, allowing the amateur radio operator to "experiment" with antennas at various heights.

John B. Burdette, VP - United States Tower Services, Ltd.

Mr. Burdette, is the vice-president of the United States Tower Services company where he has been employed for over thirty (30) years.[21] Although his company did not install the antenna system on the subject property, Mr. Burdette has considerable experience in the permitting process in numerous localities for the erection of all types of antennas and towers for communications purposes. Mr. Burdette testified that in his experience and in his knowledge of the professional literature, he is not aware of any instance in which a tower has fallen a horizontal distance greater than its height above ground. However, perhaps the most poignant provision of Mr. Burdette's testimony was that the height of an antenna/tower has no rational relationship to the width of the antenna

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[21] Mr. Burdette's letter to this Board, dated November 29, 2006, was accepted as Petitioners' Exhibit No. 10.

or the turning radius of the antenna.

James A. Nitzberg, BSEE

Mr. James Nitzberg, who holds a bachelors degree in Electrical Engineering, testified regarding the report that he co-authored with John V. Evans, PhD, entitled *Needs Analysis With Respect to Height for an Amateur Radio Support Structure – Baltimore County, Case No. 06-180-SPA*, for the Governale property.[22] Mr. Nitzberg described his familiarity with the subject property, his review of its terrain and the terrain which surrounds, and his analysis, together with Dr. Evans, of the effectiveness of the radio operator antennas on the subject property. In the analysis conducted, both authors relied on a publication Mr. Nitzberg described as "industry standard" for evaluating amateur radio sites entitled *Antenna Height and Communications Effectiveness* - A Guide for City Planners and Amateur Radio Operators, 2nd Ed.[23], co-authored by R. Dean Straw, the author of the nationally recognized and widely used software developed to analyze local terrain. In addition, Mr. Nitzberg and Dr. Evans utilized software developed by the United States Government for analysis of antenna effectiveness. Referring to the analysis conducted for the subject property, Mr. Nitzberg summarized the conclusions as follows:

- the existing tower and antennas should be higher, but will operate as an acceptable compromise for the needs of this particular amateur radio operator.
- a height of 65 feet for the 7 MHZ antenna would be unacceptable and would not meet the needs of the amateur radio operator.

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22 Petitioners' Exhibit No. 20

23 Petitioners' Exhibit No. 19; *also included* in the Appendix to Petitioners' Exhibit No. 20.

- reducing the height of the 7 MHZ antenna to 65 feet would reduce the coverage area and impair communications, including without limitation those to emergency radios used by search and rescue personnel and coverage support for the National Weather Service

Mr. Nitzberg also described the effect that trees have on the propagation of signals at frequencies range used by amateur radio operators. Mr. Nitzberg's analysis and conclusions were based, in part, on an industry recognized publication entitled *Effects of Tree on Slant Propagation Paths*, by Vogel and Hagn.[24] Mr. Nitzberg concluded that due to the extensive tree buffering around the subject property and his analysis of signal propagation using standard industry software, lowering the 7 MHZ antenna to 65 feet above the ground would adversely affect the need of the amateur radio operator.

Mr. Michael Leonard - New Neighbor

Mr. Michael Leonard, who purchased his property in the community in 2006, saw the sign for the Zoning Commissioner's hearing and requested that his realtor find out what was going on. While he lives approximately 300 feet from the subject property, the existence of the accessory structure did not impinge on his decision to purchase his home.

Mr. James Green - Tower Owner

Mr. Green (amateur radio license WB3DJU) took the stand and advised the Board that he lives in the area at 36 Sunnyview Drive, and that he, too, has an amateur radio antenna and tower, but that his is on a significantly smaller parcel.[25] Mr. Green did not understand the relationship of the width of an antenna to its height.

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[24] Petitioners' Exhibit No. 21.

[25] To aid the Board in its deliberations (although not an exhibit in the record of this case), a photograph of Mr. Green's antenna system is provided in the Appendix.

THE PROTESTANTS' CASE

There were a total of three (3) persons who live in the area who appeared and offered lay testimony in opposition to the relief requested.[26] Mr. Jason Hardebeck, who resides at 21 Dalebrook Drive, acknowledged that the antenna structure on the subject property is a monopole as described in the building permit obtained by the Owners, but he is primarily concerned about the aesthetics of the antennas. Likewise, Ms. Anne-Marie Hudak, who has resided at 18 Dalebrook Drive for 6 years, complained that she had not been informed of the erection of the accessory use on the subject property and she, too, was concerned about aesthetics.

Finally, Mr. Jeffrey L. Peek, Esquire, took the stand.[27] Mr. Peek advised the Board that he purchased his home in 2003 and wants a "balance" between owners. His view is that the "effect" of the "tower is 95% aesthetic." (Emphasis added.) His property is lower than the subject property. Mr. Peek introduced a variety of photographs that had been submitted at the time of the hearing before the Zoning Commissioner.[28] Mr. Peek concluded with his opinion that the "tower upsets the aesthetics of the area." (Emphasis added.)

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[26] Any opposition raised by People's Counsel in the Pre-hearing Memorandum will be addressed in the Argument section of this Memorandum.

[27] Due to the late hour at which Mr. Peek took the stand, legal counsel for the Petitioners agreed not to conduct any cross-examination of Mr. Peek.

[28] Protestants' Exhibit No. 1 A-J

ARGUMENT

The Petitioners Have Properly Determined the Height of the 7 MHZ Antenna to be 91 Feet Above the Ground and in Compliance with the BCZR

Prior to the passage of County Council Bill No. 30-98[29] and in response to several Council Resolutions, the Baltimore County Planning Board ("Planning Board") prepared *Proposed Amendments to the Baltimore County Zoning Regulations Regarding Wireless Telecommunications Facilities* - A Final Report of the Baltimore County Planning Board Adopted November 20, 1997.[30] The Planning Board's report and the Council's Resolutions were outgrowths of the comprehensive overhaul by the United State Congress of the regulation of communications in this nation in 1996. Although the Planning Board's report dealt mainly with wireless telecommunications facilities, it also recommended the adoption of language in a new section of the BCZR (which became codified as Section 426A), specifying that the recommended language did "not change the substance of the current regulations." Planning Board Report at page 8. County Council Bill 30-98, repealed the definitions of "Antenna, Long-Wire" and "Antenna, Rigid-Structure" and BCZR § 426 which dealt with the [undefined] use of Wireless Transmitting or Receiving Structures.[31] While, prior to 1998, a "rigid-structure antenna" was limited to 50 feet in height in the **DR zones** [BCZR § 1B01.1A.14.b][32], the corresponding height limitation in

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[29] A copy of this legislation is in evidence as Petitioners' Exhibit No. 22.

[30] Petitioners' Exhibit No. 23

[31] The repealed definitions and the prior BCZR § 426 are included in the Appendix to this Memorandum.

[32] A copy of this provision is included in the Appendix to this Memorandum.

the RC zones was 100 feet. [BCZR §§ 1A01.2B.7.g [RC-2], 1A02.2B.31 [RC-3], 1A03.3B.14 [RC-4], 1A04.2B.21 [RC-5]][33]

County Council Bill No. 30-98 added, *inter alia*, the definition of "Radio Operator Antenna" and BCZR § 426A as they exist today. Even the applicable federal regulations and *PRB-1* acknowledge that a local government will not be preempted in its adoption of height and dimensional limitations on antennas provided that such limitations "accommodate reasonably amateur communications" and "represent the minimum practicable regulation". *PRB-1* at ¶ 25. In adopting its policies, the FCC recognized that certain "amateur antenna configurations require more substantial installations if they are to provide the amateur operator with the communications that he/she desires to engage in." *Id.* (Emphasis added.)

