

Tammy L. Ribar

From: Tammy L. Ribar
Sent: Friday, March 11, 2011 11:43 AM
To: 'Zuk, Edward J.'; 'Moldovan, Emily L.'; 'wajohnsonesq@yahoo.com'
Cc: 'belusko1@comcast.net'; 'Jeff Ross'; 'Richard Violi'; Mary-Jo Rebelo
Subject: Zoning Ordinance Amendment
Importance: High

Ed, Emily and Bill,

In light of the comments made by Mr. Beinhauer's attorney last night, I reviewed some email correspondence with regard to the language of the landowner curative amendment. Please see my attached email dated February 17 and note the location of the "and/or" clauses in the definition. I have also attached Ed's February 18 email in response, with the proposed ordinance which did not incorporate those requested language changes. I believe this was an oversight and also believe that change of the "and/or" clauses as we originally proposed, makes it clear, as has been our stated intent from the outset, that the curative amendment is intended to treat crematories as accessory uses to funeral homes, and not intended to permit them as stand-alone businesses.

I do not believe this constitutes a "substantial amendment" to the proposed ordinance per Section 610(b) of the Municipalities Planning Code (the "MPC") which requires the Township to re-advertise. If you disagree, please let me know as soon as possible. Otherwise, please let me know how you would like to handle the request to make this minor change to the proposed ordinance language (i.e., would you prefer a formal letter in advance of the meeting or would you prefer that we make a statement on the record at the meeting). I look forward to hearing from you. Thank you.

Tammy L. Ribar, Esquire
Houston Harbaugh

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3/17/2011

Tammy L. Ribar

From: Tammy L. Ribar
Sent: Thursday, February 17, 2011 10:18 AM
To: 'Moldovan, Emily L'; Zuk, Edward J.; wajohnsonesq@yahoo.com
Cc: Caldwell, Paulette M.; belusko1@comcast.net; 'Jeff Ross'; Richard Violi; Mary-Jo Rebelo
Subject: RE: Revised Ordinance- Funeral/ Crematorium

Emily, Ed and Bill,

In connection with our request to amend the landowner curative amendment to delete the C-4 zoning district, please see the attached revised ordinance. I have attached a clean version as well as a redline to show the changes to the latest version that Emily emailed to me on January 20. The redlined version does not show the deletion of the chart but the clean version does. Please let me know if this is acceptable to the Township so I can attach it to my formal written request to amend the landowner curative amendment. Thank you for your time and attention to this matter.

Tammy L. Ribar, Esquire
Houston Harbaugh

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-----Original Message-----

From: Moldovan, Emily L [mailto:AsstPlanner@peterstownship.com]
Sent: Thursday, January 20, 2011 11:50 AM
To: Tammy L. Ribar
Cc: Caldwell, Paulette M.; wajohnsonesq@yahoo.com; Zuk, Edward J.
Subject: Revised Ordinance- Funeral/ Crematorium

Hello,

Please see attachment and let me know if you have any questions.

Emily Moldovan
Assistant Planner/ Zoning Officer
Peters Township
(724) 942-5005

3/17/2011

777 A.2d 1257
Commonwealth Court of Pennsylvania.

Ray RABENOLD; Tam Realty, Inc.;
Frank DePaulo and Frank DePaulo, Jr.,

v.

ZONING HEARING BOARD OF THE
BOROUGH OF PALMERTON and
Arthur R. Schisler and Fannie A. Schisler,
Frank DePaulo and Frank DePaulo, Jr., Appellants.
Arthur Schisler,

v.

Zoning Hearing Board of the Borough of
Palmerton and Ray Rabenold; Tam Realty,
Inc.; Frank DePaulo and Frank DePaulo, Jr.
Frank DePaulo and Frank DePaulo, Jr., Appellants.

Submitted on Briefs July 24,
1998. Decided June 5, 2001.

Neighbors appealed Zoning Hearing Board's decision granting permit to landowners to build crematory in borough's C-Central Business Commercial district. The Court of Common Pleas, Carbon County, Nos. 96-1099, 95-1608, and 96-1082, Lavelle, P.J., affirmed. Neighbors filed three separate appeals. On consolidation, and after reargument, the Commonwealth Court, Nos. 1326, 1327, and 1328 C.D. 1997, Doyle, President Judge, held that: (1) neighbors' appeal was timely; (2) landowners did not have vested interest in building permit; and (3) crematory was permitted use and permitted accessory use.

Affirmed.

West Headnotes (7)

1 **Zoning and Planning** ⇌ Questions or errors of law

Zoning and Planning ⇌ Matters of discretion

In zoning appeals, where the trial court takes no additional evidence, the Commonwealth court's standard of review is limited to determining whether the zoning hearing board (ZHB) committed an abuse of discretion or an error of law.

2 Cases that cite this headnote

2 **Zoning and Planning** ⇌ Commencement of limitation period

Neighbors timely appealed decision of Zoning Hearing Board (ZHB) granting landowners permit to build a crematory, although neighbors appealed more than 30 days after issuance of permit, where neighbors had no knowledge that crematory was to be built, based on notice posted on property, until more than eight months after permit was granted. 53 P.S. § 10914.1(a).

1 Cases that cite this headnote

3 **Zoning and Planning** ⇌ Vested or property rights

Landowners who built crematory on their property did not have vested right in building permit, where period for neighbors to appeal decision had not passed, due to neighbors' initial inability to discover that crematory was proposed. 53 P.S. § 10914.1(a).

3 Cases that cite this headnote

4 **Zoning and Planning** ⇌ Mortuaries, cemeteries, and mausoleums

Zoning and Planning ⇌ Particular accessory uses

Crematory adjacent to funeral home was both a permitted use and a permitted accessory use in borough's C-Central Business Commercial district, where funeral home was a "service establishment for the conducting of any retail business," and the crematory was incidental or subordinate to operation of a funeral home, as both funeral homes and crematories dealt with final disposition of human remains.

2 Cases that cite this headnote

5 **Zoning and Planning** ⇌ Questions or errors of law

Whether a proposed use falls within a given categorization contained in the zoning regulations is a question of law for the Commonwealth Court.

2 Cases that cite this headnote

6 **Zoning and Planning** ⇌ Free or unrestricted use of property

Restrictions on a property owner's right to free use of his property must be strictly construed and all doubts resolved in his favor.

3 Cases that cite this headnote

7 **Appeal and Error** ⇌ Grounds for Sustaining Decision Not Considered

The Commonwealth Court may affirm a trial court determination under a different rationale, where the result is correct and the basis on which the Court affirms is clear on the record.

2 Cases that cite this headnote

Attorneys and Law Firms

*1258 James G. Kellar, Allentown, for appellants.
Alfred S. Pierce, Nazareth, and Gary F. Dobias, Jim Thorpe, for appellees.

Before DOYLE, President Judge, PELLEGRINI, Judge, and RODGERS, Senior Judge.

Opinion

DOYLE, President Judge.

On December 17, 1997, this Court filed a previous opinion and order affirming the order of the Carbon County Court of Common Pleas in the above-captioned matter.¹ Thereafter, Frank DePaulo and Frank DePaulo, Jr. (Appellants) filed an Application for Reargument on December 29, 1997. While this Court denied reargument, we did grant reconsideration to revisit the issue of the timeliness of the appeal in view of the decisions of *Beecham Enterprises, Inc. v. Zoning Hearing Board*, 125 Pa.Cmwlth. 20, 556 A.2d 981 (1989) (*Beecham I*), and *Beecham Enterprises, Inc. v. Zoning Hearing Board*, 530 Pa. 272, 608 A.2d 1017 (1992) (*Beecham II*) and whether the subject use of the property was a permitted use under the zoning ordinance of Palmerton Borough. Upon reconsideration, we again affirm the judgment of the Common Pleas Court.

1 The original appeal was argued before a panel of this Court on October 7, 1997.

Appellants appeal from an order of Common Pleas affirming a decision of the Zoning Hearing Board (ZHB) of the Borough of Palmerton (Borough), which found that Appellants' appeal to the ZHB was timely, that a crematory is both a permitted use and a permitted accessory use in the C-Central Business Commercial zoning district of the Borough pursuant to the Palmerton Zoning Ordinance, and that the Schislars acquired a vested right to install a crematory.

The relevant facts are as follows. Arthur R. and Fannie A. Schisler are the owners of property commonly known as 517-519 and 525 Delaware Avenue, Palmerton, Pennsylvania. On June 14, 1994, Arfan, Inc. (the Schislars are the sole stockholders in this enterprise) applied to the Borough for a building permit to construct two apartment units, two commercial units and an extension to the existing funeral home located at 525 Delaware Avenue, which would include a crematory.² Modification of the 525 Delaware Avenue building was required because of extensive structural damage resulting from heavy snows during the winter of 1993-1994. The Borough Zoning Officer approved the permit on June 15, 1994, and construction began that November.

2 Only the crematory is at issue here.

The property was posted with an official notice of the issuance of the permit, which indicated that the work authorized by the permit consisted of "Partly Demolish and Reconstruct" but the notice omitted any reference to the construction and operation of the crematory. The installation of the crematory and the renovation of the building were completed in the early part *1259 of May 1995. Appellants appealed to the ZHB on May 18, 1995, asserting that the proposed improvements were not in accordance with the local zoning ordinance. Specifically, they argued that a crematory is not a permitted use or a permitted accessory use in a C-Central Business Commercial zoning district within the Borough. Appellants also maintained that they did not acquire knowledge of the issuance of the permit until April 29, 1995.

A hearing was held before the ZHB on June 21, 1995, where approximately four hours of testimony was heard from the various parties involved. On August 3, 1995, the ZHB rendered its decision and held that Appellants' appeal was timely, that a crematory was a permitted use in the Borough's C-Central Business Commercial district, but did not address

the issue of whether the Schislars had acquired a vested right to install the crematory.

On August 4, 1995, Appellants filed a notice of appeal from the ZHB's decision and, on November 29, 1995, oral argument was heard by the Court of Common Pleas of Carbon County. The court was asked to decide whether the ZHB correctly allowed the crematory to be located in the C-Central Business Commercial district, and if the ZHB was not correct, whether the crematory should be permitted under a theory of vested rights because it was already in place at the time of the appeal. On February 29, 1996, the court remanded the matter to the ZHB to specifically address the issue of whether the Schislars had a vested right to the building permit and to formulate specific findings of fact to support the ZHB's initial decision.

On April 10, 1996, the ZHB met to resolve the issues contained in the remand order from Common Pleas. The parties to this matter all agreed that no additional testimony on the issue of vested rights was necessary, and the ZHB rendered its opinion. The ZHB held that, in a C-Central Business Commercial district, a crematory was both a permitted use and a permitted accessory use, that Appellants' appeal to the ZHB was timely, and that the Schislars had acquired a vested right to install the crematory. Although the ZHB articulated its holding on April 10, 1996, it did not issue its written decision until May 6, 1996.

Appellants then filed another appeal of the ZHB's decision to the Carbon County Court of Common Pleas, which issued a decision and order on May 2, 1997. In this opinion, Common Pleas found that Appellants' appeal to the ZHB was *not* timely and that the Schislars had acquired a vested right to install the crematory. Because the court determined that Appellants' appeal was untimely and that the Schislars had acquired a vested right to install the crematory, it found it unnecessary to address the issue of whether the ZHB properly determined that a crematory was a permitted use and/or a permitted accessory use under the Palmerton zoning ordinance. Appellants filed a notice of appeal from the trial court's May 2, 1997 order with this Court on May 21, 1997.³

³ There were actually three appeals taken by Appellants to this Court from the one order of Common Pleas dated May 2, 1997, which were consolidated by this Court by an order dated June 23, 1997. This unusual situation occurred because there had been three appeals taken from the two decisions of the ZHB to Common Pleas. A motion to amend the caption was denied, however;

hence, the reference to three appeals in the caption of the case as those appeals exist in the docket of this Court.

¹ On appeal,⁴ Appellants argue that the trial court erred as a matter of law by *1260 finding: (1) that Appellants' appeal to the ZHB from the decision to grant the building permit was untimely; (2) that a crematory was a permitted use in the Borough's C-Central Business Commercial district; and (3) that the Schislars acquired a vested right to install the crematory. In our previous decision, we concluded that Appellants' appeal was timely and that the Schislars had acquired a vested right to install the crematory. Because of our resolution of these two issues, we felt it unnecessary to address whether the crematory was a permitted use in the C-Central Business District. Appellants filed an Application for Reargument, which was denied by this Court, but reconsideration was granted, limited to the application of *Beecham I*, and *Beecham II*, and the separate issue of whether the subject use of the property was a permitted use under the Borough's zoning ordinance. We now address all of the issues raised in these appeals.

⁴ In zoning appeals, where the trial court takes no additional evidence, our standard of review is limited to determining whether the zoning hearing board committed an abuse of discretion or an error of law. *Herr v. Lancaster County Planning Commission*, 155 Pa.Cmwlth. 379, 625 A.2d 164 (1993), *petition for allowance of appeal denied*, 538 Pa. 677, 649 A.2d 677 (1994).

Pursuant to Section 914.1(a) of the Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. § 10914.1(a), *added by*, Act of December 21, 1988, P.L. 1329, an appeal from the decision of the zoning officer to approve an application for development must be filed within **thirty days** after such approval "unless such person alleges and proves that he had no notice, knowledge, or reason to believe that such approval has been given." 53 P.S. § 10914.1(a). We conclude that Appellants are correct and our decision in *Beecham I*, as affirmed by the Supreme Court in *Beecham II*, is applicable to the instant matter. The facts underlying the *Beecham* decisions reflect that Motel Six began installation of a sign eight months after obtaining a variance. *Beecham*, a neighboring property owner, filed an appeal with the township zoning hearing board, which had granted the variance, as well as with the court of common pleas. *Beecham* argued that it had not received notice of the hearing before the board and was unaware of the variance until the sign was constructed. The court remanded the matter

to the board because the property had not been properly posted. The board then granted the variance and Beecham appealed. The lower court chose not to address the variance issue and found, instead, that Motel Six had acquired a vested right to the sign permit. Beecham then appealed to this Court, which held that, because the property had not been properly posted, the thirty-day appeal period did not begin to run against Beecham until it knew that the variance had been granted. Coterminous with that holding, we concluded that, because Beecham had filed its appeal within thirty days of its receipt of notice, there could be no vested right to the sign permit because the allowable appeal period had not expired without the filing of an appeal.

On appeal to our Supreme Court, the High Court observed that Beecham had filed an appeal to the board as well as to common pleas, analyzing the matter under the provisions of Section 915 of the MPC (now renumbered as Section 914.1(a), 53 P.S. § 10914.1(a)), which provides:

No person shall be allowed to file any proceeding with the board later than 30 days after an application for development, preliminary or final, has been approved by an appropriate municipal officer, agency or body if such proceeding is designed to secure reversal or to limit *1261 the approval in any manner unless such person alleges and proves that he had no notice, knowledge or reason to believe that such approval had been given.

The Court concluded that, even though Beecham's appeal had been filed eight months after the variance had been granted, the appeal was timely because it had been filed within thirty days of the point at which Beecham received notice. *Beecham II*. Thus the Supreme Court affirmed this Court.

2 In the present case, the Appellants presented testimony that they were not aware that a crematory was being placed in the reconstructed building at 517-519 Delaware Avenue. The building permit, which was displayed at the work site, stated only that the work to be conducted was: "Partly Demolish + Reconstruct 517-519 Delaware Avenue." (Original Record, Meeting of Borough of Palmerton Zoning Hearing Board, dated June 21, 1995 and August 3, 1995, Exhibit B-4.) There was no indication that a crematory was also being included in the renovation of the building. The Appellants testified that they did not acquire notice of the construction of the crematory until the latter part of April or the beginning of May 1995. (Notes of Testimony dated June 21, 1995, pp. 44-45.)

Because there is no notice provision in either the MPC or the Palmerton Zoning Ordinance, and because Appellants did not receive notice of the crematory until, at the earliest, late April 1995, and further, because the building permit did not indicate that a crematory was included in the renovations, we hold that Appellants' May 18, 1995 appeal of the Board's decision was timely.

3 Initially, Appellants argued that Common Pleas erred, as a matter of law, by finding that the Schislars had acquired a vested right to the permit to build the crematory because, as they asserted, the issue of vested rights can only be reached after a finding that a crematory was a permitted use, which they argued it is not.⁵ On reconsideration, Appellants also point out that, under *Beecham I* and *Beecham II*, the Schislars have not acquired a vested right to the permit because we determined that Appellant's appeal was timely filed. We must agree with Appellants, and thus the rationale for granting reconsideration, that the Schislars are not entitled to a vested right in their permit under the *Beecham* decisions.

5 Because of the result we reach today, we leave the validity of this argument, or lack thereof, to another day.

In *Department of Environmental Resources v. Flynn*, 21 Pa.Cmwlth. 264, 344 A.2d 720 (1975), this Court articulated a five-part standard when analyzing cases in the vested rights area. In that case, this Court held that, in order for a property owner to establish a vested right in the permit, the property owner must show:

- 1) due diligence in attempting to comply with the law;
- 2) good faith throughout the proceedings;
- 3) the expenditure of substantial unrecoverable funds;
- 4) the expiration without appeal of the period during which an appeal could have been taken from the issuance of the permit; [and]
- 5) the insufficiency of the evidence to prove that individual property rights or the public health, safety or welfare would be adversely affected by the use of the permit.

*1262 *Id.* at 725; see also *Petrosky v. Zoning Hearing Board of Upper Chichester, Delaware County*, 485 Pa. 501, 402 A.2d 1385 (1979).

Common Pleas found that the Schislars met these requirements, but on reconsideration, we find that

requirement number four, "the expiration without appeal of the period during which an appeal could have been taken from the issuance of the permit," has not been met. *Flynn*. The statute authorizes an appeal beyond the stated thirty-day period under circumstances where affected property owners can prove that they were without notice. 53 P.S. § 10914.1(a). Because Appellants did not receive notice of the permitted installation of the crematory, with the resultant determination that their appeal was timely, the period during which an appeal could have been taken had not expired. Therefore, we hold that the Schislars did not have a vested right in the permit to construct the crematory that was issued by the Borough Zoning Officer. However, the matter does not end here.

4 In our initial decision rendered in this matter, we concluded that it was unnecessary to address the issue of whether a crematory is a permitted use, or a permitted accessory use, in a C-Central Business Commercial zoning district. On reconsideration, however, the parties were required to brief this issue more thoroughly for our review. A capsulization of the procedural history relevant to this single issue will better frame our analysis.

The August 1995 decision of the ZHB determined that a crematory was a permitted use in the Borough's C-Central Business Commercial district. Common Pleas heard oral argument on the issues in the first appeal to that court, but did not receive additional evidence. In a decision circulated on February 29, 1996, Common Pleas remanded the matter to the ZHB to determine, *inter alia*, whether a crematory was a permitted use in the Borough's C-Central Business Commercial district. The ZHB conducted additional hearings and both parties declined to offer any additional testimony or other evidence. In a decision circulated in May 1996, the ZHB again found that a crematory was a permitted use. As previously indicated, the matter was again appealed to Common Pleas, which took no additional evidence and decided the case without addressing the "permitted use" issue.

Section 405 of the Zoning Ordinance sets forth the permitted uses and permitted accessory uses of a C-Central Business Commercial district as follows:

Section 405 C-Central Business Commercial

405.1 Permitted Uses

- a. Retail stores, shops or service establishments for the conducting of any retail business or service except drive-in establishments;

- b. Business, professional, or government offices and office buildings;

* * * *

405.2 Permitted Accessory Uses-Located on the same lot with the permitted principal use.

- a. Private garage or private parking areas, off-street parking areas pursuant to the provisions of Section 508.
- b. Signs pursuant to the provisions of Section 506.
- c. Accessory uses and buildings.

Section 201.4 of the Zoning Ordinance defines "accessory use" as "[a] use customarily incidental and subordinate to and located on the same lot occupied by the principal use to which it relates." (Zoning Ordinance, Article II, p. 2.)

*1263 5 6 Whether a proposed use falls within a given categorization contained in the zoning regulations is a question of law for this Court, *Merry v. Zoning Board of Adjustment*, 406 Pa. 393, 178 A.2d 595 (1962), keeping in mind that zoning ordinances must be construed expansively so as to afford the landowner the broadest possible use and enjoyment of his land. *Bakerstown Container Corporation v. Richland Township*, 508 Pa. 628, 500 A.2d 420 (1985). Thus, "restrictions on a property owner's right to free use of his property must be strictly construed and all doubts resolved in his favor." *Gilden Appeal*, 406 Pa. 484, 492, 178 A.2d 562, 566 (1962).

As the ZHB observed, Section 405.1 of the Zoning Ordinance permits "a service establishment for the conducting of any retail business." (ZHB Opinion, p. 14.) Moreover, neither a funeral home nor a crematory are specifically addressed anywhere in the Zoning Ordinance. We agree with the ZHB that the operation of a crematory is an ancillary service of a funeral home, which is a retail service establishment. Both funeral homes and crematories deal with the final disposition of human remains through either internment or cremation. Cremation is a use that is incidental or subordinate to the operation of a funeral home, and constitutes both a permitted use and a permitted accessory use to that of the principal use, a funeral home.⁶

6 While few jurisdictions have addressed this particular issue, most of those that have addressed it have concluded that operation of a crematory is an ancillary service of a funeral home. *See, e.g., Conrad v.*

Babcock, 124 Ohio App.3d 667, 707 N.E.2d 44 (1997) (concluding that installation and operation of a crematory is an accessory use to a funeral home); *Memorial Funeral Home, Inc. v. Zoning Board of Review, Town of Portsmouth*, 1997 WL 839885 (R.I.Super.1997) (holding that crematoriums are permitted uses, constituting the same character of use as a funeral home, and permitting funeral establishments to provide full funeral service needs to its retail customers); *Laurel Lawn Cemetery Assoc. v. Zoning Board of Adjustment*, 226 N.J.Super. 649, 545 A.2d 253 (1988) (stating that a crematorium is an accessory or incidental use to a cemetery because, like a funeral home, it deals with the disposition of human remains); *Ferry v. City of Bellingham*, 41 Wash.App. 839, 706 P.2d 1103 (1985) (holding that city planning board properly determined that operation of crematory was valid accessory use to funeral home).

End of Document

7 Accordingly, we affirm the order of the Carbon County Court of Common Pleas, albeit on different grounds.⁷

7 We may affirm a trial court determination under a different rationale, where the result is correct and the basis on which we affirm is clear on the record. *Rhoads v. Lancaster Parking Authority*, 103 Pa.Cmwlth. 303, 520 A.2d 122 (1987), *petition for allowance of appeal denied*, 515 Pa. 611, 529 A.2d 1084 (1987).

ORDER

NOW, June 5, 2001, the order of the Court of Common Pleas of Carbon County in the above-captioned matter is hereby affirmed.

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707 N.E.2d 44
Court of Appeals of Ohio,
Eleventh District, Portage County.

CONRAD et al., Appellants,
v.
BABCOCK et al., Appellees.

No. 96-P-0259. Decided Dec. 22, 1997.

Neighbors appealed zoning board's decision permitting expansion of funeral home's nonconforming use. The Court of Common Pleas, Portage County, affirmed board's decision. Neighbors appealed. The Court of Appeals, William M. O'Neill, J., held that: (1) trial court erred in concluding that term "assessed value," as used in zoning regulation providing that cost of expanding nonconforming use may not exceed the assessed value of property, meant "market value" instead of "tax value," and (2) zoning board was not required to apply the statutory standards for granting variance in considering request to expand nonconforming use.

Affirmed in part, reversed in part, and remanded.

West Headnotes (4)

- 1 **Zoning and Planning** ⇌ Decisions of boards or officers in general
Zoning and Planning ⇌ Decisions of boards or officers in general
Zoning and Planning ⇌ Extent of review in general
In reviewing zoning board's decision, trial court must give deference to the board's resolution of evidentiary conflicts, may not substitute its judgment for that of the board, and is bound by the nature of administrative proceedings to presume that the board's decision is reasonable and valid. R.C. § 2506.03.

- 2 **Zoning and Planning** ⇌ Illegality
Zoning and Planning ⇌ Determination supported by evidence
In reviewing trial court's ruling on zoning board's decision, unless appellate court can say, as a matter of law, that the decision of the trial court is not supported by a preponderance of the reliable,

probative, and substantial evidence, or otherwise illegal, the trial court's decision must be affirmed.

- 3 **Zoning and Planning** ⇌ Area of use
"Assessed value," for purposes of zoning regulation permitting expansion of nonconforming use so long as cost of expansion and prior renovations do not exceed the assessed value of building or structure, equaled 35 percent of the market, or true, value; assessed value equaled the "tax value."
- 4 **Zoning and Planning** ⇌ Area of use
Zoning board was not required to apply the statutory standards for granting variance in considering funeral home's request to expand its nonconforming use, where standards for granting variance had not been an issue in case. Kent, OH, Zoning Code §§ 1115.09, 1169.04.

3 Cases that cite this headnote

Attorneys and Law Firms

**44 *668 Jay P. Porter and Christopher F. Swing, Akron, for appellants.
James R. Silver, Kent Law Director, Kent, for appellees Susan Babcock, as Zoning Inspector for the city of Kent, and Kent Board of Zoning Appeals.
John J. Flynn and Jon M. DeRhodes, Kent, for appellee Bissler Funeral Home.

Opinion

WILLIAM M. O'NEILL, Judge.

Appellants, Edward and Jane Conrad et al., appeal from a judgment of the Portage County Court of Common Pleas affirming the decision of appellee, Kent Board of Zoning Appeals ("BZA"), which permitted the expansion of a nonconforming use by appellee, Bissler Funeral Home ("Bissler"). For the reasons that follow, the judgment of the trial court is affirmed in part and reversed in part, and the cause is remanded for further proceedings consistent with this opinion.

Bissler operates a funeral home in a residential zoning district designated "R-2: Medium Density Residential District." As Bissler's business use of the property predates the enactment of the Kent Zoning Code, Bissler's funeral home is a nonconforming use.

Bissler sought approval for an addition to the rear of its existing nonconforming funeral ^{**45} home. The proposed addition, which was to cost approximately \$130,000, was for a new garage in which to park vehicles and for office space. Changes to the interior of the existing building included minor alterations to the funeral home's bathrooms to accommodate the disabled and, most relevant to this appeal, the installation of a crematory in the existing garage space.

On December 5, 1995, a meeting was held before the Kent City Planning Commission ("Planning Commission") on Bissler's request for site plan review and approval to permit the enlargement of the existing nonconforming funeral home. At the meeting, the project architect, David L. Sommers, described the physical layout of the proposed expansion and answered questions from the members of the Planning Commission. There were no comments from the audience in opposition to Bissler's project. The Planning Commission unanimously approved the site plan subject to the BZA granting an expansion of the nonconforming use and on condition that the facility would not be used as a commercial crematory.

^{*669} On January 22, 1996, BZA considered Bissler's request for expansion of a nonconforming use. Unlike the meeting before the Planning Commission, a number of people who live in the neighborhood near Bissler attended the BZA hearing to express their thoughts on the proposed expansion. While some neighbors expressed their approval of the expansion, others expressed their concern that Bissler was planning on installing a crematory in the existing building.

At the hearing, Sommers again described the physical layout of the new addition and explained how the exterior of the addition would match the exterior of the existing structure. He also answered questions as to additional landscaping Bissler was planning as well as answering concerns about traffic, parking, and the environmental effects of the crematory.

During the hearing, a BZA member asked if BZA was to consider the impact the proposed expansion was to have on the neighborhood. BZA was specifically told that this was an issue for the Planning Commission and not BZA. Additionally, the Assistant Law Director for the city of Kent

informed the audience and the members of BZA that there was no appeal presently before BZA and that, pursuant to Kent Zoning Code 1169.04, there was only one issue to be decided in this case: whether the aggregate cost of any alterations Bissler planned, together with any alterations it performed during the previous ten-year period, exceeded the "assessed value" of the funeral home on May 15, 1985.

Kent Zoning Code 1169.04 provides as follows:

"A building or structure containing a nonconforming use may be altered, improved or reconstructed, enlarged or extended provided such work is not to an extent exceeding, in aggregate cost during any ten (10) year period, the assessed value of the building or structure on the date these regulations take effect, and provided that any enlarging or extending of such building or structure shall be approved by the Board of Zoning Appeals (which shall apply the standards listed in Section 1115.09 when reviewing the request)."

Sommers testified that Bissler had spent \$21,000 on renovations to the funeral home and that with the proposed alterations, the aggregate amount that was to be spent would total \$151,000. Sommers further testified that this figure was well below the "tax value" of the property in 1985 of \$192,610.

Several neighboring residents, including several of appellants, expressed their belief that the issue before BZA was more than the dollar amount of the expansion. Others questioned how a crematory was allowed on Bissler's property when even a new funeral home would not be permitted in their neighborhood. Gary S. Locke, the Plans Administrator, stated that neither the Planning Commission nor BZA had the ability to pass judgment on the crematory. He ^{*670} further stated that the Law Director for the city of Kent, at the beginning of the case, advised that a crematory fell under the definition of a funeral home as that term is defined by the ^{**46} state of Ohio.¹ Following the hearing, BZA granted Bissler's request for expansion of its nonconforming use.

On February 21, 1996, appellants, consisting of twenty-eight residents who reside near Bissler's funeral home, filed an administrative appeal in the Portage County Court of Common Pleas. After the appeal was filed, appellants moved the trial court to supplement the record, as BZA had failed to file a complete transcript of the proceedings including all of the documents presented at the hearing. The trial court granted appellants' motion, and, relevant to this appeal, tax

duplicates for Bissler's property from 1985 were submitted into evidence. The records indicated a tax value of \$67,420 for the land and building, which computes to a "market value" of \$192,628.57. The records showed a tax value of \$45,290 and "market value" of \$129,400 for the building alone.

Appellants, relevant to this appeal, presented the following issues on appeal: (1) whether BZA properly interpreted and applied Kent Zoning Code 1169.04, and (2) whether BZA considered Kent Zoning Code 1115.09 when it approved Bissler's proposed expansion. On October 7, 1996, the Portage County Court of Common Pleas filed its judgment entry affirming, as modified, BZA's decision. Determining that Bissler was entitled to construct improvements on the "assessed value" of the building or structure only, the trial court authorized Bissler to construct its improvements in a total amount not to exceed \$108,400.² Additionally, the trial court determined that Kent Zoning Code 1115.09 had no application to this case, and, to the extent some provisions of Section 1115.09 were applicable to this case, BZA considered the pertinent factors.

From this judgment, appellants filed a timely notice of appeal and now assert the following three assignments of error:

"1. The trial court erred when it concluded that the term 'assessed value' as set forth in section 1169.04 of the Kent Zoning Code, meant 'market value' instead of 'tax value,' in considering whether the estimated cost of Bissler's proposed expansion of its nonconforming funeral home, together with the cost of previous renovations, exceeded the funeral home's 1985 "assessed value."

*671 "2. The trial court erred when it concluded that the BZA was not required to consider each of the criteria set forth in section 1115.09 of the Kent Zoning Code, as incorporated in section 1169.04, in considering Bissler's request to expand its nonconforming funeral home.

"3. The trial court erred when it found that the BZA, in fact, considered those criteria set forth in Section 1115.09 of the Kent Zoning Code, which the trial court arbitrarily deemed applicable to Bissler's request to expand its nonconforming funeral home."

Before reaching appellants assigned errors, we note that R.C. 2506.04 provides the standard of review applied by the trial court in reviewing a decision by an administrative agency:

"The [trial] court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious,

unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record."

1 In reviewing BZA's decision, the trial court is limited to the transcript of the proceedings before the administrative agency and evidence that has been accepted into the record pursuant to R.C. 2506.03. The trial court must give deference to the agency's resolution of evidentiary conflicts, *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111, 17 O.O.3d 65, 67, 407 N.E.2d 1265, 1267-1268, and the court may not substitute its judgment for that of the agency, *Dudukovich v. Lorain Metro. Hous. Auth.* (1979), 58 Ohio St.2d 202, 207, 12 O.O.3d 198, 201-202, 389 N.E.2d 1113, 1116-1117. Furthermore, the "court is bound by the nature of **47 administrative proceedings to presume that the decision of the administrative agency is reasonable and valid." *Community Concerned Citizens, Inc. v. Union Twp. Bd. of Zoning Appeals* (1993), 66 Ohio St.3d 452, 456, 613 N.E.2d 580, 584. See, also, *C. Miller Chevrolet, Inc. v. Willoughby Hills* (1974), 38 Ohio St.2d 298, 67 O.O.2d 358, 313 N.E.2d 400.

