

**IN THE MATTER OF
DAVID W. ELSAESSER**

Appellant

: BEFORE THE
:
: HOWARD COUNTY
:
: BOARD OF APPEALS
:
: HEARING EXAMINER

BA 763-D Reconsideration

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ORDER

On April 30, 2019, Appellant David W. Elsaesser submitted by electronic mail attachment a document triple-captioned as a "Motion for Reconsideration of Decision and Order Granting Dismissal of F-18-099," a "Motion to Suspend F-18-099 pending the required review by the Board of Public Works," and a "Motion to Suspend SDP-18-044 pending Board of Public Works Review of F-18-099" (the "motions" document). The email contained a total of three attachments: a copy of the BA 763-D decision and order, an unsigned copy of the electronically submitted motions document, and a copy of the "motions" document with an electronic signature. The Motion for Reconsideration embedded multiple links to 11 exhibits, various files stored on internet electronic servers.

On May 7, 2019, Interested Party Limestone Valley Farms filed a timely response to the "motions" document asserting it must be denied as untimely because the electronic submissions did not comport with the Hearing Examiner's "Electronic Submissions Policy" requiring requests for reconsideration to be submitted in writing. Without waiving the alleged submission deficiencies, Limestone Valley Farms asserts the three motions must be denied because the 11 new and additional exhibits contained in the electronic submission is new evidence that could have been included in a written response to its Motion to Dismiss for Lack of Standing.

Background

Appellant noticed two appeals from Department of Planning and Zoning (DPZ) letter decision actions. The agency action appealed in BA 763-D was DPZ's decision that F-18-099, a road realignment final subdivision plan, was technically complete. Because the BA 763-D preliminary hearing on March 15, 2019 was limited to argument on Limestone Valley Farm's motion to dismiss for lack of standing, Appellant bore the burden of proving he was aggrieved under Howard County Code § 16.105(a) in accordance with the common law definitions and tests for measuring aggrievement. The BA 763-D order of April 15, 2019 dismissed the appeal because Appellant did not allege any specific facts of injury in the petition of appeal or at the motions hearing, including the 13 allegations of aggrievement in the Power Point presentation accompanying the petition.¹

¹ The 13 allegations referenced on pgs. 3-4 of the BA 763-D order are:

1. Proposed Sheppard Lane Intersection – "Cover" page
2. Proposed Sheppard Lane Intersection - Security Development Corp (SDC) the broker or owner for proposed development on adjacent property realigns Sheppard Lane for its benefit – not community. Realignment is solely in implement a high throughput shopping cents at River Hill Garden Center – bad for traffic flow on MD 108 schools, community
3. Proposed Sheppard Lane Intersection Bad for Community – bed is dangerous, single lane to the east is choke point on MD 108
4. PM traffic congestion
5. AM traffic congestion
6. Terrain/Sheppard Lane MD 108 interstation discussing moving realignment of Sheppard Lane ROW to the east
7. Continuous 5 lane MD 108 to Schools and Safe MD 108 Sheppard Intersection better for traffic flow and safer for school and school buses
8. Better Sheppard Intersection and Better MD 108 Throughput – discussing Appellant's alternative Sheppard Lane realignment to the east
9. No Clearview Residential Impact – moving the realignment east will not cause nuisance to Clearview neighbors as developer/attorney claims
10. Better/Safer Access by Moving Sheppard to East – safer access, removes dangerous left turn from MD 108 east
11. Policy Questions – who is advocating for road modifications in the best interests of the citizens and taxpayers
12. Community Concerns/Interest
13. Map indicating ROW reserved for realignment of Sheppard Lane

Appellant's subsequent BA 764-D appeal was noticed from DPZ's letter decision that SDP-18-044, a commercial site development plan, was technically complete. Appellant withdrew this appeal before the April 5, 2019 hearing. Although the F-18-099 road realignment plan is functionally related to the SDP 18-044 site development plan, the two agency letter decisions were discrete actions contested in separate appeals.

Discussion

The Hearing Examiner agrees with Limestone Valley Farms that the motions document and embedded exhibits submitted electronically did not comport with the office's electronic submissions policy and could be dismissed as untimely, the requests being submitted three days after the 15-day deadline for filing a Request for Reconsideration, May 3, 2019.² Appellant himself potentially compromised the Hearing Examiner's consideration of any legitimate allegation of mistake of law or fact by submitting the "motions" document at 4:00pm on the last day the petition of appeal could be timely filed, according the email date/time stamp.

Pursuant to Hearing Examiner Rule 11.1, any party to a case may request the Hearing

² The Hearing Examiner instituted the internal administrative electronic correspondence/Hearing Examiner Rules of Procedure submissions policy early on in her tenure due to the misuse of emails to submit unsigned correspondence/legal argument in the body of the email and to meet "pleading" deadlines through email attachments without written signatures. Additionally, these emails and attachments did not always make their way into the master record file maintained by DPZ. Unsigned submissions are therefore not accepted as part of the official record until the Office of the Hearing Examiner physically receives them in a signed document. With the advent of computer user interfaces enabling electronic "pen" signatures, the original signature problem is less of an issue, but the security problem of opening attachments remains. For this reason, all county electronic correspondence alerts readers to emails originating from outside the county and to click on attachments only if the sender is known. Concerns about computer viruses and the increasing use of external internet servers to transmit documents (cloud storage venues like Drop Box, etc.) now prompt the Hearing Examiner to instruct parties to submit electronically prepared exhibits on a thumb drive during proceedings, and which can be scanned before opening.

