

HOWARD COUNTY BOARD OF APPEALS HEARING EXAMINER

In The Matter of

MOLSEN HAGHIGHAT

Civil Citation Nos. CE 10-133(a), (b) & (c)

Respondent

FINAL ORDER

This matter came before the Howard County Board of Appeals Hearing Examiner for a February 6 and February 27, 2014 hearing on citations for violations of the Howard County Zoning Regulations (HCZR) Sections 110.0.O and 127.0.5.B&C on CAC-CLI (Corridor Activity Center) zoned property known as 10080 Route 1 (Washington Boulevard), Laurel, 20723.¹ Citation CE 10-133(a) cited Respondent for the maintenance of off-street parking or storage of unregistered, inoperable, wrecked, dismantled or destroyed motor vehicles. Citation CE 10-133(b) cited Respondent for the storage of trash and debris, including but not limited to, scrap wood, brush, pallets, wheels, tires, and construction equipment, construction and demolition debris. Citation CE 10-133(C) cited Respondent with maintaining motor vehicles not accessory to an allowed use.

On June 10, 2013, pursuant to Howard County Code (HCC) Title 24, "Civil Penalties," and Subtitle 3 of Title 16 of the Howard County Code (HCC), Department of Planning and Zoning Inspector Curtis Braithwaite issued Molsen Haghighat civil citations CE 10-133(a), (b) & (c) for violations of the Howard County Zoning Regulations (HCZR). The citations were sent by registered and regular mail to Respondent at 10080 Washington Boulevard, Laurel, 20723.

¹ The Hearing Examiner continued the February 6, 2014 hearing on Respondent counsel's request, owing to Respondent's illness.

Nowelle Ghahhari, Assistant County Solicitor, represented the Department of Planning and Zoning. Zoning Inspector Curtis Braithwaite and Zoning Enforcement Inspection Section Supervisor Anthony LaRose appeared for the hearing and testified. Michael Walls, Esquire, represented Respondent Molsen Haghghat. Molsen Haghghat appeared for the hearing and testified.

The Hearing Examiner viewed the subject property as required by the Hearing Examiner Rules of Procedure.

The Department of Planning and Zoning introduced into evidence the exhibits as follows.

1. Notice of Violation (NOV 1), May 4, 2011
2. Notice of Violation (NOV 2), August 23, 2012
3. Three Civil Citations, June 10, 2013
- 4A-T. Photographs, January 9 and February 5, 2014
5. SDAT Real Property Search for District 6, Account Number 415148
- 6A-Z & Photographs, January 9, 2013
- A-1-A-8.

Respondent introduced into evidence the exhibits as follows.

1. MVA registration certificate issued to Siyavash Nejadi

A Preliminary Matter

At the outset of the hearing, the Hearing Examiner granted Mr. Walls request to sequester DPZ witness Anthony LaRose during Mr. Braithwaite's testimony.

FINDINGS OF FACT & CONCLUSIONS OF LAW

The Procedural Construct of this Case

On May 23, 2013, the Hearing Examiner convened a hearing on a civil citation for violations of the HCZR, code enforcement Case No. CE 10-133. Respondent Molsen Haghghat

appeared for the hearing. DPZ introduced into evidence the same two NOV's underlying the instant code enforcement action (DPZ Exhibits 1 & 2). Thereafter, it became apparent that Inspector Braithwaite was unable either to produce the civil citation issued to Respondent or to answer DPZ counsel's question about how he noticed the citation and served process. DPZ counsel requested a continuance, which the Hearing Examiner granted.

On May 24, 2013, DPZ counsel Nowelle Ghahhari motioned the Hearing Examiner to dismiss civil citation CE 10-133 without prejudice "due to continuing difficulty with ascertaining the correct mailing address and obtaining service of process." The Hearing Examiner issued the dismissal on June 2, 2013.

On June 10, 2013, Inspector Braithwaite issued three civil citations to Respondent with the same case number (CE 10-133(a), CE 10-133(b), and CE 10-133(c)), as the June 2, 2013 dismissed citation, for violations of the HCZR at the same address, 10080 Route 1 (Washington Boulevard). DPZ Exhibit 3. The three citations inform Respondent that a June 6, 2013 inspection of the premises revealed the following violations of the HCZR.

CE10-133(a). §§ 101.0, 127.5.B&C: Maintain the off-street parking -street parking or storage of inoperable, unregistered, wrecked, dismantled or destroyed motor vehicles on CAC-CLI (Corridor Activity Center) zoned property.

