IN THE MATTER OF	:	BEFORE THE
BRIAN ENGLAND T/A BRITISH AMERICAN BUILDING, LLC Appellant	:	HOWARD COUNTY BOARD OF APPEALS
v.	:	HEARING EXAMINER
HOWARD COUNTY PLANNING BOARD Appellee	:	BA Case No. 747-D
v.		**In re: Interested Party's Motion to Dismiss the Administrative Appeal of Brian England t/a British American Building, LLC**
TWO FARMS, INC. Interested Party		

::

ORDER

On September 21, 2018, 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 Brian England t/a British American Building, LLC, (Appellant or British American). British American is appealing a Howard County Planning Board's September 29, 2017 decision letter denying Appellant's Final Development Plan (FDP) 55-A, E.G.U. Subdivision, Section 2, Area 2 application to amend Criteria Item 7.d of this FDP to read "Gasoline Service Stations or motor fueling facilities are permitted that are integral to the primary industrial use intended for the exclusive use in use's primary business. Retail Sale of gasoline into the general public is prohibited."

Appellant certified to compliance with the advertising and posting requirements of the Howard County Code. The Hearing Examiner viewed the subject property as required by the Hearing Examiner Rules of Procedure. British American was not represented by counsel. Thomas Coale, Esq., represented Interested Party Two Farms, Inc. (Two Farms.) David Moore, Deputy

County Solicitor represented the Planning Board.

Appellant introduced into evidence the exhibits as follows.

1. Traffic Generated by BA Auto Care

****

On July 29, 2018, Two Farms motioned to dismiss BA 747-D for Appellant's lack of standing. The September 19, 2018 hearing was therefore limited to oral argument and testimony on the issue. Upon consideration of Two Farms motion to dismiss, Appellant's response to the motion, and oral arguments presented at the motions hearing, the Hearing Examiner has determined to grant the motion to dismiss the administrative appeal.

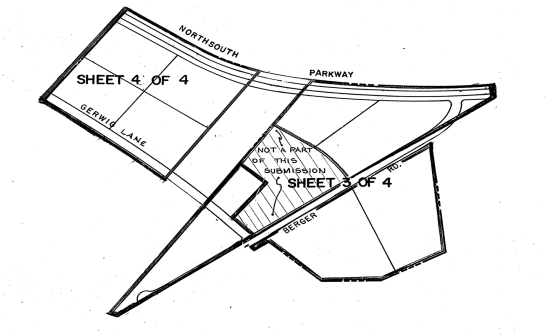
BACKGROUND

British American on July 25, 2016 submitted an FDP amendment application applicable to FDP 55-A, E.G.U. Subdivision, Section 2, Area 2 (FDP 55-A, Sec.2, Area 2) to amend Criteria Item 7.d to read "Gasoline Service Stations or motor fueling facilities are permitted that are integral to the primary industrial use intended for the exclusive use in use's primary business. Retail Sale of gasoline into the general public is prohibited." (The E.G.U. Subdivision is sometimes referred to in county documents and land records as the EGU or Guilford Industrial Park.) After public hearing, the Planning Board by decision letter of September 29, 2017 informed British American of its denial of the requested FDP amendment. British American noticed a timely appeal from this decision letter on October 26, 2018.

British American owns property at 9577 Gerwig Lane, which is located within the FDP 55-A, Sec.2, Area 2 portion of the EGU Subdivision. Two Farms is the owner of 9585 Snowden River

Parkway, which is also located in the FDP 55-A, Sec.2, Area 2 portion EGU Subdivision. The Two Farms property is located at the southeast corner of the intersection of Snowden River Parkway and Minstrel Way. Two Farms has over the years sought to construct a Royal Farms gasoline service station, car wash, and convenience store at this location. As of the date of this decision and order, however, there is no Planning Board or Hearing Authority public hearing approval of a gasoline service station, car wash, and convenience store at 9585 Snowden River Parkway.

According to the FDP 55-A Sec. 2, Area 2 plat submitted with the appeal petition (Plat 16, Folio 19, recorded among the Land Records of Howard County on 6.2.1969), FDP 55-A, Sec.2, Area 2 is 41.51 acres. Sheet 1 of the plat identifies the land area subject to FDP 55-A Sec. 2, Area 2, reproduced here as Map 1. "North South Parkway" is now Snowden River Parkway.



Map 1

The FDP criteria for "Phase 55" of this EGU Subdivision includes on Sheet 2 as Criteria 7, the permitted "Employment Center Land Use – Industrial Land Use[s].