Examiner's reconsideration of the decision in the case. In accordance with Hearing Examiner Rule 11.5, the standard for reconsideration, the Hearing Examiner will revise a decision only upon a finding of mistake of fact or mistake of law. The "Motion for Reconsideration" neither alleges nor establishes a finding of mistake of fact or law in the BA 763-D order dismissing the appeal for Appellant's want of standing. The BA 763-D order did not "dismiss F-18-099," in Appellant's words; it referenced the plan to identify the location of the road realignment to fix the "geography" of his alleged aggrievement. The Hearing Examiner instead dismissed the petition of appeal because Appellant did not factually establish his aggrievement through a direct nexus between any alleged injury specific to him as it related to the road realignment and the government action under challenge, the necessary predicate to support his right to argue his position in a subsequent merits hearing about the correctness of DPZ's letter decision that F-18-099 was technically complete.

The question of standing is different. It concerns ... "the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question"; *Flast v. Cohen*, 392 U.S. 83, 99, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947, 961 (1968) ("The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a ... court and not on the issues he wishes to have adjudicated"); *Town of Somerset v. Board*, supra, 245 Md. at 63, 225 A.2d at 301 (distinguishing between "the merits of the substantive issues decided by the Board" and whether "the appellants have the requisite standing to have those issues reviewed"); Stein, Mitchell & Mezines, *Administrative Law* § 50.01, at 50-3 (5th ed. 1996) ("Questions of standing focus not on the merits of the case but on what parties have the right to seek judicial review").

Sugarloaf Citizens' Ass'n v. Department of Env't, 344 Md. 271, 295-6, 686 A.2d 605, 616-7 (1996).

Appellant also asks that the 11 exhibits be considered because he misunderstood the Hearing Examiner's February 27, 2019 administrative letter instructing the parties that the initial hearing would be limited to the preliminary motion to dismiss and any responses thereto. This

entreaty is disingenuous. Based on the information contained in these exhibits, Appellant prepared or revised many documents after the BA 763-D March 15, 2019 hearing and others, after withdrawing BA 764-D on April 5, 2019.³ Furthermore, the exhibits go beyond the scope of proof that Appellant was specially aggrieved, in the legal sense, by DPZ's technically complete decision under the tests and standards for aggrievement set out in the BA 763-D order. They instead generally allege an admixture of indirect injuries resulting from the combined effect of F-18-099 and SDP-18-044 on his property in furtherance of his interest in an alternative road alignment.⁴

Concerning the requested "suspensions," Hearing Examiner Reconsideration Rule 11.7, Time for Appeal, narrowly authorizes the Hearing Examiner to suspend the time for filing an appeal to the Board of Appeals pending issuance of the reconsideration order. Rule 11.7 does not sanction Appellant's "Motion to Suspend F-18-099 pending the required review by the Board

³ These are the 11 "motions" document exhibits with the hyperlinks removed.

- A. Power Point Slides with supporting images and diagrams
- B. County Council Resolution 3 2019, CR3-2019, w/o Amendments
- C. CC Work Session on CR-3 discussion begins at 36:40 elapsed time
- D. Statement By SDC on the requirement by the Post Office for signal access
- E. 2013 and 2015 Incidents of School Children Struck by Cars at Linden Linthicum Lane Crosswalk
- F. 8 minute Video of traffic on Whistling Winds Walk due to Drop for River Hill High School
- G. 1 min 25 sec video of traffic on MD108 and Linden Linthicum Lane during peak school Rush Hour
- I. Howard County Code Sec 16.116. Protection of wetlands streams and steep slopes
- J. Howard County Code Sec 18.200 Roads
- K. Waiver Requests by RHS for "Necessary Disturbance" and Design Manual 3

⁴ The Hearing Examiner declined, optimistically, to schedule the BA 763-D & BA 764-D hearings back-to-back, as Valley View Farms requested, lest the standing or substantive issues specific to each appeal be muddled. In BA 763-D, the Hearing Examiner in dicta observed, "[h]ad Mr. Elsaesser standing to appeal, the hearing on the merits of the appeal would have been limited to the legal sufficiency of the agency action going to DPZ's technical completeness determination under the substantial evidence test. As a matter of law, Mr. Elsaesser could not use the merits hearing to press his interest in an alternative alignment of Sheppard Lane or a reconfigured MD 108."

of Public Works." The Hearing Examiner has no independent jurisdiction to order the suspension of F-18-099, DPZ being the approval authority. Rule 11.7 does not sanction the "Motion to Suspend SDP-18-044 pending Board of Public Works Review of F-18-099" and, again, DPZ is the approval authority. What's more, Appellant withdrew his BA 764-D appeal from DPZ's SDP-18-044 technically complete action before the merits hearing.

Upon consideration, it is this **22nd Day of May 2019**, by the Howard County Board of Appeals Hearing Examiner **ORDERED:**

That the "Motion to Suspend F-18-099 pending the required review by the Board of Public Works Review," the "Motion to Suspend SDP-18-044 pending Board of Public Works Review of F-18-099" and the exhibits accompanying the Motion for Reconsideration of BA 763-D are **STRICKEN.**

It is **FURTHER ORDERED:**

That the Motion for Reconsideration of BA 763-D is **DENIED.**

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**



Michele L. LeFavre

original signature on file