CE10-133(b). §§ 101.0, 127.5.B&C: Maintain storage of trash and debris including but not limited to scrap wood, brush, pallets, wheels, tires, and construction equipment, construction and demolition debris on CAC-CLI (Corridor Activity Center) zoned property.

CE10-133(c).§§ 101.0, 127.5.B&C. Maintain motor vehicles not accessory to an allowed use on CAC-CLI (Corridor Activity Center) zoned property.

Each citation instructs Respondent to either request a hearing, which he did not, or to abate the violation and pay a fine of \$250.00 per day by June 24, 2013, which he did not. On November 8, 2013, DPZ forwarded the three citations to the Hearing Examiner for a hearing, which was heard on February 27, 2014.

The February 27, 2014 Hearing on CE 10-133(a), (b) & (c) and What Ensued Therein

Early into the February 27, 2014 proceeding, Respondent, through counsel, took objection to DPZ Exhibits 1 and 2, the two notices of violation with the same citation number, CE-10-133, as the case dismissed by Hearing Examiner Order on June 2, 2013.² Respondent noted the objections on relevancy grounds, contending the Hearing Examiner had dismissed Case No. CE 10-133 around May 24, 2013, with the consequence that 1) anything noted by the County before this case was dismissed or 2) everything subject to that dismissal is irrelevant. DPZ counsel noted that every day a violation exists is a new violation. DPZ counsel argued in closing that the

² With the effective October 6, 2013 date of the HCZR text amendments adopted during the comprehensive rezoning process, the sections referenced in the civil citations were recodified as Sections 101.0.O and 127.0.5.B & C. Respondent was cited under Sections 101.0 and 127.5.B & C.

Inspector Braithwaite issued Respondent NOV 1 on May 4, 2011. DPZ Exhibit 1. The NOV informs Respondent that an April 7, 2011 inspection of the premises revealed the following violations of the HCZR.
§§ 101.0, 127.5.B&C: The off-street parking or storage of inoperable, unregistered, wrecked, dismantled or destroyed motor vehicles on CAC-CLI (Corridor Activity Center) zoned property. Corrective Action: To abate this notice: Register or remove vehicles from the property.

§§ 101.0, 127.5.B&C: The storage of vehicle parts, tires, wheels, construction equipment and construction and demolition debris on CAC-CLI (Corridor Activity Center) zoned property. Corrective Action: Remove the vehicle parts, tires, wheels, construction equipment and construction demolition debris from the property.

The Inspector issued NOV 2 to Respondent on August 23, 2012. DPZ Exhibit 2. The notice informs Respondent that an August 21, 2012 inspection of the premises revealed the following violations of the HCZR.

§§ 101.0, 127.5.B&C: Storage of trash and debris including, but not limited to, scrap wood, brush, pallets, wheels, tires, and construction equipment, construction and demolition debris on CAC-CLI (Corridor Activity Center) zoned property. Corrective Action: Remove the trash, scrap wood, brush, pallets, wheels, tires, construction and demolition debris from the property.

NOV language of HCC code enforcement §16.1602.(b) provides that DPZ may issue a NOV, which it typically does, although it is not required to, and further that Respondent had sufficient notice of the HCZR violations for some four years, through the NOV's and civil citations. The Hearing Examiner framed the issue as a question of whether an NOV is still "live" after the dismissal of a civil citation such that it may provide due process notice grounds for a subsequent civil citation.

The Issue before the Hearing Examiner

Respondent's objections to the two NOV's and DPZ's response thereto raises three procedural questions of first impression in the Hearing Examiner's adjudication of the code enforcement administrative procedures established in HCC §16.1600 et. seq.

1. When the Hearing Examiner dismisses a code enforcement case, may DPZ issue a second or corrective civil citation with the same case number, relying to the same NOV's subject to the dismissed case, and proceed to a new code enforcement administrative hearing?
2. Are the notice of violation provisions of §16.1602 discretionary?
3. Is the current civil citation barred by res judicata or estoppel?

Because we answer no to the first two questions, we do not reach the issues related to res judicata or estoppel.

Discussion

HCC Section 16.1600 et seq. sets forth the statutory requirements in the county's enforcement of its Subdivision and Land Development Regulations and HCZR. These include

procedural rules for the issuance of a notice of violation and a civil citation, including content and service of process for same.³

³ Sec. 16.1602. Notice of violation.

