

**AMAHA LLC (AMRAN PASHA, MANAGING MEMBER); BRITISH AMERICAN BUILDING, LLC T/A BRITISH AMERICAN BUILDING, LLC (BRIAN ENGLAND, MANAGING MEMBER); & HOWARD COUNTY INDEPENDENT BUSINESS ASSOCIATION, INC. (HCIBA)**

Appellants

vs.

**HOWARD COUNTY DEPARTMENT OF PLANNING & ZONING & TWO FARMS, INC.**

Appellees

: BEFORE THE  
: HOWARD COUNTY  
: BOARD OF APPEALS  
: HEARING EXAMINER  
: BA Case No. 694-D

.....

**DECISION AND ORDER**

On February 14, 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 administrative appeal of Amaha LLC, Amran Pasha, Managing Member (AMAHA LLC); Howard County Independent Business Association, Inc. (HCIBA), and; British American Building, LLC, Brian England, Managing Member (British American). Appellants are appealing the Howard County Department of Planning & Zoning (DPZ) October 3, 2012 signature approval of Environmental Concept Plan (ECP) 13-002. The appeal is filed pursuant to Section 18.915 of the Howard County Code (HCC). The Hearing Examiner viewed the subject property as required by the Hearing Examiner Rules of Procedure.

William Erskine, Esquire, represented the Appellants. Paul Johnson, Deputy County Solicitor, represented DPZ. Sang Oh, Esquire, represented Two Farms.

The hearing was limited to oral argument on Appellees' motions to dismiss the petition

for the reasons discussed below. Upon consideration of the motions to dismiss submitted by Appellees, Appellants' consolidated response to these motions and oral argument, the Hearing Examiner has determined to dismiss the petition.

### Background

Appellee Two Farms is the developer of property located at 9585 Snowden River Parkway (the Property), which is located on the southeast corner of the Snowden River Parkway and Minstrel Way intersection. Two Farms is proposing to develop the Property with a Royal Farms store, ten gasoline-fueling positions and a car wash. Appellant AMHA, LLC is the property owner of 7100 Minstrel Way, which is located across from the Property and adjoins the southern public right-of way for Snowden River Parkway. AMHA, LLC leases its property to a gasoline service station, convenience store and car wash operator.<sup>1</sup>

In 2012, Two Farms submitted Environmental Concept Plan ECP-13-002 to DPZ for its review and approval. By letter dated September 13, 2012, Charles Dammers, Chief of Development Engineering informed project engineer addressee Michael Coughlin of DPZ's technical determination that ECP-13-002 is approved subject to certain comments. The letter further instructs Mr. Coughlin to submit an original reproducible plan to DPZ for signature approval by the chiefs of DPZ's Development Engineering (DED) and Land Development (DLD) divisions within 45 calendar days from the PDOX notification email date.<sup>2</sup> Mr. Dammers' original signature does not appear above his typed name on the September 13, 2012 letter.

---

<sup>1</sup> Appellants' consolidated response to Appellees' motions to dismiss states that "in the interest of efficiency" the determination of AMHA LLC's legal standing will render a determination of the other Appellants' standing moot. Hence, the response contains no information about the other two appellants, other than addresses.

<sup>2</sup> ProjectDox is an electronic plans submission and review process. ProjectDox software allows plans to be

By letter dated October 2, 2012, DED engineer Philip Thompson informed Mr. Coughlin that the original ECP-13-002 was signed. Mr. Thompson's original signature does not appear above his typed name on this letter. A copy of the original three-sheet ECP plan (the Mylar signature approval plan) indicates Kent Sheubrooks (Chief, DLD) signed as approved ECP-13-002 on the Sheet 1 signature block of the three-sheet ECP plan on October 2, 2012. Charles Dammers, (Chief, DED) signed the plan as approved on October 3, 2012.

AMHA, LLC et al. filed an administrative appeal petition on November 1, 2012. The petition states the appeal is taken from the approval of ECP-13-002, and gives the date of the ruling or action as October 3, 2012. In the section provided for a brief description of error, fact, or law presented by the appeal is the statement that the "proposed Environmental Concept Plan does not conform to the requirements of the HCC, Title 18: Subtitle 9: Storm Water Management." The petition also states Appellants are aggrieved because failure to comply with the stormwater management regulations will result in the degradation of the environment in which the Appellants' real property is located.

#### **Appellees' Motions to Dismiss**

DPZ submitted a preliminary motion to dismiss the appeal for lack of jurisdiction, and in support states the following.