Even analyzing the current BCZR § 426A in a light most favorable to the County Council that adopted it still reveals the absolute ambiguity in the language of the regulation as written. It limits the height [absent a variance] of an amateur radio antenna to a maximum of 100 feet at the outset. However, the ambiguity is presented immediately when the height of the antenna is compared to its horizontal length, measured from some unknown/undefined point to the closest property line. As noted by Mr. Doak, nowhere does the current BCZR define the term "height," so its ordinary meaning from Webster's is to be applied — from the bottom to the top, as a vertical measurement.

Each of the Petitioners' experts that testified stated without contradiction that the height of an antenna is in no way related to its width or length. The Protestants are

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[33] A copy of each of these provisions is included in the Appendix to this Memorandum.

attempting to blur the extension of the antenna in a horizontal plane with its height measured in a vertical plane. Such an application, as noted by the Zoning Commissioner is improper:

> BCZR Section 426A.E cannot be read in a vacuum. There are three (3) provisions of Section 426A dealing with measurements. Those provisions are:
>
> BCZR § 426A.C: The "supporting structure for a radio operator antenna may not be located within 20 feet of any property line." (Emphasis added.)
>
> BCZR § 426A.D: A "radio operator antenna may not extend closer than the front building line to any street on which the lot fronts. (Emphasis added.)
>
> BCZR § 426A.E: A "radio operator antenna may not be higher than the lesser of 100 feet or the horizontal distance to the nearest property line above grade level." (Emphasis added.)
>
> Thus, these provisions deal, in reverse order, with the height of the antenna, the extension of the antenna and the distance that the supporting structure is located from any property line.... Thus, Protestants consider the "extension" of an antenna in a horizontal plane as the determining factor in its "height".

Order at 4.

The ambiguity of BCZR § 426A would lead to an absurd result and would effectively regulate the frequencies [communications effectiveness is reduced at lower heights] that can be utilized by an amateur radio operator in contravention of federal law

and regulation. In a seminal case not unknown to this Board, the Maryland Court of Appeals, in determining whether or not a snake was included in the definition of farm animal, held:

> We have said that '[t]he cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature.' Legislative intent must be sought first in the actual language of the statute. Where the statutory language is plain and free from ambiguity, and expresses a definite and simple meaning, courts normally do not look beyond the words of the statute to determine legislative intent. ... This Court recently stated that '**statutory language is not read in isolation, but "in light of the full context in which [it] appear[s], and in light of external manifestations of intent or general purpose available through other evidence.**" ' To this end, [w]hen we pursue the context of statutory language, **we are not limited to the words of the statute as they are printed.... We may and often must consider other 'external manifestations' or 'persuasive evidence,'** . . . .

Marzullo, et al. v. Peter Kahl, 366 Md. 158, 175-76 (2001) [Alterations in original.)(Citations omitted.) (Emphases added.)

It is only where there is no ambiguity in the words or application of a statute that the plain meaning is applied and enforced. However, where such ambiguity exists, as in BCZR § 426A, a reviewing Court must consider other evidence. Thus, a reviewing Court's goal in interpreting the words of a statue:

> is to give them their "**most reasonable interpretation, in accord with logic and common sense**, and **to avoid a construction not otherwise evident by the words actually used.**" We will avoid constructions that are illogical, unreasonable, or inconsistent with common sense. _Moreover, we will not engage in a "forced or subtle interpretation in an attempt to extend or limit the statute's meaning.""We bear in mind, however, that **the plain meaning rule is elastic**, rather than cast in stone." "**If persuasive evidence exists outside the plain text of the statute, we do not turn a blind eye to it.**" We may consider the context in which the statute appears, related statutes, legislative history, and other sources for a more complete understanding of what the General Assembly intended when it enacted particular legislation. "**We may also consider the particular problem or problems the**

> **legislature was addressing, and the objective it sought to attain." "This enables us to put the statute in controversy in its proper context and thereby avoid unreasonable or illogical results that defy common sense."**

Ohio Cas. Ins. Co. v. Chamberlin, ___ Md. App. ___, 4-5 (2007)[34] (Citations omitted.) (Emphases added.)

The interpretation suggested by the Protestants – the height of an antenna is determined by its width – defies all common sense regarding the height of an object. All of the witnesses presented by the Petitioners concluded that the measurement of height of the antennas on the subject property is the vertical distance between the ground and each antenna. Like a reviewing court, this Board should not turn a blind eye to the overwhelming evidence in this case which is necessary to avoid an illogical construction of an ambiguous regulation.

The 7 MHZ antenna is 91 feet high, well within the 100 foot maximum imposed by the BCZR [absent a variance]. The highest antenna on the subject property is less than 100 feet. As expressly acknowledged by People's Counsel, "[t]he **height** of the proposed antenna is 99 feet."[35] (Emphasis added.) In the event that this Board were to ignore the substantial evidence before it regarding the proper determination of height, the Petitioners' alternative request for a variance should be granted. The uniqueness of the subject property as testified to by Petitioners' expert witnesses remains uncontradicted. The topography, surrounding vegetation and off-site topographic considerations would have a disproportionate impact on Mr. Governale's need and ability to communicate effectively

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[34] A copy of the reported case captioned *Ohio Casualty Insurance Co. v. Chamberlin*, filed January 2, 2007, appears in the Appendix to this Memorandum.

[35] People's Counsel Pre-Hearing Memorandum at 2.

and reliably by degrading coverage and attenuating signals transmitted and received. The alternative relief is the minimum necessary and, as evidenced by the overwhelming support of all adjoining neighbors and others in the neighborhood, the alternative relief will do substantial justice to the Petitioners and others. Those three community members who are in opposition to any relief, base their opposition solely on aesthetic considerations. Beauty, being in the eye of the respective beholder, must yield to more objective considerations in facilitating and encouraging a federally licensed amateur radio operator.[36]

The Subject Property's Zoning Classification is Irrelevant to the Issues Presented

"A radio operator antenna and related equipment, including any supporting structure, is considered an accessory structure or use and is permitted by right in any zone ...." BCZR 426A.A Peoples' Counsel spends an inordinate amount of paper and words arguing about the RC-6 zoning classification applicable to the subject property and its intent, goals, density and conservancy standards. The subject property was created more than 20 years before the RC-6 classification was even adopted. Moreover, the radio operator antenna is a permitted accessory use in all zones. Likewise, the fact that the subdivision in which the subject property is located may not have been approved if presented today for the first time is irrelevant. The subdivision exists, the subject property exists, both pre-date the RC-6 zone and there is not a shred of evidence in the record that the subject property was created illegally. When the subject property was created, there

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[36] "Congress finds and declares that—. . . (3) reasonable accommodation should be made for the effective operation of amateur radio from residences, private vehicles and public areas, and that regulation at all levels of government should facilitate and encourage amateur radio operation as a public benefit." Public Law 103-408 (1994). http://thomas.loc.gov/cgi-bin/query/z?c103:S.J.RES.90.ENR

was no RC-6 conservancy goal. Even if the subject property (a legal lot of record on the effective date of County Council Bill No. 73-2000) were not improved at the time the RC-6 zone was attached, a single family dwelling and accessory uses (including without limitation, a radio operator antenna) could be erected. BCZR § 1A07.8B.4

This Board Must Apply Applicable Provisions of Federal Law, Regulation and Policy

People's Counsel sets out in its third subsection of the Prehearing Memorandum that it filed with this Board an argument that "Federal law does not preempt or justify the allowance of this antenna." In a clever attempt to give persuasive authority to the review by the Maryland Court of Special Appeals' of this Board's decision in the *Sprint PCS* case, where issues of federal preemption were raised with respect to wireless telecommunications facilities, People's Counsel quotes three entire paragraphs from that Court's unreported opinion.[37] Maryland Rule of Procedure 1-104(a) states clearly that an "unreported opinion of the Court of Appeals or Court of Special Appeals is neither precedent within the rule of stare decisis **nor persuasive authority**." (Emphasis added.)