(a) *Duty to Investigate.* The director shall investigate an alleged violation to determine whether a violation exists or has occurred.

(b) *Authority to Issue Notice of Violation.* After investigation, if the director believes that a violation of the subdivision and land development regulations set forth in Subtitle 1 of this title or the Howard County Zoning Regulations exists or has occurred, the director may issue a notice of violation to the alleged violator.

(c) *No Requirement to Issue.* The director is not required to issue a notice of violation:

- (1) For a repeated violation for which a citation under section 16.1603 Of this subtitle has been issued; or
- (2) If a notice of violation is not required by law or regulation.

(d) *Contents of Notice of Violation.* A notice of violation:

- (1) Shall be in writing;
 - (2) Shall contain the name and address of the alleged violator;
 - (3) Shall contain the time when the violation occurred and the place;
 - (4) Shall include certification by the inspector, attesting to the best of the inspector's knowledge, that a violation exists or has occurred;
 - (5) Shall describe with particularity the nature of the violation, including a reference to the Code or county provision allegedly violated, and the manner of abatement;
 - (6) Shall include a reasonable time to abate the violation or prevent future violations;
 - (7) May include an order to stop work and abate any violations; and
 - (8) Shall include a statement that failing to comply with the notice may result in one or all of the following:
 - (i) Civil penalties; and
 - (ii) A lien on the property for civil penalties and costs of compliance if the county corrects the violation.
- (e) *Service of Notice of Violation.* A notice of violation shall be served in one of the following methods:
- (1) Personal service;
 - (2) Certified or registered mail, restricted delivery, return receipt requested;
 - (3) First class mail to the last known address of the alleged violator; or
 - (4) When service cannot be obtained by one of these methods, a copy of the notice of violation may be posted in a conspicuous place on the property.

(f) *Time for Correction.* An alleged violator shall make the correction within the time required by the notice of violation.

(g) *Notice of Violation Not Appealable.* An alleged violator may not appeal a notice of violation issued under this section.

(C.B. 3, 2008, § 5)

Sec. 16.1603. Citation.

(a) *Authority to Issue.* The director may issue a citation to an alleged violator:

- (1) After the issuance of a notice of violation if the violation continues after the reasonable time stated in the notice of violation has passed; or
- (2) If law or regulation does not require the issuance of a notice of violation, when the director determines that a violation of the subdivision and land development regulations set forth in Subtitle 1 of this title or the Howard County Zoning Regulations exists or has occurred.

(b) *Content of Citation.* A citation shall:

- (1) Be in writing;

It is settled law in Maryland that an administrative agency's interpretation and application of the statute that the agency administers should ordinarily be given considerable weight by reviewing courts and by extension, boards of appeal. *Swoboda v. Wilder*, 173 Md. App. 615, 920 A.2d 518, 529-530 (2007) (internal citations omitted). DPZ has previously interpreted Section 16.1600.(b) as authorizing it to take corrective action to cure defective NOVs and civil citations. In Code Enforcement Case No. CE 08-137 (decided 2011), Supervisor LaRose testified to issuing a corrective notice of violation upon realizing the use of the property was ineligible for conditional use approval as a landscape contractor, where such action was one means of abating the violations. In CE 10-051, DPZ issued a first and then a corrective civil citation for violations of the HCZR. The first citation, CE 10-051 was for a violation described as a "[c]ombination of uses and buildings (trailers and storage sheds) occupy greater land area than the primary use (dwelling)." The second citation, CE 10-051(a) was for a violation described as "[c]ombination of uses and buildings (trailers and storage sheds) is not secondary, incidental and subordinate to the principal use (dwelling). In an August 2, 2011 Preliminary Order, the Hearing Examiner dismissed the first

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- (2) Include certification by the inspector, attesting to the best of the inspector's knowledge, that a violation exists or has occurred;
 - (3) Contain the name and address of the alleged violator;
 - (4) Describe in particularity the nature of the violation, including a reference to the Code or county provision allegedly violated;
 - (5) Contain the time when the violation occurred and the place;
 - (6) Include any fine to be assessed including a statement that a lien may be placed on the property for civil fines and costs of compliance if the county corrects the violation;
 - (7) Contain the manner, location, and time in which a fine may be paid; and
 - (8) Include a statement that the alleged violator has the opportunity to be heard before the hearing examiner.
- (c) *Service of Citation*. A citation shall be served in the same manner as a notice of violation as set forth in section 16.1602(e) of this subtitle.
- (d) *Director to Retain Copy*. The director shall retain a copy of a citation.
(C.B. 3, 2008, § 5)

citation, concluded it had been superseded by the second, and found Respondent in violation of the pertinent HCZR cited in the second citation. The same NOV supported both citations. DPZ in both cases issued the corrective NOV and civil citation before forwarding the cases to the Hearing Examiner for a hearing.

