

IN THE MATTER OF	:	BEFORE THE
OneEnergy Development, LLC	:	HOWARD COUNTY
Petitioner	:	BOARD OF APPEALS
	:	HEARING EXAMINER
	:	BA Case No. 19-008C

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DECISION AND ORDER

On September 24, 2020, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the Petition of OneEnergy Development, LLC (Petitioner) for a Conditional Use for a Commercial Solar Facility in the RC (Rural Conservation) DEO (Density Exchange Option) Zoning District, filed pursuant to Section 131.0.N.52 of the Howard County Zoning Regulations (HCZR).

Petitioner certified to compliance with the notice, posting, and advertising requirements of the Howard County Code. The Hearing Examiner viewed the property as required by the Hearing Examiner Rules of Procedure. Thomas G. Coale, Esquire represented the Petitioner and Peter Hershey, Esquire and Mark Gabler, Esquire represented the Protestants, Concerned Citizens of Howard County, Inc., Theodore Mariani, and Daniel O'Leary.

On October 5, 2020 a Decision and Order was issued in this matter, disposing both of a preliminary matter regarding the alleged improper filing of memorandum of law in violation of the Rules of Procedure, Howard County Board of Appeals Hearing Examiner, and finally disposing of the Petition on its merits.

MOTION FOR PARTIAL RECONSIDERATION

On October 14, 2020, Protestants attorneys Peter Hershey and Mark Gabler filed a Motion for Partial Reconsideration of the October 5, 2020 Decision and Order requesting (1) that

Protestants Memorandum of Law be included in the record as properly filed and considered in reaching the final Decision, and (2) that the Decision misstates Mr. Mariani's position and that the Decision be revised to add an additional condition that the megawattage not exceed 2 megawatts consistent with law.

On October 22, 2020 Petitioner filed its Answer to Motion for Reconsideration, correctly pointing out that Protestants have not asked that the granting of the conditional use be reconsidered but only that certain portions of the Decision and Order be modified. The Answer asserts (1) that the attempted filing of Protestants memorandum of law was in violation of the Rules of Procedure and was properly excluded and (2) that Mr. Mariani's position is not material to the Decision and Order.

FINDINGS OF FACT

Addressing the issues raised in reverse order, at the September 24, 2020, at the conclusion of Mr. Mariani's testimony, which included his opinion that the instant proposal was "very close to meeting the criteria", the Zoning Hearing Examiner asked "Did I understand you correctly that you are not necessarily opposed to this particular project, because you feel it is closely in line with the recommendations of the Howard County Solar Task Force, however you are presenting in opposition so that you can maintain your opposition for all future projects?" Mr. Mariani responded "That's correct.....this project is pretty close to being a good balance". Mr. Mariani did not raise any issue during the hearing regarding his inability to fully participate due to technical difficulties, indeed Mr. Mariani clearly availed himself of his right to testify.

Protestants Motion for Partial Reconsideration is in violation of Rules of Procedure Rule 6.4 as was its original attempt to file a memorandum of law. Rule 6.4 requires counsel, as a preliminary matter, to give the Hearing Examiner written notification of the names and addresses

of those whom counsel is representing. Protestants counsel continues to fail to disclose and provide addresses for those clients in this matter.

The following is the recitation of facts and conclusions of law contained in the October 5, 2020 Decision and Order regarding the attempted filing of Protestants memorandum of law:

On September 18, 2020, after business hours, Protestants attorneys attempted to file a Memorandum of Law. This Memorandum did not have a Certificate of Service in violation of both the Maryland Rules of Procedure and the Rules of Procedure of the Howard County Board of Appeals Hearing Examiner, Rule 7.5, nor did Protestants attorneys provide a copy to Petitioners attorney. By email dated September 22, 2020, Protestants attorneys were notified by the Office of the Hearing Examiner that Hearing Examiner Rule 7.5 requires that preliminary matters be addressed by motion to the Hearing Examiner with accompanying certification that a copy was provided to all persons known to have an interest in the case, including but not limited to the Petitioner, the property owner, the administrative agency, or any other person entitled to written notification under Section 2.203 of the Board's Rules. The certification must state "any person interested in responding to this motion must file a written response with the hearing examiner within fifteen days of the date that the motion was filed".

By the same email Protestants attorneys were advised the Hearing Examiner Rule 6.4 requires that Protestants attorneys must give the hearing examiner written notification of the names and addresses they are representing prior to the hearing. Protestants attorneys were also advised that while the attorneys may examine witnesses, their clients could not examine witnesses, however they could testify in their individual capacity.

By email dated September 22, 2020, Protestants attorneys attempted to again file their Memorandum of Law, this time with a limited certificate of service, still deficient under Hearing Examiner Rule 7.5 as the Certificate of Service did not provide notice of the statutory response

time as required. No attempt was made to comply with Rule 6.5 by providing the names and addresses of their clients. Protestants attorneys further stated "Also, just to clarify, other than our submission of the Memorandum on behalf of the protestants, Rich & Henderson will not appear for the hearing to question witnesses."