7. Permitted Uses – Section 17.031 D:

Employment Center Land Use – Industrial Land Use Areas
1. All uses permitted in industrial districts or industrial land use zones are permitted including but not limited to, all uses permitted in M-1 and M-R districts except, however, that uses only permitted in M-1 and T-2 Districts are prohibited. Commercial uses ancillary to, or compatible with, permitted industrial uses are permitted, including, but not limited to, all of the following:

a. Restaurants and lunchrooms, and similar establishments serving food and/or beverages
b. Personal service shops and retail stores which primarily sell or service merchandise manufactured on the premises.
c. Banks
d. *Gasoline service Stations*
e. Wholesale Distributors
f. Savings and Loan Associations
g. Business and Professional Offices
h. Parking Lots or Garages
i. Building Supplies and Lumberyards
j. Storage of prepared dairy products and other food products to be distributed on truck vending routes
k. Such other ancillary uses as may be approved by the Howard County Planning Board (emphasis added.)

Appellant's FDP amendment application seeks to amend Criteria Item 7.d to read "Gasoline Service Stations or motor fueling facilities are permitted that are integral to the primary industrial use intended for the exclusive use in use's primary business. Retail Sale of gasoline into the general public is prohibited."

Appellant in its BA 747-D administrative appeal petition makes two assertions. First, Appellant asserts it is aggrieved by the Planning Board denial decision because it is the fee owner of property on the subject FDP with a property interest in the permitted uses on this FDP and whose property rights are adversely affected by the Planning Board's denial decision because it "would allow a proliferation of retail gas stations in their industrial park creating congestion with negative implication to the value of the property and the conduct of [its] business

Second, Appellant insisted the hearing on its appeal must be postponed until "errors" in the Hearing Examiner Rules of Procedure are first resolved. In Appellant's view, the Planning Board meeting where it considered and denied the proposed FDP amendment did not create a "record." As the Hearing Examiner understand Appellant's argument, the Hearing Examiner Rules

of Procedure, read together with the applicable Board of Appeals (BOA) Rules of Procedure, specifically Howard County Code (HCC) §. 2.210(a)(4)(2), lack a definition of what constitutes a "de novo [Hearing Examiner] appeal where there is no record" and must be revised to clarify that the record on the FDP amendment is made during the de novo appeal hearing.

DISCUSSION

I. The Two Farms Motion to Dismiss (MTD) for Lack of Standing

Two Farms in its 747-D timely MTD asserts Appellant British American lacks standing to note the appeal under HCC § 16.900(j)(2)(iii), the standard for appealing the decision of the Planning Board: "Any person specially aggrieved by any decision of the Planning Board and a party to the proceedings before it may, within 30 days thereof, appeal said decision to the Board of Appeals in accordance with section 501 of the Howard County Charter."

Two Farms makes two primary arguments going to British American's lack of aggrievement – standing – to take its appeal. First, Maryland appellate courts have refused to grant standing simply by virtue of the fact that the allegedly aggrieved person owns property within a neighborhood or district that will be affected by a zoning decision. *Anne Arundel County v. Bell*, 442 Md. 539, 573, 113 A.3d 639, 660 (2015); *Ray v. Mayor and City Council of Baltimore*, 430 Md. 74, 90, 59 A.3d 545, 554 (2013); *State Center, LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 531, 92 A.3d 400, 447 (2014) (holding that standing may not be extended to all property owners within a given zoning district). These opinions, argues Two Farms, hold that sweeping definitions of "proximity" destroy the very concept of "special aggrievement" that underlies property owner standing. *State Center*, 438 Md.at 531, 92 A.3d at 447, citing *Ray*, 430 Md. at 87-

90, 59 A.3d at 552-54. By arguing that the entire "industrial park" is aggrieved by the Planning Board's decision, Appellant is attempting to assert that kind of neighborhood-wide standing that has been repeatedly rejected by Maryland courts. *See, e.g*., *Ray*, 430 Md. At 88, 59 A.3d at 553 ("[T]he creation of a class of aggrieved persons is done on an individual scale and not based on delineations of city neighborhoods."). Second, Appellant relies on an alleged aggrievement caused by a "proliferation" of motor vehicle fueling stations as a consequence of the Planning Board denial, which Two Farms claims is also inconsistent with the particularized fact-based evaluation of aggrievement applied in accordance with one's proximity to the alleged harm.