2 The standard of review at the appellate level is more limited in scope than that of the trial court. Unless an appellate court can say, as a matter of law, that the decision of the trial court is not supported by a preponderance of the reliable, probative, and substantial evidence, or otherwise illegal, the trial court's decision must be affirmed. *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34, 12 OBR 26, 29-30, 465 N.E.2d 848, 851-852.

In their first assignment of error, appellants argue that the trial court erred when it concluded that the term "assessed value," as found in Kent Zoning Code 1169.04, meant "market value" instead of "tax value" in considering whether the estimated cost of Bissler's proposed expansion, together with the cost of prior renovations, exceeded the funeral home's 1985 "assessed value." As previously noted, the tax duplicate for Bissler's property from 1985 was admitted into *672 evidence and showed a "tax value" of \$45,290 and a "market value" of \$129,400 for the funeral home's building. Thus, appellants argue that Bissler's proposed expansion should be limited to \$24,290 instead of the \$108,400 amount the trial court approved.

In support of their positions on this subject, both parties have submitted dictionary definitions of the term "assessed value"; appellants' dictionary defining the term as the "tax value" of the property while appellees' dictionary defines the term

as the "market value" of the property. Given an appellate court's limited standard of review in these matters, we would normally defer to the administrative agency's expertise in resolving these types of disputes. However, in Ohio, the term "assessed value," as utilized in this case, has a definite meaning requiring us to reverse the trial court's decision.

3 In *State ex rel. Park Invest. Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410, 25 O.O.2d 432, 195 N.E.2d 908, the Supreme Court of Ohio recognized that the "uniform rule" requirement of Section 2, Article XII of the Ohio Constitution requires uniformity in the valuation of real property, and uniformity in the percentage of actual value which constitutes a parcel's assessed value. See, also, *Roosevelt Properties Co. v. Kinney* (1984), 12 Ohio St.3d 7, 12, 12 OBR 6, 10-11, 465 N.E.2d 421, 426. The assessed value of property is thirty-five percent of its "true value." See *Consol. Aluminum Corp. v. Monroe Cty. Bd. of Revision* (1981), 66 Ohio St.2d 410, 20 O.O.3d 357, 423 N.E.2d 75. Consequently, based on the above precedent, and others, the "assessed value" of Bissler's Funeral Home equals \$45,290.

Curiously, the trial court declined to follow the above precedent defining the term "assessed value," because the Supreme Court of Ohio had only defined the term "in the context of tax related controversies." However, the appraisal of property by the county auditor, and the subsequent determination of "assessed value," is inextricably intertwined with the taxation of real estate. Thus, we feel compelled to follow the definition of the term "assessed value" as set forth by the Supreme Court of Ohio. Appellants' first assignment of error has merit.

In the second and third assignments of error, appellants argue that the trial court erred in ruling that BZA was not required to consider, or that BZA actually considered, the standards as set forth in Section 1115.09 in reviewing Bissler's request to expand its nonconforming use. As appellants' second and third assignments of error are related, they will be discussed in a consolidated fashion.

As previously noted, Kent Zoning Code 1169.04 provides, in pertinent part, as follows:

"A building or structure containing a nonconforming use may be altered, improved or reconstructed, enlarged or extended provided such work is not to an *673 extent exceeding, in aggregate cost during any ten (10) year period, the assessed value of the building or structure on the date these regulations take **48 effect, and provided that any enlarging or extending of such building or structure shall be

approved by the Board of Zoning Appeals (*which shall apply the standards listed in Section 1115.09 when reviewing the request*)." (Emphasis added.)

Kent Zoning Code 1115.09 sets forth the powers and duties of BZA, which include three things: (1) determining "all appeals from any decision or action of the Zoning Inspector in the administration or enforcement of the Zoning Ordinance," (2) the granting of variances from the Kent Zoning Code, and (3) the power to hear and decide any question involving the interpretation of any provision of the zoning ordinance.

The powers and duties of BZA are in accordance with R.C. 713.11, which permits the creation of boards of zoning appeals and provides:

"[A] municipal corporation may create an administrative board * * * and may delegate to such board, in accordance with general rules to be set forth in the districting ordinances and regulations, the power to hear and determine appeals from refusal of building permits by building commissioners or other officers, to permit exceptions to and variations from the district regulations in the classes of cases or situations specified in the regulations, and to administer the regulations as specified therein. Such administrative powers and functions may be delegated by the legislative authority to the planning commission or board."

4 While BZA had the authority to administer the regulations as set forth in the Kent Zoning Code, we can find no need for BZA to approve the enlarging or extending, absent the need for a variance, of Bissler's nonconforming use. Although Kent Zoning Code 1169.04 purports to give BZA the authority to approve *any* enlarging or extending of a nonconforming use pursuant to set standards listed in Section 1115.09, Section 1115.09 provides BZA with absolutely no standards under which to perform this duty.

Appellants argue that BZA was required to apply the standards used in reviewing a request for a variance, including evidence from Bissler as to the existence of practical difficulties or undue hardship.³ However, the standards for granting a variance were not at issue as this case has proceeded, thus far, in the courts. Bissler was only seeking to expand its funeral home for a use that was already permitted under the Kent Zoning Ordinance. Additionally, based on BZA's erroneous interpretation of the term "assessed value," Bissler did not seek *674 a variance to expand its nonconforming use beyond the "market value" of the property in 1985.

It is apparent that appellants do not want a crematory next door to their residential homes. However, at the early stages of Bissler's request to expand its facilities, city officials determined that the installation of a crematory was an accessory use to a funeral home. At the meeting before the planning commission, open to the public, no one expressed any opposition to this opinion. Moreover, the broad language employed by the legislature to define a "funeral home," as set forth in R.C. 4717.01(C), would include as an accessory use the operation of a crematory. Consequently, Bissler did not need to seek a variance to install its crematory, and the trial court did not err in determining that the "standards" of Section 1115.09 were inapplicable to this case. Appellants' second and third assignments of error are without merit.

Based on the foregoing, the judgment of the trial court is affirmed in part and reversed in part and the cause is remanded for further proceedings consistent with this opinion. It is ordered that the parties share equally the costs of this proceeding.

Judgment affirmed in part, reversed in part and cause remanded.

FORD, P.J., and NADER, J., concur.

Parallel Citations

707 N.E.2d 44

Footnotes

- 1 R.C. 4717.01(C) defines a "funeral home" as "a fixed place for the care, preparation for burial, or disposition of dead human bodies or the conducting of funerals." (Emphasis added.)
- 2 \$129,000, the appraised value of the building in 1985, minus \$21,000, the cost of the prior improvements Bissler has performed on its funeral home the past ten years, equals the amount of the trial court's judgment.
- 3 The Kent Zoning Code makes no distinction between a landowner seeking a use variance, which will be granted only upon a showing of "unnecessary hardship," and an area variance, which only requires practical difficulties to be established. See *Duncan v. Middlefield* (1986), 23 Ohio St.3d 83, 23 OBR 212, 491 N.E.2d 692.

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1997 WL 839885

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UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of Rhode Island, Newport County.

MEMORIAL FUNERAL HOME, INC.

vs.

ZONING BOARD OF REVIEW OF THE TOWN OF
PORTSMOUTH, WANDA CODERRE, ROBERT
D. SOARES, KATHLEEN MELVIN, ROY R.
TWADDLE, and DOROTHY BACKMAN, In their
Capacity as Members of the Zoning Board of Review

C.A. No. 95-0507 FILED JANUARY 30, 1997

Opinion

DECISION

GAGNON, J.

**1* The plaintiff, Memorial Funeral Home, Inc. (Plaintiff), brings this appeal of the November 13, 1995 decision of the Zoning Board of Review for the Town of Portsmouth (Board) which upheld a decision of the building inspector requiring plaintiff to obtain additional relief from the Board to install a crematorium in its existing funeral home. This court retains jurisdiction pursuant to G.L. 1956 45-24-20.

FACTS/TRAVEL

Plaintiff owns and operates a funeral home in a residential district (R-20) at Assessor's Map 27, Lot 31, 55 West Main Road, Portsmouth, Rhode Island. Plaintiff established this business on March 17, 1983, when the Board granted plaintiff a special exception to convert an existing structure on the property to a funeral home. In 1994, Plaintiff applied for a special use permit to expand the first floor of the funeral home¹ and to construct 'an accessory building to be used exclusively for funeral home purposes.' (Plaintiff's Brief at Appendix 4a, Petition of Memorial Funeral Home, Inc.) Plaintiff's petition did not further particularize the 'funeral home purposes' mentioned. *Id.* In a written decision of February 1, 1995, the Board characterized plaintiff's petition as one to 'build an accessory use building to be

used exclusively for funeral home purposes.' (Decision of February 1, 1995 at p.1) In the conclusion of the Board's written decision, the Board granted plaintiff's petition for the accessory building. While the Board indicated that the accessory building was to be used exclusively for funeral home purposes, the Board did not further specify those purposes.

After the grant of the special use permit, plaintiff took steps to install a crematory in the accessory building. In a letter of September 1, 1995, the alternate building official, George Medeiros, refused to authorize installation of the equipment to operate plaintiff's crematorium. He opined that the construction of the crematorium required additional relief from the Board. Plaintiff appealed the building official's decision to the Board.

On October 25, 1995, the Board held an advertised hearing to consider plaintiff's appeal. At the hearing, plaintiff offered the following documents into evidence before the Board: Pre-July 1, 1994 Portsmouth

Ordinances, which designated crematoriums as an Institutional, Recreational or Educational Use and designated mortuary, undertaking or funeral establishments as Retail Business or Consumer Service Establishments; Post-July 1, 1994 Portsmouth Ordinances, which changed the designation of a crematorium from an Institutional, Recreational or Educational use to a permitted part of a funeral establishment; March 25, 1983 decision of the Board; Plaintiff's 1994 petition for a special use permit to allow accessory use building; January 24, 1995 decision of the Board granting plaintiff's petition; May 9, 1995 letter from the Planning Board, which stated the intention of the 1994 ordinance governing crematoriums; and the September 1, 1995 decision of the Alternate Building Official, George Medeiros. Several abutting landowners appeared at the hearing and spoke against the installation of the crematorium. Plaintiff, through counsel, Eric Chappell, argued that the newly enacted zoning ordinance, Portsmouth Zoning Ordinance, Article 5: Table of Use Regulations, Section E, paragraph 7, did not require plaintiff to obtain another special use permit to install the crematorium. In a 4 to 1 vote, the Board upheld the alternate building official's decision to require plaintiff to obtain another special use permit for the crematorium. In support of its decision, the Board made the following findings of fact:

**2* 'The board found that Appellant proposes to install the crematorium in a new building presently under construction. The special use permit granting Appellant the right to expand

its funeral home from the first floor of the main building on the property was carefully worded. It allowed Appellant 'To construct an accessory building to be used exclusively for funeral home purposes. . . as presented in the testimony' Those purposes, the Board noted at that time, 'would be to house funeral vehicles, to store caskets, provide a show area for the caskets and an office.'

'When the special use permit was requested, Appellant presented no evidence of any intention to install a crematorium.'

[October 25, 1995 Decision of the Board].

The plaintiff filed this timely appeal.

STANDARD OF REVIEW

The Superior Court reviews zoning board decisions pursuant to G.L.

1956 45-24-69(D), which provides in pertinent part:

'(D) The court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the zoning board of review or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions or decisions which are:

'(1) In violation of constitutional, statutory or ordinance provisions;

'(2) In excess of the authority granted to the zoning board of review by statute or ordinance;

'(3) Made upon unlawful procedure;

'(4) Affected by other error of law.

'(5) Clearly erroneous in view of the reliable, probative and substantial evidence of the whole record; or

'(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.'

In reviewing the Board's decision, this court is precluded from substituting its judgment for that of the agency with respect to the credibility of witnesses or the weight of evidence

concerning questions of fact. *Costa v. Registry of Motor Vehicles*, 543 A.2d 1307, 1309 (R.I. 1988); *Carmody v. R.I. Conflict of Interest Commission*, 509 A.2d 453, 458 (R.I. 1986). This Court's review is limited to determining whether substantial evidence exists to support the agency's conclusions as to the application of law. *Newport Shipyard v. Rhode Island Commission for Human Rights*, 484 A.2d 893 (R.I. 1984). 'Substantial evidence' is more than a scintilla but less than a preponderance of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Caswell v. George Sherman Sand and Gravel Co., Inc.*, 424 A.2d 646, 647; *Salve Regina College v. Zoning Board of Review*, 878 R.I. 594 (1991). This Court may reverse conclusions of administrative agencies when they are totally devoid of competent evidentiary support in the whole record. *Milardo v. Coastal Resources Management Council*, 434 A.2d 266, 272 (R.I. 1981).

*3 Despite the great deference accorded to questions of fact, this court retains the power to review agency decisions to determine what the law is and its applicability to the facts. *Narragansett Wire Co. v. Norberg*, 376 A.2d 1, (R.I. 1977).

Plaintiff argues that this court should reverse the Board's decision. First, plaintiff contends that the Board lacked jurisdiction to require a special use permit when plaintiff had already received a special use permit for the same use. Second, plaintiff maintains that the Board's decision is erroneous where the plain and unambiguous words of the zoning ordinances state that crematories are permitted uses. Finally, plaintiff asserts that the Board erred where the legislative history demonstrates an intent to allow crematories in funeral homes by right.

A zoning board of review has the authority to grant a special use permit only where the plaintiff meets the standards established by ordinance. G.L. 1956 45-24-42;² see also *Monforte v. Zoning Board of East Providence*, 93 R.I. 447, 451, 172 A.2d 726 (1962). In addition to those standards established by ordinance, the Board has the authority and discretion to impose additional special conditions upon the grant of a special use permit. G.L. 1956 45-24-43; see also *Richardson v. Zoning Board of Review of City of Warwick*, 221 A.2d 460, 465, 101 RI 202 (1966).

The Portsmouth Zoning Ordinance follows the mandates of the Rhode Island General Laws and authorizes the Zoning Board both to grant a special use permit for those uses designated by the ordinance and to impose special conditions upon the grant of a special use permit. Portsmouth Zoning

Ordinance, Article VII, Special Use Permits, Section A (July 1, 1994); *Id.* at Article X, Special Conditions, Section A., paragraph 1. The Portsmouth Ordinance further mandates, however, that any special conditions imposed must be articulated in the Board's decision. *Id.* at paragraph 3.

The Board argues that its decision of February 1, 1995, imposed special conditions upon its grant of a special use permit. Specifically, the Board argues that the February 1, 1995 grant of the special use permit does not permit a crematorium both because a crematorium was not mentioned in plaintiff's application, and because the Board limited its grant of a special use permit to the uses listed in plaintiff's application. This court is satisfied that Rhode Island statutes and caselaw do not support the Board's argument. First, the Rhode Island Legislature, pursuant to G.L. 1956 45-24-43, requires the Board to expressly include any special conditions imposed upon the grant

*4 of a special use permit in the Board's decision. Furthermore, the Rhode Island Supreme Court has considered what constitutes an express condition. In *Hopf v. Board of Review*, 230 A.2d 420, 426, 102 R.I. 275, 284 (1967), the Rhode Island Supreme Court determined that a Board's reference in its decision to 'submitted plans' does not constitute a 'condition' upon the grant of a special permit, as 'condition' is understood in the provision of the general laws governing special use permits. *Id.* Rather, the Board's reference, in its decision, 'to erect the office building described in the submitted plan ' merely constitutes a recitation of 'the very relief sought by [petitioner] ' and does not rise to the level of an express condition upon the grant of the special use permit. *Hopf*, 230 A.2d at 426.

Applying the *Hopf* analysis to the case at bar, this court is satisfied that the Board's reference in its February 1, 1995 decision to 'the Petition for a Special Use Permit to construct . . . an accessory building to be used exclusively for funeral home purposes . . . as presented in the testimony and contained in the application . . . ' constitutes a recitation of the very relief sought by the petitioner, and does not rise to the level of an express condition upon the Board's grant of a special use permit.

The plaintiff in this case argues that the Board lacks jurisdiction to require a successive special use permit because the plaintiff's crematorium is of the same character as the use permitted by the February 1, 1995 grant of a special use permit.

It is well-settled in this state that a zoning board of review lacks authority to grant a subsequent special exception where the use sought by the plaintiff is of the same character as that granted in a prior exception and where there is no substantial intensification of that use. *Warner et ux. v. Board of Review of the City of Newport*, 243 A.2d 92, 94, 104 R.I. 207, 211 (1968); *Bernstein, et ux. v. Zoning Board of Review of the City of East Providence*, 209 A.2d 52, 53, 99 R.I. 494, 501 (1965). A zoning board's grant of a special use permit includes a grant for those uses that are both governed by the same ordinance provision and of the same character and intensity as the permitted use. *Bernstein*, 52 A.2d at 53. Furthermore, this court is mindful that a landowner who is granted a special exception from a zoning ordinance becomes entitled as of right to make use of land in accordance with the exception and retains that right as long as the use is not intensified to the extent that it becomes contrary to the public interests which justify exercise of the police power. *Warner* 243 A.2d at 95.

**In the case at bar, a review of
the applicable law and evidence**

*5 indicates that a crematorium was of the same character as the other funeral home purposes granted by the February 1, 1995 decision. First, a crematorium is governed by the same provision of the Portsmouth zoning ordinance, Article V, Section E., paragraph 7 as those 'funeral purposes' contemplated by the Board when it granted the plaintiff's special exception in 1995. The Portsmouth Zoning Ordinance designates crematoriums as permitted uses on the premises of funeral establishments in residential districts that require a special use permit. *Id.* at Article V: Table of Use Regulations, E. Retail Business and Consumer Service Establishments Uses, paragraph 7 (July 1, 1994). Also, in a letter from the Portsmouth Planning Board placed in evidence before the Board, the Planning Board interprets the above zoning ordinance. The Board may properly consider this letter as evidence of the Town Council's interpretation of the intent behind its own ordinance. See generally *In re Advisory Opinion to the Governor*, 504 A.2d 456 (R.I. 1986). The letter indicates that it was the intention of the Portsmouth Town Council, in amending the above zoning ordinance in 1994, to eliminate the need to obtain separate special use permits for crematoriums and for other funeral purposes. The letter indicates that 'the question of allowing a crematorium . . . came up for discussion several times. The members agree that allowing a crematorium on the premises [of funeral homes] would permit a funeral establishment to provide full funeral

service needs to any family that might wish to have this type of service provided for their loved ones.' May 9, 1995 Letter of Portsmouth Planning Board. This interpretation of the zoning ordinance by the drafters clearly supports the plain meaning of the ordinance that crematoriums constitute the same character of use as other funeral home uses. Furthermore, the record is devoid of any competent evidence to indicate that the crematorium is not of the same character as the 'funeral purposes' approved in the February 1, 1995 decision. Although a number of neighbors did not support the crematorium on the premises, it is well-settled in this jurisdiction that lay judgments of neighboring property owners have no probative force in respect to a zoning board's review of a special exception. *Salve Regina College v. Zoning Board of Review of the City of Newport*, 594 A.2d 878, (R.I. 1991). After a careful review of the ordinance provisions, this court finds that the crematorium is of the same character of use as 'funeral home purposes' mentioned in the February 1, 1995 decision.

The plaintiff's special exception of February 1, 1995, therefore, entitles the plaintiff, as of right, to make use of land in accordance with the exception. The plaintiff retains that right as long as the use is not intensified to the extent that it becomes contrary to the public interest. *Warner* 243 A.2d at 95.

Footnotes

- 1 Plaintiff's petition for an addition to the first floor of the funeral home for use as a memorial chapel was granted and is not at issue in the present appeal.
- 2 Although the cases refer to 'special exceptions' and not to 'special use permits,' the terms are equivalent. See R.I. Gen. Laws 45-24-31 (57) (1991) (effective July 1, 1993).

*6 A careful review of the record reveals that the operation of a crematorium in the accessory building does not substantially intensify the use of that building. Evidence in the record indicates that the plaintiff sought the accessory building granted by the February 1, 1995 decision so that the funeral home could accommodate two funerals simultaneously. Although a crematorium provides another option to patrons of the funeral home, the record is devoid of any competent evidence to indicate that the funeral home can accommodate more than two funerals simultaneously.

A review of the entire record of the hearing certified to this Court reveals that the record neither supported the court's finding that the crematorium substantially intensified the use granted in February 1, 1995, nor does it support a finding that the crematorium was of a different character of use than that granted in February 1, 1995. Therefore, this court finds that the Board's decision is clearly erroneous in view of the reliable, probative and substantial evidence contained in the record. Accordingly, the decision of the Zoning Board of Review of the Town of Portsmouth is reversed.

Counsel shall submit the appropriate order for entry.

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545 A.2d 253
Superior Court of New Jersey, Law Division,
Cumberland County.

LAUREL LAWN CEMETERY
ASSOCIATION, a non-profit corporation
of the State of New Jersey, Plaintiff,
v.
ZONING BOARD OF ADJUSTMENT OF the
TOWNSHIP OF UPPER DEERFIELD, Defendant.

Decided Jan. 19, 1988.

SYNOPSIS

Cemetery, a nonconforming use, sought conditional use permit to construct crematorium. The township zoning board denied permit, and appeal was taken. The Superior Court, Law Division, Cumberland County, Porreca, J.S.C., held that crematorium was accessory or incidental use to cemetery and thus, subject to reasonable site plan requirements and construction code mandates, cemetery had right to construct crematorium.

Reversed and remanded.

West Headnotes (3)

- 1 **Zoning and Planning** ⇨ Accessory uses in general
In determining whether proposed construction is accessory or incidental use to principal use, it is not essential to concept of "customarily incident" that majority or even substantial percentage of given type of principal use should in fact be accompanied by proposed use.

1 Cases that cite this headnote
- 2 **Zoning and Planning** ⇨ Accessory uses in general
Proposed construction may be accessory or incidental use to permitted use even if it is not strictly necessary for fulfillment of permitted use.

- 3 **Zoning and Planning** ⇨ Enlargement or Extension of Use

Crematorium was accessory or incidental use to cemetery and thus, subject to reasonable site plan requirements and construction code mandates, cemetery, which was nonconforming use, had right to construct crematorium.

2 Cases that cite this headnote

Attorneys and Law Firms

**253 *650 Allan H. Harbert, Bridgeton, for plaintiff.
Eleanor B. Hanford, Bridgeton, for defendant (Theodore Henry Ritter, attorney).

Opinion

PORRECA, J.S.C.

Laurel Lawn Cemetery Association (Laurel Lawn) owns and maintains a cemetery in Upper Deerfield Township (Township). It pre-existed the zoning ordinance and is located in an R-2 Residential Zone in which a cemetery is not a permitted use. Laurel Lawn is, therefore, a non-conforming use. Cemeteries are permitted in the Township, but only in R-1 Residential and A-1 Agricultural Zones. Laurel Lawn sought to build a crematorium in the cemetery in the R-2 Residential Zone and therefore applied to the Township for a conditional use permit. Crematoriums are not specifically provided for in any zone in the Township. Funeral homes are permitted in R-2 Residential Zones.

Laurel Lawn's theory is that a crematory is an accessory or incidental use to a cemetery and therefore, subject to reasonable site plan requirements and construction code mandates, it may, as a matter of right, construct a crematory in the cemetery. *651 The Township disagrees, contending that a crematory is a primary use, not incidental to the non-conforming cemetery use.

Persuasive, if not compelling arguments have been made by both litigants for their respective points of view. Certainly, a crematory can exist apart from and independent of a cemetery. Certainly, a crematory **254 is not essential to the operation of a cemetery. When one thinks of a cemetery one may not necessarily or ordinarily think of a crematory. However, these posits are not the test of what is an incidental use. In fact,

what any one person or group of persons may conjure up in their minds when cemetery or crematory is mentioned, is not controlling and may be irrelevant unless that person or group happens to be a court or the Legislature. It is to those institutions that we must turn for guidance, and whether the scheme discovered comports with our individual proclivities is unimportant.

1 2 Reference to court decisions is not particularly helpful.

The decisions do not provide any broad definitive guideline, but rather turn on the peculiar and particular facts of the case under consideration. A heliport has been held to be incidental to a dairy business. *Boublis v. Garden State Farms, Inc.*, 122 N.J.Super. 208, 299 A.2d 763 (Law Div.1972) and also a construction business, *State v. P.T. & L. Construction Company, Inc.*, 77 N.J. 20, 389 A.2d 448 (1978). An asphalt plant was held to be incidental to operating a rock quarry. *Booth v. Bd. of Adj., Rockaway Tp.*, 50 N.J. 302, 234 A.2d 681 (1967). The point is that there is no clear direction to be gleaned from the courts in this particular case. There are some general principles to be garnered: (1) It is not essential to the concept of "customarily incident" that a majority or even a substantial percentage of a given type of principal use should in fact be accompanied by the mooted accessory use; (2) courts have classified uses as accessory uses even though they were not strictly "necessary" to the fulfillment *652 of the permitted use, *State v. P.T. & L. Construction Company, Inc.*

While the judicial body of law is neither dispositive nor generally helpful, the Legislature does provide direction and affords us insight helpful in forging a solution. A reading of the "New Jersey Cemetery Act" irrefutably leads one to the conclusion that in the Legislative "mind" a crematory is clearly associated with, incidental to and closely aligned with the operation of a cemetery. Since crematories and cemeteries deal directly with the disposition of human remains, the Legislature treats them coincidentally.

N.J.S.A. 8A:1-2 defines cemetery and includes in the definition: "... a crematory located in a cemetery"

N.J.S.A. 8A:3-2 requires a certificate of authority issued by the New Jersey Cemetery Board before any cemetery company: "...can engage in any function or operation of a cemetery or crematory"

N.J.S.A 8A:3-13 delineates the purposes for which a cemetery company may be organized and paragraph c. states: "the procurement and operation of a crematory."

N.J.S.A. 8A:4-3 requires establishment of a trust fund by cemetery companies except for: "... any cemetery company operating a crematory physically separated from a cemetery"

N.J.S.A. 8A:5-2 b. specifically authorizes the governing body of every cemetery company to: "... build and operate a public mausoleum or crematorium."

N.J.S.A. 8A:5-3 prohibits a cemetery company from manufacturing or selling monuments, vaults and private mausoleums. It prohibits the conduct of funeral homes or mortuary science but excepts from these prohibitions crematoriums under certain circumstances.

*653 N.J.S.A. 8A:5-19 governs when a cemetery company may inter or cremate and provides immunity for interment or cremation under certain circumstances.

3 Until recently, cremation was not generally accepted, favored or utilized, which may explain why there is no well lit path of *stare decisis* dealing with the subject, why the Township zoning ordinance is silent on the subject, why many Title 8A amendments deal with the subject and why crematories are not situate and functioning in most cemeteries.

The practice appears to be gaining acceptance and more widespread use as an alternative to traditional interment. Since that is exactly what it is, an alternative to **255 interment, then the Legislative bent toward equating cremation with a cemetery use seems logical, practical and utilitarian, not disruptive, noxious or alien to a cemetery.

The Zoning Board denial is reversed and the case remanded so that the Board may impose reasonable conditions upon the location and construction of the crematorium within the Laurel Lawn Cemetery.

Parallel Citations

545 A.2d 253

End of Document

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706 P.2d 1103
Court of Appeals of Washington,
Division 1.

Joe FERRY, Appellant,
v.

CITY OF BELLINGHAM, Gregory Waddell, Director
of Planning; Paul Rushing, Administrator to Building
and Code Department, City of Bellingham; and
Jerns & Leveck Funeral Chapel, Respondents.

No. 12926-1-I. Sept. 30,
1985. Review Denied Nov. 22, 1985.

Action was brought to enjoin operation of crematory in funeral home located in single-family residence zone. The Superior Court, Whatcom County, Marshall Forrest, J., granted summary judgment dismissing the claims, and plaintiff appealed. The Court of Appeals, Scholfield, Acting C.J., held that city planning board properly determined that operation of crematory was valid accessory use to funeral home.

Affirmed.

West Headnotes (6)

1 **Licenses** ⇌ Occupations and Employments in General
Licensing and regulatory statute [West's RCWA 18.39.010] defining "funeral establishment" does not exclude operation of crematory.

2 **Zoning and Planning** ⇌ Mortuaries, cemeteries, and mausoleums
Licensing and regulatory statute [West's RCWA § 18.39.010] defining "funeral establishment" would not be controlling in zoning issue concerning operation of crematory in funeral home; that issue would be properly addressed by referring to city zoning code.

1 Cases that cite this headnote

3 **Zoning and Planning** ⇌ Availability and exhaustion of other remedies

Party seeking to enjoin operation of crematory in funeral home located in single-family residence zone on ground that city board of adjustment exceeded its authority in deciding that crematories may be installed and operated on any premises occupied by an approved funeral chapel was exempted from requirement of exhaustion of administrative remedies, absent evidence in record to indicate that he received notice, within city's 20-day appeal period, of city planning director's letter to funeral chapel operator approving installation of the crematory.

4 **Zoning and Planning** ⇌ Particular accessory uses

City zoning code expressly authorized city planning board's decision that operation of crematory was accessory use to funeral home.

5 **Zoning and Planning** ⇌ Enlargement or Extension of Use

City planning board's authorization of operation of crematory as accessory use to funeral home which was operated as nonconforming use in single-family residence zone did not constitute "enlargement of a nonconforming use" in violation of city code provision prohibiting enlargement of nonconforming use.

2 Cases that cite this headnote

6 **Zoning and Planning** ⇌ Hearings in general
Applicable zoning code did not require public hearing when city planning board exercised interpretive function in determining that operation of crematory was accessory use to funeral home.

3 Cases that cite this headnote

Attorneys and Law Firms

*840 **1104 Asmundson, Atwood & Emmons, T.B.
Asmundson, Bellingham, for appellant.

Ian R. Sievers, City Atty., Bellingham, for City of Bellingham, Gregory Waddell, Director of Planning; Paul Rushing, Administrator to Building and Code Department, City of Bellingham.

Smith & Rosellini, Philip E. Rosellini, Bellingham, for Jerns & Leveck Funeral Chapel.

Opinion

SCHOLFIELD, Acting Chief Judge.

Joe Ferry appeals a summary judgment dismissing his claims against respondents Jerns and Leveck Funeral Chapel and the City of Bellingham, alleging error in the trial court's denial of an injunction to halt the operation of a crematory in Jerns' funeral home. We affirm.

Jerns' business is located in a single-family residence zone under a specific use permit granted by a city ordinance *841 in 1967 for the operation of a funeral home. The previous owner of the establishment obtained a ruling from the Bellingham Board of Adjustment in 1976 that a crematory may lawfully be operated in conjunction with an existing funeral establishment.

In 1982, Jerns sought confirmation from the City Planning Director regarding the Board's previous ruling. The Director, in a letter to Jerns dated March 9, 1982, referred to the 1976 ruling and then stated:

**1105 Based on this interpretation, the fact that this funeral home was established as an approved use in 1967, and the information you have provided, it is my determination that a crematory may be established within the existing building at this site without further review by the Board of Adjustment, and without violation of regulations pertaining to non-conforming uses.

Within a matter of months, Jerns had installed and was operating a crematory on his premises.

Ferry began this action in July 1982, seeking a writ of mandamus directing the City to enforce zoning regulations so as to prohibit continued operation of the crematory and also seeking a permanent injunction.

1 2 First, Ferry contends that a crematory may not be operated in conjunction with a funeral home because it is not within the definition of a "funeral establishment", as provided in RCW 18.39.010.¹ We do not read the statute to

exclude the operation of a crematory. Such an establishment is devoted to the "care and preparation for burial or disposal of dead human bodies". RCW 18.39.010(4). Obviously, an alternative to burial is encompassed by the statute in the language "or disposal". Another form of disposal is inurnment following cremation; therefore, a crematory is involved in the "preparation for ... disposal of dead *842 human bodies". Furthermore, this licensing and regulatory statute would not be controlling in a zoning issue. That is properly addressed by referring to the zoning code of the City of Bellingham.