1. DPZ's October 3, 2012 ECP signature approval is not an appealable decision, only a ministerial act reflecting the actual DPZ decision made by letter of September 13, 2012. Consequently, any appeal rights regarding the September 13, 2012 approval are now waived through untimely filing.

2. Appellants are not aggrieved by DPZ's ECP approval because the September 13, 2012 determination was only the approval of a preliminary concept plan under Howard County Code (HCC) Section 18.905(b)(1), and not a final site development plan decision on stormwater management issues under Section 18.905(b)(2).
3. Appellants failed to state clearly the grounds on which the appeal is based in its petition in violation of HCC Section 18.915.
4. Appellants are not aggrieved by DPZ's ECP approval because redevelopment of the site according to the stricter stormwater management standards imposed by HCC Title 18, Subtitle, as mandated by the state of Maryland, could only improve environmental conditions in the area of the subject property.

Two Farms submitted two preliminary motions to dismiss. The first motion states Appellants lack standing to pursue the appeal because they are not aggrieved. The second motion argues Appellants failed to timely file their appeal and states as follows.

1. The approval of an ECP is not an appealable decision under HCC Section 18.915 because it is not a final decision.
2. Alternatively, if DPZ's approval of an ECP is an appealable decision, Appellants failed to file their appeal within 30 days of such approval.
3. Appellants may not rely on the later DPZ signature approval action because it was not a final approval or decision, because it did not grant, deny, decide or order anything; it only confirmed or reaffirmed DPZ's prior ECP approval or decision.

In their consolidated response, Appellants state the 30-day deadline to take an appeal from DPZ's ECP-13-002 approval was not triggered until they were on notice of a final DPZ decision or determination regarding the ECP plan, which they argue did not occur until October 3, 2012, the date DPZ's Chief of Development Engineering Charles Dammers provided his original signature approval on the original ECP-13-002 plan (a Mylar). The appeal is therefore timely because the petition was filed on November 1, 2012.

### Discussion

*1. Were Either the September 13, 2012 ECP Approval or the October 3, 2012 Mylar Signature Approval A Final Decision?*

A first issue here is whether DPZ's September 13, 2012 ECP-12-022 approval or the October 3, 2012 Mylar ECP signature approval was a final decision commencing the running of the 30-day appeal period. To answer this, we turn to HCC Code Subtitle 9. Stormwater Management, Section 18.900 et seq.

The Howard County Council enacted Section 18.900 et seq. in 2010 in response to Title 4, Subtitle 2 of the Environmental Article, Annotated Code of Maryland. The purpose of the new provisions is stormwater management through environmental site design to the maximum extent practicable. Section 18.900.

Section 18.901 defines several terms applicable to the instant appeal, including the following.

(d) *Applicant* means a person, firm, or governmental agency who executes the necessary documentation to procure official approval of a project to carry out construction activities involving stormwater management systems.

(e) *Approving agency* means the entity responsible for the review and approval of stormwater management plans. As set forth in the Howard County Design Manual and depending on the nature of the project, the approving agency is the Department of Planning and Zoning or the Department of Public Works.

(i) *Concept stage* means the first stage of the stormwater management design process. Approval of the environmental concept plan constitutes the approval of the concept stage.

(o) *Environmental concept plan* means the first of three required plan approvals that includes the information necessary to allow an initial evaluation of a proposed project.

(t) Final stage means the third stage of the stormwater management design process. Approval of the grading plan constitutes the approval of the final stage.

(ll) *Site development stage* means the second stage of the stormwater management design process. Approval of one of the following plans constitutes the approval of the site development stage: sketch plan, preliminary plan, preliminary equivalent sketch plan, final plan, or site development plan as defined in section 16.108 of the Howard County Subdivision and Land Development Regulations. The applicable plan will act as the second of three required plan approvals that include the information necessary to allow a detailed evaluation of a proposed project.

HCC Section 18.902(a) sets forth certain definitions applicable to this section only, including the definition of the term "approval." "Approval shall mean a documented action by the County following review to determine and acknowledge the sufficiency of submitted materials to meet the requirements of a specified stage in the development process []." Section 18.902(a)(1).

Section 18.905(b) establishes a three-stage stormwater management design and review process.

(1) A concept stage that provides sufficient information for an initial assessment of the proposed project and whether stormwater management can be provided according to this subtitle.

(2) Following concept stage approval by the County, the owner or developer shall submit plans meeting requirements for the site development stage. At this stage, the owner or developer must also submit a narrative that supports the site design, describes how ESD will be used to meet the minimum control requirements, and justifies any proposed structural stormwater management measure. Section 18.905(2)(iv).

