IN THE MATTER OF	:	BEFORE THE
TIMOTHY FEAGA T/A HERITAGE LAND DEVELOPMENT	:	HOWARD COUNTY
Appellant	:	BOARD OF APPEALS
v.	:	HEARING EXAMINER
HOWARD COUNTY DEPARTMENT OF HOUSING & COMMUNITY DEVELOPMENT	:	BA Case No. 738-D
Appellee		

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ORDER

On April 24, 2017, 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 Timothy Feaga, t/a Heritage Land Development (Appellant). Appellant is appealing the Howard County Department of Housing and Community Development (DHCD) December 21, 2016 decision letter denying his request to exclude three lots from the 2017 Moderate Income Housing Unit (MIHU) fee-in-lieu agreement.

James Mayer, Esq., represented the Appellant. David Moore, Assistant County Solicitor, represented DHCD.

Appellant introduced into evidence the exhibits as follows.

1. F-79-131, Zimmerman Property
2. F-16-071, Hill Property, Lots 1-6, a resubdivision of Zimmerman Property
3. Letter to Tim Feaga re: Plat #8278 (F-16-071), Hill Property, Lots 1-6, a resubdivision of Zimmerman Property, from Kelly Cimino, December 21, 2016
4. MIHU agreement re: F-16-071, Hill Property
5. F-14-110, Larimore Property, Lots 1&3
6. MIHU agreement re: F-14-110, Larimore Property
7. F-14-072, Cattail Overlook, Lots 1-6
8. MIHU agreement re: F-14-072, Cattail Overlook, Lots 1-6

At the close of Appellant's case-in-chief, DHCD moved for dismissal of the appeal. Upon consideration of DHCD's motion, the evidence before me and for the reasons stated below, I determined to grant the motion and dismiss the administrative appeal.

STATEMENT OF THE CASE

In 2013, the Howard County Council enacted CB 35-2013 (effective September 29, 2013) an expansion of the county moderate income housing unit law contained in Howard County Code (HCC) Title 13. Housing and Community Development, Subtitle 4. Moderate Income Housing Units. As enacted, CB 35-2013 gives developers of single-family detached dwellings in certain zoning districts, including the RR (Rural Residential) district, the option of meeting their MIHU obligation through alternative compliance, including paying a fee-in-lieu for each dwelling unit in the development or portion of the development that is not providing MIHUs onsite. HCC § 13.402C(e).

CB 35-2013 was a companion bill to CB 32-2013, the Comprehensive Rezoning Plan (effective October 6, 2013), which modified in pertinent part Howard County Zoning Regulations (HCZR) § 105.0, the regulations for the RR zoning district, to add subsection 105.0.F. Subsection 105.0.F requires at least 10% of the single-family dwellings in each RR development to be moderate income housing units. In accordance with the regulatory construction and effective date language set forth in HCZR § 100.0.E.3.b, this 10% MIHU mandate does not apply if a subdivision or site development plan was "technically complete prior to the date the legislation is effective []."

Appellant is the developer of the Hill Property, Lots 1-6, a Resubdivision of Zimmerman Property, Lots 4, 5 & 7 (F-16-071) a six-lot resubdivision (the Hill Resubdivision). In a December 21, 2016 decision letter (the Decision Letter) DHCD Director Kelly Cimino denied Appellant's request to exclude three lots from the 2017 Moderate Income Housing Unit (MIHU) fee-in-lieu agreement for the development. The Director informed Appellant that HCC § 13.402C(e) enables developers to pay an MIHU fee-in-lieu to the DHCD "for each unit in the development or portion of the development that is not providing MIHUs onsite" and that this legislation applies to all "subdivision plats that are deemed technically complete after October [6], 2013.[1] Appellant Exhibit 3. The Decision Letter also describes DHCD's internal policy of allowing a developer to exclude "1 existing house from the fee-in-lieu payment in the MIHU fee-in-lieu agreement." Subsequent to this Decision Letter, Appellant signed the F-16-071 Hill Resubdivision MIHU Agreement, wherein he consented to a five-unit MIHU fee-in-lieu assessment.

The administrative appeal petition describes the error of fact or law presented by the appeal so: "Legislative Bill #35-2013 provides that subdivision 'units' are subject to MIHU if not technically complete by October [6], 2013. Three of the subject units were created prior to this date." The petition also asks the Hearing Examiner to consider that "Housing has been inconsistent with their enforcement. Some subdivisions have been afforded the exact relief sought by the petitioner."

Appellant timely appealed the final agency action letter on January 13, 2017, in

[1] The Decision Letter misidentifies the technically complete "grandfathering" date as October 1, 2013.

accordance with HCC § 13.410, which authorizes a party aggrieved by a DHCD decision issued under Subtitle 4 to, within 30 days, appeal the decision to the Howard County Board of Appeals according to its rules of procedure. In accordance with Hearing Examiner Rule of Procedure 10.2(c), in an appeal of an administrative agency decision, the petitioner must show by substantial evidence that the action taken by the administrative agency was clearly erroneous, arbitrary and capricious, or contrary to law.