Ferry also contends that the Board of Adjustment exceeded its authority in its 1976 action deciding that "crematories are in common use in association with mortuaries and may be installed and operated on any premises occupied by an approved ... funeral chapel ..." He also contends that allowing the operation of a crematory enlarged the nonconforming use in violation of Bellingham Municipal Code § 20.80.020.²

3 Jerns contends that Ferry is precluded from raising these issues because he failed to exhaust administrative remedies below. It is true that the Bellingham City Code requires an aggrieved party to appeal an official decision within 20 days; however, there is no evidence in the record to indicate that Ferry received notice within the appeal period of the Planning Director's letter to Jerns approving the installation of the crematory. We, therefore, conclude that Ferry was exempted from the exhaustion requirement because of lack of notice. *South Hollywood Hills Citizens Ass'n v. King Cy.*, 101 Wash.2d 68, 74, 677 P.2d 114 (1984).

4 *843 An examination of the transcript from the Board of Adjustment's August 4, 1976 meeting reveals that the previous owner of the funeral home had sought a **1106 permit from the City's building department to install the crematory. The record reveals that after June 1975, the code allowed crematories as a conditional use in the light industrial (LM) classification with the following conditions:

1. The use shall be screened from any residential use,
2. All loading and unloading areas shall be screened from the view of surrounding properties.

Bellingham Municipal Code § 20.06.121(d)(3) (codified in 1982 as § 20.64.030C). Jerns' funeral home operated at all times as a nonconforming use in a single-family residence (RL-1) zone. Funeral chapels were permitted uses under the code only in the residential high-density (RH) district.

The transcript of the Board's 1976 meeting fairly reflects that the Board decided the operation of a crematory was an accessory use to a funeral home. The Board approved the following motion:

The Board finds that crematories are in common use in association with mortuaries and may be installed and operated on any premises occupied by an approved mortuary, funeral chapel, or other establishment providing the service of preparing human remains for disposal.

The applicable Bellingham zoning code provision defines "accessory use or structure" as a "use or structure on the same lot with, and of a nature customarily incidental and subordinate to, the principal use or structure." Bellingham Municipal Code § 20.06.011.

Bellingham Municipal Code § 20.06.020(d) provides:

Uses and buildings customarily accessory to the established principal use shall be allowed in all cases unless specifically prohibited or restricted.

Ferry contends the Board had no authority to take this action. However, the Bellingham zoning code expressly authorizes the Board of Adjustment to take the type of *844 action involved here.³ There is ample basis in the record on appeal to support the conclusion that the primary function of Jerns' business will continue to be a funeral home and mortuary and that cremation is a customary and incidental function of that business. We conclude, as did the trial court, that the Board of Adjustment acted within its authority in adopting the motion of August 4, 1976. The effect of adopting the motion was a ruling that was binding upon Bellingham zoning authorities. The Planning Director acted lawfully and consistently with Bellingham Municipal Code § 20.06.201 in concluding in his letter to Jerns of March 9, 1982 that a crematory could be lawfully operated as an accessory use in conjunction with the established funeral home.

⁵ Ferry contends that the ruling of August 4, 1976 was invalid because it was in conflict with Bellingham Municipal Code § 20.80.020, prohibiting enlargement of a nonconforming use. We conclude, however, that, as an

accessory use, the operation of the crematory did not constitute such an enlargement.

****1107** A valid nonconforming use carries with it the right to the exercise of those accessory uses which are considered customary and incidental to the principal use. Whether a *845 use is viewed in the perspective of a presently permitted use or of a use required to be permitted despite a present prohibition in the ordinance, there is no difference as to the extent to which it can be supplemented by customary accessory uses. The exercise of the right to engage in such an accessory use does not constitute a prohibited change of use where the accessory use does not achieve the status of an additional co-equal use but remains subordinate to the previously existing nonconforming use in scale, volume, and intensity.

(Footnotes omitted.) 4 A. Rathkopf & D. Rathkopf, *Zoning & Planning* § 51.01 [3] (4th ed. 1985). The Bellingham zoning code is consistent with this principle. Section 20.06.020(d) provides accessory uses "shall be allowed in all cases unless specifically prohibited or restricted."

When the Board of Adjustment made operation of a crematory an accessory use to a funeral home, they made the operation of the crematory lawful even in a funeral home that was a nonconforming use. The transcript of the hearing of August 4, 1976 reflects knowledge by the Board members that the funeral home involved was a nonconforming use. Because the operation of the crematory was valid as an accessory use, it did not constitute an enlargement of a nonconforming use.

⁶ While an argument can be made that decisions of the kind involved here should not be made without a public hearing, we find no requirement in the applicable zoning code for a public hearing when the Board is exercising interpretive functions under Bellingham Municipal Code § 20.06.201.

Judgment affirmed.

WEBSTER and GROSSE, JJ., concur.

Parallel Citations

706 P.2d 1103

Footnotes

1 RCW 18.39.010(4) provides:

“ ‘Funeral establishment’ means a place of business licensed in accordance with RCW 18.39.145, conducted at a specific street address or location, and devoted to the care and preparation for burial or disposal of dead human bodies and includes all areas of such business premises and all tools, instruments, and supplies used in preparation and embalming of dead human bodies for burial or disposal.”

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“B. A nonconforming use shall not be enlarged, relocated, or rearranged after the effective date of the ordinance which made the use nonconforming.

“C. The board of adjustment may grant a conditional use permit for a period of not more than ten years permitting a nonconforming use to change to another use not permitted in the use district in which it is located provided the owner clearly demonstrates the following:

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“The board of adjustment shall review and determine any questions involving the proper interpretation or application of the provisions, use or district boundaries of this title that may be requested by any property owner, tenant, government officer, department, board, or commission affected. The board's decision shall be in keeping with the spirit and intent of this title and of the comprehensive plan.

“Recognizing that there may be uses not specifically mentioned in this title either because of advancing technology or any other reason, the zoning enforcement officer may permit such use to be established if it is clearly evident that the use is similar and in conformity with the designated permitted uses of the use district in which it is to be located. When there is doubt as to the proper classification of a use, the board of adjustment shall rule on the matter.

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706 P.2d 1103
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⁶ While an argument can be made that decisions of the kind involved here should not be made without a public hearing, we find no requirement in the applicable zoning code for a public hearing when the Board is exercising interpretive functions under Bellingham Municipal Code § 20.06.201.

Judgment affirmed.

WEBSTER and GROSSE, JJ., concur.

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Footnotes

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“Recognizing that there may be uses not specifically mentioned in this title either because of advancing technology or any other reason, the zoning enforcement officer may permit such use to be established if it is clearly evident that the use is similar and in conformity with the designated permitted uses of the use district in which it is to be located. When there is doubt as to the proper classification of a use, the board of adjustment shall rule on the matter.

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**Background Document For The Development of the Proposed General
Plan Approval And General Operating Permit For Human And Animal
Crematories
BAQ-GPA/GP-14**

This background document describes the Pennsylvania Department of Environmental Protection's determinations related to the development of the proposed general plan approval and operating permit for human and animal crematories.

The requirements for issuance of a general plan approval and operating permit are set forth in 25 Pa. Code §§ 127.611 and 127.612. Section 127.611(a) states that "The Department may issue or modify a general plan approval or general operating permit for any category of stationary air contamination source if the Department determines that sources in the category are similar and can be adequately regulated using standardized specifications and conditions." The Department must evaluate and find affirmatively the following:

1. Whether the sources in the category are similar; and
2. If the sources in the category can be adequately regulated using standard specifications and conditions.

Webster's Ninth New Collegiate Dictionary, 1991 defines the word "similar" as "having characteristics in common; strictly comparable; alike in substance or essentials."

The Department believes that the characteristics of incinerators that must be comparable or alike are the hardware and operation of the units and the material to be combusted – in this case human and animal bodies.

Incinerators used for cremations have primary refractory-lined chambers into which the body and container (bags, boxes or caskets) are pushed through a charging door. Manufacturers offer optional feeding mechanisms to move the bodies into the primary chamber and to control air inflow while the primary chamber door is open. Units equipped with the optional feed/air lock chamber may initiate a second cycle as long as control of the combustion conditions in the secondary chamber is maintained, subject to the necessity of removing the cremated remains prior to initiation of the next cycle. Units not equipped with this option must have operating procedures or a programmed sequence of operation, which precludes initiation of the following cremation until the primary chamber is cooled to the point where combustion does not occur during charging. This is especially important with animal cremations given their substantial amount of fur, which could flash and exceed the capacity of the secondary chamber while the primary chamber door is open.

The primary chamber has burner(s) sized in proportion to the capacity of the unit, predicted heat loss, refractory surface area or volume depending on the manufacturer. The primary chamber typically operates with insufficient oxygen and temperature to

complete combustion. A thermocouple is required at the outlet from the primary chamber.

The secondary chamber is also equipped with appropriately sized burner(s) and is refractory-lined. The refractory lining in some cases extends up to and very near the top of the stack. The entire secondary volume up to this point may then be taken into account in the calculation of residence time, so long as the exit thermocouple is located at this point. Sufficient secondary air and fuel are added in the secondary chamber to complete combustion.

Thermocouples are placed at locations to monitor chamber outlet temperatures. Temperature recorders are required for new units (either analog or digital read only format).

While different manufacturers favor specific configurations there is very little variation in the basic design and principles of operation of these units. The two chambers may be directly under or over one another or be side-by-side.

Recent experience with crematories suggests that, in general, they are well maintained and operated. Owners and equipment suppliers are very conscious of their standing and of the inherent sensitivity which the cremation process holds for both the decedent's survivors and the operator's neighbors. Once these units are installed and begin operation, observed emission problems and complaints associated with their operation are very infrequent.

While there are obvious outliers, human bodies are similar in terms of composition. Approximately 96% by weight is from organic compounds composed of oxygen (65%), carbon (18%), hydrogen (10%), and nitrogen (3%). Approximately 3.5% of the remaining 4% is comprised of inorganic and metallic salts, such as calcium, phosphorous, potassium, sulfur, and sodium. The remaining .5% is from essential trace elements. (Ed Uthman, MD, American Board of Pathology and Anne Marie Helmenstine, Ph. D.- internet posting).

With respect to animals, C. R. Moulton summarized his study of "Age and Chemical Development of Mammals" in the Journal of Biological Chemistry (6-4-1923). In this study he showed that, discounting the fat content of various warm blooded, mature vertebrates (humans, dogs, cats, cattle, guinea pigs, rabbits, pigs, etc) the water (70%), ash(5-7%), and nitrogen (3.5-4.5%) content on a fat free basis occurred within a very narrow range. Most manufacturers advise operators to refuse to cremate bodies with very high fat content, so that the capacity of the equipment is not exceeded.

Cremation, or destructive decomposition by combustion, converts the organic and some of the inorganic compounds to gaseous, oxidized products of combustion (CO₂, H₂O, NO/NO₂, SO₂, etc.). The residual ash is composed mainly of calcium, potassium, sodium and metallic oxides.

Complete combustion under any circumstances is most likely achieved under stable, firing conditions so long as the charge material (fuel, waste or in this case, bodies) is uniform in terms of composition and firing rate. The equipment to accomplish this goal can be designed with a high degree of certainty and the cremation, which is a combustion process, can proceed with a high degree of stability. Given adequate process monitoring and control, and competent operation, smokeless and odorless operation of human and animal crematories is reliably achieved.

Several decades ago, there were very few human and animal crematories in the Commonwealth. Much of the existing equipment was inadequately designed and improperly maintained and operated. There was also very limited demand for crematories. In more recent times, as society's attitude toward cremation as an alternative to burial has shifted, the quality of the incineration equipment and its maintenance and operation, have improved dramatically. While complaints and problems associated with many types of incinerators were common thirty years ago, they are now quite uncommon as we have come to accept cremation and demand a very high level of performance from the equipment and the operators, commensurate with the solemnity of the occasion.

In the mid to late 1980's, air emissions from the incineration of many types of materials became extremely controversial. The incineration of municipal, hospital, infectious/chemotherapeutic, hazardous and radioactive wastes, and human and animal remains all garnered the attention of the public, the agencies, and the regulated community. Focus has shifted from incineration issues for a number of reasons. Landfill capacity has increased so less waste is being burned. Alternatives to incineration are also being utilized such as waste minimization, recycling, and resource recovery. Efficient incineration technologies which minimize emissions were developed and implemented. In the case of cremations, what was perceived as an environmentally risky practice has become accepted to the point of being routine.

Subsequently, the Department's Air Quality Program developed a number of policy documents which set minimum acceptable criteria for a variety of new sources. These documents provided consistency and efficiency in making case-by-case Best Available Technology (BAT) determinations in similar instances. Among these were signed documents for the incineration of municipal waste (dated March 26, 1993) and for hospital/infectious waste (dated February 23, 1996). There was also a recommended set of criteria (dated April 17, 1989) for crematory incinerators.

In December 2000, the U.S. Environmental Protection Agency (EPA) finalized rules relating to commercial/industrial/solid waste incineration for new and existing sources under 40 CFR Part 60. Under Part 62, state plans were also required to be developed for medical waste incineration units. These state plans were developed and put into effect.

On November 30, 2004, EPA proposed emission limits and guidelines (40 CFR Part 60 Subparts EEEE and FFFF) for new and existing "other solid waste incinerators" (OSWI) and proposed to exempt human and animal crematories. The maximum

allowable emission rates are specified for criteria and hazardous air pollutants. The applicability of these limits was narrowed to just institutional waste incinerators and to very small (less than 35 TPD) municipal waste incinerators, reflecting EPA's conclusion that emission of criteria and hazardous air contaminants associated with human and animal crematories was not of sufficient concern to justify their conclusion in the OSWI category.

There are some unique features of this proposed general permit, which are highlighted.

Many installations of human crematories are at funeral homes and many of the animal crematories are at pet care centers. Both of these businesses tend to occur in areas not typical of more traditional types of air contamination sources (e.g. residential and light commercially zoned areas). Under Act 247 as amended by Acts 67, 68 and 127 of the Municipalities Planning Code, DEP and other state agencies "shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications" for the permitting of facilities. Our rules governing General Permits, §§127.611 and 612, require that we provide the opportunity for public comment at the time of issuance by publishing proposals in six newspapers of general circulation in the state and in the PA Bulletin. Given the tendency for crematories to be located at funeral homes which are often in residential areas, we are proposing that applicants for this GP provide assurance in the form of letters from local and county municipal officials that the installation of a human or animal crematory is not incompatible with applicable zoning requirements or, alternatively, that necessary zoning variances have been obtained. We believe this is consistent with the Department's Policy (012-0200-001) regarding our consideration of Local Comprehensive Plans and Zoning Ordinances under Acts 247, 67, 68 and 127 in reviewing applications.

There have been instances in the past when zoning issues have resulted in lengthy delays in granting authorizations for construction and operation of human and animal crematories. The general permit process is intended to streamline the review process and avoid such delays within the context of regulatory obligations. Our intent is to make it incumbent upon the applicant to resolve any local land use issues before making application to the Department.

As noted above, the quality of recently installed equipment has improved to the point where we feel that the most important limiting aspect to insuring proper operation is the ability of the operator. To address this concern we have included a provision for training of operators by either the manufacturer of the unit or another qualified training source. All manufacturers with which we spoke offered training to operators. The Cremation Association of North America also trains both operators and trainers of operators. All provide certificates to those who have successfully completed the training. We propose to require that records of those certifications be maintained by the permittee. In the case of new operators at previously permitted units, the opportunities for training may be limited but we believe that adequate opportunities are available

Florida rules establish a similar requirement for training except that the training program must be approved by the Florida Department of Environmental Protection. We have specified the minimum content of the training but place the responsibility on the training provider to cover the necessary topics. We believe that this is consistent with the heightened level of responsibility on the part of the permittee. Other Federal rules, proposed for medical waste incineration and finalized for commercial/industrial solid waste incineration, have operator training requirements. We have drawn from these requirements during the development of the proposed General Permit for human and animal crematories.

We have proposed an exemption for units with design capacity less than 75 lbs per hour. This is consistent with current policy. We have also proposed to exclude from coverage under this GP, those units with capacities equal to or greater than 500 lbs per hour. In evaluating this category we found that very large human and animal bodies presented unique challenges that must be addressed and we conclude that these units cannot be adequately regulated using standardized specification and conditions. We feel that units in this size range should be reviewed under the case-by-case authority provided by our regular Plan Approval process.

Many states have established their own rules and permitting procedures for crematories. General Permits have been issued in Florida, Oregon, and Arizona. Florida and Vermont have specific rules. Missouri has a permit-by-rule. We have reviewed these rules and the permitting options available in these and other states.

We have discussed features of the available equipment with their manufacturers.

We benefit from this substantial basis in evaluating human and animal crematories as a category for issuance of a General Plan Approval and Operating Permit. While some of the regulations and policies are not applicable to human and animal crematories, the equipment is similar in form and function and we believe that the regulatory, policy and technical framework is available to enable the development of an adequate set of standardized specifications and conditions.

The proposed crematory general permit addresses issues related to emissions, monitoring, record keeping, reporting, testing, operator training, operation and maintenance, administrative details, etc.

WJC:kp

Mercury Emissions and the Cremation Process - 2008
By Paul Rahill Matthews Cremation Division

Concern for the well being of the environment is evident from all the discussion taking place in almost every facet of our daily life. It is almost impossible to pick up a newspaper or turn on a television or talk radio without the topic of the environment being discussed.

The human impact on our environment is being studied in every area of life. But the concern is not stopping there. We also continue to research what impact we are having *after* life and for the purposes of this article, specifically from the cremation process.

Great advances have been made in the reduction of particulate matter (PM), visible emissions (VE) and carbon monoxide (CO) from the cremation process. Particulate matter and carbon dioxide are the two most commonly regulated pollutants from cremation equipment. The most extensive cremation equipment emissions research ever undertaken confirmed that the design and operation of typical North American crematories provided significantly better emissions than regulations required, and even exceeded expectations with older operating systems.

Now the focus has turned to mercury emissions. Some concerns over mercury emissions from crematories in the United States and Canada continue to be voiced. The good news is that the internet has provided easier access to articles on the topic of mercury emissions. Unfortunately, much of what we see on many topics found on the web is not fact based but rather opinions, theories or consultants quoting consultants.

The United States Environmental Protection Agency (EPA) describes mercury as a "naturally occurring element that can be found throughout the environment". Although naturally occurring, different human activities can increase or decrease the amount of mercury that is moving between the atmosphere, bodies of water and soils. Mercury may be a naturally occurring element but over-exposure to it is not a good thing for humans.

According to the US EPA (chart ES-6) some of the top human activities most responsible for recycling mercury in the environment are: municipal incinerators, breaking of fluorescent tube lamps, dental facilities, production and disposal of batteries, household trash disposal and residential heating (oil). The operation of crematories is one of the lowest sources.

The most notable way that mercury enters the cremation cycle, and therefore crematory emissions, is through silver amalgam dental fillings found in some dead human bodies. Silver amalgam fillings contain mercury alloys that when introduced through dead humans into the cremation process of intense heat, often exceeding 1800F, results in the volatilization of mercury and its emissions into the atmosphere.

Silver amalgam dental fillings containing mercury have been common for many years, but their use appears to be in significant decline. Within the last 10 years, the percentage of fillings containing mercury has already declined by 30%, a tremendous decrease.

So what factual data do we have regarding mercury emissions from cremation equipment?

Testing for mercury in crematoria emissions was recently completed in the United Kingdom. The test protocols, procedures and final results from this endeavor were reviewed with the governing environmental authorities (DEFRA and SEPA) in the United Kingdom.

This testing was likely the most extensive mercury emissions test of its kind ever conducted on human cremations for this specific purpose. Determining the baseline mercury emissions from human remains that contain silver amalgam dental fillings was the sole focus of this research.

Testing protocol and supervision was developed and conducted by Dr. Ian M. Dale, forensic scientist. Dr. Dale is with Glasgow Occupational Health, Royal Infirmary, Glasgow Scotland.

Testing was conducted under British testing standards BSEN13211-2001, for the monitoring and control of trace elements. The mercury testing equipment used was a NEM-5 calibrated continuous measuring instrument as provided, calibrated and operated by Pelican Scientific LTD.

Fifty four (54) total human cremations were tested at two separate locations in the UK. All testing was conducted under normal operating conditions for the cremation equipment.

Test results were submitted to and reviewed with DEFRA - United Kingdom Department of Environment Food and Rural Affairs as well as SEPA- Scottish Environmental Protection Agency. Both agencies accepted the test as being conducted in compliance with the British testing standards BSEN13211-2001.

Testing for mercury in crematoria emissions was also conducted in the United States by the USEPA, United States Environmental Protection Agency. The test protocols and procedures were submitted by Midwest Research Institute and were reviewed and approved by the USEPA.

This USEPA testing was the most extensive comprehensive emissions test of its kind ever conducted on human cremations. In addition to testing for numerous possible emissions, various temperatures were also tested to determine the impact of temperature on emissions output. Determining the baseline mercury emissions from human remains that contain silver amalgam dental fillings was only one outcome of this research.

Testing was conducted using USEPA test methods, specifically EPA Method 29 for metal emissions sampling.

Nine (9) human cremations were tested at The Woodlawn Cemetery in the Bronx, New York, USA. All testing was conducted under normal operating conditions for the cremation equipment.

Test results were submitted by EPA's contractor, Midwest Research, to USEPA and reviewed by their staff. EPA accepted the test as being conducted in compliance with testing standards. The data was published by USEPA as the established baseline for mercury emissions and posted to the National Emissions Database as a reference for all interested parties.

Test Data Summary

UK TEST-1 (Craigton Crematorium/Pelican Scientific)

- o Conducted in October 2006
- o 23 cremations total
- o Normal operating conditions
- o 10 cremations suspected to have no silver amalgam fillings
- o Average mercury release per cremation over 23 cremations - .128 grams per body
- o Average mercury release per cremation for only the 13 cremations believed to contain silver amalgam fillings - .227 grams per body

UK TEST – 2 (Linn Crematorium/ Pelican Scientific)

- o Conducted in September 2007
- o 31 cremations total
- o Normal operating conditions
- o 21 cremations suspected to have no silver amalgam fillings
- o Average mercury release per cremation over 31 cremations - .323 grams per body
- o Average mercury release per cremation for only the 10 cremations believed to contain silver amalgam fillings – 1.001 grams per body

USEPA TEST – 1 (Woodlawn Crematorium/ Midwest Research Institute)

- o Conducted in June 1999
- o 9 cremations total
- o Normal operating conditions
- o 2 cremations suspected to have no silver amalgam fillings
- o Average mercury release per cremation over 9 cremations - .456 grams per body
- o Average mercury release per cremation for only the 7 cremations believed to contain silver amalgam fillings – .584 grams per body

We can use all this reliable test data to project a worst case scenario by averaging only the 30 tests where mercury emissions were present, only those bodies that contained silver amalgam fillings. In other words, this average would assume that 100% of the cremated population has some silver amalgam fillings. We know of course that this is a gross overstatement.

The average mercury emissions from these documented tests, under a worst case scenario, would be .568 grams of mercury emitted per body cremated.

It is very interesting to note that this average of .568 grams is almost identical to the USEPA test average of .584 grams per body. This current information confirms that the mercury emissions information located in the USEPA National Emissions database is accurate for determining the mercury emissions impact of cremation.

These three testing projects represent some of the most in depth environmental testing performed on cremation equipment anywhere to date. Relying on factual test data for important environmental decisions is critical if we are to make responsible decisions that will affect the communities we serve.

Mercury use in the dental profession is already significantly in decline. However we should continue to scrutinize the input of all types of materials into crematories while looking for and encouraging alternative materials to be used whenever possible.

Important environmental questions will continue to come up and it is important to address them by relying on the factual information that is available to us. Being a good environmental neighbor requires us to be fact based, informed and involved.

Paul Rahill is the President of the Matthews International Cremation Division (MCD) headquartered in Orlando, Florida.

He also serves as the environmental advisor and liaison for the CANA (Cremation Association of North America) Board of Directors.

Paul can be reached at prahill@matw.com .

**Table ES-3
Best Point Estimates of 1994-1995 National Mercury Emission Rates by Category**

Sources of mercury ^a	1994-1995 Mg/yr ^b	1994-1995 tons/yr ^b	% of Total Inventory ^b
Area sources	3.1	3.4	2.2
Lamp breakage	1.4	1.5	1.0
General laboratory use	1.0	1.1	0.7
Dental preparations	0.6	0.7	0.4
Landfills	0.07	0.08	0.1
Mobile sources	c	c	c
Paint use	c	c	c
Agricultural burning	c	c	c
Point Sources	141.0	154.7	97.8
Combustion sources	125.3	137.7	86.9
Utility boilers	47.2	51.8	32.8
Coal	(47) ^d	(51.6)	(32.6)
Oil	(0.2)	(0.2)	(0.1)
Natural gas	(<0.1)	(<0.1)	(0.0)
MWCs ^b	26.9	29.6	18.7
Commercial/industrial boilers	25.8	28.4	17.9
Coal	(18.8)	(20.7)	(13.1)
Oil	(7.0)	(7.7)	(4.9)
MWIs ^b	14.6	16.0	10.1
Hazardous waste combustors ^c	6.4	7.1	4.4
Residential boilers	3.3	3.6	2.3
Oil	(2.9)	(3.2)	(2.0)
Coal	(0.4)	(0.5)	(0.3)
SSIs	0.9	1.0	0.6
Wood-fired boilers ^f	0.2	0.2	0.1
Crematories	<0.1	<0.1	0.0
Manufacturing sources	14.4	15.6	10.0
Chlor-alkali	6.5	7.1	4.5
Portland cement ^e	4.4	4.8	3.1
Pulp and paper manufacturing	1.7	1.9	1.2
Instruments manufacturing	0.5	0.5	0.3
Secondary Hg production	0.4	0.4	0.3
Electrical apparatus	0.3	0.3	0.2
Carbon black	0.3	0.3	0.2
Lime manufacturing	0.1	0.1	0.1
Primary lead	0.1	0.1	0.1
Primary copper	<0.1	<0.1	0.0
Fluorescent lamp recycling	<0.1	<0.1	0.0
Batteries	<0.1	<0.1	0.0
Primary Hg production	c	c	c
Mercury compounds	c	c	c
Byproduct coke	c	c	c
Refineries	c	c	c
Miscellaneous sources	1.3	1.4	0.9
Geothermal power	1.3	1.4	0.9
Turf products	g	g	g
Pigments, oil, etc.	g	g	g
TOTAL	144	158	100

^a MWC=Municipal waste combustor; MWI=medical waste incinerator; SSI=sewage sludge incinerator

^b Numbers do not add exactly because of rounding.

^c Insufficient information to estimate 1994-1995 emissions.

^d Parentheses denote subtotal within larger point source category.

^e For the purpose of this inventory, cement kilns that burn hazardous waste for fuel are counted as hazardous waste combustors.

^f Includes boilers only; does not include residential wood combustion (wood stoves).

^g Mercury has been phased out of use.

^h EPA has finalized emissions guidelines for these source categories which will reduce mercury emissions by at least an additional 90 percent over 1995 levels.

US EPA Mercury NEI 2002

HAP_CATEGORY_NAME	Source Category Description	2002 NEI v 3 Emissions (tpy)
	ALL CATEGORIES	118.6218
Mercury Compounds	Utility Boilers: Coal	50.4417
Mercury Compounds	Stainless and Nonstainless Steel Manufacturing: Electric Arc Furne	10.6460
Mercury Compounds	Industrial/Commercial/ Institutional Boilers & Process Heaters	10.2160
Mercury Compounds	Hazardous Waste Incineration	7.4329
Mercury Compounds	Portland Cement Manufacturing	6.5983
Mercury Compounds	Gold Mining	6.4851
Mercury Compounds	Mercury Cell Chlor-Alkali Plants	5.4003
Mercury Compounds	Municipal Waste Combustors	4.2297
Mercury Compounds	Incineration: Nonhazardous solid waste	2.4766
Mercury Compounds	Stationary Reciprocating Internal Combustion Engines	1.8673
Mercury Compounds	Residential Heating	1.5325
Mercury Compounds	Iron and Steel Foundries	1.4010
Mercury Compounds	Inorganic Chemical Manufacturing	0.8645
Mercury Compounds	Pulp and Paper Production	0.7108
Mercury Compounds	Fluorescent Lamp Breakage	0.6970
Mercury Compounds	Secondary Lead Smelting	0.6798
Mercury Compounds	Dental Amalgam Production	0.5691
Mercury Compounds	Sewage Sludge Incineration	0.5544
Mercury Compounds	Brick and Structural Clay Products Manufacturing	0.4092
Mercury Compounds	Taconite Iron Ore Processing	0.3757
Mercury Compounds	Petroleum Refineries	0.3457
Mercury Compounds	Utility Boilers: Oil	0.3416
Mercury Compounds	Mobile Sources: Onroad	0.3393
Mercury Compounds	General Laboratory Activities	0.3129
Mercury Compounds	Iron and Steel Manufacturing	0.2956
Mercury Compounds	Lime Manufacturing	0.2951
Mercury Compounds	Cremation: Human	0.2915
Mercury Compounds	Ferroalloys Production	0.2635
Mercury Compounds	Medical Waste Incinerators	0.2286
Mercury Compounds	Inorganic Pigments Manufacturing	0.2200
Mercury Compounds	Mineral Products	0.1950
Mercury Compounds	Agricultural Chemicals and Pesticides Manufacturing	0.1710
Mercury Compounds	Coke Ovens	0.1698
Mercury Compounds	Primary Metal Products Manufacturing	0.1427
Mercury Compounds	Municipal Landfills	0.1396

US EPA Mercury NEI 2002

Mercury Compounds	Phosphoric Acid Manufacturing	0.1340
Mercury Compounds	Cremation: Animal	0.1200
Mercury Compounds	Electric Lamp Bulb and Part Manufacturing	0.1200
Mercury Compounds	Secondary Nonferrous Metals	0.1170
Mercury Compounds	Mining	0.1070
Mercury Compounds	Asphalt Processing and Asphalt Roofing Manufacturing	0.1050
Mercury Compounds	Primary Copper Smelting	0.1000
Mercury Compounds	Carbon Black Production	0.0900
Mercury Compounds	Glass Manufacturing	0.0790
Mercury Compounds	Site Remediation	0.0720
Mercury Compounds	Primary Nonferrous Metals--Zinc, Cadmium and Beryllium	0.0600
Mercury Compounds	Stationary Combustion Turbines	0.0370
Mercury Compounds	Coal Mining, Cleaning, and Material Handling	0.0290
Mercury Compounds	Mobile Sources: Nonroad	0.0170
Mercury Compounds	Agriculture Production - Orchard Heaters	0.0130
Mercury Compounds	Mining and Quarrying	0.0130
Mercury Compounds	Utility Boilers: Wood or Waste	0.0130
Mercury Compounds	Waste Disposal, Treatment, and Recovery	0.0120
Mercury Compounds	Landfills	0.0100
Mercury Compounds	Primary Aluminum Production	0.0090
Mercury Compounds	Gasoline Distribution (Stage I)	0.0080
Mercury Compounds	Secondary Aluminum Production	0.0070
Mercury Compounds	Phosphate Fertilizers Production	0.0050
Mercury Compounds	Open Burning - Motor Vehicle Fires	0.0010
Mercury Compounds	Publicly Owned Treatment Works (POTWs)	0.0009
Mercury Compounds	Aerospace Industries	0.0005
Mercury Compounds	Engine Test Facilities	0.0003
Mercury Compounds	Lead Acid Battery Manufacturing	0.0002
Mercury Compounds	Fluorescent Lamp Recycling	0.0001
Mercury Compounds	Primary Magnesium Refining	0.0001
Mercury Compounds	Secondary Copper Smelting	0.0000
Mercury Compounds	Mineral Wool Production	0.0000
Mercury Compounds	Shipbuilding & Ship Repair	0.0000
Mercury Compounds	Nonferrous Foundries	0.0000
Mercury Compounds	Rocket Engine Test Firing	0.0000
Mercury Compounds	Wool Fiberglass Manufacturing	0.0000
Mercury Compounds	Abrasive Blasting of Metal Parts: Auto & Light Duty Truck	0.0000

Mercury Emissions Cremation Process Talking Points

By Paul Rahill Matthews Cremation Division

- The United States Environmental Protection Agency (EPA) describes mercury as a “naturally occurring element that can be found throughout the environment”.
- Although naturally occurring, different human activities can increase or decrease the amount of mercury that is moving between the atmosphere, bodies of water and soils.
- According to the US EPA (chart ES-6) some of the top human activities most responsible for recycling mercury in the environment are:
 - municipal incinerators, breaking of fluorescent tube lamps, dental facilities, production and disposal of batteries, household trash disposal and residential heating (oil).
- The operation of crematories is one of the lowest sources.
- The most notable way that mercury enters the cremation cycle, and therefore crematory emissions, is through silver amalgam dental fillings found in some dead human bodies.
- According to the ADA (February 2009 American Dental Association), since 1990, the use of silver amalgam fillings has steadily dropped from 68% usage to a current rate of only 30% usage. This represents a 65% reduction, a tremendous decrease.
- Testing for mercury in crematoria emissions was recently completed in the United Kingdom.
- Testing was conducted under British testing standards BSEN13211-2001, for the monitoring and control of trace elements.
- Fifty four (54) total human cremations were tested at two separate locations in the UK. under normal operating conditions for the cremation equipment.
- Test results were submitted to and reviewed with DEFRA- United Kingdom Department of Environment Food and Rural Affairs as well as SEPA- Scottish Environmental Protection Agency.
- Testing for mercury in crematoria emissions was also conducted in the United States by the USEPA, United States Environmental Protection Agency.