By email dated September 22, 2020, Petitioners attorney filed a motion to dismiss arguing the violation of Hearing Examiner Rule 10.3, which enables the hearing examiner to request legal memoranda from the parties to assist the hearing examiner in her decision, but not authorizing the *sua sponte* filing of memoranda of law. Petitioners attorney also noted the violation of Hearing Examiner Rule 7.5 which establishes that responses are permitted within fifteen days of filing a motion. Protestants Memorandum of Law was attempted to be filed 2 days prior to the hearing, not giving Petitioner its statutory response time.

By email dated September 22, 2020 the Office of the Hearing Examiner notified all counsel that the motion to dismiss would be heard as a preliminary matter immediately prior to the scheduled evidentiary hearing on September 24, 2020. Protestants attorneys failed to appear and Petitioners attorney argued its motion to dismiss.

Your Examiner finds Protestants Memorandum of Law to have been initially filed in violation of the Maryland Rules of Procedure and of the Rules of Procedure, Howard County Board of Appeals Hearing Examiner Rule 7.5 by failing to provide the required certificate of service. The attempt to refile the Memorandum of Law was also in violation of Rule 7.5 as it was not timely, thus preventing Petitioner its statutory response time. Protestants attorneys are also in violation of Rule 6.5 by their failure to provide a written list of their clients in this matter along with their names and addresses to the Hearing Examiner prior to the hearing despite being expressly asked to do so. For these violations Protestants Memorandum of Law cannot be accepted and it is not necessary to address Petitioners argument regarding Rule 10.3 and the authority to file memoranda of law *sua sponte*.

CONCLUSIONS OF LAW

Rules of Procedure Rule 11.5 establishes the standard for the hearing examiners reconsideration of her decision. "The hearing examiner will revise the decision only upon a finding of mistake of fact or mistake of law." There is inherent authority in administrative bodies to reconsider their own quasi-judicial decisions which applies in the absence of a rule or statute providing for reconsideration. Where, as here, a rule or statute exists, it governs as to circumstances under which the body may grant reconsideration. Pursuant to the Rules of Procedure, Howard County Board of Appeals Hearing Examiner Rule 11.5, reconsideration is limited to a legally recognized ground and the hearing examiner may not impermissibly reconsider and reverse the decision based on a "mere change of mind". *Cinque v. Montgomery County Planning Bd.*, 173 Md. App. 349, 918 A.2d 1254 (2007)

The alleged error in failing to add a condition regarding a limitation on megawatts for the conditional use is neither a mistake of fact nor a mistake of law. Additionally, the characterization of Mr. Mariani's testimony is in accordance with the verbatim, albeit not a certified transcription, testimony as preserved in the video recording of the September 24, 2020 hearing. Even had the characterization been in error, it was not included as a basis for the October 5, 2020 Decision and Order. Protestants second issue "The Decision Misstates Mr. Mariani's Position; The Examiner Should Condition The Approval On a Requirement That The Project Not Exceed 2 Megawatts As A Whole, In Accordance With The Applicants Testimony" fails to state a mistake of fact or mistake of law upon which the requested relief can be granted.

Protestants fail to cite any mistake of law which would allow the reconsideration of the October 5, 2020 Decision and Order which listed the myriad of legal violations of both the Maryland Rules of Procedure and the Rules of Procedure Howard County Board of Appeals Hearing Examiner in which Protestants engaged. Protestants attorneys also fail to provide any

case law or other legal citations to support their request; Protestants fail to provide a legal basis upon which their requested relief can be granted.

Rule 11.7 provides that the filing of a request for reconsideration does not suspend the time for filing an appeal to the Board of Appeals unless the hearing examiner has suspended the decision. Protestants Motion for Partial Reconsideration does not request the reconsideration of the granting of the conditional use but rather seeks to impose an additional condition and include in the record the memorandum of law denied admission into the record at the September 24, 2020 hearing. The October 5, 2020 Decision and Order is not suspended and the appeal period from the Decision and Order remains in effect.

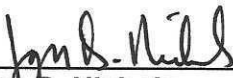
ORDER

Based upon the foregoing, it is this 26th day of October, 2020, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the Protestants Motion For Partial Reconsideration of the October 5, 2020 Decision and Order (BA 19-008C) conditionally granting the Petition of OneEnergy Development, LLC for a Commercial Solar Facility in an RC-DEO (Rural Conservation: Density Exchange Option) Zoning District, is hereby **DENIED**; and it is further **ORDERED**,

That the Decision and Order in this Petition dated October 5, 2020 is **NOT** suspended and continues in full force and effect.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**



Joyce B. Nichols