It is also settled law that no deference is due where an administrative agency, in its interpretation or conclusions in application of the zoning statutes, regulations, and ordinances it administers, misreads such laws. Any administrative application must comport with basic principles of statutory construction. Perhaps as an extension of its practice of issuing corrective NOVs and citations during its investigations of zoning complaints, DPZ's zoning enforcement section read § 16.1600 et. seq. as allowing an inspector to issue a corrective civil citation after the dismissal of a defective citation, with the discretion to rely on the NOV attached to the defective citation or issuing no NOV at all. Neither Inspector Braithwaite nor Supervisor LaRose, however, testified as to DPZ's justification for forgoing the issuance of a new NOV before issuing the second citation under the same case number. It was only on Respondent's objections to the introduction of the two NOVs into evidence that the issue arose and it was in this context that DPZ counsel argued that the term "may" as used in §16.1602.(b) invests DPZ with the option to issue an NOV before issuing a civil citation. For answers to the questions posed above, we must probe the applicable statutes and regulations.

Applicable HCC Sections

The applicable NOV provisions of the HCC are set forth in §16.1602 and are as follows.

(b) Authority to Issue Notice of Violation. After investigation, if the director believes that a violation of the subdivision and land development regulations set forth in Subtitle 1 of this title or the Howard County Zoning Regulations exists or has occurred, the director *may* issue a notice of violation to the alleged violator.

(c) No Requirement to Issue. The director is not required to issue a notice of violation:

(1) For a repeated violation for which a citation under section 16.1603 Of this subtitle has been issued; or

(2) If a notice of violation is not required by law or regulation.

(Emphasis added.)

Of import to this Order is the meaning of the term "may." As used in §16.1602.(b) the term is certainly permissive, but not in the manner argued for by DPZ. The permissive term "may" is deployed to grant DPZ's director broad discretion in how to enforce the HCZR (and the Land Development and Subdivision Regulations.) "May" means only that DPZ may optionally enforce the HCZR through the citation and administrative hearing procedures established in §16.1600 et. seq. As §16.1601 clarifies, these procedures are available for use, elective, "in addition to any other remedy authorized by law", including maintaining an action in a court of competent jurisdiction for an injunction, or filing a petition for equitable relief in the District Court. In its broader context, "may" invokes the county's sovereign exercise of discretionary judgment in the enforcement of its police power functions, including code and regulations enforcement, a discussion of which is beyond the scope of this Order.

Once DPZ has opted to enforce the HCZR through the citation and administrative hearing procedures, it must proceed in the manner set forth in § 16.1600 et. seq. by first investigating an alleged violation. Upon belief a violation exists or has occurred, DPZ is required to issue an NOV, with two statutory exceptions. Section 16.1602.(c) excuses DPZ from issuing a notice of violation for a repeated violation for which a citation under section 16.1603 of this subtitle has been

issued, or if a notice of violation is not required by law or regulation. Neither apply to this case. The first exception did not excuse DPZ from issuing a new NOV because the Hearing Examiner dismissed the first CE 10-133 civil citation on June 2, 2013. The second exception does not apply because the code enforcement provisions of the HCZR excuse DPZ from issuing an NOV only upon a determination that no zoning violation exists.

HCZR §102.0.B provides for the county's enforcement of these regulations and prescribes in pertinent part the procedures available to DPZ to take action for any violation of said regulations. The first two paragraphs echo the optional remedies available to DPZ to address alleged violations under HCC §16.1600 et. seq.

Upon becoming aware of any violation of these regulations, the Department of Planning and Zoning *may* institute an injunction, mandamus, abatement or any other appropriate action to prevent, enjoin, abate or remove such erection, construction, alteration, enlargement, conversion or use in violation of any of the provisions of these regulations. The Department of Planning and Zoning *may* give notice that activities on the premises are in violation of the Zoning Regulations and may order an end to these activities within 10 days, or a reasonable specified time...