- Testing was conducted using USEPA test methods, specifically EPA Method 29 for metal emissions sampling.
- Nine (9) human cremations were tested under normal operating conditions for the cremation equipment.
- Test results were submitted to USEPA and EPA accepted the test as being conducted in compliance with testing standards.
- The data was published by USEPA as the established baseline for mercury emissions and posted to the National Emissions Database as a reference for all interested parties.

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- We can use all this reliable test data to project a worst case scenario by averaging only the 30 tests where mercury emissions were present, only those bodies that contained silver amalgam fillings.
- The average mercury emissions from these documented tests, under a worst case scenario, would be .568 grams of mercury emitted per body cremated.
- It is very interesting to note that this average of .568 grams is almost identical to the USEPA test average of .584 grams per body.
- This current information confirms that the mercury emissions information located in the USEPA National Emissions database is accurate for determining the mercury emissions impact of cremation.

Paul Rahill -environmental advisor and liaison for the CANA (Cremation Association of North America) Board of Directors. prahill@matw.com .



Cremation Systems Testing

Cremation systems by design are fairly complex combinations of equipment used to transition “*human remains*” to “*cremated remains*” in a set time period. To accomplish this transition, the equipment has to utilize sophisticated combustion systems, environmental detection devices and various safeties that monitor the systems at all times. Therefore, it is necessary to maintain the highest level of quality and safety assurance on these systems throughout their typical 20 year life span. Meeting these demands requires cremation systems designers, manufacturers and service agencies to utilize various types of testing. This article will discuss the testing that takes place in the factory, in the field and for environmental compliance.

Factory testing is performed to ensure that the design of the cremation system meets the specifications that it was intended to. In addition to meeting design specifications, there are many quality assurance benchmarks that must be met to ensure that the equipment meets expectations of the manufacturer and the client that will receive and operate this cremation system.

Factory testing is accomplished by engineers, quality assurance technicians and combustion technicians at different points throughout the manufacturing process. Many manufacturing quality assurance programs require that quality checks take place along the way during the manufacturing process, such as after the steel frames are welded, after the high temperature refractory linings are installed, once all of the mechanical components such as doors are installed, and then again when the combustion systems are installed on the cremation unit. At the completion of all of the assembly, a final function test of the equipment is performed. These factory testing procedures are done to ensure the achieved quality meets the levels that have been set, and that the internal customer (each individual department) is receiving equipment that will meet their expectations for the next phase of manufacturing.

In addition to quality assurance testing like ISO (International Standards Organization), there is safety testing to be sure that the cremation systems meet the requirements of OSHA, UL Underwriters Laboratories, CSA (Canadian Standards Association), and CE (European Compliance). Each one of these safety/quality agencies has various areas of the equipment or manufacturing process that they focus on. Most of these agencies require detailed individual checklists which must be completed, or systems verified, to meet their individual requirements.

It must also be noted that if the equipment is built on site, or the final assembly takes place at the customer’s place of business, these same quality assurance and safety compliance tests must take place at the different phases of construction on site. The onsite engineers utilize detailed checklists during their safety and quality checks. These checklists are much like the checklists that are utilized by pilots to verify that every step and every component has been verified and checked to be sure that nothing is overlooked or omitted. In addition, design functions, such as burner heat output, emissions detection and flame safety controls, are all checked and the operating perimeters verified during the final checkout.



Field testing is performed by trained and specialized combustion engineers and technicians. This testing takes place once the cremation system is installed at the customer's place of business. At this point, all of the utility connections, i.e. electrical, gas and fresh air, should be connected and available for the technicians to verify. In addition, the exhaust stack is installed and the system is ready for operation. It is best to wait until all other on site contractors are finished to be sure that no one interferes with the cremation system once the field inspections and testing have taken place. Normal testing that takes place in the field is to repeat the quality assurance and safety testing that took place at the factory. This is due to the fact that often times the equipment is disassembled for transportation to the final location, and then reassembled on site. This is often accomplished using local contractors so it is necessary to confirm that everything has been installed and reassembled correctly.

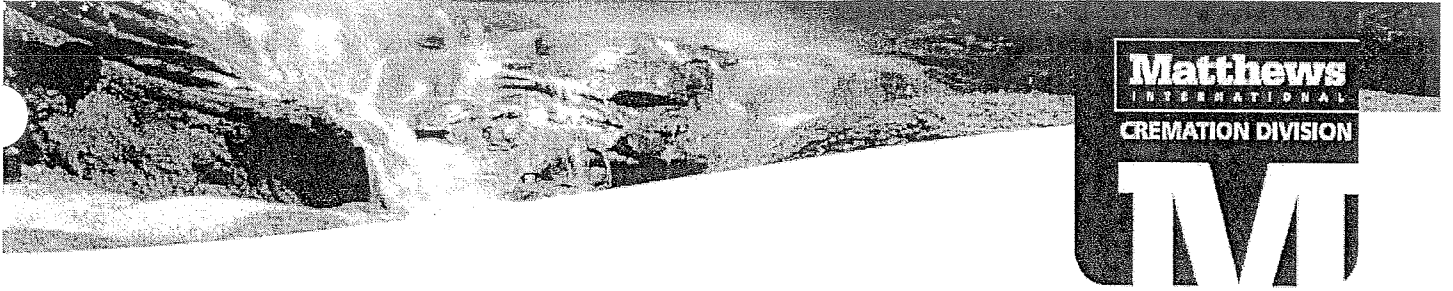
There are also many variables in the field such as the fuel pressures, electrical supply, fresh air supply to the room, stack exhaust connections, and the room set up in general. Detailed checklists with the design requirements are provided to the field technicians so they can check and verify that all of the design requirements are being met. Once this initial check has been accomplished, the field technicians begin to set up the combustion system by adjusting the fuel/air ratios, temperatures, draft in the exhaust vent, and all other perimeters of the combustion and air systems. Most times, these set up perimeters are influenced by the local jurisdiction that has authority over the operating temperatures for the cremation system. Typically the operating perimeters are defined and provided in the operating permit issued by the local environmental regulatory authority. The field technicians utilize specialized equipment to confirm the supply of electricity, the fuel pressures being provided to the crematory building, and the amount of fresh air provided for the combustion process to take place inside the cremation equipment. All these impact the performance of the burners on the cremation system which, in turn, impact the quality and efficiency of the cremation process itself.

Environmental testing is accomplished using independent test laboratories which are approved by the local governing environmental authority. Independent test laboratories perform specialized testing and measurements of emissions and the flow of combustion gases within the cremation system.

The testing process by the environmental laboratories is highly regulated and set out in detail by the United States Environmental Protection Agency (USEPA) so that laboratories across North America conduct the environmental testing in a like fashion according to these specifications. After the installation is complete and the field set up has taken place by the technicians, the crematories are allowed a break in period for the equipment and for the operators to be trained. This typical start up period is accomplished within 90 days after the initial set up of the cremation system.

There are different levels of environmental testing. The lowest or minimum level of environmental testing is called a Visible Emissions test (VE test). During a VE test four readings are taken every minute over a 60 minute period (240 readings) by a trained smoke watcher. These are technicians that are trained several times per year to read the degree of smoke based on calibrated machines that they compare their readings against. During a typical VE test, the technician will also note wind direction, cloud cover, and whether any unusual circumstances or odors have been detected.

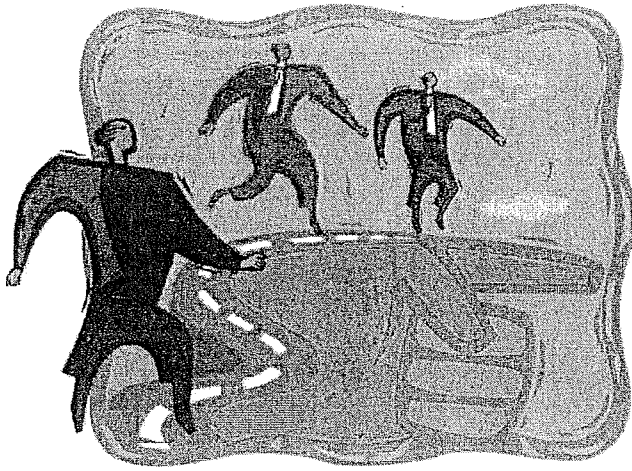
The next level up of stack testing is called in-stack emissions testing. With this type of test, a mobile laboratory and usually three technicians travel to the site with their testing equipment and portable laboratory. Each test will last 60 minutes and it will be performed on three different cremations. During this testing, the lab technicians monitor the stack gas temperatures flow rates, as well as the oxygen



levels, carbon dioxide levels, carbon monoxide levels, particulate emissions (dust), and nitrogen oxide emissions. All of this information is compiled by the independent laboratory and prepared in a detailed report that is provided to the local environmental authorities, as well as the owner and the owner's representatives. It is a good idea to have the factory representative tune up the cremation equipment before this type of testing takes place to be sure that all of the combustion systems are in proper calibration and operating correctly.

The next level is more advanced, requiring that more emissions are tested for during this process. Usually there are a variety of metals, such as mercury, lead, cadmium, that are measured during the cremation process to determine their levels and to allow the local environmental authorities to determine what, if any, impact it has on the surrounding community. Often times this level of testing is performed on cremation systems that have expanded filtration and abatement systems. These types of cremation systems usually also include continuous emissions monitors that provide emissions information real time to the operators, as well as provide it online where it is often monitored by the factory service technicians.

In conclusion, it is important to know what type of testing is required and beneficial to the ongoing operation of a cremation system. It is quite helpful to ask your equipment designer and supplier for sample testing references of factory testing, field calibration testing, and environmental testing, including the checklist and reports that are produced from each type. It is a good idea to maintain current files on all testing and calibration that is done on cremation equipment in case it is requested or beneficial to share with local authorities that may stop in for a visit. Remember...if it can be successfully measured, it can be successfully managed.



Environmental Journey

By Paul Rahill,
Matthews Cremation Division

A Journey of Ten Years . . .

The regulation development process for human and animal crematories that began in 1996 was originally estimated to take four years to complete. At the start of this journey, the US EPA did not have any regulations covering the design, installation and operation of human or animal crematories, leaving this process to the individual states and provinces to deal with as they may. The EPA regulation development plan was originally designed to include varied public and private groups, giving them the opportunity to express their concerns, provide their input and make recommendations that would shape the outcome of the future regulations.

This process, worked by consensus amongst teams, proved to be very slow in producing tangible results. Adding frustration to the process was the surprising lack of credible data on crematory emissions available through the US EPA and its sources. Two years after the teams began to meet, EPA felt it best to reorganize and called upon only those participants it felt could move the process along in a positive and productive manner.

This void of crematory emissions data concerned the members of the newly reorganized "Subteam 1," which included representatives from CANA's environmental team. This Subteam was tasked with making recommendations to the EPA's Work Group leaders on how to

proceed with developing regulations, but without accurate emissions data this proved to be a challenge. The options available to the team were not great. The team could propose moving forward with developing regulations based on best estimates of crematory emissions or recommend crematory specific testing be performed before any regulations were considered.

The risk of basing long term regulations for crematories on inadequate and inaccurate data was too great for the death care industry and the Subteam to consider. Whether based on best guess or facts, regulatory change for crematories would certainly result in significant cost increases to the industry and the public,

not to mention the inconvenience that would be caused by the inevitable closing and consolidating of crematories that could not economically meet new regulations.

With the overshadowing negative attitudes by the public towards the general funeral service industry and the belief that both costs and inconvenience would increase, the mandate for CANA's representatives on Subteam 1 was clear; it must take a proactive role on behalf of its members and the public they serve. This mandate was not only to insure that cremations be readily available at reasonable costs but also that the commitment to clean air for the living not be compromised through unnecessarily weak or

over-ambitious regulations. With this mandate, the EPA Subteam headed by Paul Rahill and Dale Walter (IEE-Industrial Equipment & Engineering, ALL Crematory, Matthews) proposed to the US EPA that extensive environmental testing be performed prior to developing any Federal environmental regulations for crematories.

Environmental Testing like that proposed by the Subteam is very expensive under any circumstances, but when the testing will be used to guide US EPA regulations, only environmental testing contractors approved by US EPA can be used, increasing costs dramatically. The direct costs to perform the testing required for this critical evaluation would be approximately \$300,000. In addition to this was the significant pre-test engineering and technical preparation services, most of which was donated by Matthews Cremation.

During this regulatory development process, crematories were only one of many "industries" being reviewed by the US EPA. Quite honestly, crematories were a low priority and the likelihood of obtaining precious test funding from EPA was slim at best. The Subteam then proposed a very unique matching funds idea: EPA would pay half the cost of testing, evaluation and reporting and the balance would be raised by CANA, its members and affiliated death care groups with an interest in the outcome. This proposal intrigued EPA and they soon agreed to this idea. Under the proactive leadership of then CANA President John Cole of Pinecrest Cemetery Company Ottawa, Canada, the task of raising the capital needed for testing began.

CANA was established in 1913 for the purpose of promoting professional standards related to cremation practices throughout North America. There are approximately 1200 members who are engaged in serving the cremation families

through Funeral Homes, Cemeteries, Societies, as well as associated service providers. In addition, there are many vendor members to the industry who are also dedicated to indirectly serving families through their clients. This venture with EPA would require a coordinated effort of all parties to successfully meet the challenges ahead.

As with previous testing performed by the members of the Subteam it was determined that it would be advantageous to test different casket and container types at different temperatures to see what effect these variables had on the tested emissions under a very strict test setting. The types of containers were basic (minimum) cardboard cremation containers, cloth covered caskets and particle board/wood caskets. The three temperature ranges selected were the three most common found in North America, 1400°F, 1600°F and 1800°F. The location selected by the US EPA was a CANA member, The Woodlawn Cemetery located in the Bronx, New York. One of the reasons Woodlawn was selected was because their cremation equipment was typical to what could be routinely found operating throughout North America.

US EPA originally decided on 12 tests with the assorted containers and caskets at two temperature levels. CANA however requested a total of 18 tests be performed at three different temperature levels and agreed to pay for the additional testing above the cost sharing arrangement in order to obtain the most detailed and accurate data for the industry. EPA hired the two independent testing contractors whom they knew well and had utilized in other testing projects. After considerable pre-test preparations, testing began on June 11, 1999 and concluded on June 17, 1999.

The cremations were performed at each of the three levels of temperature

with data collected and samples taken by the assembled group of technicians and scientists. Pollutants tested for included visible emissions (smoke), particulate matter, carbon monoxide, nitrogen oxides, sulfur dioxide, hydrogen chloride, metals, dioxins and furans. This data collected was unprecedented and would later be utilized to establish baselines by which crematory emissions impact would be evaluated. The conclusion of the test company was clear.

"In general, no correlation was observed between either body characteristics or container type and emissions. Overall emissions tended to increase with increasing temperature."

By October 1999 with the testing complete, data verified, analyzed and documented with the reports written by the test companies and submitted to US EPA, crematories had slipped from a low priority to a very low priority. It was no coincidence; the encouraging test results had contributed to a lower sense of urgency. Crematories, both human and animal would be placed on a back burner at EPA, but not to be forgotten.

Final Regulations were eventually proposed in November of 2004. This was followed by a nationwide public comment period of almost one year allowing anyone; public, industry or agency to submit objections to US EPA for consideration where their basis would be considered before the final regulations would be adopted. Only two comments were received during the one year period and EPA's position remained unchanged.

EPA stated, "Final regulations for other solid waste incineration (OSWI) units were signed by the EPA's Administrator on November 30, 2005, and can be found at <http://www.epa.gov/ttn/oarpg/new-.html> or see an excerpt on page 20 of this magazine. Regarding the status of human and animal crematories, EPA did not change its position with respect to these

sources between proposal and promulgation and they are not regulated as part of the final OSWI regulations or any other existing Clean Air Act Section 129 incineration regulation.”

Human Crematories: “We noted in the preamble to the proposed rules that in considering the nature of human crematories . . . , EPA has come to the conclusion that the human body should not be labeled or considered solid waste. Therefore, human crematories are not solid waste combustion units, and are not a subcategory of OSWI for regulation. Moreover, we state in the preamble to the final rules that as stated in the preamble to the proposed OSWI rules, if EPA or States determine in the future that human crematories should be considered for regulation they would be addressed under other authorities.”

Animal Crematories: “In the preamble to the proposed rules, we noted that (1) emissions from these units are very low when compared to other solid waste combustion units. The emissions levels from uncontrolled animal crematory units are, in fact, less than emissions after controls from other types of incinerators that are regulated . . . ; (2) EPA is concerned about biosecurity within the agricultural sector; (3) In many areas there is also a lack of reasonable and economic alternatives (e.g., rendering, composting, burial) to incineration.; and (4) EPA has determined that the adverse impacts associated with regulation of animal crematories outweigh the benefits of regulation and these units are not included as a subcategory of OSWI for regulation at this time. We state in the preamble to the final rules that EPA has not changed our decision to exclude animal crematories and pathological waste incineration units, based on our analysis of their emissions and the adverse impacts that would occur if these units were regulated under the final OSWI rules, . . . At this time, EPA has no plans

underway to regulate human or animal crematories.”

15 years after the 1990 Clean Air Act and 10 years after the regulation development process began in earnest, crematories have been tested, reviewed and evaluated with a final determination of no federal regulations planned and none recommended to the States.

Next Steps must be considered though, as problems still exist for current and future crematory operations. In anticipation of US EPA developing federal regulations, many States moved forward on their own and developed regulations without the benefit of the comprehensive test data that was later available from the EPA testing. As a result, several states and provinces have regulations that actually appear to increase the pollutant emissions from crematories as well as increase the fuel consumption of crematories and the production of greenhouse gases.

CANA must now adopt a new mandate which will be a “win-win” for all parties involved. This will require industry leaders to meet with environmental authorities from the States and Provinces to review US EPA’s data. This will create goodwill and provide a greater understanding on how crematories actually function. At the same time, CANA’s leaders must discuss how state and provincial regulations might be updated to reduce emissions by lowering operating temperatures to those levels that achieved the best results during the tests.

This change, which is supported by US EPA’s own published test data, is good for the environment, which is good for us all. Reducing operating temperatures will also increase safety for those who operate cremation equipment and safety must always be a top concern for all crematory operations. Reducing temperatures also reduces fuel consumption and equipment maintenance costs which benefits the consumer by controlling the escalation of

operating costs for crematories.

The journey has been long, expensive and frustrating at times, but much has been learned and gained along the way. Finding and maintaining the delicate balance between the environment and the consumer will always be a challenge but may not be as difficult as once thought. Many interests are common, yet this journey is far from over.

Mercury Rising? Analyzing Emissions and the Cremation Process 2008

By Paul Rahill

Consumers and businesses are adopting an ecological mindset more than ever before. The environment's well being permeates everything we do—from properly disposing of fast-food containers to driving hybrid cars. The environment (and the U.S. role in global pollution) is a key issue for many candidates running for office.

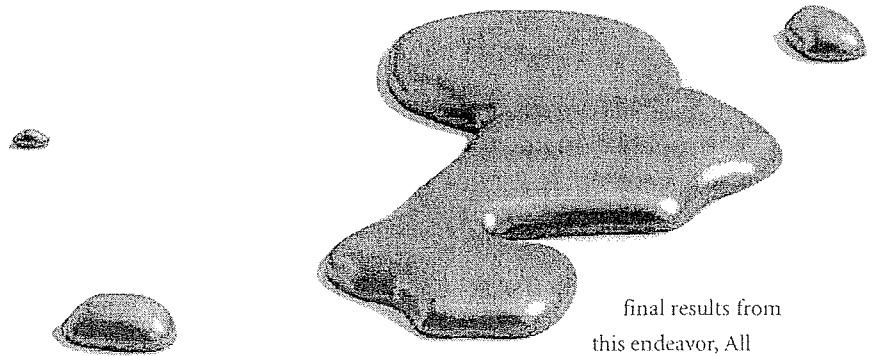
But the environmental focus for professionals in our industry is not stopping there. We continue to research the impact of our environmental footprint after life, specifically from the cremation process.

Our systems and technology yield great advances in the reduction of particulate matter (PM), visible emissions (VE) and carbon monoxide (CO) from the cremation process. PM and CO are the two most-commonly regulated pollutants from cremation equipment.

Now, however, the focus has turned to mercury emissions. The U.S. Environmental Protection Agency (EPA) describes mercury as a “naturally occurring element that can be found throughout the environment.” Although naturally occurring, different human activities can increase or decrease the amount of mercury moving among the atmosphere, bodies of water and soils.

According to the report, “U.S. EPA Best Point Estimates of 1994-1995 National Mercury Emission Rates by Category,” there are some human activities among the top culprits of recycling mercury into the environment:

- Municipal incinerators.
- Fluorescent tube lamps breaking and releasing their contents.



- Dental facilities.
- Batteries (production and disposal).
- Household trash disposal.
- Residential heating (oil).

The operation of crematories is one of the lowest sources cited.

The most notable way that mercury enters the cremation cycle, and therefore crematory emissions, is through silver amalgam dental fillings found in some dead human bodies.

Silver amalgam fillings contain mercury alloys that when introduced through dead humans into the cremation process of intense heat result in the volatilization of mercury and its emissions into the atmosphere.

Silver amalgam dental fillings containing mercury have been common for many years, but their use appears to be in significant decline. Within the last 10 years, the percentage of fillings containing mercury declined by 30 percent.

One British organization recently tested 54 cremations at two U.K. crematoria for mercury emissions. The Department for Environment, Food and Rural Affairs (DEFRA) and Scottish Environmental Protection Agency (SEPA) reviewed test protocols, procedures and

final results from this endeavor. All testing was conducted

under normal operating conditions for the cremation equipment. Both agencies accepted the test as being conducted in compliance with the British testing standards BSEN13211-2001.

Testing for mercury in crematoria emissions was also conducted in the United States by the U.S. EPA. The test protocols and procedures were submitted by Midwest Research Institute and were reviewed and approved by the U.S. EPA. Nine human cremations were tested at The Woodlawn Cemetery in the Bronx, N.Y. All testing was conducted under normal operating conditions for the cremation equipment.

Test results were submitted by EPA's contractor, Midwest Research, to the U.S. EPA and reviewed by its staff. EPA accepted the test as being conducted in compliance with testing standards. The data was published by the U.S. EPA as the established baseline for mercury emissions and posted them to the National Emissions Database as a reference for all interested parties.

Test Data Summary

U.K. TEST 1 (Craigton Crematorium/Pelican Scientific)

Here is an overview of the U.K. study:

- Conducted in October 2006.

- 23 cremations total.
- Normal operating conditions.
- 10 cremations suspected to have no silver amalgam fillings.
- Average mercury release per cremation over 23 cremations—.128 grams per body.
- Average mercury release per cremation for only the 13 cremations believed to contain silver amalgam fillings—.227 grams per body.

UK TEST 2 (Linn Crematorium/ Pelican Scientific)

The second test was almost a year later:

- Conducted in September 2007.
- 31 cremations total.
- Normal operating conditions.
- 21 cremations suspected to have no silver amalgam fillings.
- Average mercury release per cremation over 31 cremations—.323 grams per body.
- Average mercury release per cremation for only the 10 cremations believed to contain silver amalgam fillings—1.001 grams per body.

U.S. EPA TEST 1 (Woodlawn Crematorium/ Midwest Research Institute)

Compare the U.K. data with the first U.S. test:

- Conducted in June 1999.
- Nine cremations total.
- Normal operating conditions.
- Two cremations suspected to have no silver amalgam fillings.
- Average mercury release per cremation over nine cremations—.456 grams per body.
- Average mercury release per cremation for only the seven cremations believed to contain silver amalgam fillings—.584 grams per body.

The average mercury emissions from these documented tests, under a worst-case scenario, would be .568 grams of



mercury emitted per body cremated. It is very interesting to note that this average of .568 grams is almost identical to the U.S. EPA test average of .584 grams per body. The current information confirms that the mercury emissions information located in the U.S. EPA National Emissions database is accurate for determining the mercury emissions impact of cremation.

Mercury used in the dental profession is already significantly in decline. However, we should continue to scrutinize the input of all types of materials into crematories while looking for and encouraging alternative materials to be used whenever possible. Important environmental questions will continue to arise and it is important to address them by relying on the factual information that is available to us. Being a good environmental neighbor requires us to be fact based, informed and involved.



Paul Rahill is the president of the Matthews International Cremation Division (MCD) with headquarters

in Orlando, Fla. He serves as the environmental adviser and liaison for the CANA Board of Directors. He can be reached at PRahill@matthewsintl.com.

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Mercury and Cremation Issues Revisited

By Paul Rahill

Paul Rahill is President of the Matthews International Cremation Division (MCD) headquartered in Orlando, Florida. Matthews Cremation designs and manufactures cremation equipment systems, caskets and urns as well as providing service and repairs for cremation equipment, and crematory supplies for the Cremation Industry.

Paul's involvement with the cremation industry began in 1973. He has worked in various capacities in the design, manufacturing and service of cremation equipment, as well as research, development, environmental and regulatory issues. Paul also develops and implements seminars, training and certification programs for the cremation industry.

Questions and concerns regarding mercury emissions from crematories in the United States and Canada continue to arise from time to time. Minimizing emissions of all types are certainly a priority to crematory owners, operators and cremator manufacturers who have developed training programs to minimize many types of emissions common to crematories. These training programs which include special sections on cremator design, the environment and proper operations have been presented to thousands of operators over the last 20 years.

North American cremator designs have typically performed better environmentally due to designs that included large afterchambers for the reburning and scanning of the exhaust prior to discharge into the atmosphere. These types of designs are important as the locations where crematories have often been built in North America are light commercial and adjoining residential properties.

The most extensive cremation equipment emissions research ever undertaken confirmed that the design and operation of typical North American crematories provided significantly better emissions than regulations required, and even exceeded expectations with older operating systems.

However, issues will continue to come up and it is important to address them by revisiting the information that is available to us, updating both the facts and accuracy at each opportunity. It is important to acknowledge that often those raising these issues and questions, though well-meaning, base their concerns on inadequate information or un-answered questions. In this article, I would like to specifically review how the cremation process correlates to mercury emissions into the atmosphere, the effect on the surrounding environment and the trends for the future that will impact mercury emissions.

The United States Environmental Protection Agency (EPA) describes mercury as a "naturally occurring element that can be found throughout the environment". Although naturally occurring, different activities by humans can increase the amount of mercury that is moving between the atmosphere, bodies of water, soils and within themselves.

Some of these human activities that recycle mercury in the environment are: municipal incinerators, breaking of fluorescent lamps, dental facilities operations, production and disposal of batteries, household waste disposal and the operation of crematories as well as other sources.

As this naturally occurring element cycles through our environment, particularly in water, it is ingested by small organisms as they feed. These organisms become part of nature's food chain. The accumulation of mercury we are most familiar with tends to center on fish. Different types of fish have differing levels of mercury.

The lower a fish is in the food chain the lower it's likely level of mercury accumulation. The higher the fish is in the food chain the higher the potential mercury concentration may be. Shark, swordfish and kingfish are often cited as those having some of the highest concentrations of mercury. Of course, human consumption of these fish could increase one's exposure to mercury depending on the actual levels found in the fish.

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Mercury and Cremation Issues Revisited

So, we can see that although mercury is a naturally occurring element, over-exposure to it is not a good thing for humans.

The most notable way that mercury enters the cremation cycle, and therefore crematory emissions, is through silver amalgam dental fillings found in many dead human bodies.

Silver amalgam fillings contain mercury alloys that when introduced through dead humans into the cremation process of intense heat, often exceeding 180°F, results in the volatilization of mercury and its emissions into the atmosphere.

Silver amalgam tooth fillings containing mercury have been common for many years, but their use appears to be in significant decline. It is estimated that at one time silver amalgam represented the greatest majority of filling materials used, possibly as high as 90%. Within the last 10 years, the percentage of fillings containing mercury has already declined by 30%, a significant decrease.

Although concern for the environment has always been a priority for the dental industry, the primary driver of this trend is actually found in the mirror, appearance. Composite resins blend better with the color and appearance of natural teeth. Other materials, such as gold, porcelain and non-precious alloys are also used to restore teeth, but none of these contain mercury. All these changes in dental practices and consumer preferences have resulted in significantly less mercury entering the cremation stream and thereby reducing mercury emissions by reducing mercury input.

Mercury emissions from crematories today are in significant decline due primarily to changes in dental practices, but how bad were they actually before this recent trend?

One of the most detailed studies of mercury emissions impact was conducted in the United Kingdom where over 70% of dead humans are cremated. The study focused on a crematorium that had been in operation for over 40 years, processing more than 112,000 cremations at the time of the study.

The direction of the prevailing winds of the crematory exhaust was determined to identify the land surrounding the crematory where the highest concentrations of mercury could be found. Five soil samples were taken along this windward axis; three samples were taken on the downwind axis and two additional samples were taken on the upwind axis. All the samples were then analyzed.

As anticipated, the downwind samples contained a higher, though not significant, level of mercury. "Trigger concentrations" had been determined to evaluate level of soil contamination. These "trigger levels" ranged from low levels of 1mg/kg for human food producing soils to 20mg/kg levels that are deemed acceptable for children's playgrounds. The concentration of mercury found in the crematory soil samples averaged less than .15 mg/kg, almost 7 times lower than that allowed for food production and more than 100 times lower than that allowed for children's playgrounds. The soils were deemed uncontaminated even after 112,000 cremations and 40 years of operation.

Consider that typical North American crematories operate at only 20% of these production levels used in the analysis, and it becomes readily apparent the anticipated impact of mercury emissions from those crematories are even further diminished.

As an industry, we must be receptive to discussing environmental and performance issues whenever they come up. Proper training of crematory operators and managers must be continually encouraged and older cremation systems should be properly maintained and updated to keep them in prime operating condition.

Mercury use in the dental profession is significantly in decline. However we should always scrutinize the input of other materials into our crematories while looking for and encouraging alternative materials to be used in all areas of the death care profession, whenever possible.

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Peters Township Planning Commission
Peters Township Council
McMurray, Pennsylvania

March 13, 2011

Dear Members:

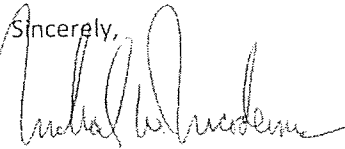
I was recently contacted by Danielle Belusko regarding her dilemma requesting zoning for installing a cremator. Let me be perfectly clear that I have not, nor will I receive any monetary payment for my involvement. Ms. Belusko, who I do not know and never met, was referred to me due to my experience in the cremation profession. Although I am the President-Elect of the Cremation Association of North America (CANA), and Chairman of their Crematory Operators Certification Program, I base the following facts solely on my opinion.

Now that we have all the disclaimers out of the way, I would like to address a few issues regarding cremation. Cremation has been around for some time. In fact the very first cremator began operation in 1876 by Dr. Julius LeMoyne ironically, of all places, in Washington, PA. a mere fifteen or so miles away from the area in question.

As with any new computer, phone, or iPad, the list could go on and on, and cremators are no different when it comes to advanced technology. Without question, the increased awareness of cremator manufacturers throughout the country rank in the same category as the aforementioned gadgets. Every cremator manufacturer has worked tirelessly to improve the efficiency of their equipment, and the results speak volumes of the safety of said equipment. The issues of Particulate Emissions (PM), and in particular, Mercury (HG) are foremost in everyone's mind when it comes to what is being released into the atmosphere. CANA has written a position paper that will help dispel the myths about PM and HG. This position paper includes statements from the ADA, the USEPA, and an Environmental Scientist. Test results from locations in the United States and the UK, and a very poignant quote from an extremely qualified Medical Examiner will show PM and HG from cremator emissions pose no threats to the environment, or one's health.

