IN THE MATTER OF : BEFORE THE

ALAN & GERALYN MAGAN : HOWARD COUNTY
Appellants
: BOARD OF APPEALS
v.
: HEARING EXAMINER

HOWARD COUNTY DEP'T OF PLANNING AND ZONING & ESTATE OF ORVILLE E. AND PATRICIA L. SHEPHERD, ET AL. : BA Case No. 743-D
Appellees

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ORDER

On October 25, 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 Alan and Geralyn Magan (Appellants). Appellants are appealing a May 17, 2017, Howard County Department of Planning and Zoning letter concerning F-16-123 (Ten Oaks Farm).

On August 24 and August 30, 2017, the Department of Planning and Zoning (DPZ) and the Estate of Orville E. & Patricia L. Shepherd, et al. (Shepherd) moved, respectively, to dismiss the administrative appeal as untimely. The October 25, 2017 hearing was therefore limited to oral argument on the issue.

Andrea LeWinter, Esquire, represented Appellants. Paul Johnson, Deputy County Solicitor, represented appellee DPZ. William Erskine, Esquire, represented appellee Shepherd.

STATEMENT OF THE CASE

By letter of May 17, 2017, DPZ informed Shepherd as follows.

> The Department of Planning and Zoning hereby grants approval of the Final Subdivision Plans for Ten Oaks Farm consisting of 6 lots on 20.12 ± acres of land located on Ten Oaks Road in the Fifth Election District of Howard County, Maryland. Signature of the original construction drawings is

> complete. Compliance with the following conditions, and the conditions previously transmitted in our letter of March 7, 2017 is required.
>
> This project is subject to the submission deadlines established by the Adequate Public Facilities Ordinance (APFO) as outlined in our previous letter of March 7, 2017. Filing of agreements, payment of fees and posting of financial obligations must be accomplished on or before July 5, 2017. The plat originals must be submitted on or before September 3, 2017. If these deadlines are not met, your plan will be considered null and void, all previous approvals will be rescinded. This Department cannot entertain any extensions of time under the provisions of the APFO legislation.

Appellants take exception to this "approval letter," contending in the administrative appeal petition that DPZ erred in approving this Final Subdivision Plan as it lacked sufficient information regarding storm water run-off from the site pre- versus post-development and, stability calculations for the proposed replacement culvert, particularly regarding hazards to downstream properties from high level storms. DPZ further erred in approving this Plan because DPZ lacked sufficient information regarding how the developer and future homeowners' association would maintain, repair, and protect the proposed replacement culvert and its outfall directly downstream onto the adjacent Property. (Petition, pg.1). Appellants describe the manner in which they are aggrieved as: "The approved Final Subdivision Plan risks grievous environmental damage to the appellant's property (adjacent to the proposed subdivision) due to intensified and Improperly managed storm water runoff." (Petition, pg.1).

Shepherd - the Estate of Orville E. & Patricia L. Shepherd, et al. - is the property owner and F-16-123 developer of 5020 Ten Oaks Road. F-16-123 is an RR-DEO (Rural Residential - Density Exchange Option) zoned, six-residential lot, major subdivision plan for property identified as Tax Map 0028, Parcel 140, and located in the 5th Election District (the Property). The Property is located in a growth Tier III area, as delineated in PLANHoward 2030, Map 6-3 (pg.72).

Background

Note: During the motions hearing, the Hearing Examiner took notice of Appellants' PB 426 administrative appeal to the Board of Appeals.