The Department of Planning and Zoning *may* enforce the Zoning Regulations by issuing citations to alleged violators to be heard in Court or in Administrative Proceedings as provided by Law.
(Emphasis added.)

In 2011, the Howard County Council amended the third paragraph of HCZR §102.0.B, which addresses the procedure by which DPZ responds to a zoning complaint and a complainant's right to appeal a determination not to issue an NOV because no zoning violation exists. As amended, DPZ must notify a known complainant that it has received the zoning complaint and issued an NOV. "[I]f the Department of Planning and Zoning does not issue such a zoning violation

notice within 60 days of receiving the written request, this shall be considered to be a final decision of the Department that the alleged violation does not exist. . ." and the complainant may appeal any final decision to not issue a zoning violation notice.

This language could not be clearer. There is only one circumstance in which DPZ will not issue an NOV if it pursues a zoning violation under the HCC citation and administrative hearing procedures: when it makes a final decision that the alleged violation does not exist.

Lastly, in the approximately six-year history of the code enforcement administrative hearing process, DPZ has consistently issued alleged violators NOVs prior to issuing a civil citation in every case before the Hearing Examiner. When DPZ took the decision to go forward on in this case without first issuing an NOV to Respondent, it was an arbitrary and capricious exercise of the department's police power to enforce its regulations.

Conclusions

Upon the dismissal of the first CE 10-133 citation, DPZ's prosecution against Respondent for all alleged violations of the HCZR at 10080 Route 1 ceased as it concerned the administrative hearing process. The attendant NOVs supporting the issuance of this citation became "stale" or lost their regulatory procedural force. The Inspector having sidestepped his statutory duty to issue Respondent a fresh NOV before issuing a fresh citation, the Hearing Examiner is compelled to dismiss all three code enforcement cases. An alleged violator of the HCZR is entitled to have

alleged violations of the HCZR resolved in accordance with validly adopted procedures, as a matter of Federal and Maryland Constitutional due process requirements.⁴

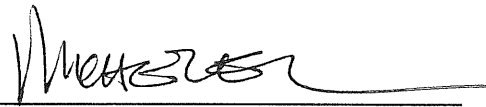
⁴Kane v. Board of Appeals, 887 A.2d 1060, 390 Md. 145 (Md, 2005) (The Due Process Clause of the federal Constitution is part of the Fourteenth Amendment, which states: "nor shall any State deprive any person of life, liberty, or property, without due process of law." The Maryland Constitution Due Process Clause is stated in Article 24 of the Declaration of Rights: "no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." This Court has recognized for a long time that this clause generally is interpreted in the same manner as the Due Process Clause of the Fourteenth Amendment. Bowie Inn, Inc. v. Bowie, 274 Md. 230, 235 n. 1, 335 A.2d 679, 683 n. 1 (1975)).

ORDER

It is therefore this **31st day of March 2014**, by the Howard County Board of Appeals Hearing Examiner, ORDERED that:

That civil citations CE 10-133(a), CE 10-133(b) and CE 10-133(c) are **DISMISSED**.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**



Michele L. LeFaivre

NOTICE TO RESPONDENTS: Respondents are advised that pursuant to Section 16.1608.(c) of the Howard County Code, all fines are due and payable by the date indicated in the citation; and are payable to the Director of Finance of Howard County. Pursuant to Section 16.1609, a final order issued by the Hearing Examiner may be appealed within 30 calendar days of the date of this order by the alleged violator to the Board of Appeals in accordance with Section 16.304 of this title. If an alleged violator appeals the final order of the hearing examiner, the alleged violator may request the stay of any civil fine imposed by a final order pending the final resolution of an appeal. Pursuant to Section 16.1610, if a final order of the Hearing Examiner includes a civil fine and the order is appealed to the Board of Appeals, the alleged violator shall post security in the amount of the civil fine to the director in a form acceptable to the Director of Finance. After all appeals are exhausted, if a civil fine is reduced or vacated, the security shall be reduced proportionately; any surplus shall be returned to the alleged violator; and any balance shall be used to satisfy the civil fine; or is not reduced or vacated, the security shall satisfy the fine assessed and accrue to the benefit of the county. Pursuant to Section 16.1611, if a final order issued by a Hearing Examiner assesses a civil fine and the alleged violator does not pay the fine within the time required by the order, the Hearing Examiner shall certify to the Director of Finance the amount owed that shall become a lien on the property on which the violation existed; and be collected in the manner provided for the collection of real estate taxes.

A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the order. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard on the record by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.