

MICHAEL GRODIN, ANNE ANDREWS, STEVE FITZGERALD, ANGELA SANDS & MICHAEL SANDS : BEFORE THE
 Appellants : HOWARD COUNTY
 vs. : BOARD OF APPEALS
HOWARD COUNTY, MARYLAND, DEPARTMENT OF PLANNING AND ZONING : HEARING EXAMINER
 Appellee : BA Case No. 699D

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DECISION AND ORDER

On August 12, 2013, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, conducted a hearing on the departmental appeal of Michael Grodin, Anne Andrews, Steve Fitzgerald, Angela Sands & Michael Sands (Appellants). Appellants are appealing the May 1, 2013 letter to Remembrance Bibles, Inc., c/o Charles Marlin Barnes (Remembrance Bibles) from Robert J. Frances, P.E., Director, Department of Inspections, Licenses and Permits (DILP).

E. Alexander Adams, Esq. represented Appellants. David Moore, Esq., Senior Assistant County Solicitor represented DILP.

As a preliminary matter, DILP moved for dismissal of the case. Upon consideration of DILP's motion to dismiss, Appellants' response to the motion and oral arguments heard on August 12, 2013 and for the reasons stated below, the Hearing Examiner is granting the motion and dismissing the appeal.

Background

In 1986, Dr. Byong Yoo subdivided property into a four-lot subdivision recorded in the land

records of Howard County as Record Plat #6886.¹ This record plat denotes a 50-foot ingress/egress easement to Daisy Road for Lots 1-4. Appellants Anne Andrews, Steve Fitzgerald, Angela Sands & Michael Sands are the current owners of Lots 1, 4 and 2, respectively.² This easement begins near the easternmost area of Lot 4 and runs eastward along the northern property lines of Lots 3, 2 and 1 to provide access to Daisy Road.³

At one time Dr. Yoo also owned the subject property at issue in this case, which he conveyed to Remembrance Bibles. This lot currently has a street address of 3190 Daisy Road and is identified as Tax Map 20, Grid 6, Parcel/Lot 122 (the Property). The Property adjoins a portion of Lot 4 and shares its common eastern lot line with the western lot line of property owned by Appellant Michael Grodin.

The record indicates that Remembrance Bibles has recently undertaken to grade some portion of the Property and improve it with a driveway. DILP became aware these activities were proceeding without a grading permit and issued Remembrance Bibles a Notice of Violation (NOV). The record also demonstrates that DILP and the Department of Planning and Zoning (DPZ) (which reviews various permit DILP permit applications for compliance with

¹ To aid the reader, a copy of Record Plat # 6886 (Page 1) is attached to this Decision and Order. This plat accompanied Appellants' Opposition to DILP's Motion to Dismiss.

² The Hearing Examiner takes notice that in 2011, she approved a Commercial Communications Tower (cell tower) conditional use application on Lot 4. The petition/technical staff report identified the location of the proposed use as Lot 4 of the Byong Yoo Subdivision, with access from Daisy Road via an 800'± driveway. More recently, in Board of Appeals Case No. 697D (April 2013), Remembrance Bibles unsuccessfully challenged a DPZ decision to close a zoning violation case because the alleged violator, Mr. Grodin, had abated the violation (a pole barn on the Grodin property had encroached into the setback along the common lot line with the subject property in this case).

³ Record Plat #6886 notes a "50' Easement for Ingress and Egress to Lots 1, 2, 3 & 4" and a line pointing to a 50-foot width denotation. Within this designated easement area, two 25-foot wide dimensions are noted. There appears to be a property boundary demarcation generally running along the center of the 50-foot call out.

county zoning and subdivision regulations) have had concerns as to whether the Property has a right of ingress/egress to Daisy Road via Lot 4 and the Byong Yoo subdivision easement.

At some juncture, the two departments challenged both the validity of Remembrance Bibles' interest in the Property and the existence of an access easement. By letter dated April 12, 2013 to Lisa O'Brien, Esquire, Senior Assistant County Solicitor and Remembrance Bibles (among others), the title insurance company covering Remembrance Bibles issued an opinion on the dispute (Opinion Letter). In the insurer's opinion, Remembrance Bibles took legal title to the Property together with an express access easement (referenced in the vesting deed's legal description), said easement running easterly over the northerly 25-foot portion of Lot 4 running from said property to Daisy Road and running with the land.⁴

By letter of May 1, 2013, DILP, on the signature of Director Robert J. Frances, issued Remembrance Bibles Inc., c/o Charles Marlin Barnes, a "NOTICE OF VIOLATION (UPDATED – EXTENDED)" (Updated NOV). The Updated NOV initially conveys DILP's satisfaction as to title and right of ingress/egress to the Property via Lot 4 and alludes to the department's receipt of the Opinion Letter. It next acknowledges DPZ's endorsement of the grading permit application based on the Opinion Letter and advises addressee of the need to submit stormwater management facilities plans for the driveway to DPZ's Development Engineering Division for approval. The third paragraph states as follows.