- October 31, 2016. DPZ issues "technically complete" letter to Shepherd re: F-16-123
  The Subdivision Review Committee has determined the above referenced plan to be technically complete, subject to the plan markups and comments in ProjectDox and previous comments from our letter dated August 26, 2016. If you have any questions regarding a specific comment, please contact the appropriate review agency. If, in responding to those comments, design changes are made which could affect another SRC agency, you are advised to consult with the appropriate agency.
- January 5, 2017. Planning Board hearing on PB 426 (F-16-123,Ten Oaks Farm major subdivision)
- March 2, 2017. Planning Board issues decision approving PB 426. Finding #2 states in part: "Ms. Tuite testified that the existing driveway for the property was proposed to be retained as the location for the driveway for the proposed subdivision in order to minimize additional disturbance on the property. Ms. Tuite described the improvement of the driveway as a widening of the driveway to 16 feet and also a repair of the culvert by inserting a 36 inch pipe sleeve inside the existing damaged culvert which was made of corrugated metal and concrete." "In response to a question from Mr. Alan Magan, resident of 5038 Ten Oaks Road, as to the parameter used in the design of the stormwater management system and the intensity storms modeled, Ms. Tuite stated that the culvert was designed for a 10 year storm and to ensure the driveway doesn't over top in the 100 year storm. Ms. Tuite testified that her modeling of the runoff had indicated that there would be no cascading of water on the driveway under 100 year storm conditions."
  Finding #3 states: "Mr. Alan Magan, an adjacent property owner, testified that he was not opposed to the proposed development but that he did not believe the driveway should be widened at its present location adjacent to his property but that it should be relocated to the west side of the property. He testified that the environmental impacts onsite and offsite should be considered by the Planning Board in accordance with Senate Bill 236 before the driveway location for the proposed subdivision. Mr. Magan further requested additional time be taken to more thoroughly and comprehensively review the plans. Mr. Magan did not present any testimony in support of his belief that the use of the location of the current driveway for the subdivision driveway could pose potential environmental issues and cause water to run off the driveway onto his property. He expressed his belief that a bad situation was being made worse by the current proposal."
- March 7, 2017. DPZ issues letter to Shepherd re: PB 426 decision and order stating: The Howard County Planning Board signed the Decision and Order granting approval to the above referenced final plan on March 2, 2017. Based on that approval, the Department of Planning and Zoning grants tentative allocations for 5 housing units for this subdivision in the Rural West Planning Area and the year 2019 . . . These tentative allocations will remain valid provided you continue to meet all required milestones and processing deadlines . . .
- May 17, 2017 letter. DPZ issues F-16-123 letter.
- September 26, 2017 Board of Appeals holds merits hearing on Appellants' appeal from PB 426 and verbally dismisses the appeal. The written decision and order has not been issued as of the date of this decision and order.

DISCUSSION

I.
The Howard County Subdivision and Land Development Regulations and Appealable DPZ Actions

1. The May 17, 2017 Letter is not a Final, Appealable Agency Action

In support of its motion to dismiss Appellants' administrative appeal as untimely, DPZ argues the Hearing Examiner lacks jurisdiction to hear Appellants' appeal because DPZ's May 17, 2017 letter is not an "appealable decision" as to the location of the driveway to serve the subdivision under Maryland law and the Howard County Code, but rather a later ministerial letter according to the holding of United Parcel Service v. People's Counsel, 336 Md. 569, 650 A.2d 226, at 234 (1994), in which the Court of Appeals held a "reiteration or reaffirmation" of a previously unappealed decision was not appealable because to hold otherwise would "circumvent entirely the statutory time for taking appeals."

DPZ further argues DPZ's October 31, 2016 letter to Shepherd informing the developer its proposed F-l6-123 was technically complete was the definitive decisional letter Appellants were obliged to appeal for review of DPZ's final decisions regarding approval of the driveway location to serve the subdivision. Appellants did not file an appeal from this decisional letter within 30 days as required by Section 2.206 of the Howard County Board of Appeals Rules and Section 16.105(a) of the Howard County Subdivision and Land Development Regulations (HCSLDR).

Shepherd's motion to dismiss references Appellants' description of error presented by the appeal as implicating stormwater, stability calculations and future maintenance relating to a

proposed replacement culvert to argue DPZ's October 31, 2016 letter technically complete letter served as notice of all final decisions made by DPZ in relation to the location of the driveway/culvert). Like DPZ, Shepherd argues DPZ's May 17, 2017 letter to the owner/developer of the Ten Oaks Farm subdivision, was not a decisional letter.

The Hearing Examiner agrees with Appellees. The Hearing Examiner is authorized only to hear matters authorized by the Howard County Code (HCC) that are otherwise within the jurisdiction of the Board of Appeals. Section 10-305(b)(2) of the Local Government Article of the Maryland Code, Md. Code (2012, 2014 Repl. Vol.) establishes in pertinent part the Board of Appeals subject-matter jurisdiction: to review the action of an administrative officer or unit of government over matters arising under any law, ordinance, or regulation of the county council, that concerns the issuance, renewal, denial, revocation, suspension, annulment, or modification of any license, permit, *approval*, exemption, waiver, certificate, registration, or other form of permission or of any adjudicatory order. Emphasis added.