British American argues in its timely August 15, 2018 response that it is not suggesting the entire industrial park is aggrieved by the decision. Rather, it is aggrieved because "land uses that are not permitted on the FDP are being finagled to allow retail uses in an industrial park that will conflict with [its] property. [It] submitted an FDP amendment to affirm the longstanding precedent of permitted uses that was and still intended for more than 40 years."

Analysis

Oh, no, it wasn't the airplanes. It was Beauty killed the Beast.
King Kong, 1933

The right to appeal is wholly statutory in nature. *Howard County v. JJM, Inc*., Md. 256, 261, 482 A.2d 908, 910 (1984) (citing *Maryland Bd. v. Armacost*, 286 Md. 353, 354-55, 407 A.2d 1148, 1150 (1979); *Criminal Injuries Comp. Bd. v. Gould*, 273 Md. 486, 500, 331 A.2d 55, 64 (1975); *Urbana Civic Ass'n v. Urbana Mobile Vill., Inc*., 260 Md. 458, 461, 272 A.2d 628, 630 (1971)). The statutory right to appeal the Planning Board's denial of the FDP amendment is set forth in HCC § 16.900(j)(2)(iii), which identifies the "class of the class of persons who may challenge the

decision of the planning board to those who are 'specially aggrieved.'" *Amha, LLC, et al. v. Howard County Board of Appeals, et al*. No. 2176, slip op. at 16 (Md. App. December 3, 2015).

Lurking behind the parties' arguments about Appellant's status as an aggrieved party with standing to notice the 747-D appeal, as the parties themselves recognize, is Appellant's factually impossible need to specify how the Planning Board decision specifically and adversely affects its personal or property rights, the object of the proposed FDP amendment being unmoored from a specific or excluded use at a specific location. Proof of aggrievement and what measure of aggrievement - prima facie or specially aggrieved – is always rooted in the geography of the "zoning/land use action" being appealed relative to an appellant's specific interest or property right. The person claiming to be aggrieved must have a substantial interest in the zoning/land use decision and this interest at a particular location must be in danger of suffering some special damage or injury not common to all property owners similarly situated. "The decision must not only affect a matter in which the protestant has a specific interest or property right, but his interest therein must be such that the person is personally and specifically affected in a way different from that suffered by the public generally." *Bryniarski v. Montgomery County Board of Appeals*, 247 Md. at 144, 230 A.2d at 296 (1967). As Appellant succinctly observed in its response to the MTD, "[h]ow can I prove I'm harmed by something that didn't happen?" Two Farms in its MTD similarly recognizes "[z]oning decisions related to a Final Development Plan are different from those pertaining to a particular property. FDP 55 covers approximately 41.51 acres and

includes 15 distinct parcels under various ownership. The amendment sought by Appellant does not affect any one parcel, but rather applies to all properties governed by FDP 55."

The very FDP amendment sought by Mr. England thwarts his evidentiary wherewithal to prove geographical proximity to the zoning/land use action, and, critically, the attendant geographical modality of aggrievement, i.e., whether he is prima facie or specially aggrieved. *Ray*, 430 Md. at 87-90, 59 A.3d at 552-54. Appellant Brian England t/a American British Building, LLC, has made no showing of being aggrieved. In the last instance, the FDP amendment forecloses any possibility of the applicant's taking an appeal from the Planning Board's denial. The Hearing Examiner is compelled to dismiss the appeal.

II. Alleged Errors in the Hearing Examiner's Rules of Procedure

We now consider Appellant's two-part collateral argument that any hearing on BA 747-D appeal must be postponed until "errors" in the Hearing Examiner Rules are corrected. First, in Appellant's view, the Planning Board meeting where it considered and denied the proposed FDP amendment did not create a "record." There being no record, the Hearing Examiner hearing on the 747-D appeal is the venue where the record is made. Second, no hearing record can be made until Hearing Examiner Rule of Procedure 10.2(c), which sets forth the substantial evidence review and burden of proof on the petitioner in an appeal of an administrative agency decision is corrected to identify the appeal as "de novo", in line with with HCC § 2.210(a)(4)(ii), a Board of Appeals (BOA) burden of proof rule providing that "*[i]n all other de novo appeals,* the burden of proof is upon the appellant to show that the action taken by the administrative agency was clearly erroneous, and/or arbitrary and capricious, and/or contrary to law (emphasis added.)