Accordingly, the Department of Inspections, Licenses & Permits (DILP) will not be issuing a civil citation, but rather will be *extending the Notice of Violation (N-O-V)*. You will have 30 days from the date of this letter (May 31, 2013) to submit plans and information to DED for review and approval. Once you submit the required plans, you

⁴ A copy of this letter is attached to the appeal petition as Exhibit 2.

will be granted an additional 60 days (July 30, 2013) to get the plans approved and implemented such that a grading permit can be issued. Should you fail to meet either one of these deadlines, a civil citation may be issued at anytime. If plans are received and approved within the above referenced guidelines, thus allowing the grading permit to be issued, the N-O-V will be abated.

(Emphasis added.)

Appellants have timely appealed the Updated NOV, alleging the County has failed to enforce Record Plat # 6886, which they allege limits use of the shared driveway to the four-lot subdivision. For this claim of legal and factual error, they cite to HCC § 16.106.(a), a Howard County Subdivision and Land Development Regulations (SLDR) provision that they allege obliges the "County" to enforce the record plat.

Discussion

I. The May 1, 2013 DILP Updated NOV letter

The threshold decision in this appeal is whether DILP's Updated NOV letter of May 1, 2013 to Remembrance Bibles is an appealable decision. As Hearing Examiner, I am authorized to hear only matters that are otherwise within the jurisdiction of the Howard County Board of Appeals. HCC § 16.302.(a). The Board is authorized to hear such matters as set forth in Article 25A, § 5(U) of the Annotated Code of Maryland and as defined by implementing legislation enacted by the County Council. HCC §§ 501.(b) & .(f). Art. 25A, § 5(U) authorizes boards of appeal to hear and decide such matters arising (either originally or on review of the action of an administrative officer or agency) under any law, ordinance, or regulation, including "the issuance, renewal, denial, revocation, suspension, annulment, or modification of any license,

permit, approval, exemption, waiver, certificate, registration, or other form of permission or of any adjudicatory order."

In support of its motion to dismiss, Appellee DILP argues the Updated NOV is not a final decision for the purposes of appeal, but rather nothing more than a continuation of a notice of violation period and a deferred issuance of a civil citation. The Hearing Examiner agrees.

The Maryland Court of Appeals in *United Parcel Service, Inc. v. People's Counsel for Baltimore County*, 336 Md. 569, 650 A.2d 226 (1994) has defined what is an "appealable event" within Art. 25A, § 5(U). In UPS, neighboring landowners objected by letter to the county zoning commissioner's previous approval of a building permit application. The commissioner's response letter explained and defended this initial approval decision. When the neighboring landowners took an appeal from the response letter, the Board of Appeals ultimately ruled on the merits of the case and determined the initial approval was correct, and the Circuit Court and Court of Special Appeals upheld the Board decision on appeal by UPS. On final appeal, the Court of Appeals reversed, holding the Board of Appeals had no jurisdiction to entertain the merits of the appeal because the response letter was not an operative event determining the issuance, renewal, denial, revocation, suspension, annulment, or modification of a license or permit, but merely a reaffirmation of a prior approval or decision. The Court reasoned an appealable event must be a final administrative decision, order, or determination. "If this were not the case an inequitable, if not chaotic, condition would exist. All that an appellant would be required to do to preserve a continuing right of appeal would be to maintain a continuing stream of correspondence, dialogue, and requests ... with appropriate departmental authorities

even on the most minute issues of contention with the ability to pursue a myriad of appeals ad infinitum." 336 Md. at 584-585, quoting from Nat'l Inst. Health Fed. Cr. Un. v. Hawk, 47 Md. App. 189, 422 A.2d 55, 58-59 (1980), cert. denied 289 Md. 738 (1981). See also Meadows of Greenspring Homeowners Association v. Foxleigh Enterprises, Inc., 133 Md. App. 510, 758 A.2d 611 (2000).