Pursuant to this enabling authority, the Howard County Charter (Charter), § 501 establishes a Board of Appeals. Charter § 501(b) defines the BOA's limited subject-matter jurisdiction: to exercise the functions and powers relating to the hearing and deciding, either originally or on appeal or review, of such matters as are or may be set forth in [then] Article 25A, Subparagraph (u) of the Annotated Code of Maryland, excluding those matters affecting the adopting of or change in the general plan, zoning map, rules, regulations or ordinances. Article 25A § 5(X) is now codified in Local Government Article § 10-324.

HCC Title 16, Subtitle 1 (HCC § 16.100 et seq.) contains the HCSLDR. HCSLDR § 16.105(a) compels a person aggrieved by a DPZ order to appeal the order to the Board of Appeals within 30 days of the issuance of the order. HCC Title 2, Subtitle 2, § 2.200 et seq. contains the Board of Appeals Rules of Procedure. Rule 2.206, "Administrative Appeals," requires 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 30 days of the date of that administrative decision.

The question of timeliness is jurisdictional. Accordingly, the Hearing Examiner has jurisdiction to hear this appeal only if DPZ's May 17, 2017 letter was an appealable event. The Maryland Court of Appeals in United Parcel Service, Inc. v. People's Counsel for Baltimore County, 336 Md. 569, 650 A.2d 226 (1994) has defined what an "appealable event" is within then Art. 25A, § 5(U). In UPS, neighboring landowners objected by letter to the county zoning commissioner's previous approval of a building permit application. The commissioner's response letter explained and defended this initial permit approval decision. When the neighboring landowners noted an appeal from the response letter, the Board of Appeals ultimately ruled on the merits of the case, determining the initial approval was correct, and the Circuit Court and Court of Special Appeals upheld the Board decision on appeal by UPS. On final appeal, the Court of Appeals reversed, holding the Board of Appeals had no jurisdiction to entertain the merits of the appeal because the response letter was not an "operative event" determining the issuance, renewal, denial, revocation, suspension, annulment, or modification of a license or permit, but

merely a reaffirmation of a prior approval or decision. The operative event occurred when the building permit was approved and issued, not when the commissioner sent his explanatory letter. The Court reasoned an operative event must be a final administrative decision, order, or determination. "If this were not the case an inequitable, if not chaotic, condition would exist. All that an appellant would be required to do to preserve a continuing right of appeal would be to maintain a continuing stream of correspondence, dialogue, and requests . . . with appropriate departmental authorities even on the most minute issues of contention with the ability to pursue a myriad of appeals ad infinitum.'" UPS, 336 Md. at 584-585, quoting from Nat'l Inst. Health Fed. Cr. Un. v. Hawk, 47 Md. App. 189, 422 A.2d 55, 58-59 (1980), cert. denied 289 Md. 738 (1981). The right to note an appeal from DPZ's processing of F-16-123 turns then on the occurrence of an operative event constituting final agency action - an appealable decision - under state and county law, the event being the administrative action determining whether the F-16-123 subdivision plan would be approved.

Applying UPS to the instant appeal, DPZ's May 17, 2017 letter was not an "operative event" from which a proper appeal could be noted; it merely conveyed certain functional processing notices necessary under HCSLDR § 144 et seq. The May 17, 2017 letter was therefore a ministerial action, a mandatory administrative execution of a task imposed on DPZ by the procedures for filing and processing subdivision applications contained in HCSLDR § 16.144(n).

Sec. 16.144. - General procedures regarding the subdivision process.
(n) Approval/Denial of Final Plan:
(1) Within 60 days of active processing time from submission of the final plan, or if additional information was requested, within 45 days of receiving the information, the Department of

> Planning and Zoning shall indicate to the developer in writing whether the final plan is approved, approved with modifications or denied.
> (2) If the final plan is approved or approved with modifications, this notice shall serve as authority to proceed to submission of final construction drawing originals, payment of fees, developer agreement, etc., preparatory to recordation.
> (o) Submission of Final Construction Drawings. Within 60 days of receiving approval of the final plan the developer shall submit the final construction drawing originals to the Department of Planning and Zoning for signature. If a subdivision has a forest conservation obligation, the final forest conservation plan shall be submitted within 60 days.
> (p) Payment of Fees; Posting of Financial Obligations. Within 120 days of receiving approval of the final plan the developer shall:
> (1) Pay all required fees to the County; and
> (2) If subject to a developer agreement or major facility agreement, shall post all monies and file appropriate surety covering the developer's financial obligations for the required public or private improvements.
> (q) Final Subdivision Plat. Within 180 days of final plan approval, the developer shall submit the final subdivision plat to the Department of Planning and Zoning for signatures and recordation.