Analysis

1. Planning Board Decisions – Record-Making

HCC § 16.900(j)(2)(i) authorizes the Planning Board "to make decisions with respect to matters submitted to it pursuant to the laws, regulations, rules, and ordinance of the County." Of import to Appellant's decision "making of a record" argument is the Planning Board's charge through county laws and regulations with two types of decision-making functions defined in the Board's Rules of Procedure: quasi-judicial decisions (§ 1.105 et seq.) and administrative decisions (§ 1.106 et seq.). Section 1.105 quasi-judicial decisions are issued in writing after a public hearing. Section 1.106 administrative decisions are issued as "decision letters" after a public meeting.

The instant appeal concerns a Planning Board Rule § 1.106 administrative decision denying Appellant's FDP amendment application in a "decision letter" after a public meeting. In Appellant's view, the Planning Board at its September 27, 2017 public meeting where it considered the amendment, did not made a "record" of the basis for its September 29, 2017 denial decision, which informed Appellant that "based upon the testimony presented, the Planning Board: Denied the plan, with recommendation for zoning review." Appellant insists that in "Planning Board cases conducted as a meeting without a record, one of the Hearing Examiner's critical functions is to create a record."

The Planning Board, however, did make a record. It considered the FDP amendment application as an executive, administrative official at a public meeting. *Howard Research v. Concerned Citizens*, 297 Md. 357, 363–66, 466 A.2d 31 (1983) (concluding the term "administrative official," for purposes of the zoning enabling act, includes: whatever

administrative mechanism a local jurisdiction in Maryland sets up to enforce its planning and zoning laws and ordinances, including a multi-member body such as a local planning commission-decision making capacity.) As an executive administration official, the Planning Board considered the FDP amendment application, the Department of Planning and Zoning (DPZ) technical staff report, and a DPZ staff presentation of the TSR. Presumably, the Board also heard Mr. England and perhaps others speak about the FDP amendment. In its work session, the Board considered these documents and any speaker comments. These documents and speaker comments constituted the record of the case. The Planning Board having voted to deny the FDP amendment application under its executive administrative authority, it could do so through an oral recitation of the record at the public meeting, followed by the decision denial letter.

2. Appellant's Stance on a Hearing Examiner Rule of Procedure

A. *Stop the Hearing! Correct an Error!*

Appellant's collateral argument in its response to the MTD is that the instant appeal must be postponed until a grave error in the Hearing Examiner Rules of Procedure is corrected in reference to the below italicized phrase in Rule 10.2(c).

> 10.2. Burden of Proof. Unless otherwise provided by law, the burden of proof in a case heard by a hearing examiner is as follows:
> (c) *In any other 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 (emphasis added.)

This is Appellant's reasoning.

> Since a decision at a meeting is not a contested case hearing under the Howard County Code, the matter first proceeds to the Hearing Examiner. Section 130.0 of the HCZR addresses the powers of the Hearing Authority []. Section 130.0.B.4 refers to Appeals of Administrative Decisions, but this

> section refers to appeals "where it is alleged the Department of Planning and Zoning has erred in the interpretation or application of any provisions of the Zoning Regulations."
>
> Section 10.2(c) of the Rules of the Procedure of the Board of Appeals Hearing Examiner states that the burden of proof in "any other appeal of an administrative agency decision" is that "the petitioner must show by substantial evidence that the action taken by the administrative agency was clearly erroneous, arbitrary and capricious, of contrary to law." However, there is nothing in the section that addresses whether the appeal is *de novo.* Section 2.210(a)(4)(ii) of the Rules of Procedure of the Board of Appeals provides that "[i]n all other de novo appeals, the burden of proof is upon the appellant to show that the action taken by the administrative agency was clearly erroneous, and/or arbitrary and capricious, and/or contrary to law." Obviously, these errors need cleaned up [sic] to clearly define the conduct of "de novo appeals" in cases where there is no record.
>
> This request is directly intertwined with the reply to the Motion to Dismiss for Lack of Standing to Appeal. As I said, if the case is "de novo" I have no burden to prove aggrievement. Indicative of this fact is County Code section 16.302, that requires Planning Board cases conducted as on the record hearings be appealed directly to the Board of Appeals. In Planning Board cases conducted without a record, one of the Hearing Examiner's critical functions is to create a record.