Next, People's Counsel attempts to argue that the federal Telecommunications Act of 1996 (codified as 47 U.S.C. § 332(c)(7)) does not preempt, in any way, the issues in this case.[38] As a bald statement, it is correct — People's Counsel is citing federal law that has no bearing, impact or relevance to an amateur radio antenna; the provision cited applies only to wireless telecommunications facilities, a category which does not include amateur radio facilities.

The issue in this case involves the allowable height of an amateur radio operator

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37 People's Counsel Prehearing Memorandum at 8-9.

38 People's Counsel Prehearing Memorandum at 7.

antenna. As such, 47 CFR § 97.15 which deals with amateur radio antennas is the controlling law which limits local authority, by requiring reasonable accommodation:

> Except as otherwise provided herein, a station antenna structure may be erected at heights and dimensions sufficient to accommodate amateur service communications. (State and local regulation of a station antenna structure must not preclude amateur service communications. Rather, it must reasonably accommodate such communications and must constitute the minimum practicable regulation to accomplish the state or local authority's legitimate purpose. *See* PRB-1, 101 FCC 2d 952 (1985) for details.)

47 CFR § 97.15(b)

The Petitioners have shown conclusively, through uncontradicted, expert evidence that interpretation of BCZR §426A as suggested by the Protestants will not accommodate, reasonably or otherwise, amateur radio communications from the subject property to meet the needs of the licensed amateur radio operator. Lowering the height of the 7 MHZ antenna to 65 feet above the ground will impair its capabilities and impinge on the needs of this radio amateur.[39]

The Williams Case

One Protestant, Mr. Peek, appears to argue that this Board may balance the interests of the Protestants with those of the radio amateur in the creation of its ruling. He bases this claim on *Williams v. City of Columbia*, 906 F.2d 994 (4th Cir. 1990). The key holding from *Williams* is: "[PRB-1, or 47 C.F.R. § 97.15(b)] requires only that the City balance the federally recognized interest in amateur radio communications with local zoning

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[39] "PRB-1's guidelines brings *(sic)* to a local zoning board's awareness that the very least regulation necessary for the welfare of the community must be the aim of its regulations so that such regulations will not impinge on the needs of amateur operators to engage in amateur communications."
http://www.fcc.gov/Bureaus/Wireless/Orders/1999/da992569.txt

concerns." 906 F.2d at 998.

Subsequent to the *Williams* case, the FCC expressed the full extent of its preemptive intent and explicitly disapproved of the Fourth Circuit's approach.

> [T]he PRB-1 decision precisely stated the principle of 'reasonable accommodation.' In PRB-1, the Commission stated: 'Nevertheless, local regulations which involve placement, screening, or height of antennas based on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose.' **Given this express Commission language, it is clear that a 'balancing of interests' approach is not appropriate in this context.**

Modification and Clarification of Policies and Procedures Governing Siting and Maintenance of Amateur Radio Antennas and Support Structures, 14 F.C.C.R. 19,413 para. 7 (1999), FCC 99-2569 or RM-8763 (Emphasis added.)

As the FCC pointed out nine years after the *Williams* decision, the plain language of *PRB-1* imposes the obligation of reasonable accommodation upon a municipality and belies a simple balancing approach. Given this plain and express language, *Williams* was incorrect in its key holding. In the absence of an explicit disapproval of the "balancing of interests" approach by the FCC, the 1990 holding was somewhat understandable, although still incorrect. Given the FCC's explicit disapproval, *Williams* is plainly incorrect today. Published case law after 1990 has uniformly agreed. *See*, *Evans v. Board of County Commissioners*, 994 F.2d 755, 762-63 (10th Cir. 1993) ("We believe the balancing approach under represents the FCC's goals as it specifically selected the 'reasonably accommodate' language."); *Pentel v. City of Mendota Heights*, 13 F.3d 1261, 1264 (8th Cir. 1994) ("[A] standard that requires a city to accommodate amateur communications in a reasonable fashion is certainly more rigorous than one that simply requires a city to

balance local and federal interests when deciding whether to permit a radio antenna."); *Marchand v. Town of Hudson*, 788 A.2d 250, 254 (N.H. 2001) (addressing balancing of interests: "[T]he federal directive requires municipalities to do more.").

A particularly good, and recent, criticism of the *Williams* case may be found in *Snook v. Missouri City, Texas*, http://users3.ev1.net/~osnook/34.pdf (USDC, SDTX, 2003, Hittner, J.)(the Order, 63 pp.); *also* http://users3.ev1.net/~osnook/35.pdf (the Final Judgment, 2 pp.). PACER citation: https://ecf.txsd.uscourts.gov/cgi-bin/login.pl?387442335892775-L_238_0-14:03-cv-00243_Snook v._City_of_Missouri:

59. *Williams* is the principal source for a contrary line of cases to *Pentel* which essentially uncritically defer to a city's zoning action through a balancing test.

60. In *Williams*, an amateur radio licensee twice applied for an exception to a city's 17-foot height restriction for antennas. *Williams v. City of Columbia,* 906 F.2d 994, 995 (4th Cir. 1990). The federal district court had ordered the second request for an exception in an effort to ensure compliance with PRB-1. *Id.* The city denied the application a second time with the basic conclusion that it had complied with PRB-1. *Id.*

61. The *Williams* court erred by first assuming the traditional pre-PRB-1 deference to a city's fact-findings. *See id.* At 996. The court essentially utilized a standard of review for municipal action that had been rejected by PRB-1. *See id.*

62. Proceeding from its incorrect assumption regarding the proper standard, the *Williams* court then quoted excerpts from PRB-1, while erroneously concluding that under PRB-1, "the law requires only that the City balance the federally recognized interest in amateur radio communications with local zoning concerns." *Id.* At 996-98.

63. Although the conclusion of the *Williams* court is not consistent with the text of PRB-1, it may be explained in part based upon where it arises in the context of the discussion in the opinion. The Court's conclusion that a balancing of interests is the proper test does not appear after a discussion of

the text of PRB-1, but as a response to an amicus position of the American Radio Relay League ("ARRL") that an amateur radio operator must be allowed to erect the antenna of choice without any restrictions from a city. *Id.* At 997-998.

64. The *Williams* court, moreover, did not require any real scrutiny of the city's zoning actions, and instead simply reverted to the pre-PRB-1 practice of deferring to a city's zoning action if the city recites that it is in compliance with federal law. *Id.*

65. *Williams*, therefore, turns PRB-1 on its head. The FCC later confirms this when it rejects the *Williams* balancing test as antithetical to the text of PRB-1. RM-8763 at ¶ 7.

The Petitioners urge this Board to adopt the opinion of their expert, communications attorney, Christopher Imlay, and the several courts cited above, to recognize that *Williams* has been implicitly overturned and is no longer good law.

This Case is Not About Aesthetics

People's Counsel and the three other Protestants who appeared before the Board have focused on their "perceived" aesthetic aspects of the radio operator antenna. There has been no showing that the approval of the relief requested will have any impact on the character of the residential neighborhood in which the subject property is located. Ownership of homes, including one immediately adjoining the subject property, has changed since the Petitioners obtained their building permit and erected the antenna. The testimony of one of those new neighbors was he was initially concerned when he saw a zoning sign on the subject property advertising a hearing . Once he learned what the issue was, he had no concern and purchased his home. **This case is <u>not</u> about the 99 foot tall supporting tower – all testifying Protestants acknowledged that it can remain for the VHF and UHF antennas per the BCZR provisions**. Rather, the issue is – at what height

above the ground the 7 MHZ antenna will be located and how that height is determined. The antenna support structure, the most "visual" component of the accessory radio operator antenna use, is battle-ship gray and constructed of a lattice work structure to minimize visual impedance – you look right through the tower. For People's Counsel or the other Protestants to suggest that an antenna, averaging less than two (2) inches in diameter and 68 feet long, presents an aesthetic issue or a visual impact is silly. One need only review the photographs in evidence in this case.