HCSLDR § 16.144(n) is mandatory language directing DPZ to approve or deny a subdivision plan within certain statutory deadlines. The May 17, 2017 letter could not be a decisional letter, conflicting as it would with these deadlines. Rather, DPZ issued this ministerial, procedural letter correspondence to Shepherd to inform the developer of its compliance, apparently, with the processing requirements of HCSLDR § 16.147 for construction drawings, developer's agreement, and other ministerial matters.

These conclusions accord with prior Hearing Examiner administrative appeal rulings on the timeliness of an appeal. The Hearing Examiner has consistently concluded DPZ "technically complete" letters are "operative events" for the purpose of appeal as the appeal related to the subject development plan. See BA 601-D (September 20, 2007), BA 628-D (August 11, 2008) and BA 643-D (October 6, 2008). In BA 694-D (March 6, 2013), the Hearing Examiner concluded an environmental concept plan Mylar signature approval was not a final decision commencing the

running of the 30-day appeal period. More recently, the Hearing Examiner in BA 727-D (August 8, 2016) dismissed appellants' appeal of a DPZ letter informing a developer it had signed site development plan Mylars (final signature approval) of a site development plan because the letter was a later ministerial communication, the appealable decision being the earlier technically complete letter issued some 14 months earlier.

2. Appellants' Defenses against Dismissal are Distinctions without Legal Difference

As the Hearing Examiner understands the first of Appellants' arguments in response to the motions to dismiss, their appeal should be interpreted in a different light than UPS based on the "party" status of the addressee. In their view, the fact that the developer was the addressee in the May 17, 2017 and October 31, 2016 letters is legally distinguishable from the letter at issue in UPS, where the Zoning Commissioner's reaffirmation letter was "sent directly to an appellant/constituent, not to the developer." "The Zoning Commissioner's letter [in UPS] unequivocally did not represent any grant of permission to the developer or departmental decision-making regarding zoning designation, [sic] it was simply a detailed justification of a prior decision provided to a member of the public."

The status of a letter action addressee is not dispositive of what constitutes an operative event triggering a time to appeal deadline. In Meadows of Greenspring Homeowners Association v. Foxleigh Enterprises, Inc., 133 Md. App. 510, 758 A.2d 611, 614-616 (2000), a case "sufficiently analogous to United Parcel," the court on final appeal held a letter from the Director of the Baltimore County Department of Permits and Development Management responding to

developer Foxleigh Enterprise's request was not an "operative event," where the request sought resolution on whether a development plan was exempted from review under current development regulations, and which would permit the developer to proceed with its proposal under review through the former County Review Group (CGG) process, Rather, the Director's letter to Foxleigh merely informed the developer the proposed plan must be reviewed by the CRG." The CRG's action to approve or deny the plan would be the decisional action.

In line with UPS and Foxleigh, the operative "letter" event triggering an appeal from a DPZ letter action approving a subdivision plan does not turn on the "party" status of the addressee, but is always to be gauged in reference to the effect or content of the letter action. Although the record does not instruct us when Shepherd submitted F-16-123, the October 31, 2016 technically complete letter references an August 26, 2016 letter in which DPZ made comments about the plan. Based on these letter dates, the May 17, 2017 letter date is significantly beyond HCSLDR's § 16.144(n)'s, 60-day processing approval deadline or the 105 day deadline when additional information is requested.

A recent unreported opinion comparing the effect or content of two related letter actions to discern which was the appealable, operative event is Hereford Works, LLC, et al. v. Board Of Education Of Baltimore County, et al. (No. 1914, February 27, 2017) (decided on other grounds), citing UPS favorably to conclude a March 21, 2014 letter from a county school superintendent to a high school principal permitting some flexibility in class scheduling mandates in follow up to the superintendent's earlier February 24, 2014 letter to the head of a community school

association, Hereford Works, (a third party) concerning adjustments to the mandates, was a later communication; it did not extend the deadline for filing an appeal because the second decision letter did not make substantial changes to the first decision letter.