DISCUSSION

The fulcrum of Appellant's claim of DHCD's wrongful imposition of fee-in-lieu payments for all six lots of the Hill Resubdivision is the department's methodology, per HCC § 13.402C(e), for calculating the number of units in the development or portion of the development that is not providing MIHUs onsite. In support of his claim, Appellant makes two primary arguments about this departmental calculus. First, DHCD arbitrarily and capriciously excepted a lot already improved with a house and second, the department's calculus of a "six-unit" obligation is incorrect as a matter of law because three of the lots are "grandfathered" under HCZR § 100.0.E.3.b.

As evidence of arbitrary and capricious action, Appellant relies on a difference in wording between the MIHU Agreement Exhibit A "Construction Plan" form for the Hill Resubdivision MIHU Agreement and its Larimore Property Resubdivision and the Cattail Overlook Resubdivision counterparts. The 2015 Larimore Resubdivision resubdivided a single lot into two lots through F-14-110. Appellant Exhibit 5. The Exhibit A "Construction Plan" form for the Larimore

Resubdivision MIHU Agreement calculates the "subdivision" as a "2 dwelling units*" development. The asterisk reference note states ""[s]ubdivision will create one (1) new lot that will be subject to fee-in-lieu. One (1) *existing lot* is not subject to fee-in lieu" (emphasis added.) Appellant Exhibit 6. The Cattail Overlook, Lots 1 Thru 6, Resubdivision of Lot 2 (part of a pre-October 6, 2013 subdivision) created six lots through the 2015 F-14-072. Appellant Exhibit 7. The Exhibit A "Construction Plan" form for the Cattail Overlook MIHU Agreement calculates the "subdivision" as a "6 dwelling units*" development. The asterisk reference note likewise states "[s]ubdivision of Lots 1-6 will create five (5) new lots that will be subject to fee-in-lieu. One (1) *existing lot* is not subject to fee-in lieu" (emphasis added.) Appellant Exhibit 8.

The asterisk reference note in the Exhibit A "Construction Plan" form for the Hill Resubdivision MIHU agreement, which calculates the subdivision as a "6 dwelling units*" development, however, is alleged to be unreasonable because it states "[l]ot number 3 with *an existing unit* is not subject to fee-in-lieu" (emphasis added.) Appellant Exhibit 4. Reading together this "existing unit" language with the Decision Letter's reference to DHCD's internal policy of excluding "1 existing house" from the fee-in-lieu payment, Appellant argues DHCD's unit calculus is irrationally inconsistent and treats him differently from other developers. (Appellant was the developer in the Cattail Overlook Resubdivision.) Embedded in this argument, as the Hearing Examiner understands the Appellant, is the claim of a shifting interpretation of the term "unit."

Appellants second argument is that the DHCD Decision Letter denying his request to exclude three lots from the fee-in-lieu payment is contrary to law because DHCD previously

calculated fee-in-lieu MIHU units and payments based on the number of new lots approved through resubdivision after October 6, 2013, whereas for the Hill Resubdivision, the unit calculus was based on the total number of lots (the three grandfathered lots and the three additional lots approved through F-16-071.) In Appellants view, the three 1988 "technically complete" lots created through F-79-131 (Appellant Exhibit 1), should not be counted when in 2016 he resubdivided the same property to create three new lots (six total lots) through F-16-071. Factoring in DHCD's one "exception" policy, Appellant figures his MIHU obligation is for two units only.

Lastly, Appellant contends he signed the Hill Property Resubdivision MIHU Agreement under protest because he wanted the Hill Resubdivision development to be tested and eligible for Adequate Public Facilities housing unit allocations (HCC § 16.1100 et seq.). Had he not signed the Agreement, he would have to start the process again, which might expose the development to new regulations.

DHCD grounds its motion to dismiss on Appellant's failure to produce substantial evidence to support his burden of proof. Even more, DHCD argues the evidence of record supports a pattern of consistent DHCD application of HCC § 13.402C(e) to resubdivisions. The Hearing Examiner agrees.

Appellant's theory of arbitrary and capricious agency action in the wording of the Exhibit A MIHU Construction Plan forms and the Decision Letter exalts form over substance. The

evidence of record indicates that DHCD, through internal policy, routinely excepts one lot of a resubdivision from the reach of HCC § 13.402C(e), whether this one lot is improved with a "house" or not. DHCD's questionable internal "exception" policy notwithstanding, DHCD correctly applied the law in its calculus of the fees-in-lieu payment pursuant to HCC § 13.402C(e), and so in its Decision Letter denial of Appellant's request to exclude three lots.