Neither the accessory building provisions of the BCZR (BCZR § 400), nor the radio operator antenna provisions (BCZR § 426A) regulate, impact or influence the location or height of the existing, accessory use based on aesthetic or visual impact considerations. This is no different than the regulations governing the numerous, much taller towers constructed adjacent to residences in the Phoenix/Jacksonville area depicted in Petitioners' Exhibit No. 16. This Board should view the aesthetic/visual impact arguments of the Protestants for the red herrings that they are.

SUMMARY and CONCLUSION

This case is about how far above the ground the 7 MHZ antenna can be located on an existing, permitted accessory structure. The primary issue is how height is determined. The Board should apply the plain, common sense definition of height set forth in Webster's and that described by Petitioners' witnesses. If the height of the 7 MHZ antenna is to be determined by its width, that determination must reasonably accommodate and not impact the need of the licensed radio operator to conduct his public service and other licensed activities.

Alternatively, the Petitioners have met their burden for a variance for the 91 foot

height of the 7 MHZ antenna from the height as and if determined by the width of the antenna. No evidence exists to contradict the Petitioners' case regarding the uniqueness of the subject property, the disproportionate impact of the BCZR or the practical difficulty that the Petitioners would be subjected to upon denial of the variance and a strict application of BCZR § 426A as suggested by the Protestants.

For all of the foregoing reasons, the Petitioners' requested relief should be granted.

Respectfully submitted,

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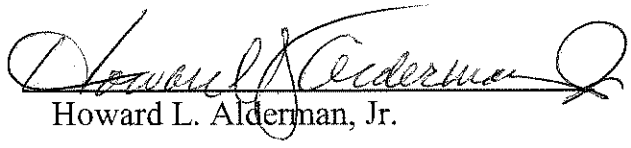
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of January, 2007, a copy of the foregoing Petitioners'/Owners' Post-Hearing Memorandum, together with a copy of the Owners' *Supplemental Information Accompanying Application for Approval of Radio Operator Antennas*, was mailed, postage prepaid, First Class United States Mail to the following:

Peter Max Zimmerman, People's Counsel
Baltimore County Office of People's Counsel
400 Washington Avenue, Room 47
Towson, Maryland 21204
and

Jeffrey L. Peek, Esquire
19 Dalebrook Drive
Phoenix, MD 21131



Howard L. Alderman, Jr.

APPENDIX

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coin-operated pool tables, music boxes, children's rides, and shuffleboards. [Bill No. 29, 1982.]

Animal Boarding Place: Any building, other structure or land, or any portion thereof, which is used, intended to be used, or arranged for the boarding, breeding or other care of animals for profit, but excluding a farm, kennel, pet shop, veterinarian's office or veterinarium. [Bill No. 85, 1967.]

Animal Boarding Place, Class A: An animal boarding place exclusively for dogs, cats, birds, and/or other household pets. [Bill No. 85, 1967.]

Animal Boarding Place, Class B: Any other animal boarding place not excluded under the general definition of "Animal Boarding Place", above. [Bill No. 85, 1967.]

Antenna, Long-wire: A single, flexible wire not thicker than 12-gauge, stretched between two stationary insulators and used as an antenna for the transmission and/or reception of broadcast signals. [Bill No. 61, 1967.]

Antenna, Rigid-structure: Any exterior wireless antenna other than a long-wire antenna. [Bill No. 61, 1967.]

{"Apartment Building..."} {Deleted by Bill No. 2, 1992.}

{"Apartment, Group-house..."} {Deleted by Bill No. 2, 1992.}

{"Apartment House..."} {Deleted by Bill No. 114, 1968.}

Arcade: A building or part of a building in which five or more pinball machines, video games, or other similar player-operated amusement devices are maintained. [Bill No. 29, 1982.]

Area, Net: Land area not including area of land in public streets or other fee-simple public rights of way. [Bill No. 40, 1967.]

Arterial Street: A motorway or portion thereof which: is, or is intended, for travel to or from major employment centers, such as town centers; has or is intended to have, four or more lanes for moving traffic; is, or is intended to be, designed for traffic speeds of at least 40 miles per hour; has or is intended to have, a right of way at least 66 feet wide; is not a freeway or an expressway; and has been designated as an arterial street (or as a boulevard or thoroughfare) by the planning board. [Bill No. 40, 1967.]

Assisted Living Facility: A building, or a section of a building, or a residence that provides: 1) a residential environment assisted by congregate meals, housekeeping, and personal services, for persons 62 years of age or older, who have temporary or periodic difficulties with one or more essential activities of daily living, such as feeding, bathing, dressing or mobility, and for persons, regardless of age, who have physical or developmental disabilities; or

g. Radio antennas in conjuction with wireless transmitting or receiving facilities, provided that any such facility is used by a resident who has an amateur radio operator's licence issued by the Federal Communications Commission. No such antenna may extend closer than the front building line to any street on which the lot may front; no rigid-structure antenna may be taller above grade level than the horizontal distance to the nearest property line or 100 feet, whichever is less; and no supporting structure may be situated within 50 feet of any property line [see also Section 400]. [Bill No. 178, 1979]

h. Swimming pools, tennis courts, garages, utility sheds, satellite receiving dishes (subject to Section 429), or other accessory structures or uses (subject to the height and area provisions for buildings as set forth in Section 400). [Bill No. 178, 1979; Bill No. 71, 1987.]

i. Tenant houses, including trailers used as tenant houses. [Bill No. 178, 1979]

j. Rubble landfills, provided that the actual fill area does not exceed three percent of the total contiguous acreage of the property in the same ownership, and subject to the provisions of subsection 412.7 only. [Bill No. 97, 1987.]

8. Commercial film production, subject to Section 435. [Bill No. 67, 1990.]

9. Transit facilities. [Bill No. 91, 1990.]

C. Uses permitted by special exception.[4] The following uses, only, may be permitted by special exception in any R.C. 2 zone, provided that in each case the hearing authority empowered to hear the petition finds that the use would not be detrimental to the primary agricultural uses in its vicinity; and, in the case of any use permitted under Item 24, further provided that the hearing authority finds that the use would support the primary agricultural use in its vicinity and would not itself be situated on land more appropriately used for primary agricultural uses: [Bill No. 178, 1979.]

1. Airports. [Bill No. 178, 1979.]

2. Animal boarding places (regardless of class), kennels, veterinarians' offices or veterinariums (see Section 421). [Bill No. 178, 1979.]

[4]

{20. "Research Institutes (subject to the provisions of Section 418)" added by Bill No. 98, 1972; repealed by Bill No. 122, 1984.}

20. Rail passenger station, subject to Section 434. [Bill No. 91, 1990.]

21. Standard restaurants or tea rooms converted from dwellings or other buildings as provided in Subsection 402.3. [Bills No. 98, 1975 and No. 110, 1993.]

22. Riding stables, (Commercial or non-commercial). [Bill No. 98, 1975.]

23. Sanitary or rubble landfills (see Section 412). [Bills No. 98, 1975; No. 97, 1987.]

24. Schools not permitted as of right. [Bill No. 98, 1975.]

25. Shooting ranges, including, but not limited to, archery, pistol, skeet, trap, target (smallbore rifle only) except that any such use existing at the time of date of enactment of this subsection may continue at the same level, provided that within 365 days of the enactment date of this legislation, they shall file for a use permit as prescribed under the now existing zoning regulation Section 500.4, and turkey shoots. [Bill No. 98, 1975.]

26. Shooting preserves including hunting and fishing preserves. [Bill No. 98, 1975.]

26a. Sludge disposal facility - Landspreading (see Section 412.A2.E). [Bill No. 46, 1982.]