In the instant appeal, the purpose of the Updated NOV is to inform Remembrance Bibles that DILP is continuing the NOV. By continuing the NOC, Director Frances did not "grant, decide, deny, or order anything," to apply the Court's language in UPS.

II. DILP's acceptance of retroactive grading permit application

Appellants also challenge DILP's decision to accept the grading permit application retroactively after physical completion of all illegal grading despite no departmental action to enforce the applicable county regulations. On this point, DILP contends the petition must be dismissed because the HCC does not authorize appeals to the Hearing Examiner from the issuance of a grading permit, were the Updated NOV letter a final decision for the purposes of Art. 25A, § 5(U).

The right to take an appeal is statutory.⁵ With respect to appeals of grading permits, the County Council has not legislated a right of appeal from a final grading permit decision to the Hearing Examiner, as DILP argued in its motion to dismiss. The enforcement provisions contained in the grading subtitle, HCC § 3.406, mandate the enforcement of the subtitle

⁵ See *Howard County v. JJM*, 301 Md. 256, 482 A.2d 908 (1984) (citing *Maryland Bd. v. Armacost*, 286 Md. 353, 54-55 (1979); *Criminal Inj. Comp. Bd. v. Gould*, 273 Md. 486, 500 (1975); *Urbana Civic v. Urbana Mobile*, 260 Md. 458, 461 (1971)).

through multiple methods of enforcement, but not through an appeal to the Hearing Examiner.⁶ By comparison, HCC § 3.101 of the same Building Title does authorize appeals from final building permit decisions to a hearing examiner of the Howard County Board of Appeals, as DILP referenced in its motion to dismiss.⁷

⁶ Sec. 3.406. Enforcement.

(a) Enforcement Authority. The County shall, through the authority of this subtitle and COMAR 26.17.01 and 26.08.01.01b(20), use enforcement actions when violations of this subtitle occur. Any step in the enforcement process may be taken at any time, depending upon the severity of the violation.

(b) Right of Entry. The County may enter upon property to ensure compliance with this subtitle. If a permit is revoked, the County may enter the property and perform work in order to stabilize the soil within the construction areas, to construct sediment control measures on the perimeter of the site to control mud and silt, or to provide positive drainage patterns.

(c) Corrective Action Order. When the County determines that a violation of this subtitle has occurred, the County shall notify the on-site personnel or the permittee in writing of the violation, describe the required corrective action and the time period in which the violation must be corrected.

(d) Stop-Work Order. If a person clears or grades land without a grading permit, the County shall issue a stop-work order banning any or all construction activity on the site except temporary sediment control measures specified by the County. If a person clears or grades land in violation of this subtitle, the County may issue a stop-work order banning any or all construction activity on the site except temporary sediment control measures specified by the County, until the violation is corrected.

(e) Civil Citation. When the County identifies a violation of this subtitle, the County may issue a citation to the owner/developer or the permittee, or both, assessing civil penalties in accordance with section 3.407 of this subtitle. The contents and enforcement of the citation shall be governed by title 24 of this Code.

(f) Injunctive Relief. Any agency whose approval is required under this subtitle or any interested person may seek an injunction against any person who violates or threatens to violate any provision of this subtitle.

(g) Other Legal Action. The County may take any of the enforcement actions authorized by this subtitle regardless of whether any other enforcement action has been taken for a violation and may take other legal action including, without limitation, referral for criminal enforcement or a civil action for damages to recover double the amount of costs incurred by the County for actions taken to abate a violation. The County shall use any damages recovered under this section solely for the County's erosion and sediment control program, including correcting failures to implement or maintain sediment and erosion controls.

⁷ § 3.101(36) Means of Appeal.

Application for appeal. Except for a notice of violation, a person may appeal the approval, denial, revocation, suspension, or extension of a permit to a hearing examiner of the Howard County Board of Appeals. An application for an appeal shall be based on a claim that this Code has been incorrectly interpreted, the provisions of this Code do not apply, or an equally good or better form of construction is proposed. A notice of violation may not be appealed.

Board of Appeals. The Howard County Board of Appeals' Hearing Examiner shall hear and decide appeals in accordance with the procedures set forth in title 16, subtitle 3 of the Howard County Code. Neither the Board of Appeals' Hearing Examiner nor the Board of Appeals shall have authority to waive requirements of this Code.