The gist here is that Appellant wants to insert into Hearing Examiner Rule 10.2(c) the term "de novo" such that in an appeal from a Planning Board Rule § 1.106 action the Hearing Examiner makes the determinative factual findings – a record – not the Planning Board, with regards to the merits of its FDP amendment application. This "correction" would relieve Appellant from proving it is aggrieved pursuant to HCC § 16.900(j)(2)(iii), effectively.[1]

****

The Hearing Examiner's exploration of this argument begins with Appellant's triggering

[1] Appellant took an analogous position on the "aggrieved person" requirement in its BA 702-D appeal from a DPZ waiver letter decision to the Hearing Examiner and on appeal to the BOA. There, Appellants sought to convert HCC § 2.206, a BOA Rule of Procedure requiring an individual wishing to appeal an administrative decision of a county agency to file an appeal on the petition provided by the Department of Planning and Zoning within thirty days of the date of that administrative decision, into a de facto definition of a "person aggrieved" conferring a broad right of standing to prosecute the waiver decision. " On final appeal to the Court of Special Appeals, the court in *Amha, LLC,* at 16, held, "[c]ompliance with HCC § 2.206, then, is a necessary, but not always a sufficient, condition precedent to attaining relief from the Board of Appeals. We reject the appellants' attempt to ignore the express purpose of HCC § 16.900(j)(2)(iii) by arguing that their claim is somehow collateral to the Planning Board's decision. We, therefore, hold that the Board of Appeals did not err in requiring that appellants fall within a class of persons who are 'specially aggrieved' pursuant to HCC § 16.900(j)(2)(iii)."

reference to use of the term "de novo" in (BOA Rule of Procedure) HCC §. 2.210(a)(4)(ii), which must be read in context. HCC §. 2.210(a)(4) provides as follows.

> (4) Burden of proof.
> (i) In an appeal of an administrative agency's issuance of a notice of violation of county laws and regulations, the burden of proof is upon the administrative agency (proponent) to show, by a preponderance of the evidence, that the respondent has violated the laws or regulations in question. However, it shall be the respondent's burden to prove all affirmative defenses, including the defense of nonconforming use.
>
> (ii) *In all other de novo appeals,* the burden of proof is upon the appellant to show that the action taken by the administrative agency was clearly erroneous, and/or arbitrary and capricious, and/or contrary to law (emphasis added.)

The "in all other de novo appeals" phrase in subsection (ii) is language clarifying only that the burden of proof for administrative action de novo appeals differs from the burden for appeals de novo from a notice of violation of county laws and regulations.

Critically, the distinction between the burden of proof in an appeal from a notice of violation code enforcement letter action and an administrative official letter action no longer has legal force. CB 3-2008 substantively revised the HCC Subdivision and Land Development and Zoning Regulations code enforcement Titles to create a Hearing Examiner administrative citation show cause hearing process. These revisions eliminated the statutory right to appeal a notice of violation, the burden of proof for which is still set forth in Hearing Examiner Rule 10.2(b) and BOA Rule HCC §. 2.210(a)(4)(i). See HCC 16.302(g) *Notice of Violation Not Appealable.* An alleged violator may not appeal a notice of violation issued under this section.

To this end, the CB 3-2008 administrative citation hearing process legislation substantively revised multiple code sections to recontour the Hearing Examiner and BOA's statutory jurisdiction and attendant standards of review and statutory rights of appeal, including

HCC § 16.301, "Jurisdiction of hearing examiner", subsection (a) of § 16.303 "Hearing examiner procedures", § 16.304 "Appeal to board of appeals" of Subtitle 3 "Board of Appeals ", and HCC Title 16 " Planning, zoning and subdivisions and land development regulations".

> **Subtitle 3. Board of Appeals**
> Sec. 16.301. Powers
> The Howard County Board of Appeals shall have the following zoning power
> (D) TO HEAR AND DECIDE CITATIONS ISSUED, UNDER SUBTITLE 16 OF THIS TITLE, FOR A VIOLATION OF THE SUBDIVISION AND LAND DEVELOPMENT REGULATIONS SET FORTH IN SUBTITLE 1 OF THIS TITLE OR THE HOWARD COUNTY ZONING REGULATIONS.
>
> Sec. 16.304. Appeal to board of appeals
> (a) A person aggrieved by a decision of a hearing examiner may, within 30 days of the issuance of the decision, appeal the decision to the board of appeals. UNLESS THE APPEAL IS OF A CITATION ISSUED UNDER SUBTITLE 16 OF THIS TITLE [, [The]] THE board will hear the appeal de novo in accordance with § 2.209 or § 2.210(a) of the Code, as amended, as applicable. THE BOARD WILL HEAR THE APPEAL OF A CITATION ISSUED UNDER SUBTITLE 16 OF THIS TITLE ON THE RECORD IN ACCORDANCE WITH SECTION 2.210(B) OF THIS CODE.