27. Trailers (subject to the provisions of Subsection 415.1d). [Bill No. 98, 1975.]

28. Volunteer fire company or ambulance-rescue facilities. [Bill No. 98, 1975.]

29. Radio or television transmitting facilities. [Bill No. 98, 1975.]

30. Planned unit developments (subject to the provisions of Section 430.2). [Bill No. 98, 1975.]

31. Wireless transmitting and receiving structures, except that a radio antenna in conjunction with transmitting and receiving facilities used by a

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resident amateur radio operator possessing an amateur radio operator's license issued by the Federal Communications Commission shall be considered an accessory structure or, if attached to another structure, an accessory use, and, as such, is permitted without a special exception, provided: (a) that if it is an accessory structure, it shall be subject to the provisions of Section 400; (b) that if it is a rigid-structure antenna, it shall be no higher than 100 feet or the horizontal distance to the nearest property line, whichever is less, above grade level, and no supporting structure thereof shall be closer than 50 feet to any property line; and, further, (c) that it does not extend closer to the street on which the lot fronts than the front building line. [Bill No. 98, 1975.]

1A02.3--Height and area regulations [Bill No. 98, 1975.]

A. Height regulation. No structure hereafter erected in an R.C. 3 zone shall exceed a height of 35 feet, except as otherwise provided under Section 300. [Bill No. 98, 1975.]

B. Area regulations.

1. Cluster development. Residential development shall be permitted in the R.C. 3 zone classification on lots not less than one acre in area and clustered in such a manner to allow for future urban density development, except as provided in Subparagraph 103 or Paragraph 6 below. [Bill No. 98, 1975.]

2. Density control. The maximum gross density of a record lot of the effective date of this paragraph is 0.3 dwellings per acre. [Bill No. 98, 1975.]

3. Minimum diametral dimension. The minimum diametral dimension of any lot hereafter created in an R.C. 3 zone shall be 150 feet, except as provided in Subparagraph 103 or Paragraph 6 below. [Bill No. 98, 1975.]

4. Building setbacks. Any principal building hereafter constructed in an R.C. 3 zone shall be situated at least 75' from the centerline of any street and not less than 50' from the future right-of-way line, 25' from both side lot lines and 50' from any rear lot line. [Bill No. 98, 1975.]

7b. Horticultural nurseries, subject to the provisions of Section 404.1 and 404.2. {Bill No. 41, 1992.}

7c. Landscape service operations, subject to provisions of Section 404.1 and 404.3. {Bill No. 41, 1992.}

7d. Offices or studios of physicians, dentists, lawyers, architects, engineers, artists, musicians, or other professional persons as an accessory use, provided that any such office or studio is established within the same building as that serving as the professional person's primary residence; does not occupy more than 25% of the total floor area of that residence; and does not involve the employment of more than one non-resident professional associate nor two other non-resident employees. [Bill No. 105, 1982.]

8. Public utility uses not permitted as of right, including underground interstate and intercontinental pipe lines. [Bill No. 98, 1975.]

8a. Rail passenger station, subject to Section 434. [Bill No. 91, 1990]

9. Riding stables. [Bill No. 98, 1975.]

10. Shooting preserves including hunting and fishing preserves. [Bill No. 98, 1975.]

11. Shooting ranges, including, but not limited to, archery, pistol, skeet, trap, target (small bore rifle only) except that any such use existing at the time of date of enactment of this subsection may continue at the same level, provided that within 365 days of the enactment date of this legislation, they shall file for a use permit as prescribed under the now existing zoning regulation Section 500.4, and turkey shoots. [Bill No. 98, 1975.]

12. Trailers (subject to the provisions of Section 415.1.D). [Bill No. 98, 1975.]

13. Volunteer fire company or ambulance-rescue facility. [Bill No. 98, 1975.]

14. Wireless transmitting and receiving structures, except that a radio antenna in conjunction with transmitting and receiving facilities used by a resident amateur radio operator possessing an amateur radio operator's license issued by the Federal Communications Commission shall be considered an accessory structure, or, if attached to another structure, accessory use, and as such, is permitted without a special exception, provided that:

a. If it is an accessory structure, it shall be subject to the provisions of Section 400;

b. If it is a rigid-structure antenna, it shall be no higher than 100 feet or the horizontal distance to the nearest property line, whichever is less, above grade level, and no supporting structure thereof shall be closer than 50 feet to any property line; and

c. It does not extend closer to the street on which the lot fronts than the front building line. [Bill No. 98, 1975.]

15. Farm market, subject to the provisions of Section 404.4. {Bill No. 41, 1992.}

16. Winery as an agricultural support use, including accessory retail and wholesale distribution of wine produced on-premises. Temporary promotional events, such as wine tasting or public gatherings associated with the winery, are permitted, within any limits set by the special exception. {Bill No. 51, 1993.}

1A03.4 Height and Area Regulations. [Bills No. 98, 1975; No. 178, 1979; No. 113, 1992.]

A. Height. No structure hereafter erected in an R.C. 4 zone shall exceed a height of 35 feet, except as otherwise provided under Section 300. [Bill No. 98, 1975.]

B. Area regulations. [Bills No. 98, 1975; No. 178, 1979; No. 113, 1992.]

1. Lot density. {Bill No. 113, 1992.}

a. A tract to be developed in an R.C.4 zone with a gross area of less than 6 acres may not be subdivided, and a tract to be developed with a gross area of at least 6 acres but not more than 10 acres may not be subdivided into more than two lots (total), each of which must be at least three acres, except as otherwise provided in Section 103.3 or in paragraph 4 below. [Bills No. 98, 1975; 178, 1979; 113, 1992.]

b. The maximum gross density of a tract to be developed with a gross area of more than 10 acres is 0.2 lot per acre. Any lots created hereafter, except as provided in paragraph 4 below, shall be in accordance with the

14. Residential art salons (subject to the provisions of Section 402C). [Bill No. 98, 1975.]

15. Standard restaurants or tea rooms, converted from dwellings or other buildings as provided in Subsection 402.3. [Bills No. 98, 1975; No. 110, 1993.]

16. Riding stables (commercial or non-commercial). [Bill No. 98, 1975.]

17. Sanitary or rubble landfills (see Section 412). [Bills No. 98, 1975; No. 97, 1987.]

18. Schools, not permitted as of right. [Bill No. 98, 1975.]

19. Trailers (subject to the provisions of Section 415.1D). [Bill No. 98, 1975.]

20. Volunteer fire company or ambulance-rescue facilities. [Bill No. 98, 1975.]

21. Wireless transmitting and receiving structures, except that a radio antenna in conjunction with transmitting and receiving facilities used by a resident amateur radio operator possessing an amateur radio operator's license issued by the Federal Communications Commission shall be considered an accessory structure, or, if attached to another structure, an accessory use, and, as such, is permitted without a special exception, provided: (a) that if it is an accessory structure, it shall be subject to the provisions of Section 400; (b) that if it is a rigid-structure antenna, it shall be no higher than 100 feet or the horizontal distance to the nearest property line, whichever is less, above grade level, and no supporting structure thereof shall be closer than 50 feet to any property line; and, further, (c) that it does not extend closer to the street on which the lot fronts than the front building line. [Bill No. 98, 1975.]

1A04.3 Height and area regulations. [Bill No. 98, 1975.]

A. Height regulation. No structure hereafter erected in an R.C. 5 zone shall exceed a height of 35 feet, except as provided under Section 300. [Bill No. 98, 1975.]

B. Area regulations. [Bill No. 98, 1975.]

C. Parking, drop off and delivery areas shall be located in the side or rear yards, unless the zoning commissioner, upon the recommendation of the director of Planning, determines that there will be no adverse impact by using the front yard for parking, drop off or delivery purposes. In all cases these areas shall be located outside of the required buffer area. [Bill No. 200-1990.]