There being no statutory right to appeal even a final grading permit decision to the Hearing Examiner, Appellants' claim of error with respect to retroactive acceptance of a grading permit application does not lie to compel the Hearing Examiner to adjudicate the issue.

III. Enforcement of the Record Plat

As was determined in Part I, the Updated NOV letter is not a final decision for the purposes of appeal. The Hearing Examiner also disagrees with Appellants' premise and conclusion that DILP's acceptance of a grading permit application is legal error, an impermissible failure on the "County's" part, effectively, to enforce the Record Plat under HCC § 16.106.(a). HCC § 16.106.(a) is a Subdivision and Land Development Regulations (SLDR) provision, which states as follows.

Section 16.106. Enforcement.

(a) In Violation of Approved Plan or Failure to have Approved Plan: If property is developed, used, or maintained in violation of or without obtaining *an approved final plan or site development plan*, the County shall institute appropriate action to compel compliance. In addition to and concurrent with all other remedies, the County may enforce the provisions of an approved final plan or site development plan with civil penalties pursuant to the provisions of Title 24, "Civil Penalties," of this Code and Subtitle 16 of this Title. A violation shall be a Class B offense under Title 24 of this Code or an offense subject to a fine in the amount set forth in Section 16.1608 of this Title.

(Emphasis added.)

This appeal concerns DILP's Updated NOV. DILP does not enforce approved final plans or site development plans.⁸ That duty falls to DPZ pursuant to HCC § 16.801.(c)(2)(iii): "[t]he

⁸ Perforce of HCC § 3.601.(c)(2) DILP enforces codes, laws, rules, and regulations relating to housing, building, grading, signs, plumbing, electrical installations, gas installations, fire safety, taxicabs, concerts, amusement devices and facilities, public utilities, mobile home parks, rental housing and other areas as required by law.

Department of Planning and Zoning shall administer and enforce laws and procedures governing the subdivision of land and land development."

Appellants' broad insistence that the "County" must resolve the issue, irrespective of the agency involved, has no merit in an administrative appeal proceeding. The administrative appeal process is intended to provide a due process forum for evaluating the correctness of an administrative agency decision. Appellants may not rely on regulations the administrative agency (in this case DILP) has no authority to enforce to allege error of law or fact in the agency decision. To the extent that Appellants root their appeal in HCC § 16.106.(a), there can be no finding of any violation of a procedural duty or requirement by DILP.

Lastly, on a related matter, Appellants present this claim of legal error by substitution of the term "record plat" for "final plan" in relation to the "County's" alleged enforcement obligations, terms Appellants use as equivalents, apparently. These terms are not synonymous.

The SLDR defines a "final plan" as a "final subdivision plan": "[a] final plat and supporting detailed plans and data demonstrating that all technical requirements of the County's regulations have been met." HCC § 16.108.(a)(21). On the other hand, a "final plat" is "[t]he official record of a division of land approved by the Department of Planning and Zoning and recorded in the land records of Howard County." HCC § 16.108.(a)(20). The purpose statement of HCC 16.147.(a), Final Subdivision Plan and Final Plat, differentiates the individual functions of the two terms within the subdivision process.

(a) **Purpose:** The final subdivision plan is the culmination of the subdivision process and shall include all information necessary to comply with Subsection (c), "Required Information for Final Plat"; (d) "Construction Drawings, Documents and Specifications"; (e), "Developer's Agreement"; and (f), "Major Facilities Agreement,"

of this Section. The final plat becomes the official record of the division of land, and no lot within the subdivision may be sold legally until a final plat has been approved and recorded by the Department of Planning and Zoning.

Art. 25A, § 5(U) does not invest the Hearing Examiner with jurisdiction to enforce land use restrictions such as easements. Although an easement may restrict the use of land, as do zoning and subdivision regulations, they operate independently and must be enforced through the appropriate regulatory regime. The Hearing Examiner explained this to Appellants during the hearing, commenting that easements (as interests in property) are a type of private covenant or contract, which she has no jurisdiction to enforce. Consequently, Appellants' dispute over Remembrance Bibles' legal right to access Daisy Road via the easement, must be litigated elsewhere.

ORDER

Based upon the foregoing, it is this 23rd Day of August 2013, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of Appeal of Michael Grodin, Anne Andrews, Steve Fitzgerald, Angela Sands & Michael Sands in Board of Appeals Case No. 699D is hereby **DENIED**.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**



Michele L. LeFavre

Date Mailed: _____

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. 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 *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.