Ms. Belusko asked me to view the website, www.ptaco.org. I found it amusing this website stated Ms. Belusko would make a "Ton of Money" while she poisons our children. As a cremator manager/operator for over thirty (30) years, and having cremated or assisted in cremating over 6,000 to 7,000 decedents, I can unequivocally state I am in perfect health, a happily married man with a wife, two children, and a grandson who show no effects of HG poisoning and, I am not making a "Ton of Money". I am providing a much needed service to our community which is exactly what Ms. Belusko wishes to do. I would also like to add, to the best of my knowledge; the Cremation Association of North America has never received any documentation that property values declined at any time due to the opening of a crematory.

Although the decision is in your hands, and not mine, I would not have a problem, knowing what I know, living next to a crematory. The CANA position paper will support my reasoning.

Sincerely,

Michael W. Nicodemus



The CANA Perspective on Particulate Emissions and Mercury: An In-Depth Look at a Global Controversy

For years, The Cremation Association of North America (CANA) has witnessed the concern surrounding cremating human remains and the corresponding release of primarily two emissions: particulate matter (PM) and mercury (Hg). PM can be defined as solid particles suspended in a gas as a byproduct of all combustion processes, including cremations. Mercury on the other hand, is derived from the use of silver amalgam in dental fillings that is released into the environment during the cremation process. A task force was developed by CANA to further investigate the issues; the results of the investigation are included in this report.

Particulate emissions (PM) are released into the environment in many ways, including through residential and commercial fuel-based heating — through cars, trucks, restaurant grills and fireplaces. None of these common community sources of PM have any emission controls to reduce, monitor or limit PM emissions. Crematories, however, have emission controls as part of their design to limit the amount of PM entering the atmosphere.

According to the U. S. Environmental Protection Agency (USEPA), there are many ways mercury emissions are released into the air. Some of these common sources include municipal incinerators, the breaking of used fluorescent tube lamps, dental facilities, production and disposal of batteries, household trash disposal and residential heating. USEPA lists the operation of crematories as one of the lowest sources of Hg emissions. Mercury emissions from cremation are very low and they are not regulated by any environmental agency. Under the Clean Air Act, the USEPA reviewed and updated national air-quality standards for all types of possible pollutant sources, including crematories. This review considered all possible pollutants including PM and mercury. As a result, crematories were not considered for any further federal regulation. CANA surveyed various crematories throughout the United States — Virginia, Georgia, Illinois, Washington, Florida, Indiana, Kentucky, California, Wisconsin and New York were just a few states to respond. CANA asked if there has ever been an air-quality or environmental agency in these areas that raised a concern regarding the release of mercury emissions from their crematories: The unanimous answer was no.

The American Dental Association (ADA), which oversees and regulates dentists in the United States, reports that since 1990 the use of silver amalgam has dropped from a 68-percent usage rate to 30 percent. The ADA attributes this decrease to the patients' preferences for natural-looking non metallic dental fillings. Moreover, continuous changes in dental practices, as the durability of other cavity-filling materials are proven, continues to lessen the already minimal amounts of Hg being released.

Furthermore, the Indianapolis Office of Environmental Services has responded to this growing concern by performing crematory emissions studies to determine if a source would be required to obtain an air permit. The group concluded that, although Hg from silver amalgam is certainly released, in reality, emissions are quite small, below the minimum levels of all criteria pollutants and Hazardous Air Pollutants.

The USEPA also states that crematories statistically represent 0 percent of the total inventory for national mercury emission rates, according to their Best Point Estimates. Based on actual data

collected in 1999, when presumably more people still had silver amalgam fillings, all the U.S. crematories combined produced a total of only 238 pounds or 108 kilograms of Hg.

Actual tests performed for USEPA at the Woodlawn Crematorium by representatives of the Midwest Research Institute in New York, and published by the USEPA, have determined the amounts of Hg released to the environment. The tests show that in a total of nine cremations, two were suspected of not containing any silver amalgam whatsoever. They contend that the stack testing at the Woodlawn facility was considered to be representative of all crematoria operations and, therefore, a reliable source for developing an uncontrolled emission factor for use in estimating potential emissions from all crematoria. The conclusion is that the average mercury release of nine cremations yielded 0.456 grams or 0.0010 pounds of Hg per body. In addition, the average Hg release for the seven cremations believed to contain silver amalgam fillings yielded only 0.584 grams or 0.0013 pounds per body.

Further testing by Pelican Scientific in the United Kingdom measured Hg in crematoria emissions and submitted the results to The Department of Environment, Food and Rural Affairs and the Scottish Environmental Protection Agency. Both agencies accepted the tests as having been conducted in compliance with testing standards. The first test, conducted during October 2006 at the Craigton Crematorium in Glasgow, Scotland, involved 23 cremations under normal operating conditions:

- 10 remains were suspected of not having silver amalgam fillings whatsoever.
- The average Hg release per cremation of more than 23 cremations yielded 0.128 grams or 0.0003 pounds per body.
- The average Hg release per cremation for the 13 cremations believed to contain silver amalgam fillings yielded 0.227 grams or 0.0005 pounds per body.

The second test, conducted September 2007 at the Linn Crematorium in Glasgow involved 31 cremations under normal operating conditions:

- 21 remains were suspected of not having silver amalgam fillings whatsoever.
- The average Hg release per cremation of more than 31 cremations yielded 0.323 grams or 0.0007 pounds per body.
- The average Hg release per cremation for the 10 cremations believed to contain silver amalgam fillings yielded 1.001 grams or 0.0022 pounds per body.

This information confirms that the Hg emissions information located in the USEPA National Emissions database is accurate for determining the Hg impact of cremations; and based on significant and unbiased testing, Hg emissions from crematories are not deemed sufficient to be regulated.

All the data available has already prompted notable environmentalists to draw realistic conclusions in regard to the emissions of Hg. Environmental Scientist Alexis Cain, of the Chicago office of the Environmental Protection Agency said, "I don't think it's a risk to people who live in the vicinity of crematoriums."

Two specific practices target the reduction of Hg emissions into the atmosphere via cremations. CANA recommended that neither of these directives be mandated:

- The first measure would be the installation of filtration systems or "bag houses" to the cremation equipment. There is no guarantee that these filtration systems will prevent the release of Hg into the environment, not to mention that they are extremely cost-prohibitive.
- The second measure suggests that teeth containing silver amalgam should be pulled prior to the cremation process. CANA considers this an act of mutilation and such an act would violate the respectful manner in which cremationists perform their duties. The notion that teeth-pulling would even be suggested implies that some individuals are not approaching this matter with objective insight. The misguided fear of mercury emissions clouds the realistic

assessment of their environmental impact. Our decisions should be based on the soundness of the data collected and intellectually interpreted.

The most extensive cremation equipment emissions research ever undertaken confirms that the design and operation of typical North American crematories provides significantly better emissions than regulations required, and even exceeds expectations with the older operating systems.

Summing up the matter, Samantha Wetzler, M.D., a medical examiner in the Tidewater Virginia region, said, "There are so many variables, and so many sources of mercury both to people and the environment, of which none have been eliminated ... not fish, amalgams, coal plants, industrial emissions and the breaking of light bulbs. It seems that regardless of what studies one does, no one will be able to predict these things, and pointing a finger at a crematory as one source that must be stopped seems ridiculous and frivolous. A neighbor putting a fluorescent bulb into the trash rather than recycling it properly will create more concrete hazards for the community than any amounts crematories will ... but policing of peoples' trash is not in the plans."

###

CANA is the recognized authority for all information, education, products, services and support for cremation. Founded in 1913, CANA is an International organization of over 1,300 members, composed of cemeterians, cremationists, funeral directors, industry suppliers and consultants. CANA's purpose is to actively lead and support the providers of cremation services and to promote memorialization. This is accomplished through the highest standards of ethics, education and consumer information. CANA's members support and adhere to the following principles: integrity and ethics; excellence; professional development and education; and leadership and innovation. For more information about CANA, visit www.cremationassociation.org.

COPY

WASHINGTON

* REPORT *

By Stephen L. Morgan, CCE, Executive Vice President,
and Robert M. Fells, General Counsel

EPA downgrades priority of regulating crematories

The U.S. Environmental Protection Agency (EPA) recently included crematories in a draft listing of solid waste incinerators it considers of lesser priority in terms of developing new performance and emission standards. According to the EPA, new Clean Air Act regulations for crematories will be issued, if at all, by the year 2000.

Under the 1990 amendments to the Clean Air Act, the EPA is required to develop new source performance standards and emission guidelines for four classes of solid waste incinerators. The four classes are: 1) municipal waste combustors (MWCs); 2) medical waste incinerators (MWIs); 3) industrial and commercial waste incinerators (ICWIs); and 4) other solid waste incinerators (OSWIs). The EPA has proposed to include crematories in the fourth class of incinerators: OSWIs.

Due to the limited information on OSWIs available to EPA at this time, the agency does not know

The scheduled deadline for issuing any such regulations is November 15, 2000.

The Clean Air Amendments require the EPA to establish emission limits for acid gases (such as sulfur dioxide and hydrogen chloride), particulate matter, opacity, metals (such as cadmium, lead and mercury), organics (such as dioxin/furans), carbon monoxide, and nitrogen oxides from solid waste incineration units. The EPA stated that emission reductions to be derived from regulating the first three categories of incineration, as noted above, "are expected to outweigh those that can be achieved in regulating the categories of incinerators included in the draft list of OSWIs."

In addition to crematories, other types of incinerators included in the draft OSWI list are small municipal waste combustors (with capacities of 39 tons/d or less), residential incinerators, agricultural waste

treatment facilities. The EPA has agreed to publish a final list of OSWIs and a regulatory schedule by December 31, 1993.

EPA plans to prioritize the use of its resources by focusing first on MWCs or municipal waste combustors, then on MWIs or medical waste incinerators, and finally on ICWIs or industrial and commercial waste incinerators. The selection of the year 2000 for publication of OSWI regulations was based on the EPA Administrator's judgment "that the proposed categories of OSWIs are of lesser significance than MWCs, MWIs, and ICWIs, and upon the Administrator's conclusion that it will be a more efficient use of EPA's resources to regulate those three source categories first."

ACA members wishing a copy of the EPA notice should call headquarters at 1-800-645-7700. □

Taken from: American Cemetery

whether regulations will in fact be issued for all types of OSWIs.

incinerators, wood waste incinerators, construction and demolition waste incinerators, and petroleum contaminated soil

Environmental Protection Agency

40 CFR Part 60/Vol 70 No 241

December 16, 2005

Rules and Regulations

Page 74881

9. Various Other Applicability Issues

Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Other Solid Waste Incineration Units; Final Rule excerpt . . .

Human Crematories. Two commenters objected to the exemption of human crematories from the proposed rules. Both commenters argued that the incineration of human bodies emits significant quantities of mercury and other hazardous air pollutants. One commenter objected to EPA's conclusion that human bodies are not solid waste and noted that EPA defines solid waste under the SWDA as any "discarded material." The definition also clarifies that a material is "discarded" if it is "burned or incinerated."

Clean Air Act section 129 regulations deal solely with solid waste combustion units. As noted in the preamble to the proposed rules, in considering the nature of human crematories, EPA has determined that the human body should not be labeled or considered "solid waste." Therefore, human crematories are not solid waste combustion units, and are not a subcategory of OSWI for regulation.

We disagree with the commenter's assertions that human bodies are discarded and that CAA section 129 rules must consider a material to be "discarded" if it is "burned or incinerated." The definition of "discarded" referred to by the commenter is found in 40 CFR part 261, which defines "hazardous waste" for the purpose of implementing the hazardous waste program authorized by the SWDA. In defining "hazardous waste," 40 CFR

part 261 also defines "solid waste" and elaborates on the meaning of "discarded," which is a term used in the definition of solid waste. However, in doing so, 40 CFR part 261 states explicitly in 40 CFR 261.1(b)(1) that this definition of solid waste is only for the purpose of materials that are hazardous wastes. Much of the complexity and specificity of the 40 CFR part 261 definitions is needed to assure that hazardous waste is properly identified, tracked, transported, and disposed of, and is not inappropriately discarded or abandoned. The 40 CFR part 261 details on the meaning of solid waste and discarded are not found in solid waste definitions within the Resource Conservation and Recovery Act (RCRA) rules pertaining to nonhazardous wastes (e.g., 40 CFR part 240 through 40 CFR 259). The regulatory definitions of "solid waste" and "discarded" found in 40 CFR part 261, therefore, do not apply to nonhazardous solid wastes. Section 129 of the CAA regulates only nonhazardous solid wastes. As described in previous **Federal Register** notices pertaining to the proposed and final CISWI rules (64 FR 67104, November 30, 1999 and 65 FR 75342, December 1, 2000) EPA has adopted, under the joint authority of the CAA and RCRA, a definition of solid waste that is used solely to identify nonhazardous solid waste for the regulatory programs authorized by CAA section 129, such as the final CISWI and OSWI rules. The definition of discarded cited by the commenter is not applicable to CAA section 129 rules. However, as stated in the preamble to the proposed OSWI rules, if EPA or States determine in the future that human crematories should be considered for regulation, they would be addressed under other authorities.

Animal Crematories. One commenter expressed support for the proposed decision to exclude animal crematories as a regulated subcategory of the proposed

OSWI rules and supports the proposed exclusion of pathological waste incineration units. The commenter pointed out that the other alternatives to incineration, such as rendering, burial, composting or feeding of the carcass to exotic animals does not address the need for disposal of animal carcasses with an infectious disease. Another commenter contended that animal crematories are solid waste incineration units that must be regulated under CAA section 129.

EPA has not changed our decision to exclude animal crematories and pathological waste incineration units, based on our analysis of their emissions and the adverse impacts that would occur if these units were regulated under the final OSWI rules, as fully described in the preamble to the proposed rules and in the response to comments document.



90 Lambertson Road, Windsor, CT 06095

Phone #: 1-800-842-0355

Fax#: 860-687-7430

AIHA IHLAP Accredited - Laboratory ID 100126

Laboratory Work Order Number: 2011030209

Report Issued To:

Brandon Schaffer
Washington Penn Plastics
450 Racetrack Road
Washington, PA 15301

Date Samples Received: 3/7/2011

Report Date: 3/8/2011

Location Sampled: Washington Penn Plastic Co.

Sample Submitter: Brandon Schaffer

Sample ID	Sample Description	Results		Air Volume or Total Time
		mg/m3	µg	
Mercury Vapor				
3277400559	Area Sample of Unit #2	LT 0.0015	LT0.10	68.4 Liters
3277400554	Shed 32 ft away	LT 0.0014	LT0.10	72 Liters
3277400553	In Roof between Stacks	LT 0.0014	LT0.10	73.8 Liters
3277400552	Area Sample of Unit #1	LT 0.0015	LT0.10	68.4 Liters
3277400557	Blank		LT0.10	

COMMENTS:

Metal sample results have been blank corrected.

Analyte	Media type	MRL	Reference Method	Analysis Date
Mercury Vapor	226-17-1A	0.10 µg	OSHA 140 Digestion followed by ICP/MS - Modified OSHA ID 140	3/8/2011

Please Note: The method reporting limits (MRLs) listed are for normally processed samples. Samples requiring special processing (i.e. dilutions) may have elevated MRLs. N.A. = Not Applicable

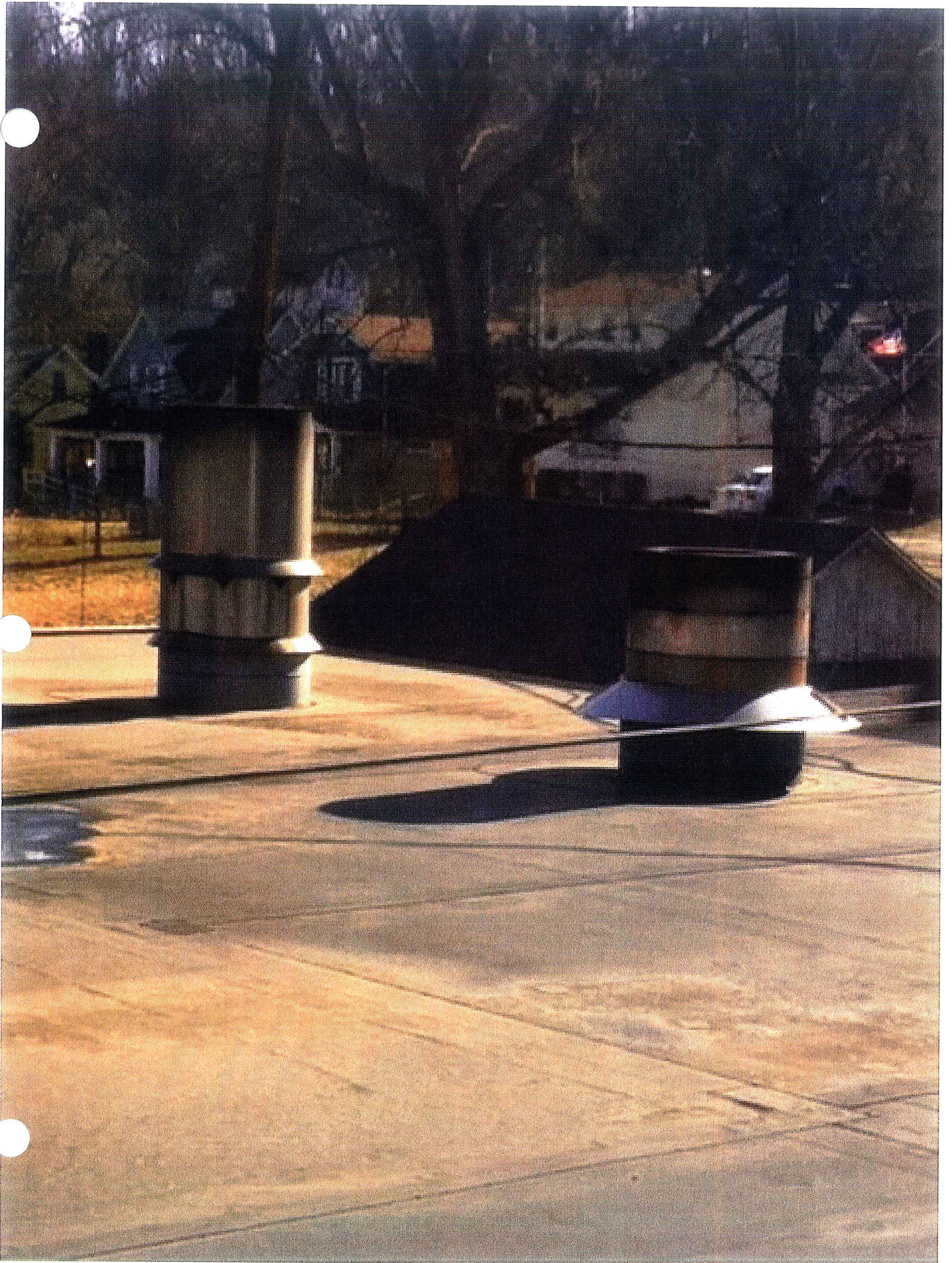
WORKORDER COMMENTS:

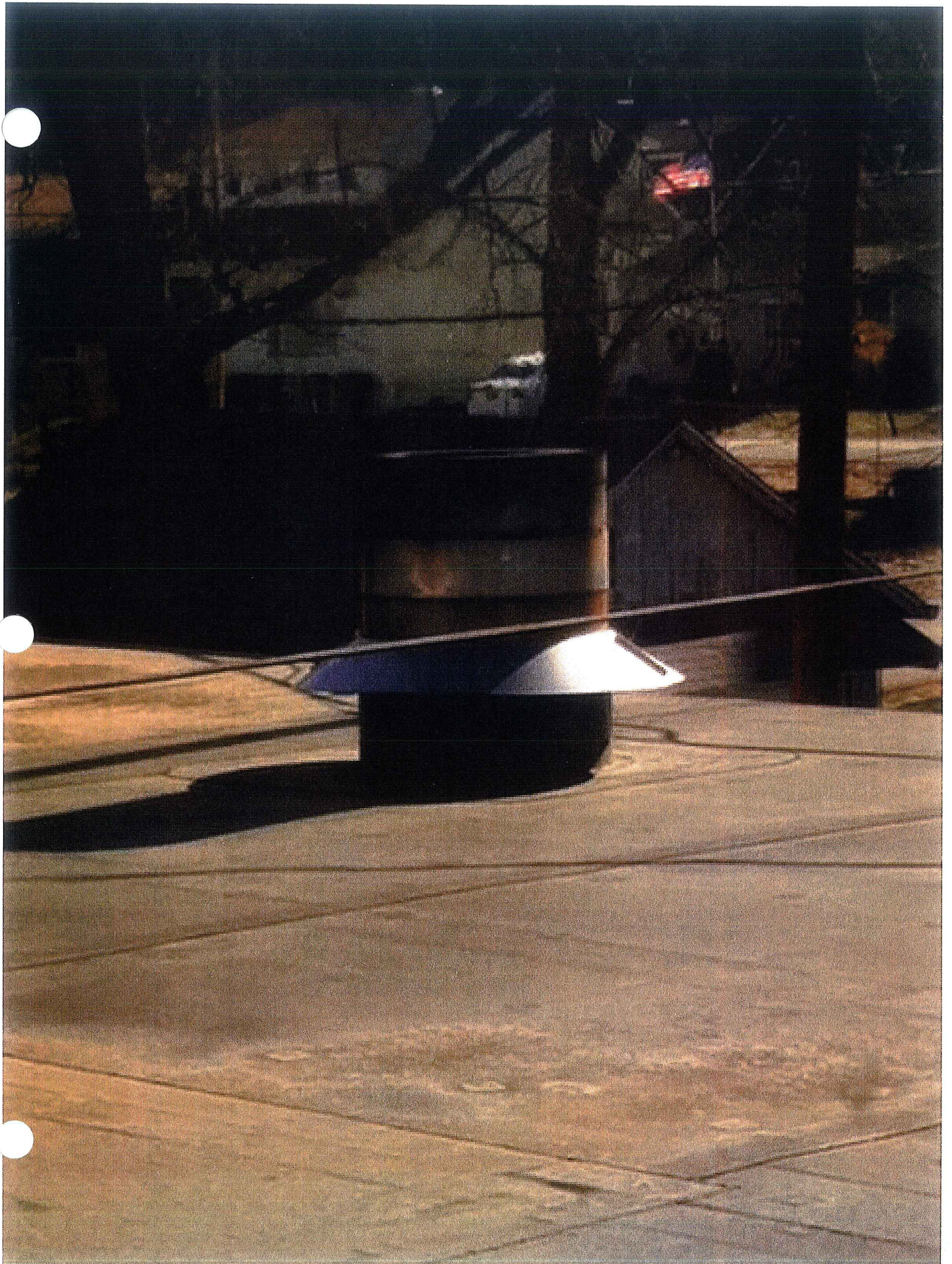
The reported data relate only to the samples as received by the Laboratory. The reported air concentrations have been calculated using information supplied by the customer and have NOT been adjusted to represent a Time Weighted Average (TWA). "LT" indicates less than the method reporting limit (MRL). The contaminant may or may not be present at levels below this concentration. This report shall not be reproduced except in full, without written approval of the laboratory. The samples have not been blank corrected unless otherwise noted. Unless otherwise noted, all samples were received in satisfactory condition.

Approved by: Tom Surveski Josef Chrzanowski George E. Johnson Marcel F. Baril
Tom Surveski Josef Chrzanowski George E. Johnson Marcel F. Baril
QA Manager Production Group Leader Group Leader Laboratory Director