D. Maximum height: 35 feet [Bill No. 200-1990.]

E. Maximum impervious surface area: 25% of gross area [Bill No. 200-1990.]

Section 425--ALCOHOLIC BEVERAGES LICENSE. [Bill No. 66, 1983.]

Any entertainment, leisure, or recreation oriented principal use provided for in Section 422(a) which holds a valid on-sale alcoholic beverages license of any class, except a special or temporary license, may have amusement devices on its premises as long as the alcoholic beverages license remains effective. All of the conditions and limitations set forth in Sections 422 and 423 are applicable to such uses, except that Sections 422(c)(4) and 423.5 do not apply to such uses. [Bill No. 66, 1983.]

Section 426--WIRELESS TRANSMITTING OR RECEIVING STRUCTURES [Bill No. 64, 1986.]

426.1--Wireless Transmitting or Receiving Structures with a maximum height of 200 feet above grade level, including all antennas and platforms, are permitted by right in O-2 (Office Park) zones, O.T. (Office and Technology) zones, and business and manufacturing zones subject to the following restrictions: [Bill No. 64, 1986.]

A. The structure shall be enclosed within a locked, chain link fence, or comparable wall or structure, at least 8 feet high unless such structure is roof-mounted. [Bill No. 64, 1986.]

B. The minimum setback from any boundary of a residential or R-Ozone shall be 200 feet. [Bill No. 64, 1986.]

C. Environmental protection agency standards and guidelines relating to radiation emissions shall be met at all times. [Bill No. 64, 1986.]

426.2--Within O-2, O.T., business and manufacturing zones, accessory wireless transmitting or receiving structures are permitted by right; however, no exterior antenna greater than 50 feet above grade level shall be considered as an accessory use or structure. [Bill No. 64, 1986.]

b. Wireless transmitting and receiving structures, provided that any such structure: is a radio antenna in conjunction with transmitting and receiving facilities used by a resident amateur radio operator possessing an amateur radio operator's license issued by the Federal Communications Commission; if it is an independent structure, shall be subject to the same requirements as are applied to buildings under Section 400; if it is a rigid-structure antenna, shall be no higher than 50 feet above grade level and with no supporting structure thereof closer than 10 feet to any property line; and does not extend closer to the street on which the lot fronts than the front building line; [Bill No. 100, 1970.]

{c. "Automotive-service stations"...deleted by Bill No. 172, 1993.}

d. Home occupations, as defined in Section 101; {Bill No. 100, 1970.}

e.[2]

f. Parking spaces, including accessory garage spaces; [Bill No. 100, 1970.]

g. Offices for the conduct of business incidental to the rental, operation, service, or maintenance of apartment buildings; [Bill No. 100, 1970.]

h. Accessory signs (see Section 413); [Bill No. 100, 1970.]

i. Swimming pools, tennis courts, garages, utility shed, satellite receiving dishes (subject to Section 429) or other accessory structures or uses (all such accessory structures or uses subject to the height and area provisions for buildings as set forth in Section 400). [Bill No. 71, 1987.]

15. Commercial film production, subject to Section 435. [Bill No. 57, 1990.]

B. Dwelling-type and other supplementary use restrictions based on existing subdivision and development characteristics. [Bills No. 100, 1970; No. 124, 1981.]

1. Residential transition areas and uses permitted therein. [Bills No. 100, 1970; No. 124, 1981; No. 2, 1992.]

a. Definitions and purpose. [Bills No. 100, 1970; No. 124, 1981; No. 2, 1992.]

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1574

September Term, 2005

OHIO CASUALTY INSURANCE COMPANY

v.

SARA CHAMBERLIN, et al.

Murphy, C.J.,
Salmon,
Karwacki, Robert L.
(Ret., specially assigned),

JJ.

Opinion by Karwacki, J.

Filed: January 2, 2007

On May 23, 2005, Ohio Casualty Insurance Company, appellant, filed a motion in the Circuit Court for Baltimore County, seeking to compel Sara Chamberlin, appellee, to return $20,000 paid to her pursuant to Md. Code (2002 Repl. Vol.) §19-511 of the Insurance Article ("Ins."). On August 12, 2005, the circuit court issued a written opinion and order denying appellant's motion, and this appeal followed.

The sole question presented for our consideration is whether the circuit court erred in denying appellant's request for reimbursement of the funds advanced pursuant to Ins. §19-511. Finding no error, we shall affirm.

FACTUAL BACKGROUND

This case arises out of an automobile accident involving motor vehicles operated by Sara Chamberlin, appellee, and Charlotte Deitrick. Chamberlin filed a complaint in the Circuit Court for Baltimore County against Deitrick and her own uninsured/underinsured motorist ("UIM") carrier, Ohio Casualty Insurance Company, appellant herein, claiming that she was injured as a result of Deitrick's negligence and demanding compensation from Deitrick and Ohio Casualty.

Prior to trial, Deitrick's insurer, Progressive Insurance Company, offered its policy limits of $20,000 in exchange for a release of all claims by both Chamberlin and Ohio Casualty. Ohio Casualty rejected the request for a release. Pursuant to Ins. §19-511, Ohio Casualty advanced to Chamberlin the $20,000

that had been offered by Progressive, and the case proceeded to trial.

The jury returned a verdict in favor of Chamberlin in the amount of $5,445 and Progressive paid that amount to Ohio Casualty. By letter dated April 21, 2005, Ohio Casualty demanded that Chamberlin repay the $20,000 that had been advanced to her pursuant to §19-511, but Chamberlin refused. Thereafter, Ohio Casualty filed a motion in the trial court seeking an order compelling the return of the $20,000.

A hearing was held on July 6, 2005, and the court held its decision *sub curia*. In a written opinion and order filed on August 12, 2005, the circuit court denied Ohio Casualty's request for an order compelling the return of the $20,000 paid to Chamberlin stating, in part:

> Ohio Casualty had an opportunity to carefully assess its exposure in this case, and it ultimately determined that [Chamberlin's] claim was worth significantly more than the proposed settlement amount; otherwise, it would have no reason to "thwart" settlement to preserve its own subrogation rights. Accordingly, [Chamberlin] is entitled to keep the $20,000 advanced by Ohio Casualty.

DISCUSSION

Ohio Casualty contends that the circuit court erred in denying its motion to compel the return of the $20,000 paid to Chamberlin, to the extent that the funds advanced exceeded the jury verdict, because there is no provision in Maryland law or in

the insurance policy issued to Chamberlin that entitles her to retain the full amount paid by Ohio Casualty, and it would be neither fair nor equitable to allow her to do so, particularly when the jury verdict was considerably less than the amount advanced. Resolution of this issue requires us to examine §19-511 of the Insurance Article.

As the Court of Appeals stated in *Adamson v. Correctional Medical Services, Inc.*, 359 Md. 238, 251 (2000), "[t]he principles of statutory construction are not novel." The cardinal rule of statutory construction is to ascertain and effectuate legislative intention. *State v. Green*, 367 Md. 61, 81 (2001). Our "quest to discover and give effect to the objectives of the legislature begins with the text of the statute." *Adamson*, 359 Md. at 251 (quoting *Huffman v. State*, 356 Md. 622, 628, 741 A.2d 1088, 1091 (1999)). "'[I]f the plain meaning of the statutory language is clear and unambiguous, and consistent with both the broad purposes of the legislation, and the specific purpose of the provision being interpreted, our inquiry is at an end.'" *Thomas v. Dep't of Labor, Licensing, and Regulation*, 170 Md. App. 650, 104 (2006)(quoting *Breitenbach v. N.B. Handy Co.*, 366 Md. 467, 473 (2001)). *See also Adamson*, 359 Md. at 251 (and cases cited therein)(if the Legislature's intentions are evident from text of statute, inquiry will cease and plain meaning of statute will govern).