As revised through CB 3-2008, the HCC § 16.303(e) burden of proof in "in a case" heard by a Hearing Examiner is now as follows:

> (e) Unless otherwise provided by law, the burden of proof in a case heard by a Hearing Examiner will be:
> (1) The burden of proof set forth in subsection 2.209(c) of the Code, as amended, except as provided in paragraph (2).
> (2) For any case coming before the Hearing Examiner as an appeal of an administrative decision, the burden of proof set forth in subsection 2.210(a)(4) of the Code, as amended.

Nota bene: This hearing procedural language trumps the BOA Rule " in all other de novo appeals" phrase in HCC §. 2.210(a)(4)(ii), the foundation of Appellant's argument about errors in the Hearing Examiner Rules of Procedure because the BOA no longer hears appeals from notices of violations, and instead hears on the record appeals from a Hearing Examiner citation hearing ruling in an HCC §. 2.210(b)(4) hearing. It also trumps the Hearing Examiner's 10.2 "burden of proof" rules of procedure. Put simply, the citation show cause administrative hearing laws

effectively rendered the contested subsection (ii) phrase, "in all other de novo appeals", as surplusage, superfluous, meaningless, or nugatory.

In fairness, the Hearing Examiner tested Appellant's argument against the superseding laws. Read against these laws, Appellant's argument is wholly without traction because the "in all other de novo appeals" phrase vanishes. Ironically, Howard County no longer enforces zoning and subdivision violations through the administrative citation hearing process.

B. *The Hearing Examiner's Appellate Jurisdiction: The Grand Statutory Scheme*

Charter § 501(f) provides that "the powers and functions of the Board of Appeals as herein provided for shall be defined by implementing legislation heretofore or hereafter enacted by the Council, subject to and to the extent required by applicable State law." Charter § 502 authorizes a hearing examiner to conduct hearings and make decisions concerning matters within the jurisdiction of the Board of Appeals and for the County Council to establish by legislative act the duties, powers, authority and jurisdiction of any examiner appointed under this section.

HCC Title 16 contains the Planning, Zoning Subdivision and Land Development Regulations, including regulations pertaining to the BOA and Hearing Examiner's original and appellate jurisdiction to review specific zoning, subdivision and land development matters. Subtitle 3. – Board of Appeals, HCC § 16.301(b), grants the BOA appellate jurisdiction to hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by any administrative official in the application, interpretation, or enforcement of this title or of any regulations adopted pursuant to it.

Subtitle 3, HCC § 16.302(a), Jurisdiction of the Hearing Examiner, provides, with certain exceptions, for a Hearing Examiner to first hear and decide a matter authorized by the HCC or zoning regulations to be heard and decided by the BOA. Subtitle 3, HCC § 16.302(b), qualifies the scope of the Hearing Examiner's HCC § 16.302(a) appellate jurisdiction: "Wherever in this Code or the zoning regulations a person is authorized to appeal a decision made by an administrative agency after an opportunity for a contested case hearing, the appeal will be heard and decided by the Board of Appeals." Subtitle 3, HCC § 16.303(f) provides for Hearing Examiner procedures, including the adoption of rules of procedures to govern "the conduct of hearings," which are effective upon approval by resolution of the Council.

HCC § 16.304(a), Appeal to Board of Appeals, authorizes a person aggrieved by a decision of a Hearing Examiner to appeal the decision to the Board of Appeals. Unless the appeal is of a citation issued under subtitle 16 of this title, the Board will hear the appeal de novo in accordance with section 2.209 or subsection 2.210(a) of the Code, as amended, as applicable. The Board will hear the appeal of a citation issued under subtitle 16 of this title on the record in accordance with section 2.210(b) of this Code.

Accordingly, the Board of Appeals Rules contained in HCC § 2.210**,** Conduct of Administrative Appeal Hearings, delineate two types of hearing conduct rules and attendant burden of proof rules. HCC § 2.210(a)(4) directs the conduct of de novo appeals. The HCC § 210.(a)(4)(ii) burden of proof on an appeal de novo is on the appellant to show the action taken by the administrative agency was clearly erroneous, and/or arbitrary and capricious, and/or contrary to law. Mirroring this code language, Planning Board Rule 105.G., Appeals to the Board

of Appeals, states that appeals from the Planning Board's administrative decision-making authority shall be heard de novo by the Board of Appeals in accordance with the Board of Appeal's Rules of Procedures.