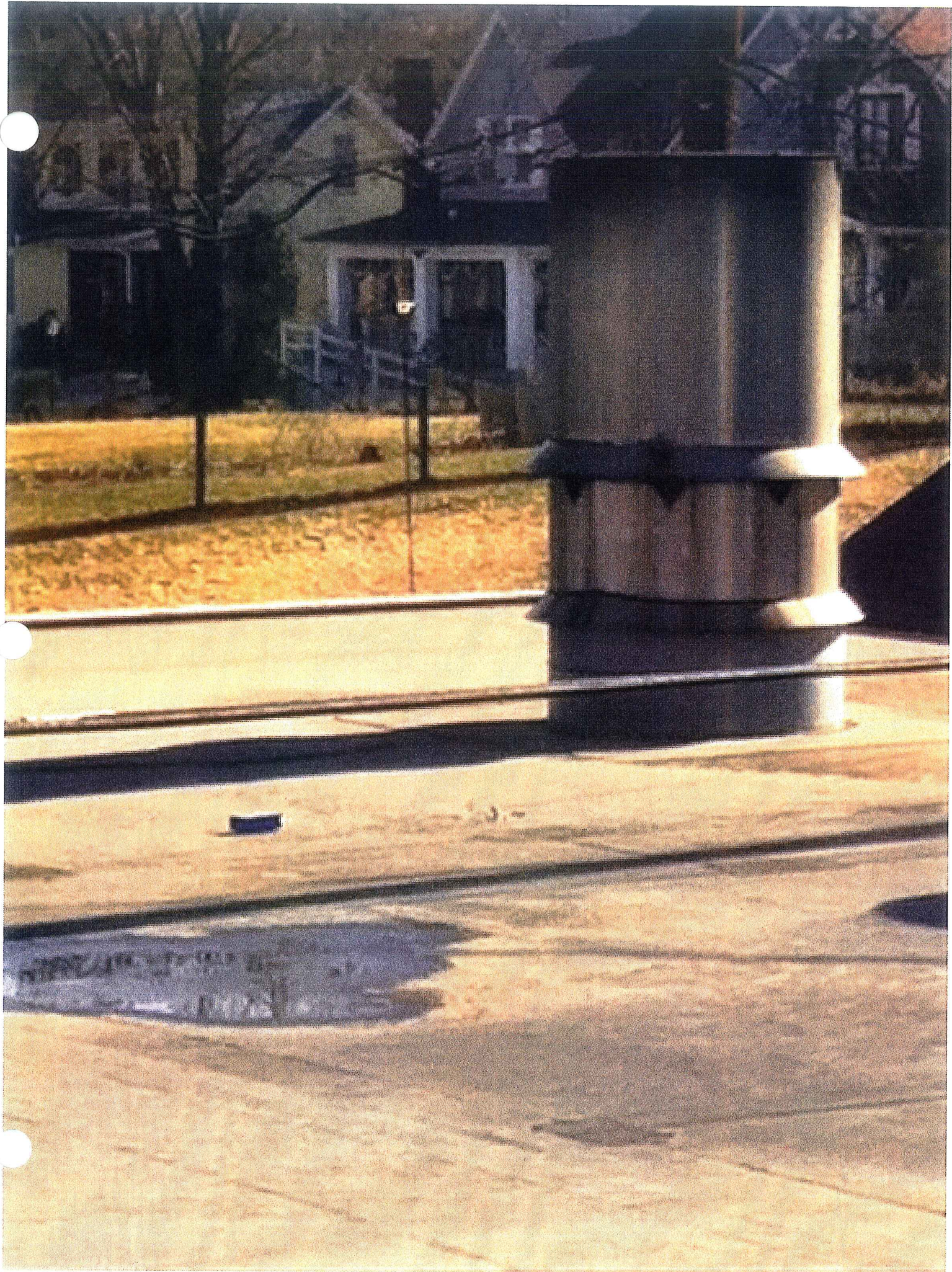


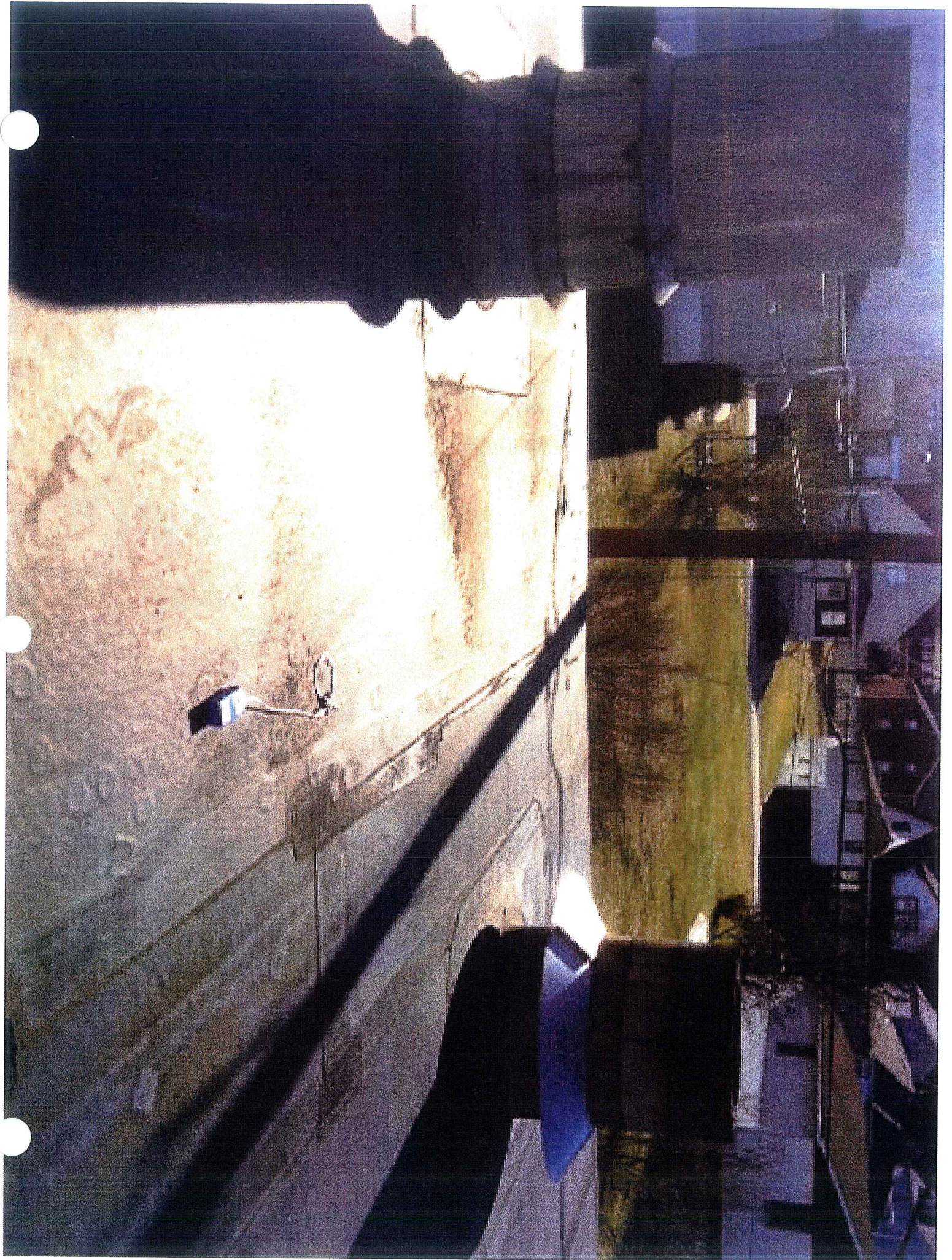




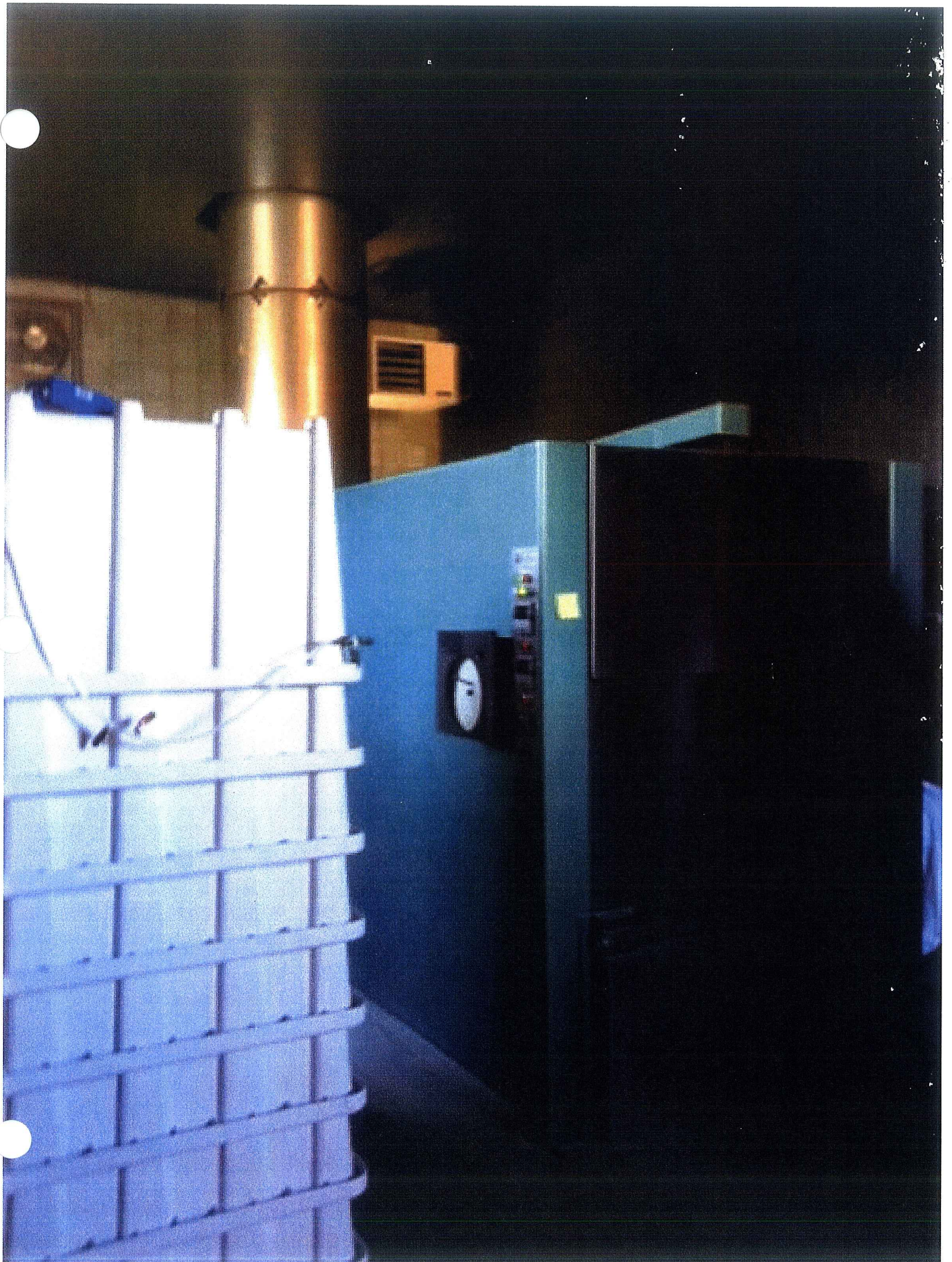


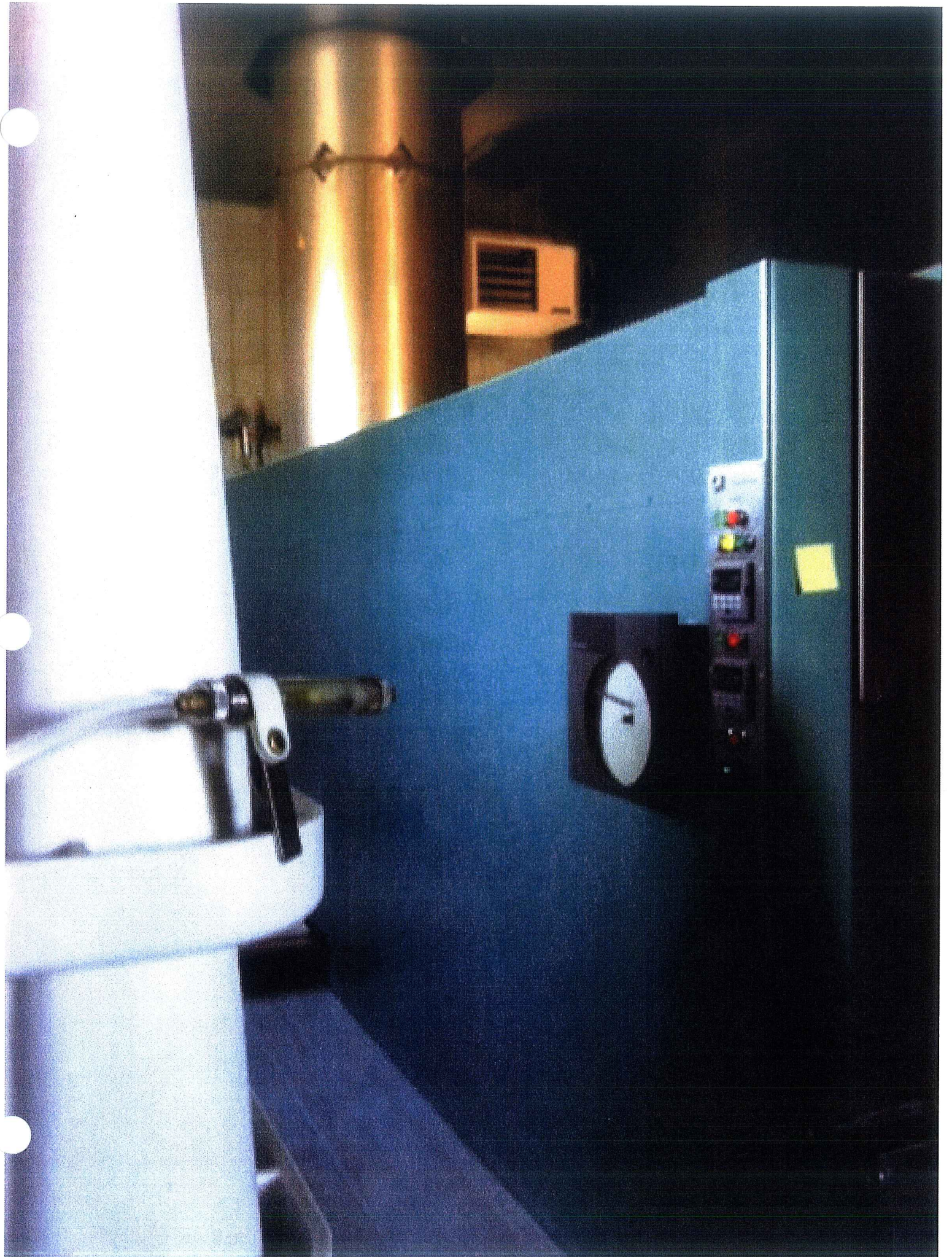


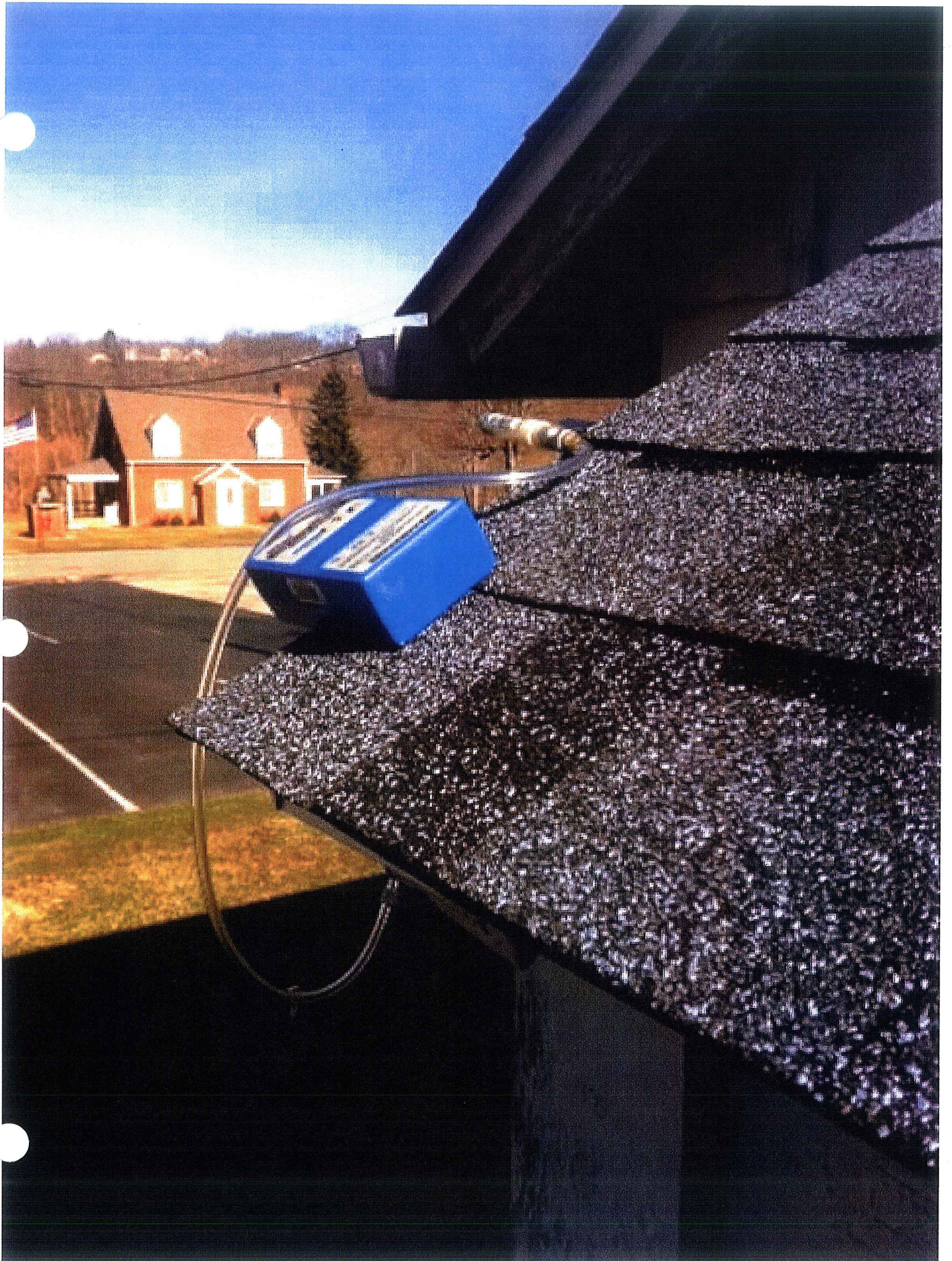


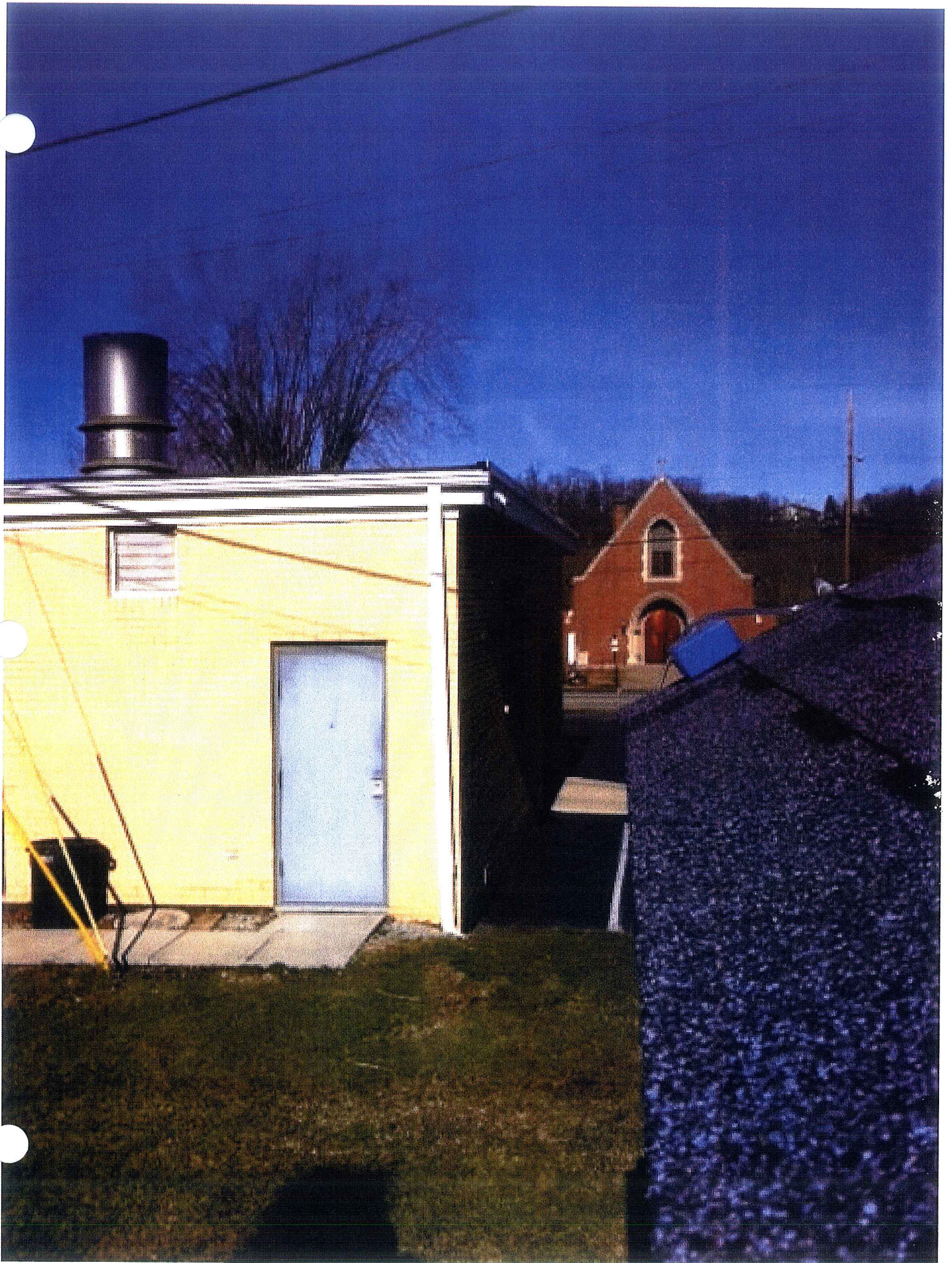


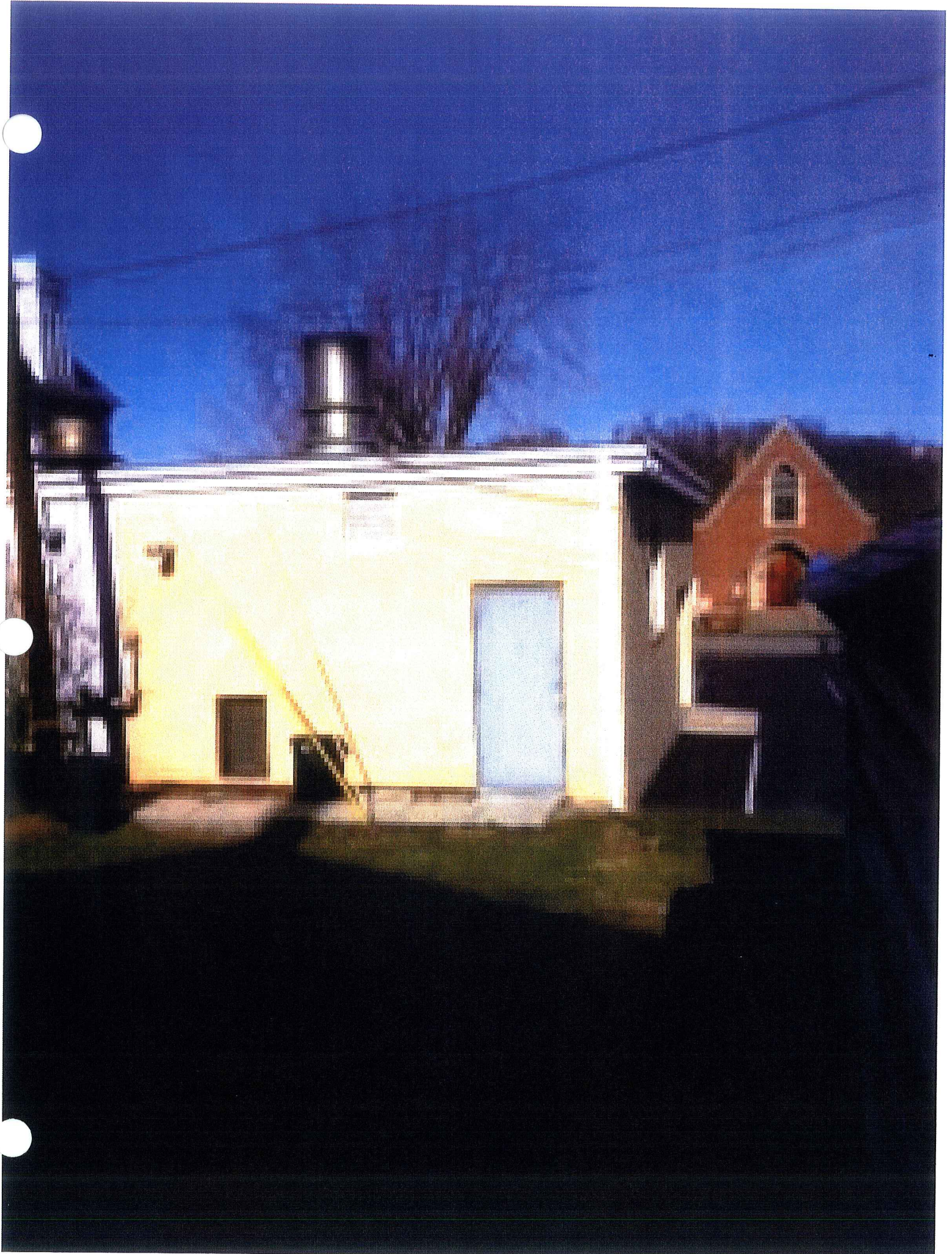


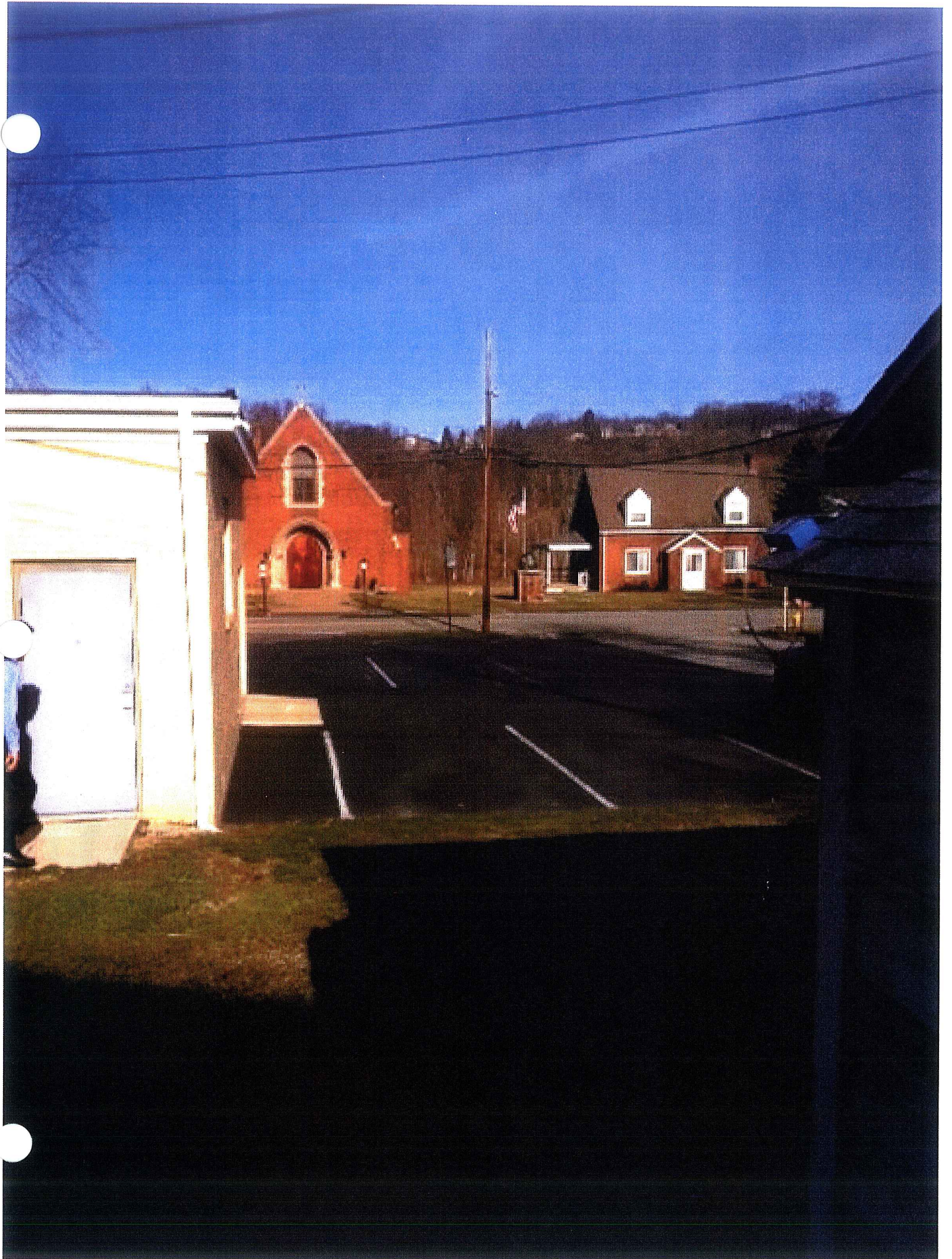
















Tammy L. Ribar

From: Jeff Ross [Jeff.Ross@washpenn.com]
Sent: Thursday, March 10, 2011 11:03 AM
To: Tammy L. Ribar; Mary-Jo Rebelo; belusko1@comcast.net; Richard Violi
Subject: FW: TRAVELERS INDUSTRIAL HYGIENE LABORATORY - 2011030209

I had an opportunity to discuss the results with Zach. He informed me that all of the results were "LT" which means they were below the instruments ability to read. They did not detect any mercury present. Those "LT" values only show how low they can go to detect mercury.

That level of detection is over 16 times lower that the ACGIH recommended level of exposure to mercury.

From: Brandon Schaffer
Sent: Tuesday, March 08, 2011 3:57 PM
To: Jeff Ross; Danielle Andy Belusko
Cc: Zach McCombie
Subject: FW: TRAVELERS INDUSTRIAL HYGIENE LABORATORY - 2011030209

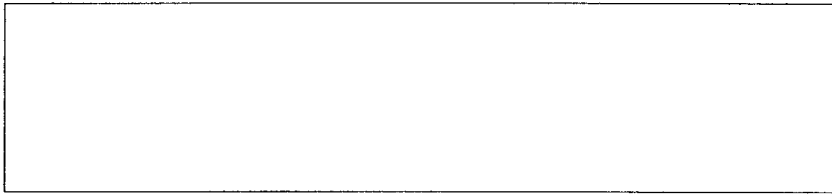
Danielle and Jeff,
Here's the lab's results from last week's air sampling. Results from testing show no exposure to Mercury Vapors above the following published exposure limits for 8-hour shifts.

OSHA's Permissible Exposure Limit for Mercury - .1 mg/m³
American Conference of Governmental Industrial Hygienists (ACGIH) Limit for Mercury - .025 mg/m³

-Brandon

From: MacDonald,Debra A [mailto:DAMACDON@travelers.com]
Sent: Tuesday, March 08, 2011 3:38 PM
To: Brandon Schaffer
Subject: TRAVELERS INDUSTRIAL HYGIENE LABORATORY - 2011030209

Your RUSH Mercury Vapor results are attached. Please contact the laboratory if you have any questions.



Be sure to attend our 2-day Practical Industrial Hygiene seminar on April 26-27.
Class size is limited, so [register](#) soon!

Debra MacDonald
Travelers Industrial Hygiene Laboratory
90 Lamberton Road
Windsor, CT 06095
Phone: 800-842-0355, Ext. 7435
Fax: 860-687-7430

www.travelerslab.com

=====
This communication, including attachments, is confidential, may be subject to legal privileges, and is intended for the sole use of the addr

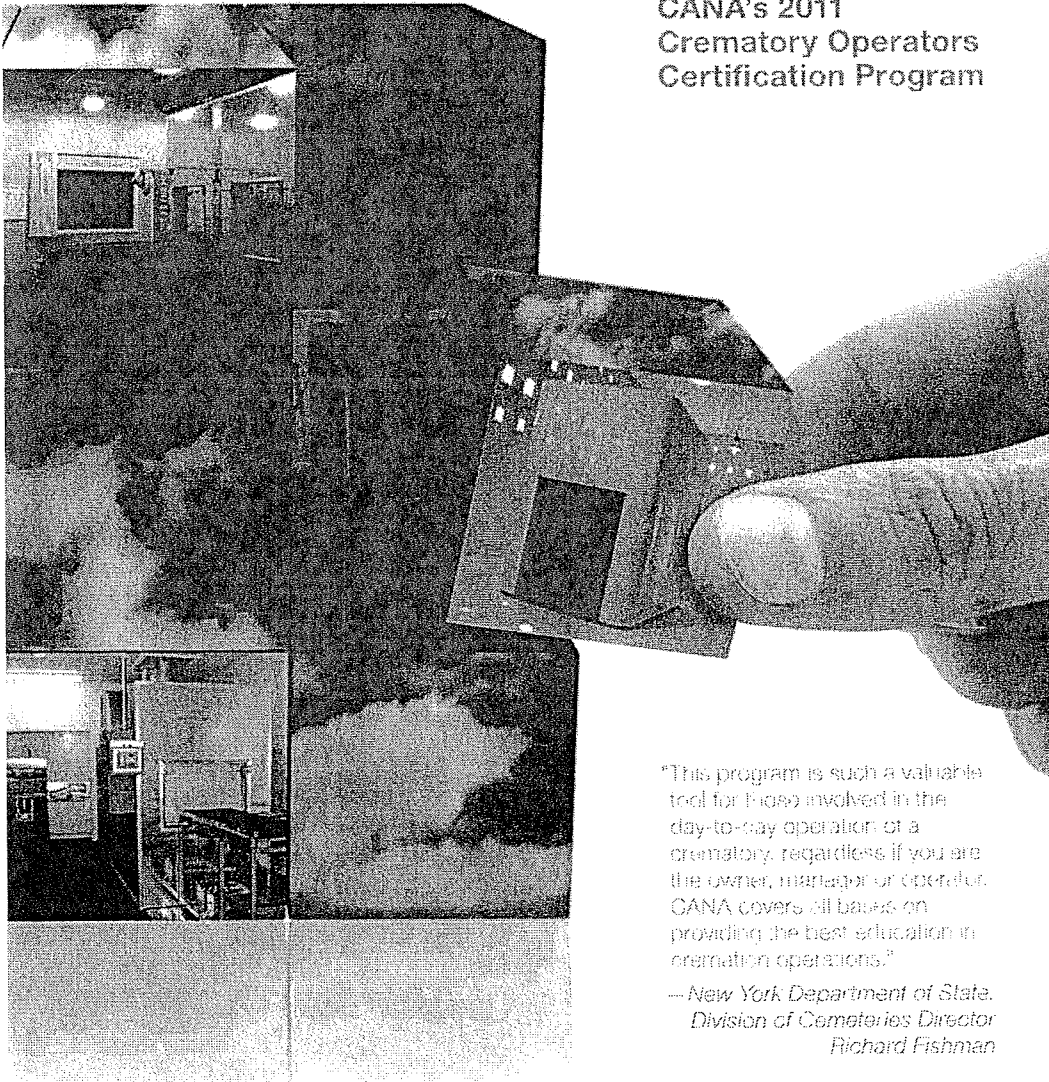
Please consider the environment before printing this email. This e-mail and any files transmitted with it are confidential and are intended for the sole and exclusive use of the individual or entity to whom they are addressed. Personal views and expressions in this communication are those of the originator and may not reflect those of their employer or email server host company. If you are not the original recipient, be advised that you have received this e-mail in error, and that any use, dissemination, forwarding, printing or copying of this e-mail is strictly prohibited.



Cremation Association of North America

Crematory Training for Today Protecting You for Tomorrow

**CANA's 2011
Crematory Operators
Certification Program**



"This program is such a valuable tool for those involved in the day-to-day operation of a crematory, regardless if you are the owner, manager or operator. CANA covers all bases on providing the best education in cremation operations."

—New York Department of State,
Division of Cemeteries Director
Richard Fishman

Crematory Training for Today

The Cremation Association of North America and Matthews Cremation Division invite you to join us for the acclaimed Crematory Operators Certification Program (COCP). In one day, you will gain extensive knowledge — technical, scientific and legal. All of which is proactive prevention for future business.

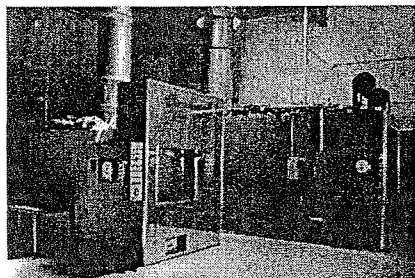
During your certification training, the following issues will be covered:

- Incinerator Terminology
- Principles of Combustion
- Cremation and the Environment
- Incinerator Criteria & Design
- Basics of Operation & Difficult Cases
- General Maintenance & Troubleshooting
- Cremation & Funeral Home Litigation

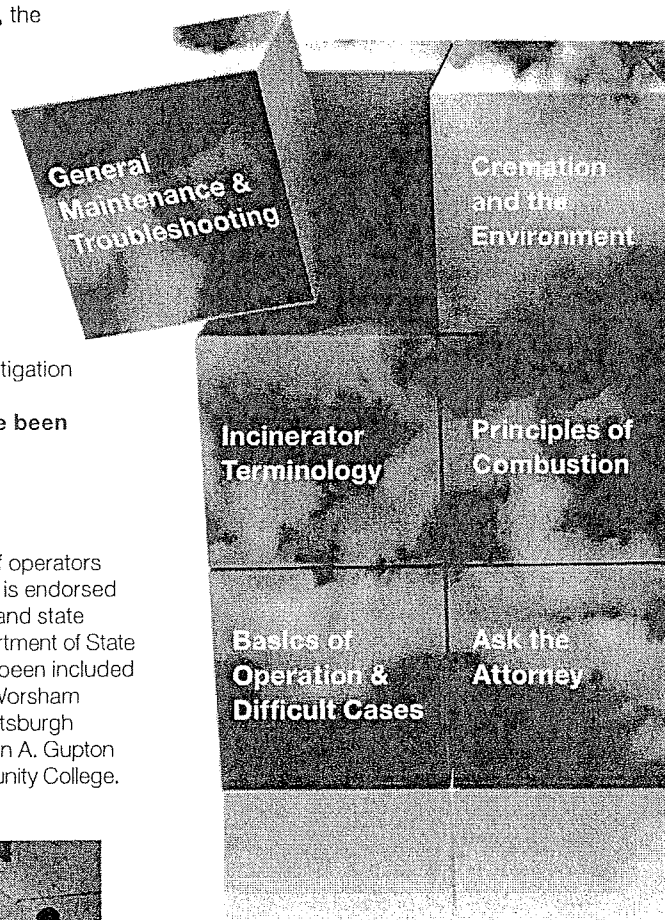
Plus, two new additions have been added to the 2011 program:

- Problem Solving 101
- Ask the Attorney

CANA has certified thousands of operators over twenty years. This program is endorsed by NFDA, FAMIC, state boards, and state associations, the New York Department of State Division of Cemeteries, and has been included as a curriculum requirement at Worsham College of Mortuary Science, Pittsburgh Institute of Mortuary Science, John A. Gupton College, and Kansas City Community College.



CANA
Cremation Association of North America



Keep reading to learn how beneficial the CANA Crematory Operators Certification Program experience can be for you!

Protecting You for Tomorrow

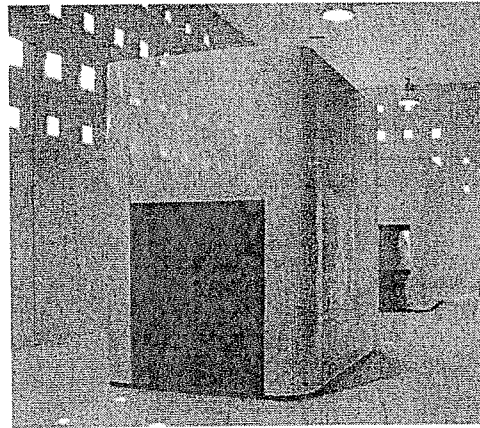
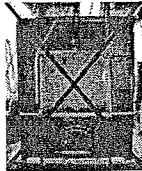
Over the past five years, the cremation rate has increased nearly 20% and is expected to be over 50% by 2020.