"'Where the statutory language is plain and unambiguous, a court may neither add nor delete language so as to 'reflect an intent not evidenced in that language.'" *Chesapeake & Potomac Telephone Co. v. Director of Finance for Mayor and City Council of Baltimore*, 343 Md. 567, 579 (1995)(quoting *Condon v. State*, 332 Md. 481, 491 (1993)). Our goal in interpreting statutes is to give them their "most reasonable interpretation, in accord with logic and common sense, and to avoid a construction not otherwise evident by the words actually used." *Greco v. State*, 347 Md. 423, 429 (1997). We will avoid constructions that are illogical, unreasonable, or inconsistent with common sense. *Frost v. State*, 336 Md. 125, 137 (1994). Moreover, we will not engage in a "forced or subtle interpretation in an attempt to extend or limit the statute's meaning." *Nesbit v. GEICO*, 382 Md. 65, 76 (2004).

"We bear in mind, however, that the plain meaning rule is elastic, rather than cast in stone." *Adamson*, 359 Md. at 251 (citing *Kaczorowski v. Mayor of Baltimore*, 309 Md. 505, 513 (1987)). "If persuasive evidence exists outside the plain text of the statute, we do not turn a blind eye to it." *Id.* We may consider the context in which the statute appears, related statutes, legislative history, and other sources for a more complete understanding of what the General Assembly intended when it enacted particular legislation. *Id.*; Ridge *Heating, Air*

Conditioning & Plumbing v. Brennan, 366 Md. 336, 350-51 (2001); *Harris v. State*, 331 Md. 137, 146 (1993). "We may also consider the particular problem or problems the legislature was addressing, and the objective it sought to attain." *Sinai Hosp. of Baltimore, Inc. v. Dep't of Employment and Training*, 309 Md. 28, 40 (1987). "This enables us to put the statute in controversy in its proper context and thereby avoid unreasonable or illogical results that defy common sense." *Adamson*, 359 Md. at 252.

In the case at hand, our analysis begins with the statutory language itself, which provides:

> (a) If an injured person receives a written offer from a motor vehicle insurance liability insurer or that insurer's authorized agent to settle a claim for bodily injury or death, and the amount of the settlement offer, in combination with any other settlements arising out of the same occurrence, would exhaust the bodily injury or death limits of the applicable liability insurance policies, bonds, and securities, the injured person shall send by certified mail, to any insurer that provides uninsured motorist coverage for the bodily injury or death, a copy of the liability insurer's written settlement offer.
>
> (b) Within 60 days after receipt of the notice required under subsection (a) of this section, the uninsured motorist insurer shall send to the injured person:
>
> (1) written consent to acceptance of the settlement offer and to the execution of releases; or
>
> (2) written refusal to consent to

acceptance of the settlement offer.

(c) Within 30 days after a refusal to consent to acceptance of a settlement offer under subsection (b)(2) of this section, the uninsured motorist insurer shall pay to the injured person the amount of the settlement offer.

(d)(1) Payment as described in subsection (c) of this section shall preserve the uninsured motorist insurer's subrogation rights against the liability insurer and its insured.

(2) Receipt by the injured person of the payment described in subsection (c) of this section shall constitute the assignment, up to the amount of the payment, of any recovery on behalf of the injured person that is subsequently paid from the applicable liability insurance policies, bonds, and securities.

(e) The injured person may accept the liability insurer's settlement offer and execute releases in favor of the liability insurer and its insured without prejudice to any claim the injured person may have against the uninsured motorist insurer:

(1) on receipt of written consent to acceptance of the settlement offer and to the execution of releases; or

(2) if the uninsured motorist insurer has not met the requirements of subsection (b) or subsection (c) of this section.

This statute sets forth the settlement procedure for claims pertaining to the uninsured motorist coverage provided by §19-509 of the Insurance Article. The uninsured motorist provision was enacted to protect innocent victims from irresponsible drivers who drive without insurance. It is liberally construed to ensure

that innocent victims of motor vehicle accidents can be compensated for the injuries they suffer as a result of such accidents. *State Farm Mut. Auto. Ins. Co. v. DeHaan*, 393 Md. 163, 194 (2006).

The specific provisions of §19-511(b) at issue in this case were enacted in 1995. The words of section (b) do not address whether an insured is entitled to keep the entire amount paid to him or her by a UIM carrier when a subsequent jury verdict is less than that amount. The legislative history, however, sheds some light on the purpose of the settlement provisions. A Floor Report prepared for Senate Bill 253 provides that the bill

> contains a remedy to a problem that has existed in Maryland's tort system for some time. Currently, an injured person who makes a claim against a liability carrier for limits available under the liability policy is frequently not allowed by their uninsured/underinsured motorist carrier to give the liability carrier a full release of their claim. Therefore, if the injured person wishes to make an additional claim for their injuries against their underinsured motorist coverage, they get caught in a situation where the liability carrier will not give them the limits of the at-fault party's policy without a release and the uninsured/underinsured motorist carrier will not allow them to give a release to the liability carrier. As a result, they are unable to recover funds from either carrier. This dilemma can cause a lengthy delay in settlement.
>
> Senate Bill 253 would eliminate this dilemma by requiring the uninsured/ underinsured motorist carrier to: (1) allow their injured insured to settle with the

> liability carrier and provide a release or (2) pay their injured insured themselves to fully maintain their subrogation rights against the liable party. Therefore, the injured party gets his money more quickly and the uninsured/underinsured motorist carrier would have "up front" the liability settlement.

There is nothing in the Bill File to suggest that the Legislature considered that a jury verdict could be less than the amount paid to the insured by the UIM carrier. In fact, as a Revised Fiscal Note for Senate Bill 253 indicates, the assumption clearly was that "[e]ventually the injured person's insurer would recover ... from the tortfeasor's insurer and be able to seek recovery ... from the tortfeasor's assets." Certainly, the Legislature, in enacting §19-511, was most concerned with eliminating the lengthy delay experienced by injured parties and it addressed this dilemma by placing the burden of protecting subrogation rights on the UIM carrier.

Under the statutory scheme, the UIM carrier, in order to protect its subrogation rights, must examine and evaluate the facts of the case before deciding to make a payment to the injured party in the amount of the settlement offered by the liability carrier. The UIM carrier's payment to the injured party is designed to protect the carrier's subrogation rights and is not intended to deprive insureds of the benefit of a settlement with the liability carrier. Accordingly, a subsequent jury verdict less than the payment made by a UIM carrier cannot

justify a "refund" of that portion of the payment that exceeds the verdict.

Although no Maryland court has addressed this issue previously, courts in several other jurisdictions have considered it and have reached the same conclusion. In *Gusk v. Farm Bureau Mutual Insurance Co.*, 559 N.W.2d 421 (1997), the Supreme Court of Minnesota considered a case in which Farm Bureau made a substituted payment to Gusk in lieu of allowing him to settle with an underinsured motorist, in order to preserve its subrogation rights. A jury found for Gusk, but in an amount less than the insurer's substitution payment. In considering whether Farm Bureau could offset its contractual liability for UIM benefits against the amount it had paid, the Supreme Court held that it could not demand a refund of the amounts paid and that the insured did not receive an impermissible double recovery. In reaching that decision, the Supreme Court stated that "[a] substitution is a payment to the plaintiff for the protection of the insurer's potential right of subrogation; its creation was not intended to deprive insureds of the benefit of their tentative settlement bargain." *Id.* at 424.