HCC § 2.210(b) contains the BOA's on the record hearing conduct rules. Mirroring this code language, Planning Board Rule 105.H, Appeals to the Board of Appeals, restates that decisions made pursuant to the Planning Board's quasi-judicial decision-making authority shall be heard on the record by the Board of Appeals in accordance with the Board of Appeal's Rules of Procedure.

Because this statutory "appellate regime" sets up the boundaries of the Hearing Examiner's appellate jurisdictional authority, confining it to administrative action de novo appeals only, the Hearing Examiner Rules of Procedure contain only one set of appellate hearing conduct rules. By action of law, all appeals to the Hearing Examiner are de novo, even though not expressly stated as such in the rules. *See, Bd. of Educ. for Montgomery County v. Spradlin*, 161 Md. App. 155, 172 (2005)("It is worthy of note that what is now so venerable an institution as the trial de novo in Workers' Compensation cases was never explicitly referred to in those terms by the statute that created it.")

C. *On the Nature of Appeals "De Novo"*

A final matter to be addressed is the legal operation of the term "de novo" in "appeals de novo". The extent to which an "appeal" de novo is treated as an original proceeding, as Appellant desires, depends on the statute creating the right of appeal. In *Lohrmann v. Arundel Corp*., 65 Md. App. 309, 317 (1985), the Court of Appeals noted the variety of different types of de novo

appeals, observing that, "[s]ome of these appeals are less "de novo" than others in that the action of the body subject to review retains some vitality and must be considered in the reviewing process." *See also*, *Halle Companies v. Crofton Civic Ass'n*, 339 Md. 131, 142, 661 A.2d 682, 687 (1995) ("The fact that an appellate tribunal may be authorized to receive additional evidence or hear a case de novo does not mean that it is exercising original jurisdiction. A de novo appeal is nevertheless an exercise of appellate jurisdiction rather than original jurisdiction.") Everything depends on the statutory framework of appeals, the applicable standard of review, and the evidentiary burden of proof.

The court in *Hikmat v. Howard County*, 148 Md. App. 502, 813 A.2d 306 (2002) surveyed the Howard County statutory regime of appeals de novo in in the context of a property owner's appeal to the BOA from a DPZ letter decision denying a petition to waive a Howard County Subdivision and Land Regulation (SLDR) requirement to disturb a stream and buffer area on the property. DPZ denied the request based in part on a forest conservation law not yet in effect. The property owner noted an appeal to the BOA under (SLDR) HCC § 16.105. The BOA conducted the hearing de novo under HCC § 2.210(a)(4) subject to the HCC § 2.210(a)(4)(ii) burden of proof. The BOA granted the waiver to find, ultimately, the DPZ denial was clearly erroneous, and/or arbitrary and capricious, and/or contrary to law based on DPZ's reasoning in its decision letter. The circuit court on appeal reversed the Board's decision and remanded the case to the Board to either affirm DPZ's decision or remand the matter to DPZ for DPZ to correct its decision, holding the BOA exceeded its HCC § 2.210(c) authority by granting the waiver petition based on errors in wording or captioning in DPZ's denial letter, and explaining in pertinent part DPZ's decision was

supported by substantial evidence, and thus, the Board's decision was arbitrary and capricious. *Hikmat v. Howard County*, 148 Md. App. 502, 813 A.2d 306, 312- 313.

On Mr. Hikmat's petition for judicial review of the circuit court decision, the Court of Special Appeals reversed, holding in pertinent part the BOA had applied the correct standard of review. It found that in accordance with the "de novo nature of the appeal" the BOA could grant the waiver if upon applying HCC § 2.210(a)(4)(ii), the DPZ decision letter evidentiary record was clearly erroneous, and/or arbitrary and capricious, and/or contrary to law. The court's analysis of how the BOA conducts a de novo appeal after surveying the relevant statutes and regulations concisely illuminates the hearing conduct of an appeal de novo.

> We conclude that, read as a whole, these provisions mean that the Board's standard is not as deferential as the judicial standard *but is not a purely de novo proceeding*. The Board expressly applied section 2.210(a)(4)(ii) and recognized that it was required to consider DPZ's decision and treat it as correct unless, based on the facts found from the evidence, the Board determined that DPZ's decision was clearly erroneous, and/or arbitrary and capricious, and/or contrary to law. The provision in question is one of the Board's own rules of procedure. We reach our conclusion, having given due deference to the Board's interpretation and application of its rule of procedure. The question is not one of substantive law to which no deference is owed.