Cremation rates continue to rise on an annual basis. Environmental issues regarding crematories are being watched ever so closely. Cremation lawsuits are devastating to the firm and the families. **Don't put your reputation at risk.**

Problem Solving 101

Incinerator Criteria & Design

Cremation & Funeral Home Litigation



The Crematory Operators Certification Program is designed to provide death care professionals of all backgrounds and levels of experience with a thorough knowledge of the practice, the risks, and the proactive measures one can take to have a prosperous cremation practice. Ensure the safety of your employees and help protect your business by registering your crematory operators for this important program.

"The Crematory Operator Certification Program gives an employer the confidence he or she needs in an operator, and the confidence to know that because of the excellent education provided by CANA, the operator is serving families properly, professionally and knowledgeably."

— Mark Durbin, Lexington Crematory Co.

The Crematory Operators Certification Program Experience

7:00 a.m. – 7:30 a.m.	Registration Open
7:30 a.m. – 7:45 a.m.	Welcome & Introductions
7:45 a.m. – 9:45 a.m.	Classroom Instructions: Sections 4, 5, 6, 7 <ul style="list-style-type: none"> • Terminology • Principles of Combustion • Cremation & the Environment • Incinerator Design/Criteria
9:45 a.m. – 10:00 a.m.	Break
10:00 a.m. – 11:15 a.m.	Classroom Instructions: Sections 8, 9, 11 <ul style="list-style-type: none"> • Basics of Operation • General Maintenance & Troubleshooting • Handling & Exposure Control
11:15 a.m. – 12:00 p.m.	Lunch
12:00 p.m. – 1:00 p.m.	Classroom Instructions: Sections 8, 9, 11 <ul style="list-style-type: none"> • Basics of Operation • General Maintenance & Troubleshooting • Handling & Exposure Control
1:00 p.m. – 2:00 p.m.	Litigation
2:00 p.m. – 2:15 p.m.	Break
2:15 p.m. – 2:45 p.m.	Problem Solving 101
2:45 p.m. – 3:30 p.m.	Ask the Attorney
3:30 p.m.	Testing Period
4:30 p.m. – 5:30 p.m.	CSCT (CANA Senior Certified Technician) & CMCT (CANA Master Certified Technician) Additional Hour of Course Review

New in 2011!

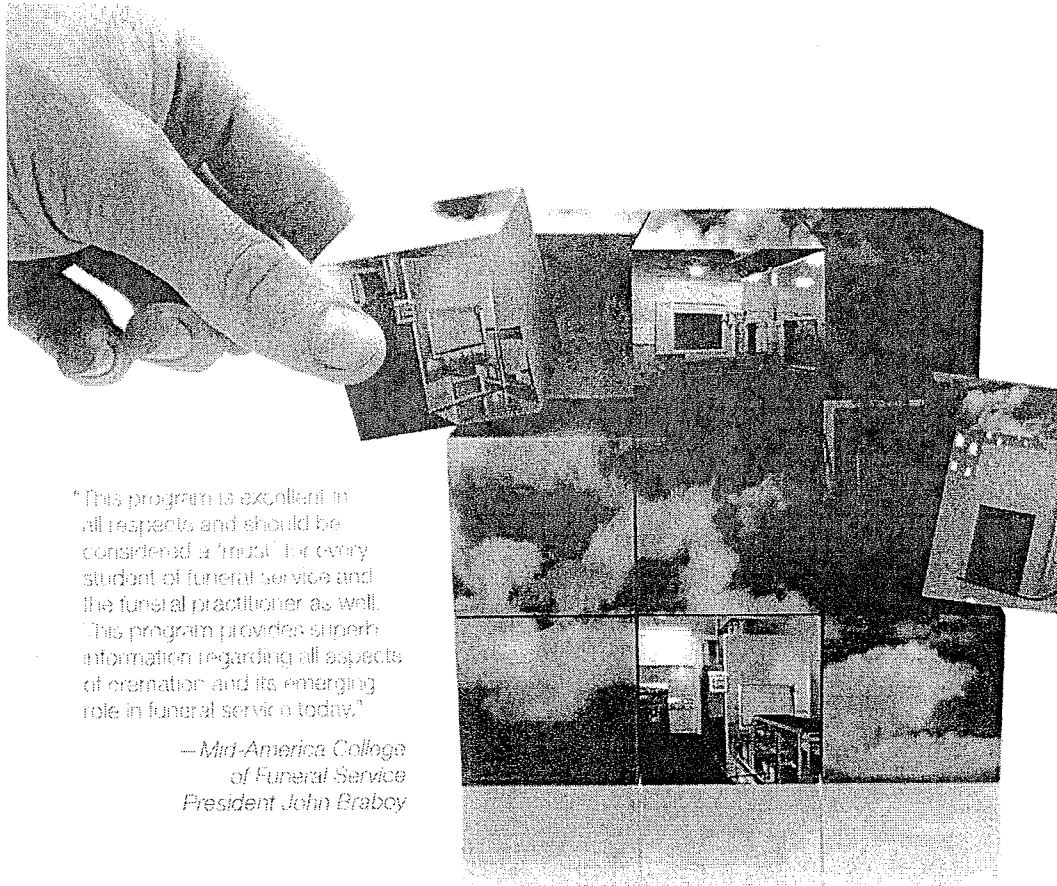
CANA and Matthews Cremation Division constantly work to ensure the crematory operators certification is up-to-date on the latest issues and needs of death care professionals!

Problem Solving 101

Interacting with peers and discussing issues relevant to your organization is sometimes the best way to solve problems. During *Problem Solving 101*, you'll have the opportunity, in groups with fellow attendees, to brainstorm solutions for your everyday cremation needs.

Ask the Attorney

Chris Farmer will speak about many current legal topics that you need to know as an owner or operator of a crematory. He will discuss the importance of documentation, record keeping, wording of authorizations among other issues. Chris will also share current and hot-off-the-press trends in litigation, and employment law tips you must know!



"This program is excellent in all respects and should be considered a 'must' for every student of funeral service and the funeral practitioner as well. This program provides superb information regarding all aspects of cremation and its emerging role in funeral service today."

—Mid-America College
of Funeral Service
President John Braboy

Opportunities to Attend

The Crematory Operators Certification Program is growing! In 2011, CANA and Matthews Cremation Division offer you the following opportunities to attend.

FEBRUARY 15, 2011	Pre-Symposium COCP, Caesars Palace, Las Vegas, NV
APRIL 1, 2011	John A. Gupton College, Nashville, TN
APRIL 15, 2011	Kansas City Community College, Kansas City, KS
JUNE 9, 2011	Kates-Boylston COCP, Philadelphia, PA
OCTOBER 22, 2011	Pre-convention COCP, McCormick Place, Chicago, IL

Stay tuned to www.cremationassociation.org! We're constantly working with industry leaders, educational institutions and state regulators to expand the Crematory Operators Certification Program throughout the United States.

Reasons to Attend

A common sense approach is not enough to ensure proper operational procedures. Today's crematory operator needs the education and training to operate efficiently and safely. CANA's Crematory Operators Certification Program offers just that and much more!

- Gain a better understanding of current terminology
- Obtain insight concerning recordkeeping and its importance
- Become a "watchdog" regarding authorization forms
- Learn the latest in operating procedures
- Discover how to cremate problem cases without fear
- Become more of an environmentally-friendly operator
- Gain awareness of state laws regarding cremation

Register today by completing the registration form included in this brochure. For more information, visit our Web site at www.cremationassociation.org or call CANA Headquarters at (312) 245-1077.

Features of the Program

Michael Nicodemus COCP Chair



Michael Nicodemus, the CANA Crematory Operator Certification Program Chair, has been a featured speaker at various state and national conventions on cremation marketing and cremation litigation. He's featured and utilized as an expert source on cremation in numerous national publications, including *Newsweek Magazine*, *MSNBC*, *USA Today* and *ABC News* radio.

Richard Thomas Service & Repair Sales - Eastern Region, Matthews Cremation



Richard Thomas has been with Matthews Cremation Division consisting of Industrial Equipment & Engineering, All Crematory and Elder Davis Caskets for over 33 years. He has held many positions during his 33 years with Matthews. Rick is certified to conduct crematory operator training, and has trained thousands of crematory operators in the proper operation and maintenance of cremation equipment.

Steven P. Schaal President - North American Region, Matthews Cremation



Steve represents over 15 years in the death care industry. Steve is responsible for all domestic and international sales and marketing functions for both the IEE/ALL brand cremation equipment manufactured in Orlando, Florida and the Elder-Davis cloth-covered and alternative caskets manufactured in Richmond, Indiana.

Ron Salvatore Equipment Consultant, Matthews Cremation



Ron Salvatore has been with Matthews Cremation Division consisting of Industrial Equipment & Engineering, ALL Crematory and Elder Davis Caskets for more than 20 years. Ron is a certified crematory operator trainer and has trained more than 2,000 crematory personnel in the proper operation and maintenance of cremation equipment, exposure control and proper recordkeeping. He has published numerous cremation-related articles and writes a monthly column for *Funeral Home and Cemetery News* (published by Nomis Publications) entitled "Cremation Issues and Answers."

Tony Lombardi Division Manager of Manufacturing, Service & Repair, Matthews Cremation



Tony Lombardi is the Division Manager of Production, Service and Repair for Matthews International's Cremation Division (MCD) headquartered in Orlando, Florida. Tony's involvement with the cremation industry began in the 1980's where he was involved in the operation of high volume crematory, and continued in 1991 when he joined the MCD team to manage large crematory design and installation projects in the Far East. He has worked in various capacities in the management, design, manufacturing and service of cremation equipment.

Chris Farmer Speaker, *Ask the Attorney*



Chris Farmer is General Counsel to, and on the Board of Directors for CANA. He provides legal counsel to CANA, its board and its membership. Farmer is also Of Counsel to Sheehy, Ware & Pappas, P.C., in Houston, Texas, and is a founding member of the firm's funeral and cemetery practice group, representing one of the most experienced and respected collection of attorneys practicing death care law in Texas and beyond.

CANA's 2011 Crematory Operators Certification Program Registration Form

Registrant Information

FIRM NAME _____

ATTENDEE NAME* _____

ADDRESS _____

CITY _____ STATE/PROVINCE _____ ZIP/POSTAL CODE _____

TELEPHONE _____ FAX _____

ATTENDEE E-MAIL _____

ATTENDEE MEMBERSHIP ID # (must be completed to receive CANA member rate)

*If you have others from your company registering for this event, please copy this registration form and have each employee fill out his or her own form. Please contact CANA Headquarters for Senior and Master certification details.

Please note: CANA memberships are held on an individual basis. Membership must be in your name in order to qualify for the CANA Member registration rate. Affiliate Memberships are available to additional individuals from a company that maintains a Regular Membership. Consult the CANA Web site (www.cremationassociation.org) for detailed membership information.

Event of Choice

Date	Event	Registration Deadlines
<input type="checkbox"/> FEBRUARY 15, 2011	Pre-Symposium COCP, Caesars Palace, Las Vegas, NV	February 7, 2011
<input type="checkbox"/> APRIL 1, 2011	John A. Gupton College, Nashville, TN	March 25, 2011
<input type="checkbox"/> APRIL 15, 2011	Kansas City Community College, Kansas City, KS	April 6, 2011
<input type="checkbox"/> JUNE 9, 2011	Kates-Boylston COCP, Philadelphia, PA	June 3, 2011
<input type="checkbox"/> OCTOBER 22, 2011	Pre-convention COCP, McCormick Place, Chicago, IL	October 14, 2011

Registration Fees

if you would like to earn Continuing Education Units for Funeral Directors and Embalming Licenses while attending the Crematory Operators Certification Program, please contact CANA Headquarters **sixty (60) days prior** to the program.

CANA Members: \$495 Non-Members: \$595*

***Note: Join CANA now and \$100 will be applied toward your annual membership dues.**

Download a CANA membership application from the CANA Web site, complete it and return it with this registration form and payment.

Payment

- Check made payable to CANA in the amount of \$ (USD) is enclosed.
- Credit Card: \$ (USD) MasterCard Visa American Express

CREDIT CARD #

EXPIRATION DATE

CARDHOLDER'S NAME

SIGNATURE

Send Payment and Form to:

Checks

Mail to: CANA, 401 N. Michigan Ave., Suite 2200, Chicago, Illinois 60611 USA

Credit Cards

Fax to: (312) 321-4098 or

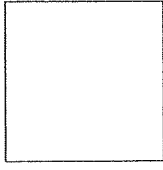
Mail to: CANA, 401 North Michigan Ave., Suite 2200, Chicago, Illinois 60611 USA

For questions please call CANA Headquarters at (312) 245-1077 or e-mail: CANA@cremationassociation.org.



Cremation Association of North America

401 North Michigan Avenue
Chicago, Illinois 60611 USA
Phone: (312) 245-1077
Fax: (312) 321-4098
E-mail: info@cremationassociation.org



Dates to Remember

FEBRUARY 15, 2011
Pre-Symposium COCP
Caesars Palace
Las Vegas, NV

JUNE 9, 2011
Kates-Boylston COCP
Philadelphia, PA

APRIL 1, 2011
John A. Gupton College
Nashville, TN

OCTOBER 22, 2011
Pre-convention COCP
McCormick Place
Chicago, IL

APRIL 15, 2011
Kansas City
Community College
Kansas City, KS

CANA Crematory Operators Certification Program

Registration Form



Friday May 13, 2011 – John Tyler Community College
Sponsored by Virginia Funeral Directors Association

Limited Space Availability – Registrations MUST be received no later than 10 days before the event!

Instructions

Please read this entire document carefully and complete this application in its entirety. If registration form is incomplete, it will be returned to the attendee to be completed, which may affect space availability. Please mail the completed form along with full payment to CANA Headquarters, 401 N. Michigan Ave., Suite 2200, Chicago, IL 60611, or fax to (312) 321-4098.

Company Information

Company Information:

DANIELLE ANDY BELUSKO
 Company Name
320 ANNUITY DRIVE
 Mailing Address
WASHINGTON PA 15301
 City State/Province Zip/Postal Code
 Country _____
 Phone _____ Fax _____
 Email _____

Payment Information

Total Balance Due \$ _____
 Our Check is enclosed (payable to CANA)
 Please charge this amount to this credit card \$ 1090.00
 Credit Card # _____
 Exp. Date 9/13
 Cardholder's Name DANIELLE ANDY BELUSKO
 Cardholder's Signature _____

Please return completed form with payment to:
 CANA Headquarters
 401 N. Michigan Ave.
 Suite 2200
 Chicago, IL 60611-4267 USA
 Or fax to: (312) 321-4098

Attendee Information

Directions: List all attendee names below and check the appropriate event package and location for each individual from your company. Please note: CANA memberships are held on an individual basis. Membership must be in your name in order to qualify for the CANA Member registration rate. CANA Affiliate Memberships are available to additional individuals from a company who maintains a Regular Membership. Consult the CANA website (www.cremationassociation.org) for detailed membership information.

Attendee Name	Member Rate	Non Member	Student	Member ID
<u>ROD BELUSKO</u>	<input type="checkbox"/> \$495	<input checked="" type="checkbox"/> \$595	<input type="checkbox"/> \$295	_____
<u>DANIELLE ANDY BELUSKO</u>	<input checked="" type="checkbox"/> \$495	<input type="checkbox"/> \$595	<input type="checkbox"/> \$295	<u>107211</u>
_____	<input type="checkbox"/> \$495	<input type="checkbox"/> \$595	<input type="checkbox"/> \$295	_____

By my signature below, I agree to receive electronic communications from CANA and its related industry partners.

X _____

Date: 3/16/11

1) Washington Penn Plastic Co., Inc
2) Arden Division

Date/Time: Mar.17. 2011 10:26AM

File No.	Mode	Destination	Pg (s)	Result	Page Not Sent
8077	Memory TX	13123214098	P. 1	OK	

Reason for error
E.1) Hang up or line fail
E.3) No answer

E.2) Busy
E.4) No facsimile connection

CANA Crematory Operators Certification Program

Registration Form



Friday May 13, 2011 - John Tyler Community College
Sponsored by Virginia Funeral Directors Association

Limited Space Availability - Registrations MUST be received no later than 10 days before the event!

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Please read this entire document carefully and complete this application in its entirety. If registration form is incomplete, it will be returned to the attendee to be completed, which may affect space availability. Please mail the completed form along with full payment to CANA Headquarters, 401 N. Michigan Ave., Suite 2200, Chicago, IL 60611, or fax to (312) 321-4098.

Company Information

Company Information:

Company Name: DANIELE ANDY BELUSKO
320 ANNUITY DRIVE
Washington PA 15301
City: WASHINGTON PA 15301
Country: [Redacted]
Phone: [Redacted] Fax: [Redacted]

Payment Information

Total Balance Due \$
 Our Check is enclosed (payable to CANA)
 Please charge this amount to this credit card \$1090.00
 AMEX VISA MasterCard
Credit Card # [Redacted]
Exp. Date [Redacted]
Cardholder's Name: DANIELE ANDY BELUSKO
Cardholder's Signature: [Redacted]

Please return completed form with payment to:
CANA Headquarters
401 N. Michigan Ave.
Suite 2200
Chicago, IL 60611-4267 USA

Or fax to: (312) 321-4098

Attendee Information

Directions: List all attendee names below and check the appropriate event package and location for each individual from your company. Please note: CANA memberships are held on an individual basis. Membership must be in your name in order to qualify for the CANA Member registration rate. CANA Affiliate Memberships are available to additional individuals from a company who maintains a Regular Membership. Consult the CANA website (www.canaonline.com/registration) for detailed membership information.

Attendee Name	Member Rate	Non Member	Student	Member ID
ROD BELUSKO	<input type="checkbox"/> \$495	<input checked="" type="checkbox"/> \$595	<input type="checkbox"/> \$295	
DANIELE ANDY BELUSKO	<input checked="" type="checkbox"/> \$495	<input type="checkbox"/> \$595	<input type="checkbox"/> \$295	107211
	<input type="checkbox"/> \$495	<input type="checkbox"/> \$595	<input type="checkbox"/> \$295	

By my signature below, I agree to receive electronic communications from CANA and its related industry partners.

X [Signature] Date: 3/16/11

Mary-Jo Rebelo

From: Danielle Andy Belusko [belusko1@comcast.net]
Sent: Friday, March 18, 2011 8:18 AM
To: Mary-Jo Rebelo; Tammy L. Ribar; Jeff Ross; Richard Violi
Subject: Fwd: funeral home

COPY

FYI - I do not know him... But thanks

Sent from my iPhone

Begin forwarded message:

From: William Menni <williammenni@gmail.com>
Date: March 17, 2011 10:23:56 PM EDT
To: belusko1@comcast.net
Subject: funeral home

Dear Peters Township Board;

In support of a new funeral home establishment in Peters Twp, many reasons come to mind. In the 30 years that I have practiced as a licensed funeral director/embalmer, I have worked in the south hills many of those years, at well established respected funeral firms. The south hills have grown increasingly both in business and residential. As you find Home Depot on one corner Lowes will emerge soon close by, or vice a versa. CVS pharmacy will usually be not to far from a Wallgreens. Car dealers will build next to each other and reasons for a share of the market. This has been proven to be healthy for a community because it allows members of that given area a choice. People do not like to be driven to any one direction, competition allows every family the right to choose of whom they wish to support. This brings us to the exact reason for supporting a new funeral establishment in your community so people can turn left or right when such an emotional time presents itself. Trusting a funeral director who you or your family may know on a personal level surely helps in the healing process. Unlike any other business, the funeral industry deals with families at the apex of emotion. Sitting with a licensed funeral director that you have chosen as opposed to being there because it is the only funeral home available makes all the sense that any community should need to realize in order to support Daniel in her profession as a funeral director.

Thank you,
William E. Menni Licensed Funeral Director/Embalmer

Tammy L. Ribar

From: Danielle Andy Belusko [belusko1@comcast.net]
Sent: Wednesday, March 16, 2011 4:10 PM
To: Jeff Ross; Mary-Jo Rebelo; Tammy L. Ribar; Richard Violi
Subject: Fwd: Crematory

Sent from my iPhone

Begin forwarded message:

From: McLaughlin Builders <joemclaughlin1956@comcast.net>
Date: March 16, 2011 3:59:31 PM EDT
To: belusko1 <belusko1@comcast.net>
Subject: Fwd: Crematory

----- Forwarded Message -----

From: "McLaughlin Builders" <joemclaughlin1956@comcast.net>
To: "EJZuk" <EJZuk@peterstownship.com>
Sent: Wednesday, March 16, 2011 3:57:42 PM
Subject: Crematory

Ed

I am writing this to you to forward on to council.

Dear council member

I am writing to urge peters twp. to support the crematory that is proposed in the old lazyboy building.(rt 19)

Many residents have given very emotional testimony as opposition to this. While I am sympathetic to their concerns,they simply need as council does

also to prove their point. I'm sure we are all exposed to greater health risks in our everyday life,from florescent light bulbs to the chem-lawn we

spray on our lawns. I have attended all the meetings concerning this topic and have not heard 1 fact I believed from the anti-group.

Our own P.T. staff has done research, air,testing plus an on site visit to see a cremation and i get no impression that they are in agreement with this anti-group.

I did read their report dated 3-10-11 (Emily and Scott) very good work from our staff.

This group makes a very passionate appeal, but they need to stay on topic, as does this council. I know by following your recent comments

on the Marcellus shale topic you have very strongly stated you do not want to spend tax dollars on court battles. This particular issue I also think

it to be evident our solicitor needed to spend a little more time with.

As a lifelong resident of the twp. and a business owner in addition to a commercial property owner on this rt. 19 corridor I urge council to look with an open

mind to the facts and approve this. Planning commission made their minds up before their meeting, please listen to everyone.

The Audia group has worked with staff to find a site, and will be filling an empty eyesore of a building. Not only will they provide us with a new look at that

intersection (which may encourage the neighbor to the north ,sears/ schwotzer to re-evaluate his curb appeal) it will give us a service, a choice and

provide competition. There is a shameless business working here to keep a monopoly.

This business will be a great value to our community, We should be a little more welcoming as a group.

I trust in you to look at the facts and not to punt this one to the courts to decide.

Joseph J. McLaughlin

Tammy L. Ribar

From: Danielle Andy Belusko [belusko1@comcast.net]
Sent: Sunday, March 13, 2011 7:59 AM
To: Mary-Jo Rebelo; Tammy L. Ribar; Richard Violi
Subject: Fwd: Cremation Complaints

Sent from my iPhone

Begin forwarded message:

From: "Jeff Ross" <rossjr2002@gmail.com>
Date: March 11, 2011 10:25:44 PM EST
To: "Danielle Andy Belusko" <belusko1@comcast.net>
Subject: FW: RE: Cremation Complaints

fyi

Respectfully,

Jeff Ross

(724) 554-5876

From: Basher, Najeeb [mailto:NBasher@achd.net]
Sent: Friday, March 11, 2011 2:12 PM
To: rossjr2002@gmail.com
Subject: RE: RE: Cremation Complaints

There is no crematory in Uniondale Cemetary. Crematories do not produce any odors. They run at a temperature of 1800F a temperature at which any odorous compounds would be burned.

Najeeb Basher, Inspection Supervisor
Air Quality Program
Allegheny County Health Department
301 39th Street

3/18/2011

> Allegheny County Health Department

>

>

> 301 39th Street

>

>

> Pittsburgh, PA 15201-1891

>

>

> Phone: (412)578-8135

>

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> Fax: (412)578-8144

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> nbasher@achd.net

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> From: Jeff Ross [mailto:rossjr2002@gmail.com]

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> Sent: Tuesday, March 08, 2011 2:56 PM

>

>

> To: Basher, Najeeb

>

>

> Subject: RE: Cremation Complaints

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> Fax: (412)578-8144

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> nbasher@achd.net

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> "Telephone: 724-554-5876"Message from: Jeff Ross

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> at rossjr2002@gmail.com

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> Hidden: GeneralForm

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> Name: Jeff Ross

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>

> E-mail: rossjr2002@gmail.com

>

>

> Subject: Cremation Units

>

>

> Comment: How many complaints have you received over the last 36 months for cremation units?

>

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> If you have, what was the complaint and how was it resolved.

>

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> If not, when was the last time you received a complaint?"

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Document Retrieval Result

63 P.S. § 479.2
§ 479.2. Definitions
Effective: [See Text Amendments]

63 P.S. § 479.2

Purdon's Pennsylvania Statutes and Consolidated Statutes Currentness
Title 63 P.S. Professions and Occupations (State Licensed) (Refs & Annos)
Chapter 14. Funeral Directors (Refs & Annos)
Funeral Director Law (Refs & Annos)
➔ **§ 479.2. Definitions**

The following terms as used in this act shall, unless the context indicates otherwise, have the following meanings:

(1) The term "funeral director" shall include any person engaged in the profession of a funeral director or in the care and disposition of the human dead, or in the practice of disinfecting and preparing by embalming the human dead for the funeral service, burial or cremation, or the supervising of the burial, transportation or disposal of deceased human bodies, or in the practice of funeral directing or embalming as presently known, whether under these titles or designation or otherwise. The term "funeral director" shall also mean a person who makes arrangements for funeral service and who sells funeral merchandise to the public incidental to such service or who makes financial arrangements for the rendering of such services and the sale of such merchandise.

(2) The word "board" shall mean State Board of Funeral Directors in the Department of State.

(3) The word "department" shall mean the Department of State of this Commonwealth.

(4) The term "resident interne" shall mean any person operating under or with a funeral director for the purpose of learning the profession, to the end that he may become a licensed funeral director. The term shall also include a student apprentice serving as such on the effective date of this act under any law repealed hereby.

(5) The term "student trainee" shall mean any person accepted for matriculation at a mortuary college or university specializing in mortuary subjects which have been approved by the American Board of Funeral Service Education, Inc.

(6) The term "funeral establishment" shall mean every place or premise approved by the State Board of Funeral Directors wherein a licensed funeral director conducts the professional practice of funeral directing including the preparation, care and funeral services for the human dead.

(7) The word "preceptor" shall mean a licensed funeral director under or with whom a resident interne is registered and operates.

(8) The term "school of embalming" shall mean a mortuary college, institute or university offering a course of actual class work in didactic and laboratory studies in a manner accredited by the American Board of Funeral Service Education, Inc.

(9) The term "profession" as used in this act shall mean the aggregate of all funeral service licensees and their duties and responsibilities in connection with the funeral as funeral directors licensed under this act.

(10) The term "advertisement" shall mean the publication, dissemination, circulation or placing before the public, or causing directly or indirectly to be made, published, disseminated or placed before the public any announcement or statement in a newspaper, magazine or other publication, or in the form of a book, notice, stationery, circular, pamphlet, letter, handbill, poster, bill, calendar, sign, placard, cards, labels or tags or over any radio or television station whenever applicable to any rules and regulations approved by the board.

(11) The term "full-time supervisor" shall mean a licensed funeral director who is a registered supervisor of no more than one funeral establishment and who is accessible to serve the public at the funeral establishment which he is supervising and is not engaged in any activity, business or profession, including assisting other funeral directors, which substantially interferes with or prevents the supervision of the practice carried on by the funeral establishment which he supervises.

CREDIT(S)

1952, Jan. 14, P.L. (1951) 1898, § 2. Amended 1959, Aug. 10, P.L. 658, § 2; 1968, July 31, P.L. 1008, No. 295, § 1; 1978, Oct. 5, P.L. 1074, No. 250, § 1, effective in 60 days.
63 P.S. § 479.2, PA ST 63 P.S. § 479.2

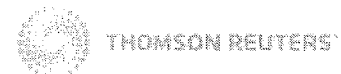
Current through end of the 2010 Regular and First Special Sessions

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Document Retrieval Result

63 P.S. § 479.2
§ 479.2. Definitions
Effective: [See Text Amendments]

63 P.S. § 479.2

Purdon's Pennsylvania Statutes and Consolidated Statutes Currentness
Title 63 P.S. Professions and Occupations (State Licensed) (Refs & Annos)
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(2) The word "board" shall mean State Board of Funeral Directors in the Department of State.

(3) The word "department" shall mean the Department of State of this Commonwealth.

(4) The term "resident interne" shall mean any person operating under or with a funeral director for the purpose of learning the profession, to the end that he may become a licensed funeral director. The term shall also include a student apprentice serving as such on the effective date of this act under any law repealed hereby.

(5) The term "student trainee" shall mean any person accepted for matriculation at a mortuary college or university specializing in mortuary subjects which have been approved by the American Board of Funeral Service Education, Inc.

(6) The term "funeral establishment" shall mean every place or premise approved by the State Board of Funeral Directors wherein a licensed funeral director conducts the professional practice of funeral directing including the preparation, care and funeral services for the human dead.

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(11) The term "full-time supervisor" shall mean a licensed funeral director who is a registered supervisor of no more than one funeral establishment and who is accessible to serve the public at the funeral establishment which he is supervising and is not engaged in any activity, business or profession, including assisting other funeral directors, which substantially interferes with or prevents the supervision of the practice carried on by the funeral establishment which he supervises.

CREDIT(S)

1952, Jan. 14, P.L. (1951) 1898, § 2. Amended 1959, Aug. 10, P.L. 658, § 2; 1968, July 31, P.L. 1008, No. 295, § 1; 1978, Oct. 5, P.L. 1074, No. 250, § 1, effective in 60 days.
63 P.S. § 479.2, PA ST 63 P.S. § 479.2

Current through end of the 2010 Regular and First Special Sessions

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850 A.2d 882
(Cite as: 850 A.2d 882)



Commonwealth Court of Pennsylvania.
Robert MACIOCE and Pittsburgh Cellular Telephone
Company, d/b/a A.T. & T. Wireless Services

v.

The ZONING HEARING BOARD OF THE BOR-
OUGH OF BALDWIN, Pennsylvania

v.

The Borough of Baldwin, Appellant.

Argued Feb. 4, 2004.
Decided May 28, 2004.

Background: Landowner and cellular telephone company sought judicial review of borough zoning board's denial of site specific relief to build wireless telephone tower on landowner's property, which was located in planned residential zoning district that did not permit telecommunications towers. The Court of Common Pleas, Allegheny County, No. SA 00-1372, James, J., found the ordinance to be invalid and reversed the zoning board decision. Borough appealed.

Holding: The Commonwealth Court, No. 1405 C.D. 2003, Kelley, Senior Judge, held that: zoning ordinance was not invalid as de facto exclusionary.

Reversed.

West Headnotes

[1] Zoning and Planning 414 ↪ 1747

414 Zoning and Planning
414X Judicial Review or Relief
414X(E) Further Review
414k1744 Scope and Extent of Review
414k1747 k. Questions or errors of law.

Most Cited Cases
(Formerly 414k745.1)

Zoning and Planning 414 ↪ 1750

414 Zoning and Planning
414X Judicial Review or Relief
414X(E) Further Review

414k1744 Scope and Extent of Review
414k1750 k. Matters of discretion.

Most Cited Cases
(Formerly 414k746)

Scope of review in landowner's action for relief from zoning ordinance is whether the trial court committed an abuse of discretion or an error of law.

[2] Zoning and Planning 414 ↪ 1754

414 Zoning and Planning
414X Judicial Review or Relief
414X(E) Further Review
414k1744 Scope and Extent of Review
414k1754 k. Questions of fact; find-
ings. Most Cited Cases
(Formerly 414k747)

Assuming that trial court's record in landowner's action for site specific relief from zoning ordinance demonstrates the existence of substantial evidence, reviewing court is bound by the findings of fact made below which are the result of resolutions of credibility and conflicting testimony rather than a capricious disregard of evidence.

[3] Zoning and Planning 414 ↪ 1118

414 Zoning and Planning
414II Validity of Zoning Regulations
414II(B) Particular Matters
414k1118 k. Telecommunications towers
and facilities. Most Cited Cases
(Formerly 414k76)

Zoning and Planning 414 ↪ 1530

414 Zoning and Planning
414IX Variances and Exceptions
414IX(A) In General
414k1530 k. Telecommunications towers
and facilities. Most Cited Cases
(Formerly 414k502.1)

Zoning ordinance was not de facto exclusionary

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based only on fact that ordinance permitted wireless telecommunications towers on only 1% of borough land, and thus, landowner and telecommunications company were not entitled to site specific relief to erect tower on landowner's property within district that did not permit towers; there was no evidence that the wireless telephone needs of borough residents were not being adequately served.