In *Nationwide Mutual Ins. Co. v. State Farm Auto. Ins. Co.*, 973 S.W.2d 56 (1998), the Supreme Court of Kentucky considered a case in which the UIM carrier, Nationwide, substituted its policy proceeds for a liability insurer's settlement offer. After a

jury awarded damages less than the liability policy limits, Nationwide brought an action against the liability insurer, State Farm, to recover subrogation. The court held that Nationwide bore the risk of overpayment when the jury awarded damages less than the liability coverage limits and, therefore, it was not entitled to subrogation. In reaching its decision, the Kentucky court noted that if UIM coverage is to accomplish its remedial purpose, the UIM carrier's contractual subrogation right must not obstruct the UIM's right to settle for the policy limits, even if that means releasing subrogation. The remedial purposes of the statutory scheme are accomplished when

> the plaintiff can receive the amount of the tortfeasor's policy limits, either from the liability carrier or from the UIM carrier without having to obtain a judgment. The tortfeasor has an incentive to settle, in that he may obtain a release from further liability, and the tortfeasor's liability carrier protects itself from a bad faith action by making the offer for policy limits. The plaintiff can then proceed against the UIM carrier and the UIM carrier can preserve its right of subrogation. ... [Bearing] the risk of overpaying the plaintiff ... encourages the UIM carrier to make an informed decision as to whether its subrogation rights are valuable or simply illusory. Since UIM benefits are payable only when the tortfeasor's liability exceeds the tortfeasor's policy limits, the UIM carrier must determine the value of the plaintiff' claim and the value of the potential subrogation claim when the liability carrier has offered the policy limits. The UIM carrier must determine, before it substitutes payment, the strength of the plaintiff's claim, the extent of the

> plaintiff's damages and the likelihood of being reimbursed by the tortfeasor for UIM benefits.

Id., 973 S.W.2d at 57-58.

Regarding who should bear the risk of loss, the Kentucky court went on to say:

> [A] substitution by the UIM of the amount offered in settlement does not truly result in a settlement. The tortfeasor remains in a position of potential liability should the judgment exceed the amount of his policy limits. Further, should the tortfeasor refuse to settle, instead of going to trial, the jury could absolve him or her of liability or adjudge the liability to be less than the policy limits. Thus, if the UIM carrier can substitute its payment without any risk, then the tortfeasor may be in a better position if he does not make a settlement offer at all to the plaintiff. With the risk of a bad decision on the UIM carrier, the UIM carrier is forced to make an informed decision and a realistic assessment of the offer. Further, it promotes finality between the plaintiff and the tortfeasor when the UIM carrier decides that its subrogation right has no value.
>
> * * *
>
> [T]he UIM carrier must determine its own destiny: if it chooses to substitute payment based on the risk of evaluation of the liability carrier, it is bound by that assessment when the time to assert its subrogation rights arrives.

Id. at 58.

Similarly, in *USAA Casualty Ins. Co. v. Kramer*, 987 S.W.2d 779 (Ky. 1999), the Supreme Court of Kentucky held that a UIM carrier was not entitled to reimbursement from the insured or the

liability insurer of $50,000 that was advanced to the insured after the liability insurer offered that amount in settlement even after a jury found that the defendant/motorist was not negligent for striking the insured's automobile. Relying on *Nationwide*, 973 S.W.2d 56 (1998), the court held that "[t]he bottom line is that the UIM bears the risk when it chooses to thwart a proposed settlement between the plaintiff and the alleged tortfeasor by substituting payment of the settlement amount." *Id.* at 783.

In *Connelly v. McVeigh*, 863 A.2d 1085 (2005), the Superior Court of New Jersey held that a UIM carrier that refused to consent to an insured's settlement with an alleged tortfeasor and substituted payment was not entitled to the money after a jury determined that the alleged tortfeasor was not liable. The Court reasoned that the insurer owed the substituted payment to the insured "as the price of preserving its own subrogation rights against [the alleged tortfeasor], and not as a measure of [the insured's] damages....[The UIM] nonetheless remains obligated for the payment it made to preserve its own right of subrogation. That payment was due as a consequence of its refusal to allow plaintiff to accept the [liability insurer's] settlement." *Id.* at 171.

We find the reasoning in these cases to be persuasive. Thus, we hold that when a UIM chooses to thwart a proposed

settlement between a plaintiff and an alleged tortfeasor by substituting payment of the settlement amount, it bears the risk that a jury might return a verdict in an amount less than the amount advanced or in favor of the defendant(s) and it is not entitled to a refund of any amount paid.

II.

Appellant next contends that even if the statute does not allow for the return of the substituted payment, appellee is required by the language of the UIM provisions of her insurance policy to return the funds. Specifically, appellant points to the following language from appellee's insurance policy:

> PART F - GENERAL PROVISIONS
>
> * * *
>
> OUR RIGHT TO RECOVER PAYMENT
>
> * * *
>
> If we advance payment to the insured in the amount equal to the tentative settlement within thirty (30) days after written refusal to consent to the acceptance of the settlement offer:
>
> 1. That payment will be separate from any amount the "insured" is entitled to recover by the provisions of the Uninsured Motorists Coverage; and
>
> 2. We also have the right to recover the advance payment.

Appellee contends that the language of subsection 2 is vague and unenforceable, and we agree.

Contractual language is considered ambiguous "if, when read by a reasonably prudent person, it is susceptible of more than one meaning." *Calomiris v. Woods*, 353 Md. 425, 436 (1999); *Heat & Power Corp. v. Air Prods. & Chems., Inc.*, 320 Md. 584, 596 (1990). In determining whether language is susceptible of more than one meaning, courts are not precluded from considering "the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution." *Pacific Indem. Co. v. Interstate Fire & Cas. Co.*, 302 Md. 383, 388 (1985). If ambiguity is found to exist, then extrinsic evidence may be used to determine the parties' intent. *Sullins v. Allstate Ins. Co.*, 340 Md. 503, 508 (1995). In *Calomiris*, the Court of Appeals recognized that the question of whether a contract is ambiguous ordinarily is a question of law. *Calomiris*, 353 Md. at 434. The Court explained:

> [T]he determination of ambiguity ... is subject to *de novo* review by the appellate court .... [T]he review is essentially a "paper" review where the same contractual language is before the appellate court as was before the trial court. Since neither the credibility of witnesses nor the evaluation of evidence, other than the *written* contract, is in issue, the policy reasons behind deferring to the trial judge under the clearly erroneous standard are inapplicable.

Id., 353 Md. at 434-35. On appeal, therefore, we determine whether the trial court was legally correct.

Appellant argues that, pursuant to Section III, Part F,

subsection 2 of the insurance policy, it is entitled to recover from Chamberlin the funds advanced to her in excess of the jury's verdict. Specifically, that provision provides that appellant has "the right to recover the advance payment." That language, however, does not specify from whom appellant may recover advance payments. A reasonably prudent person might read the policy language as implying that the insurer has a right to recover advanced payments from the insured, but that is not specifically stated. A reasonably prudent person might also read that language as implying that the insurer has a right to recover from the tortfeasor or the tortfeasor's insurer.

Moreover, the interpretation argued by appellant is at odds with the purpose of §19-511(b) and the following language contained in the policy issued to Chamberlin pertaining to the duties of a person seeking UIM coverage:

> ADDITIONAL DUTY
>
> A person seeking Uninsured Motorists Coverage must
>
> * * *
>
> 3. Allow us to advance payment to that "insured", within 30 days after the written refusal to consent to acceptance of the settlement offer, in an amount equal to the tentative settlement **to preserve our rights against the insurer, owner or operator of such "uninsured motor vehicle."**

(Emphasis added).

Since the contractual language lacks the necessary clarity

and definiteness that are required for a contract to be enforceable, we conclude, as did the trial court, that Chamberlin is not obligated to return any portion of the $20,000 advanced to her by appellant.

JUDGMENT AFFIRMED; APPELLEE'S REQUEST TO HAVE SPECIFIC PRINTING COSTS ASSESSED AGAINST APPELLANT IS DENIED; ALL OTHER COSTS TO BE PAID BY APPELLANT.