Id., at 312, 320 322 (emphasis added.)

In line with *Hikmat*, when the Hearing Examiner conducts an appeal de novo from an administrative official action, the standard of review – the viewpoint or scope of decision review – is substantial evidence in the decision record, and the de novo review centers on errors of law and administrative fact in the action on appeal, with deference to the decision-maker's findings of facts. The appeal de novo hearing is not a fact-finding expedition. An appeal de novo is thus to be distinguished from a de novo hearing, which is what Appellant is seeking in order to evade the aggrievement standard jurisdictionally barring the Hearing Examiner's convening a hearing

on the merits of its appeal. A de novo hearing is the first formal hearing on an issue. For FDP amendments, the laws of Howard County Code places that responsibility with the Planning Board; it is the do novo decision maker.

A Final Note

Historically, Howard County, including its "land use boards," does not routinely update conflicting or superseded language in other laws or in the reviewing body's rules of procedure upon the enactment of new laws. This is called corrective legislation or updating. For example, the Maryland General Assembly in 2013 re-codified state land use and zoning laws to add a new Local Government Article to the Annotated Code of Maryland. Although the Local Government Article in pertinent part repealed in its entirety, Article 25A, Chartered Counties of Maryland, the statute for the establishment of a board of appeals, the Howard County Charter still refers to Maryland Code 1957, art. 25A, § 5(U). Neither the BOA's nor the Planning Board's rules of procedure were updated when the position of the Hearing Examiner was created in 2001. Nor were the Hearing Examiner and BOA rules updated upon the enactment of CB 3-2008. CB 6-2015 amended HCC § 16.801 to require all technical staff reports (TSRs) be made available to the public at least two weeks before any required hearing, but there was no update to HCZR § 131.0.F.2.f, which still provides that conditional use TSRs be transmitted to the Hearing Authority at least 7 days prior to the public hearing on a petition. CB 51-2016 amended the computation of deadlines in HCC § 22.900 et seq., to exclude weekends, holidays, or days when County offices or closed, but there was no update to HCZR § 130.0.A.3, which requires appeals to the Hearing Authority

to be filed no later than 30 calendar days from the date of the action and expressly stating that appeals with a deadline falling on a weekend or holiday must be filed prior to that deadline.

Another "surplusage" phrase – the subject of much county myth – is the HCC § 16.900(j)(2)(iii) reference to a superseded/repealed by implication aggrievement code section.

> Any person specially aggrieved by any decision of the Planning Board and a party to the proceedings before it may, within 30 days thereof, appeal said decision to the Board of Appeals in accordance with section 501 of the Howard County Charter. For purposes of this section the term "any person specially aggrieved" includes but is not limited to a duly constituted civic, improvement, or community association provided that such association or its members meet the criteria for aggrievement *set forth in subsection 16.013(b) of this title*" (emphasis added.)

The Maryland Court of Appeals reviewed this subsection 16.013(b*)* language during oral argument on *Renaissance Centro Columbia, LLC v. Broida*, 421 Md. 474, 27 A.3d 143 (2008) (decided on other grounds), in re: Mr. Broida's HCC §. 2.210(a)(4) standing before the BOA. There, the court observed no substantive distinction between the old subsection criteria for a "person specially aggrieved" and the common law definition. Even so, Appellants continue to invoke the "as set forth in subsection 16.013(b) of this title" phrase to assert standing when appealing disfavored Planning Board decisions.

Beyond the narrow decision in the instant appeal, this order surely puts front and center Howard County's need to undertake routine straightforward corrective updates to laws and rules of procedure affected by superseding laws and regulations. Delays in cleaning up surplus language or language implied as repealed can prove contentious, the very "surplusage" to be corrected susceptible to being reopened with the goal of substantively redefining the superseded or implied as repealed laws and regulations. This, of course, was the impossible object of Appellant's take on "errors" in the Hearing Examiner Rules of Procedure.

ORDER

Based upon the foregoing, it is this **30th Day of October 2018,** by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the BA 747-D administrative appeal of Brian England, t/a British American Building, LLC, is hereby **DISMISSED**.

HOWARD COUNTY BOARD OF APPEALS

HEARING EXAMINER

_____

Michele L. LeFaivre

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.

In accordance with C.B. 51-2016, § 1 (HCC Sec. 22.902 - Computation of time), if the deadline to appeal is a Saturday, Sunday, or holiday, or if the County offices are not open, the deadline shall be extended to the end of the next open County office business day.