(3) Following site development stage approval by the County, the owner or developer shall submit plans meeting requirements for final stage. Plans submitted for final stage approval shall be of sufficient detail to allow all approvals and permits to be issued. At this stage, final stormwater management design shall be submitted for approval in the form of construction drawings and shall be

accompanied by a report that includes sufficient information to evaluate the effectiveness of the proposed runoff control design. Section 18.905(3)(ii).

Section 18.915 authorizes any person aggrieved by any final decision made by the Official charged with the enforcement of Subtitle 9 to appeal such decision to the Board of Appeals. The appeal must be filed in writing within 30 days *of the date of official transmittal of the final decision or determination to the applicant*, state clearly the grounds on which the appeal is based, and be processed in the manner prescribed for hearing administrative appeals in Howard County. (Emphasis added.)

Applying Section 18.900 et seq. to ECP-13-002, the Hearing Examiner finds that DPZ's September 13, 2012 ECP-13-002 action was an approval of the first, concept stage. This "preliminary project approval" determined the ECP was technically complete. DPZ, through Mr. Dammers, documented DPZ's preliminary ECP-13-002 approval action by informing Mr. Coughlin through the September 13, 2012 letter.

The Hearing Examiner agrees with Appellees that this ECP approval was not a final decision for the purposes of appeal. An administrative agency action is "final" only if it determines or concludes the rights of the parties, or if it denies the parties means of further prosecuting or defending their rights and interests in the subject matter before the agency, thus leaving nothing further for the agency to do. *Maryland Commission on Human Relations v. Baltimore Gas & Electric Co.*, 296 Md. 46, 56, 459 A.2d 205 (1983) (internal citations omitted). DPZ's approval of an environmental concept plan at this first, concept stage concluded its initial assessment of whether Two Farms could provide environmental site design. It did not determine any rights of the applicant.

Nor is DPZ's October 3, 2012 Mylar signature approval action a final decision, the action being only a formal completion of the concept plan stage and serving no substantive purpose. Appellees correctly recognize this ECP-13-002 signature approval step as a later ministerial action that did not decide, grant or order anything. *United Parcel Service v. People's Counsel for Baltimore County*, 336 Md. 569, 650 A.2d at 232-233 (1994).

The Hearing Examiner is thus compelled to dismiss Appellants' administrative appeal petition because it is premature. As DPZ's motion to dismiss explains, there is no appealable final decision concerning stormwater management design issues until DPZ makes a final site development plan decision on stormwater management measures pursuant to Section 18.905(b)(2).

*2. Notice of a Final Decision – Is There an Original Signature Requirement?*

We turn now to Appellants' argument that procedural due process required DPZ to provide notice of a final decision through an original or electronic signature, which is lacking Mr. Dammer's September 13, 2012 ECP-13-002 letter, relegating it to the lowly status of "unexecuted draft" correspondence. While neither of the two actions contested by Appellants was a final decision for taking a timely appeal, the underlying disputed legal question of whether due process dictates the inclusion of an original signature on a DPZ final decision under Section 18.900 et seq. warrants analysis. DPZ is now processing the new three-stage stormwater management design and review process electronically through PDOX, including email notifications to applicants of its approvals. DPZ has traditionally corresponded with development applicants through regular mail, and this correspondence included an original



signature, as a rule. With PDOX, DPZ now has the capacity to transmit official correspondence through electronic attachments, which may or may not include an electronic signature.

The Hearing Examiner disagrees with Appellants' insistence on an original signature as a necessary signal of a final decision triggering the 30-day time to appeal. Appellants' response cites no law or regulation requiring an original signature on a DPZ documented action, including ECP concept plan stage approval and, importantly, a stormwater management design final decision and the Hearing Examiner has found none. Indeed, the Hearing Examiner's review of the laws, regulations and documents pertaining to the three-stage stormwater management design and review process produced but one document referencing DPZ approval signatures—the Howard County Department of Planning & Zoning Environmental Concept Plan Checklist. Part II of this checklist instructs an applicant to provide a standard Howard County approval signature block for the DLD Division Chief and the DED Division Chief with a date.<sup>3</sup>

The Hearing Examiner is therefore disinclined to burden existing statutory language concerning environmental site design final decisions with a signature act condition. To impose such a condition would give undue legal status to form over substantive law. Absent regulatory or statutory language to the contrary, it is the Hearing Examiner's determination that the purpose of an original signature on a DPZ stormwater management design final decision is intended only as a representation of the signer's authority to make the decision.