*882 Thomas P. McDermott, Pittsburgh for appellant.

James H. Roberts and Kathryn L. Hunter, Pittsburgh, for appellees.

*883 BEFORE: LEADBETTER, Judge, and KELLEY, Senior Judge, and FLAHERTY, Senior Judge.

OPINION BY Senior Judge KELLEY.

The Borough of Baldwin (Borough) appeals from the order of the Court of Common Pleas of Allegheny County (trial court) which reversed the decision of the Zoning Hearing Board of the Borough of Baldwin (Board), and granted site-specific relief to Robert Macioce (Landowner) and Pittsburgh Cellular Telephone Company d/b/a A.T. & T. Wireless Services (AT & T) to construct a communications facility in the Borough's Planned Residential Zoning District (PRD). We reverse.

Landowner owns a 70-acre parcel of land in the Borough's PRD Zoning District.^{FN1} On March 28, 2000, Landowner and AT & T entered into a lease agreement under which AT & T leased a 100-foot by 100-foot portion of the parcel to construct and operate a wireless communications facility.^{FN2} The proposed facility consists of a 120-foot monopole with nine panel antennas, a 12-foot by 28-foot shelter at the base, and an eight-foot chain link fence surrounding the facility.

FN1. Pursuant to Sections 168-19 through 168-22 of the Borough's Zoning Ordinance, only residential uses are permitted within the PRD Zoning District.

FN2. On February 17, 1997, the Borough adopted Ordinance No. 708 which amended its Zoning Ordinance to provide for the use

of land as a "communication facility." Section 168-12 of the Borough's Zoning Ordinance was amended to define "communications facilities" as "[t]owers, antennas and associated structures operated by any ... corporation ... which furnishes mobile cellular radio telecommunications services ... for public or private use ..." In turn, Sections 168-18A(3)(a)(4), 168-23.4E(1)(d), 168-24B(3)(g), and 168-25B(3)(a)(9) were added to include communications facilities and tower sites as permitted conditional uses in the R-4 Multiple Family Residential Zoning District, the Professional Offices and Professional Services (POPS) Zoning District, the C-1 General Business Zoning District and the C-2 Shopping Center Zoning District.

On July 10, 2001, Landowner and AT & T filed a challenge to the validity of the Borough's Zoning Ordinance with the Board pursuant to Section 168-59A of the Borough's Zoning Ordinance^{FN3} and Section 916.1(a) of the Pennsylvania Municipalities Planning Code (MPC).^{FN4} Landowner and *884 AT & T alleged that the Zoning Ordinance resulted in a *de facto* exclusion of communications facilities, that it violated the provisions of the Federal Telecommunications Act of 1996 (Telecommunications Act)^{FN5} and, as a result, Landowner and AT & T are entitled to site-specific relief permitting the construction of the proposed communication facility on the proposed site.

FN3. Section 168-59A of the Borough's Zoning Ordinance provides, in pertinent part, that "[t]he Board shall hear challenges to the validity of a zoning ordinance ... In all such challenges, the Board shall take evidence and make a record thereon ... At the conclusion of the hearing, the Board shall decide all contested questions and shall make findings on all relevant issues of fact which shall become part of the record on appeal to the court."

FN4. Act of July 31, 1968, P.L. 805, added by Act of December 21, 1988, P.L. 1329, as amended, 53 P.S. § 10916.1. Section 916.1 of the MPC provides, in pertinent part:

(a) A landowner who, on substantive

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grounds, desires to challenge the validity of an ordinance or map or any provision thereof which prohibits or restricts the use or development of land in which he has an interest shall submit the challenge ...:

(1) to the zoning hearing board under section 909.1(a) ...

* * *

(c) The submissions referred to in subsection[] (a) ... shall be governed by the following:

(1) In challenges before the zoning hearing board, the challenging party shall make a written request to the board that it hold a hearing on its challenge. The request shall contain the reasons for the challenge ...

* * *

(5) Based upon the testimony presented at the hearing or hearings, ... the zoning board ... shall determine whether the challenged ordinance or map is defective, as alleged by the landowner ... If a challenge heard by a zoning hearing board is found to have merit, the decision of the zoning hearing board shall include recommended amendments to the challenged ordinance which will cure the defects found....

In turn, Section 909.1 of the MPC provides, in pertinent part:

(a) The zoning hearing board shall have exclusive jurisdiction to hear and render final adjudications in the following matters:

(1) Substantive challenges to the validity of any land use ordinance ...

53 P.S. § 10909.1(a)(1).

FN5. 47 U.S.C. §§ 160-614.

With respect to the former claim, Landowner and AT & T alleged that when all of the requirements of

Section 168-46.1 of the Borough's Zoning Ordinance were applied to all of the suitable undeveloped lots located in the Borough's R-4, POPS, C-1 and C-2 Zoning Districts, less than 1% of the land in the Borough could be used as a communications facility.^{FN6} With respect to *885 the latter claim, Landowner and AT & T alleged that the Borough had violated Section 332(c)(7)(B)(i)(11) of the Telecommunications Act ^{FN7} by "[p]rohibit [ing] or having the effect of prohibiting the provision of personal wireless services." Hearings before the Board ensued.

FN6. Regarding a conditional use as a communications facility, Section 168-46.1 of the Borough's Zoning Ordinance was added and provides, in pertinent part:

The granting of a conditional use for communications facilities and tower sites shall be subject to the following express standards and criteria.

A. The minimum tower site shall be two acres.

B. No tower shall be located within 250 feet of an existing dwelling, or of the property line of a RA or RB Zoning District, or 500 feet of an existing school, hospital or similar use measured from the nearest property line to the nearest property line.

C. No such tower shall be erected within 2,000 feet of another existing tower measured from the property line of the tower site to the nearest property line of an existing tower.

D. Shared use of towers and structures shall be encouraged ...

E. Communications facilities and their associated structures may exceed the height limitations of the district, subject, however, to § 168-33B hereof, provided that they shall be set back from any property line or public street right of way a minimum distance of 100% of the tower height or greater ...

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F. Unless the communications facility is located on a building, the tower structure shall be completely enclosed by a six-foot high chain link or similar fence with self-latching gate ...

G. All guy wires and all guyed towers shall be clearly marked so as to be visible at all times. All guy wires shall be located a minimum of 100 feet from any property line.

H. The applicant shall submit evidence that the ... tower upon which an antenna is to be constructed, has been designed by a registered engineer, and is certified by a registered engineer and is certified by that registered engineer to be structurally sound and able to withstand wind and other loads in accordance with accepted engineering practice ...

I. The tower shall be subject to any applicable Federal Aviation Administration (FAA) and airport zoning regulations.

J. No sign or other structure shall be mounted on the tower, except as may be required and approved by the FCC, FAA or other governmental agency.

K. All lighting, except required beacons, shall be shielded and reflected away from adjoining properties.

L. A minimum of two off-street parking spaces shall be provided on the tower site, plus one off-street parking space for each on-site personnel.

M. Existing vegetation on the site shall be preserved to the maximum extent possible ...

N. A minimum twenty-foot (in width) easement or right-of-way for access shall be provided to the tower which is adequate to accommodate maintenance and emergency vehicles and which is im-

proved with a dust-free, all-weather (chip and shot) surface sufficient to accommodate the weight of the vehicles proposed to use the easement or right-of-way.

O. In the event that any tower ceases to be used as a communication facility for a period of six months, then the owner and/or operator of the tower or the owner of the land on which the tower is located shall be required to remove the same ...

P. The construction, erection, operation and maintenance shall comply with all applicable laws and regulations of the commonwealth ...

FN7. 47 U.S.C. § 332(c)(7)(B)(i)(II).

On December 24, 2001, the Board issued a decision disposing of the validity challenge in which it made the following relevant findings of fact:

8. On February 17, 1997, the Borough adopted Ordinance No. 708 permitting the development of communications facilities and tower sites as conditional uses in certain districts and establishing standards and criteria for granting such conditional uses ...

9. Section 2 of Ordinance No. 708 permits communications facilities and tower sites as conditional uses in "residential districts," "commercial districts" and "industrial districts" within the Borough.

10. Ordinance No. 708 does not permit communications facilities and tower sites in PRD and POPS zoning districts.

11. Section 4 of Ordinance No. 708 sets forth specific standards and criteria for the granting of conditional uses for communications facilities and tower sites ...

12. [Landowner and AT & T] have not offered any evidence that would tend to satisfy the enumerated standards and criteria for the grant of either a conditional use or a use or dimensional variance as set forth in the Borough Ordinance or the

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law set forth in the [MPC]. In any event the granting or denial of a conditional use is not within the jurisdiction of this [Board] because it is a matter that must be submitted to the Borough Planning Commission and thereafter to the Borough Council.

Board Decision at 2.

Based on the foregoing, the Board made the following relevant conclusions of law:

(C) The Borough Zoning Ordinance is presumed valid under the law and the challengers to the constitutionality of the zoning ordinance bear a heavy burden of proof and they must demonstrate that the Ordinance completely excludes their proposed legitimate uses. [Landowner and AT & T] have not sustained their burden of proof.

(D) The Borough Zoning Ordinance is not an exclusionary ordinance, but it does legally confine a type of activity, to wit, communications facilities and tower sites, to particular locations in the Borough. Therefore, there is not a total prohibition of such land use within the Borough.

(E) Ordinance No. 708 established identifiable criteria that the governing body will apply in evaluating an applicant's proposed land use, and in this case, the Ordinance sets forth the standards and criteria that the Borough Planning Commission and Council must utilize in determining whether [Landowner and AT & T] are entitled to a conditional use of the proposed site for the construction and operation of a communications facility and tower site.

(F) The Borough Zoning Ordinance, as amended by Ordinance No. 708, is *886 constitutionally valid and enforceable. Since it is not constitutionally invalid, [Landowner and AT & T] are not entitled to site-specific relief. This Ordinance does not violate the [Telecommunications Act].

Id. at 2-3. As a result, the Board denied the request of Landowner and AT & T to declare the Zoning Ordinance invalid and for site-specific relief. *Id.* at 3.

On January 22, 2002, Landowner and AT & T appealed the Board's decision to the trial court. On February 20, 2002, the Borough filed a notice of intervention in the appeal.

On May 21, 2003, the trial court issued an order and opinion disposing of the appeal in which it stated the following, in pertinent part:

Although not exclusionary on its face, [Landowner and AT & T] contend the Ordinance is exclusionary in fact and therefore invalid because once all of the requirements and restrictions contained in the Zoning Ordinance that relate to communications facilities are applied, less than 1% of the total parcels and acreage in the Borough are eligible for the location of a communications facility. In arriving at this conclusion, [Landowner and AT & T] considered available parcels partly or fully located in C-1, C-2, POPS or R-4 Zoning Districts which were two acres or greater in size. In coming to their decision, the Zoning Board referred to Ordinance No. 708 which adds "Communications Facilities" as conditional uses to I1 and I2 Zoning Districts. Although [Landowner and AT & T] did not include these additional areas in their calculations, the conclusion drawn by [Landowner and AT & T] is still valid. The majority of the additional area zoned I1 and I2 is in low lying areas where construction of a communications facility such as the one sought by [Landowner and AT & T] would not be feasible. Because the additional useable area provided by the inclusion of I1 and I2 areas is negligible, the [Landowner's and AT & T]'s failure to include those areas does not change the exclusionary nature of the Zoning Ordinance.

Trial Court Opinion at 2.

[1][2] Thus, the trial court found:

[I]n considering the total land in the Borough, [Landowner and AT & T] found less than 1% was available for a communications facility once all of the zoning restrictions were taken into consideration.

For the reasons stated above, this court finds that the [Borough's] Zoning Ordinance concerning permissible sites for communications facilities exclusionary in fact and therefore invalid.

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Id. at 4.^{FN8} Accordingly, the trial court entered an order reversing the Board's decision,*887 and granting Landowner and AT & T site-specific relief to construct the proposed communications facility. *Id.* at 5. The Borough then filed the instant appeal of the trial court's order.^{FN9}

FN8. It is evident from the foregoing that the trial court made findings of fact not contained in the Board's decision. It was entirely proper for the trial court to do so. See Section 1005-A of the MPC, 53 P.S. § 11005-A (“[I]f the record does not include findings of fact ... the court shall make its own findings of fact based on the record below as supplemented by the additional evidence, if any.”); Eastern Consolidation and Distribution Services, Inc. v. Board of Commissioners of Hampden Township, 701 A.2d 621, 623 (Pa.Cmwlt.1997), *petition for allowance of appeal denied*, 553 Pa. 683, 717 A.2d 535 (1998) (“[W]e have held that the court may make the necessary findings under the MPC, where the board has not, even if it takes no additional evidence. Ford v. Zoning Hearing Board of Caernarvon Township, [151 Pa.Cmwlt. 323, 616 A.2d 1089 (1992)].”); Snyder v. Railroad Borough, 59 Pa.Cmwlt. 385, 430 A.2d 339, 345 (1981) (“[I]n the instant case, the lower court did not disturb any findings, but added one, citing as its authority for so doing, Hess v. Upper Oxford Township, [17 Pa.Cmwlt. 399, 332 A.2d 836, 838 (1975)]), where this Court said, ‘(a)s Section 1010[,the predecessor to Section 1005-A,] precludes a remand to the governing body in validity challenges under Section 1004, we hold it to be the duty of the lower court to make appropriate findings of fact in order to enable meaningful review.’”

FN9. Our scope of review in this case is whether the trial court committed an abuse of discretion or an error of law. Eastern Consolidation and Distribution Services, Inc. In addition, assuming that the record demonstrates the existence of substantial evidence, the Court is bound by the findings of fact made below which are the result of

resolutions of credibility and conflicting testimony rather than a capricious disregard of evidence. *Snyder*.

In this appeal, the Borough claims: (1) the trial court erred in determining that the Borough's Zoning Ordinance was *de facto* exclusionary; and (2) even if it is assumed that the Zoning Ordinance is *de facto* exclusionary, the trial court erred in granting Landowner and AT & T site-specific relief.^{FN10}

FN10. The Borough also asserts that its Zoning Ordinance does not violate the provisions of the Telecommunications Act. As noted above, Landowner and AT & T raised a claim with respect to the Telecommunications Act in the validity challenge that was filed with the Board. See Reproduced Record (RR) at 29-32. However, as noted by Landowner and AT & T in their appellate brief:

Much of the Borough's brief addresses the [Telecommunications Act] which, although mentioned by Appellees in their Validity Challenge, was not actively pursued before the Board or the court below. Appellees relied below, and now before this Court, upon Pennsylvania law and its clear prohibition against *de facto* exclusionary and unduly restrictive zoning.

Brief for Appellees at 12 fn. 6. As neither the Board nor the trial court considered this claim, it will not be addressed for the first time by this Court in the instant appeal. See, e.g., Pa.R.A.P. 302(a) (“[I]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal.”); Insurance Company of Evans-ton v. Bowers, 758 A.2d 213, 221 (Pa.Super.2000) (“[G]enerally, an issue once raised must be preserved at each stage of the case. Since the trial court was not given the opportunity to address this issue in the first instance, we have nothing left to review.”) (citations omitted).

With regard to the purported invalidity of local zoning ordinances, as alleged in the instant case, it has been noted:

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[T]he law applicable to this kind of claim is well settled. Zoning ordinances in Pennsylvania enjoy a presumption of constitutionality and validity, and the party challenging one bears the “heavy burden” of proving otherwise. *See* [*APT Pittsburgh Limited Partnership v. Penn Township*, 196 F.3d 469, 475 (3rd Cir.1999)] (quoting *Benham v. Board of Supervisors of Middletown Township*, [22 Pa.Cmwlth. 245, 349 A.2d 484, 487 (1975)]; *see also Schubach v. Silver*, 461 Pa. 366, 336 A.2d 328, 335 (1975); *Beaver Gasoline Co. v. Zoning Hearing Board of the Borough of Osborne*, 445 Pa. 571, 285 A.2d 501, 503-04 (1971) (“the validity of a zoning ordinance is presumed and ... the burden of establishing its invalidity is upon the party who seeks to have it declared invalid.”).

In order to overcome this presumption of constitutionality, the challenger must demonstrate that “the ordinance totally excludes an otherwise legitimate use.” *Farrell v. Worcester Township Board of Supervisors*, [85 Pa.Cmwlth 163, 481 A.2d 986, 989 (1984)]. “Unless the challenger demonstrates that the ordinance in question completely or effectively excludes a legitimate use, ... the challenger has failed to carry its burden...” *Ficco v. Board of Supervisors of Hempfield Township*, 677 A.2d 897, 899 (Pa.Cmwlth.1996) (citing **888BAC, Inc. v. Board of Supervisors of Millcreek Township*, 534 Pa. 381, 633 A.2d 144 (1993)); *Overstreet v. Zoning Hearing Board of Schuylkill Township*, [152 Pa.Cmwlth 90, 618 A.2d 1108 (1992)]. To prove total or effective exclusion of a permitted use, the challenger can show that the ordinance is either de jure or de facto exclusionary:

De jure exclusion exists where an ordinance, on its face, totally bans a legitimate use. De facto exclusion exists where an ordinance permits a use on its face, but when applied acts to prohibit the use throughout the municipality.

Penn Township, 196 F.3d at 475 (internal quotations and citations omitted).

If the challenger is able to establish that the ordinance excludes the use in question, the burden then shifts to the state or locality “to demonstrate that the zoning ordinance ‘[b]ears a substantial relationship to public health, safety, and welfare.’ ” *Id.*

(quoting *Borough of Edgewood v. Lamanti's Pizzeria*, [124 Pa.Cmwlth. 325, 556 A.2d 22, 24 (1989)]); 53 P.S. § 10916.1(a)(5)(i)-(v); *see also Fernley v. Board of Supervisors of Schuylkill Township*, 509 Pa. 413, 502 A.2d 585, 587 (1985) (“Where the challenger proves a total prohibition of a legitimate use, the burden shifts to the municipality to establish that the prohibition promotes public health, safety, morals and general welfare.”) (citing *Beaver Gasoline*, 285 A.2d at 503); *Ellick v. Board of Supervisors*, [17 Pa.Cmwlth. 404, 333 A.2d 239, 243-44 (1975)]).

Omnipoint Communications Enterprises v. Zoning Hearing Board of Easttown Township, 248 F.3d 101, 106-107 (3rd Cir.2001).

As noted above, the Borough first claims that the trial court erred in determining that its Zoning Ordinance is *de facto* exclusionary. In the proceedings below, Landowner and AT & T asserted that the Zoning Ordinance is *de facto* exclusionary in that it fails to provide a “fair share” of Borough land for a communications facility use.^{FN11} In particular, Landowner and AT & T alleged that although the ordinance provides for “communications facilities” as a conditional use in Section 168-46.1, such a use is only permitted on less than 1/2 of 1% of all of the parcels or total land in the Borough when all of the restrictions in that section are applied. Indeed, it was on this basis alone that the trial court determined that the Zoning Ordinance was unconstitutionally exclusionary and reversed the Board's decision. *See* Trial Court Opinion at 3, 4.

^{FN11}. At the hearings before the Board, AT & T conceded that it had received conditional use approval from the Borough to place an antenna on top of an apartment building in the southern portion of the Borough, and that another provider, Sprint, had also placed an antenna on a transmission tower in the Borough approximately 1/2 - mile east of the proposed site. *See* RR at 0168-0169, 0181, 0263-0264; Exhibit 8, RR at 0486. In fact, it was never AT & T's position that there was no cellular telephone coverage in the Borough. Rather, throughout the proceedings, AT & T sought to place a tower on the proposed site to cover an area of unreliable service in the Borough. *See* RR

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at 0056-0057, 0145, 0149-0150, 0169-0171; Exhibit 8, RR at 0486; Exhibit 9, RR at 0487. Indeed, AT & T's Exhibit 9 depicts its extensive coverage area throughout the Borough, and the pockets of unreliable service areas to be corrected by the proposed tower. *Id.*

[3] As the Pennsylvania Supreme Court has noted:

The "fair share" test ... was judicially developed as a means of analyzing zoning ordinances which effect a partial ban that amounts to a *de facto* exclusion of a particular use, as distinguished from *889 those ordinances which provide for a total or *de jure* exclusion. The *de facto* exclusionary doctrine "was intended to foster regional growth by requiring communities located on the fringes of the metropolitan areas to absorb the 'increased responsibility' and 'economic burdens' which time and natural growth invariably bring." Cases involving *de facto* or partially exclusionary zoning turn on the question of whether the provision for a particular use in the ordinance at issue reasonably accommodates the immediate and projected demand for that use ...

Fernley, 509 Pa. at 418-419, 502 A.2d at 587-588 (citations and footnote omitted).^{FN12} "[H]owever, we have held in a commercial fair share challenge, 'it is not sufficient for a developer to merely point out that a relatively small area of the municipality is zoned for commercial use without any proof that the needs of the community's residents are not being adequately served.' " *Montgomery Crossing Associates v. Township of Lower Gwynedd*, 758 A.2d 285, 289 (Pa.CmwltH.2000), *petition for allowance of appeal denied*, 565 Pa. 656, 771 A.2d 1291 (2001) (citation omitted).^{FN13} Thus, it is clear that the trial court erred in reversing the Board's decision on the exclusive basis that "[l]ess than 1% was available for a communications facility once all of the zoning restrictions were taken into consideration." Trial Court Opinion at 4.^{FN14}

^{FN12}. *But cf. Centre Lime and Stone Co., Inc. v. Spring Township Board of Supervisors*, 787 A.2d 1105, 1111 (Pa.CmwltH.2001), *petition for allowance of appeal denied*, 568 Pa. 740, 798 A.2d 1291

(2002) ("[I]f the zoning exclusion is partial, as in this case, the percentage of community land available under the ordinance for the proposed use becomes relevant. This percentage must be considered in light of the total amount of undeveloped land in the community. Where the amount of land zoned for the proposed use is disproportionately small in relation to the total amount of undeveloped land in the community, the ordinance will be held to be exclusionary.") (citation omitted).

^{FN13}. *See also Omnipoint Communications Enterprises v. Zoning Hearing Board of Easttown Township*, 331 F.3d 386, 394 (3rd Cir.2003), *cert. denied*, 540 U.S. 1108, 124 S.Ct. 1070, 157 L.Ed.2d 894 (2004) ("[O]mnipoint contends that Easttown Township fails to provide a 'fair share' allowance for telecommunications uses. The B-Business District comprises only 1.1% of the total area of Easttown Township. The relevant inquiry is whether Omnipoint has carried its 'heavy burden' of showing that the needs of the community's residents are not being adequately served. Other telecommunications providers have been able to serve the needs of their customers by placing towers within the business district. To overcome the presumption that the ordinance is constitutional, Omnipoint would have had to show a causal link between the small area of land zoned for business use and the community residents' inability to meet their needs") (footnote and citations omitted); *APT Pittsburgh Limited Partnership v. Penn Township*, 196 F.3d 469, 477 (3rd Cir.1999) ("[T]he fact that the design APT has chosen for its system enables it to erect the tower that it wishes to build only on a relatively small portion of the land in the M Districts does not make Ordinance 109 exclusionary. Pennsylvania's rule against exclusionary zoning does not impose upon a township the duty to assure that all providers, regardless of the systems they have chosen to construct, will have a suitable site for a functioning tower within the township. To be exclusionary, the ordinance must effectively foreclose not only APT's use, but all use. Yet, APT provided no evi-

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dence to the ZHB that other providers could not use any of the 600 acres of M District land to build a tower that would functionally meet their systems' needs. Without such evidence we cannot fault the ZHB for determining that APT had failed to meet its 'heavy burden' to prove that Ordinance 109 was unconstitutionally exclusionary.”).

FN14. See, e.g., *Weiner v. Board of Supervisors of Lower Macungie Township*, 119 Pa.Cmwlth. 485, 547 A.2d 833, 836 (1988) (“[W]e reject Appellant's argument that the trial court erred in finding that the evidence presented did not satisfy the fair share analysis. As correctly noted by the trial court, the fair share test is 'intended to foster regional growth by requiring communities located on the fringes of the metropolitan areas to absorb the increased responsibility and economic burdens which time and natural growth invariably bring.' Appellant has not established that the 1.2% of Township acreage that is zoned commercial cannot accommodate the Township's 'economic burden', despite his claim that the Township has a projected 90-acre deficit in commercial property.”) (citations omitted); *BP Oil, Inc. v. Zoning Hearing Board of the Borough of Brookhaven*, 37 Pa.Cmwlth. 258, 389 A.2d 1220, 1223 (1978) (“[H]ere the Appellant argues that it can sustain its burden by proving that the Borough has failed to provide for its 'fair share' of this use and therefore that a de facto exclusion has occurred. It cites as supporting evidence that 1) only three-tenths of one percent of the land in the Borough is zoned 'B' commercial, 2) there is a need for at least one additional gasoline station, 3) the Borough population is increasing, 4) there is now no vacant land in the 'B' commercial district which could be used for a gasoline station, and 5) the only property in this district which is not presently used for a gasoline station is being used for a hardware store and is not available for other use. Claims involving exclusion of commercial uses, however, can seldom be sustained on the basis of percentage figures alone; some analysis of the present and projected needs of the municipality and some proof that the needs of the community

residents are not being adequately served must be present. And we agree with the Board and the lower court that the ordinance here did not set aside an unreasonably small amount of land for that use in relation to the needs of the community.”).

*890 Accordingly, the order of the trial court is reversed.^{FN15}

FN15. Based upon our disposition of this issue, we will not reach the other claim raised in this appeal.

ORDER

AND NOW, this 28th day of May, 2004, the order of the Court of Common Pleas of Allegheny County, dated May 22, 2003 at No. S.A. 02-83, is REVERSED.

Pa.Cmwlth.,2004.
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Peters Township

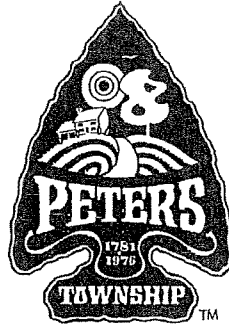
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MEMO TO: Planning Commission
FROM: Ed Zuk *EZ*
DATE: October 6, 2010
TOPIC: **Planning Commission Recommendation to Council – Zoning Ordinance**
Amendment to C-4 Zoning District Permitted Uses to Allow Funeral Homes with
Crematorium

On August 3, 2010 Peters Township reviewed a request from Michael J. Dempster, Attorney on behalf of Danielle Belusko to consider an amendment to the zoning ordinance to allow funeral homes with crematorium as a permitted use in the C-4 Transitional zoning district. Ms. Belusko does have a C-4 zoned property at 115 Hidden Valley Road under agreement to purchase contingent upon zoning approval.

As part of this report is a proposed zoning ordinance amendment that would allow funeral homes with crematory as a permitted use in the C-1, C-2 and C-4 zoning districts. The proposed ordinance amends the definition of funeral home to include cremation.

The zoning ordinance currently permits funeral homes without a crematory in C-1 and C-2 zoning districts.

The intent of the C-4 Transitional Commercial Zoning District is to function as a transitional zoning district by allowing the use of commercial properties which are adjacent to residential zones or front on local roads for uses which are low traffic generators, have minimal lighting or signage needs, minimal evening hours or operation, and construction characteristics which are compatible with the adjacent residential land uses.

Currently, within Peters Township the following areas are zoned C-4 Transitional Commercial:

1. Waterdam & Galley Roads
2. Old Oak/Pleasant Ave./Jones Drive
3. Oakhurst Drive/Old Oak Road
4. Center Church/Wilhaven Drives

5. Hidden Valley Road
6. Gateshead Drive to Pleasant View Drive East side of Rt. 19
7. E. McMurray Road at Thompsonville Road
8. Old Washington Road behind the Volvo Dealership

Trans Associates, township traffic engineer was consulted on funeral home traffic. Funeral homes are low traffic generators. Funeral services typically occur off peak am/pm hour traffic periods. According to Ms. Belusko public viewings usually occur between 2 to 4 pm and 7 to 9 pm. Construction characteristics of most if not all funeral **homes** are residential and in a lot of cases funeral homes are operating within former residences.

Included for Planning Commission is a report prepared by Civil & Environmental Consultants, Inc (CEC) that characterizes atmospheric emissions from the proposed cremator and compares those emissions to other common sources of combustion emissions. Representatives from CEC will present the findings of the report to the Commission at the October 14, 2010 meeting.

I contacted Mark Gorog, manager new source review section with PA DEP to gain knowledge of the permitting requirements for new crematories. Included for Planning Commission's information are the general plan and/or general operating permit requirements. Mr. Gorog informed me that the DEP cannot authorize a permit for a crematory that will cause air pollution. Pennsylvania (DEP) requires cremators to operate at such high heat levels that zero emissions occur. The permit DEP issues requires annual inspections, stack testing and stringent record keeping that must be made available upon request by the DEP. Mr. Gorog informed me that crematories operating under the DEP General Permit Requirements do not pose health hazards to the environment.

Planning Staff Recommendation:

Planning Staff recommends the proposed zoning ordinance amendment to allow funeral homes with crematories to be a permitted use within the C-1, C-2 and C-4 zoning districts be approved.

Attachments: Proposed Zoning Ord. Amendment
Aerial View 115 Hidden Valley Rd. Twp GIS
8-3-10 Letter M. Dempster
CEC Report 9-2-10
PA DEP G P Requirements
Peters Township Zoning Map

Cc: D. Belusko
M. Dempster
File



Houston Harbaugh

ATTORNEYS AT LAW

WRITER'S DIRECT DIAL:
(412) 288-5018
ribartl@hh-law.com

January 11, 2011

Via Email – EJZuk@peterstownship.com
and U.S. First Class Mail

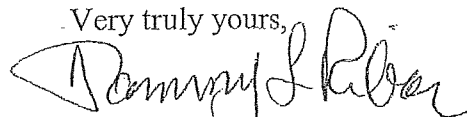
Mr. Edward J. Zuk
Planning Director
Peters Township Planning Office
610 East McMurray Rd
McMurray, PA 15317

Re: C-4 Zoning Ordinance Amendment related to 115 Hidden Valley Road

Dear Mr. Zuk:

I am writing on behalf of Danielle Belusko with regard to her request for an amendment to the Peters Township Zoning Ordinance to permit a funeral home in the C-4 Commercial Zoning District and to allow crematories as an accessory use to funeral homes in C-1, C-2 and C-4 Commercial Zoning Districts. I am writing to request that Council hold a public hearing on the zoning amendment during February or March, as appropriate. Please let me know what meeting date works best for scheduling and advertising purposes. Thank you for your attention to this matter.

Very truly yours,



Tammy L. Ribar

TLR/mb

cc: Danielle Andy Belusko – via email belusko1@comcast.net
Mary-Jo Rebelo, Esquire – via email

Three Gateway Center • 401 Liberty Avenue 22nd Floor • Pittsburgh PA 15222-1005

Phone 412.281.5060 • Fax 412.281.4499 • www.hh-law.com

William A. Johnson

ATTORNEY AT LAW

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(724) 225-1365

8 East Pine Avenue
Washington, Pennsylvania 15301

RECEIVED JAN 25 2011

January 21, 2011

Tammy L. Ribar, Esquire
Houston Harbaugh
401 Liberty Avenue 22nd Floor
Pittsburgh, PA 15222-1005

Re: Proposed Zoning Amendment for the C-4 Commercial District

Dear Ms. Ribar:

This will confirm our discussion on Thursday, January 20, 2011 that Peters Township will entertain your letter dated January 11, 2011 as a request for a landowner curative amendment under §609.1 of the Pennsylvania Municipalities Planning Code.

We have also agreed that the Planning Commission public hearing that was held on October 14, 2010 will be considered as fulfilling the procedural requirements under the MPC.

Michael Silvestri, Township Manager, has indicated that this matter will be placed on the Peters Township Council's agenda for a special meeting to be held on March 21, 2011. In the event that that meeting would be construed as falling outside of the 60 days mandated by the Code, you have agreed on behalf of your client to an extension of time.

Finally, you have agreed to submit documentation to the Township to confirm the Beluskos' ongoing standing to pursue this matter. Please advise if this correspondence in any way misstates our agreements. Thank you for your courtesy in this matter.

Very truly yours,



William A. Johnson

WAJ:esj
Enclosure

cc: Michael A. Silvestri, Manager
Ed Zuk, Planning Director