HCC § 13.402C(e) is a developer option to pay a fee-in-lieu to the Department *for each unit in the development or portion of the development* that is not providing MIHUs onsite (emphasis added.) A "unit" is a "dwelling unit," which HCC § 13.401(f) defines as having the same meaning stated in the HCZR. HCZR § 103.0 defines a "dwelling unit" as "[a] single unit providing complete independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking limited to one kitchen, and sanitation."[2] In this appeal, the Hill Resubdivision is located in the RR zoning district where, in pertinent part, one single-family detached dwelling unit per residential lot is permitted as a matter of right. HCZR § 105.0.B.3. Per HCC §§ 13.401(f) & 13.402C(e) and HCZR §§ 103.0 & 105.0.F, 1 development unit = 1 dwelling unit = 1 single-family residential/subdivision lot = 1 MIHU unit.

Also to be factored into this general equation is HCC § 13.402C(e)(1), which sets the actual fee-in-lieu payment each fiscal year based on the square footage of "residential space" for each unit in the development as calculated for the building excise tax, section 20, subtitle 5 of the Howard County Code of Maryland." HCC § 20.503, in turn, is the rate schedule for the building

[2] During the hearing, the Hearing Examiner mistakenly found there was no definition of "dwelling unit" in the HCZR.

excise tax, a dollar figure based on the gross square footage of new construction, which includes in pertinent part residential additions and new residential construction. "Residential" construction is "a building which contains one or more dwelling units, including boarding houses but not including transient accommodations such as hotels, country inns or bed and breakfast inns." HCC § 20.502(k). Applying this "construction" qualifier to the general calculus of HCC § 13.402C(e), DHCD's exclusion of the Hill Resubdivision lot with an existing residence was appropriate and DHCD correctly applied the law to calculate the fee-in-lieu payment as for five MIHU units. (There is no evidence of record going the construction date of the existing house in the Hill Resubdivision.) To conclude otherwise would contravene a principal precept of statutory construction: "[w]hen seeking the legislative intent of an enactment, absent a clear intention to the contrary, a statute, when reasonably possible, is to be read so that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless, or nugatory." County Com'rs of Carroll County v. Uhler, 78 Md.App. 140, 147, 552 A 2d 942 (1988) (quoting Mayor & City Council of Baltimore v. Hackley, 300 Md. 277, 283, 477 A.2d 1174 (1984)). So, too, a "degree of deference should often be accorded the position of the administrative agency charged with interpreting and enforcing a particular set of statutes or regulations." People's Counsel for Balt. Cnty. v. Surina, 400 Md. 662, 682, 929 A.2d 899, 911 (2007) (quoting Marzullo v. Kahl, 366 Md. 158, 172, 783 A.2d 169, 177 (2001).

The larger issue in this appeal is Appellant's assertion that the effective date language in HCZR § 100.0.E.3.b applies only to the additional lots created through the resubdivision of a

subdivision deemed "technically complete" prior to October 6, 2013. This argument fails to recognize that within the Howard County Subdivision and Land Development Regulations, a "resubdivision" is also a "subdivision" as the Hearing Examiner found in Board of Appeals Case No. 722-D (decided August 8, 2016).[3]

> Subdivision means any division of a lot or parcel of land into lots or parcels for the immediate or future transfer of ownership, sale, lease or building development. The term includes lot mergers and resubdivision and, when appropriate to the context, shall relate to the process of subdivision or to the land subdivided.

HCC § 16.108(b)(60). It follows, then, that the total number of residential lots approved after October 6, 2013 through a resubdivision, as a subdivision, are part of DHCD' fee-in-lieu calculus.

Because the instant appeal is one of "first impression," the Hearing Examiner reviewed the legislative history of CB 35-2013.[4] This history includes the bill as introduced, multiple amendments, the administration's testimony, and the minutes from a work session on the bill. There was no discussion or consideration of exempting the original residential lots of a "grandfathered" subdivision from the reach of the bill when the subdivision was later resubdivided to yield more residential lots. Appellant's interests and concerns may be resolved only through legislative action.

Lastly, concerning Appellant's testimony that he signed the MIHU agreement under protest, the Hearing Examiner concurs with DHCD that he is bound by Para. 15 to this contractual

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[3] BOA Case No. 722-D is on appeal to the Board of Appeals, which has not heard the petition as of the date of this decision and order. Notably, BOA Case No. 722-D also found that no County regulation defines "technically complete" – a gateway provision – and which is instead construed through internal administrative policy.

[4] See https://apps.howardcountymd.gov/olis/LegislationDetail.aspx?LegislationID=458.

agreement.

Entire Agreement. This agreement constitutes the entire understanding and agreement of the parties as to the matters contained herein. All previous agreements, understandings, promises, and representations, whether written or oral, relating to this transaction, are superseded by this Agreement.

ORDER

Based upon the foregoing, it is this **9th day of May 2017,** by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the administrative appeal of Timothy Feaga, t/a Heritage Land Development, is hereby **DISMISSED**.

HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER

Michele L. LeFaivre

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.