---

<sup>3</sup> In 2010, the Howard County Council approved Resolution No. 38-2010, which adopted a comprehensive revision to Volume I, Chapter 5 (Stormwater Management) of the Howard County Design Manual (Design Manual). This revision brought the county's standards for the design and construction of stormwater management facilities in compliance with the State's Stormwater Management Act. The Design Manual, Volume I, Section 5.3.2 requires the owner/developer of any proposed development to submit multi-step stormwater management plans to Howard County for review and approval. Section 2.5 provides that a completed checklist shall be submitted with

*3. Does Procedural Due Process Oblige DPZ to Apprise Appellants  
of its ECP Actions?*

Appellants' secondary argument that their due process rights were violated because DPZ failed to apprise them of any final decision or approval has an equally unstable legal foundation. They argue that despite two requests from counsel to DPZ requesting to be notified them of any filings or DPZ actions with respect to ECP-13-002 or the Property, perforce of a long-standing DPZ policy to copy citizens on all correspondence between DPZ and an applicant, DPZ failed to provide them such notice.<sup>4</sup> Equating this policy with DPZ's statutory obligation under the Subdivision and Land Development Regulations to "keep all parties to a proposed subdivision or development advised in writing of the Department's recommendations and actions" (HCC Section 16.103(a)), Appellants reason the time for appeal does not begin until DPZ meets its obligation to comport with minimum due process notice requirements. To support this claim, Appellants analogize their circumstances to those in *Aberle v. City of Baltimore*, 228 Md. 542, 180 A.2d 836 (1962), where the court held that where a law required the Baltimore zoning board to send notice of a decision to protestants of record, the time to appeal a decision did not start until such notice was sent.

Appellants' rely on *Aberle v. City of Baltimore* to support this argument is misplaced. In *Aberle*, the court concluded the prescribed time to start the period to appeal from a final zoning board decision was from the date notice was sent to protestants, there being a

---

each initial plan submission, signed, sealed and dated by the appropriate design professional.

<sup>4</sup> This policy is stated in a DPZ document entitled "Development Review Process," a copy of which was attached to the response. The response explains the two letters from counsel (dated June 20, 2012 and August 15, 2012) requesting to be copied in were found in the official ECP-13-002 file.

legislative directive to provide them such notice. There is no legislative directive in Section 18.900 et seq. to provide notice to Appellants. When DPZ makes a final decision in the three-stage stormwater management design and review process, it must do so via a documented action, in accordance with Section 18.902(a)(1). However, notice of a final decision or an ECP approval via official transmittal is owed by statute only to the applicant—the person, firm, or governmental agency who executes the necessary documentation to procure official approval of a project to carry out construction activities involving stormwater management systems. Sections 18.901(d) and 18.915. While it is regrettable that DPZ failed to copy in Appellants on the ECP technically complete letter, the policy of sending correspondence to citizens like Appellants does not confer on them any right of notice. Appellants' may not elevate this policy to a legal obligation by conclusory reference to DPZ's statutory obligatory to provide information to all "parties" of a proposed subdivision or development pursuant to HHC Section 16.103(a). Certainly, the mere expectation of notification through DPZ's long-standing policy creates no interest protected by procedural due process. Due process is triggered only when notice is a statutory requirement. *Reese v. Dept. of Health*, 177 Md. App. 102, 934 A.2d 1009, 1041 (2007) (discussing the U.S. Supreme Court's examination of the due process right of notice to protect property interests in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 578, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)).

#### *4. Appellees' Additional Arguments in Support of Their Motions to Dismiss*

There being no final decision from which to take an appeal, the Hearing Examiner declines to address Appellees' additional arguments in support of their motions to dismiss.

**ORDER**

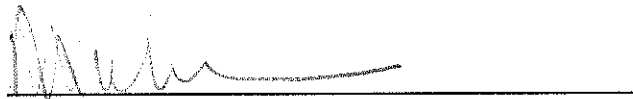
Based upon the foregoing, it is this **6<sup>th</sup> day of March 2013**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of Appeal of AMHA, LLC, Amran Pasha, Managing Member; Howard County Independent Business Association, Inc. (HCIBA) and; British American Building, LLC, Brian England, Managing Member (British American) in BA Case No. 694-D is hereby **DISMISSED**.

It is **FURTHER ORDERED** that the Department of Planning and Zoning shall copy all correspondence between DPZ and ECP 13-002 applicant Two Farms to Appellants' counsel, William Erskine.

**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.