> The March 21, 2014 letter merely allowed the school to "retain the semesterized A/B Block schedule in math and world languages for [ ] junior and seniors going forward." The superintendent did not retract or reverse his planned schedule for all County schools. United Parcel Serv., Inc. v. People's Counsel for Balt. Cty., 336 Md. 569, 582 (1994). Such a minor concession or modification would not allow the clock to start ticking anew. Ohio Cas. Ins. Co. v. Ins. Comm'r, 39 Md. App. 547, 557 (1978). ("The courts have very little leverage in permitting untimely appeals. The most persuasive appeal, 'if filed late, may prove to be an expensive and professionally embarrassing excuse in futility.'") (Citation omitted).
>
> We agree with the MSBE that Superintendent Dance's February 24, 2014 letter was the final decision and that the March 21, 2014 letter *did not make substantial changes to that decision*. A timely appeal must have been filed within thirty days of the February 24, 2014 letter. Md. Code (1978, 2014 Repl. Vol.), Education Article, § 4-205(c)(3).

Emphasis added. Likewise, DPZ's May 17, 2017 letter to Shepherd, as well as the intermediate March 7, 2017 letter informing Shepherd of the PB 426 decision and order signing and several technical requirements did not, in content or effect, make substantial changes to DPZ's approval of the F-16-123 through the October 31, 2016 technically complete letter, which determined Shepherd's subdivision rights.

In addition, as with the status of an addressee not being dispositive of a letter action being an operative event, the use of the word "approval" in the later F-16-123 letters is not dispositive of a DPZ subdivision plan letter being an appealable decisional action. cf. Art Wood Enterprises v. Wiseburg Community Association, Inc. 88 Md.App. 723, 732-733, 596 A.2d 712, 716-717 (1990) (the fact that CRG used the word "conditionally" and the phrase "to be addressed" in the minutes

evidencing its action on the Plan is not dispositive in determining whether that action was "a final action" for judicial review in accordance with county regulations).

Next, Appellants allege DPZ's act of giving Mr. Magan access to "Pdox" should not be cause for dismissal for an untimely appeal. In Appellants' view, it "is inequitable and overly burdensome to expect the Magans to learn of such a letter in a timely fashion through the online file." Pdox - ProjectDox - is an electronic plans submission and review process. Pdox software allows plans to be submitted and reviewed electronically and emails sent to applicants. DPZ Pdox Manual, pgs.1, 9. Appellants' parallel "equitable" defense against dismissal rests on DPZ's longstanding practice of copying in persons interested in specific development projects as grounds for delaying the time to appeal a final, appealable agency decision if the department fails to "notice" them of the appealable action. In their view, the May 17, 2017 letter date should trigger the 30-day appeal deadline, DPZ having not copied them in, as requested, on all actions pertaining to F-16-123.

During the proceeding, the Hearing Examiner reviewed her prior ruling on the legal effect of DPZ's "interested person" notice practice in BA 694-D (decided March 6, 2013), an administrative appeal from DPZ's mylar signature approval of an environmental concept plan (ECP) by persons and businesses opposed to a proposed gas station/convenience store/carwash. The appeal was ultimately dismissed as untimely; neither the Mylar signature approval nor the department's earlier ECP preliminary approval letter having been an operative event under HCC § 18.900 et seq. triggering the 30-day timeline for noting an administrative appeal.

> 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 HCC 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)).

No legal traction lies in Appellants' invocation of the Accardi doctrine as support for their "equitable defenses" through cursory reference to Massey v. Sec 'y Dep't of Pub. Safety & Corr. Servs., 389 Md. 496, 886 A.2d 585 (2005), and couched in the UPS opinion dicta on the discovery rule. A doctrine of administrative law, the Accardi remedy generally invalidates an agency action when the agency fails to follow its own procedures or regulations. United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954); see also Pollock v. Patuxent Inst. Bd. of Review, 374 Md. 463, 823 A.2d 626 (2003) (discussing the various approaches of Maryland courts in applying the Accardi doctrine).

The Massey opinion referenced the Accardi doctrine only as a tool to scrutinize what constitutes regulations under the state Administrative Procedure Act in the court's analysis of a prisoner's procedural due process rights, because an Accardi analysis distinguishes between "regulations that affect 'fundamental rights,' especially those that are Constitutionally derived,

and those governing merely the 'orderly transaction of agency business' - routine internal management." Pollack, 374 Md. at 467. The distinction is key. The Accardi doctrine embeds an exception for regulations for the "orderly transaction of agency business," and technical noncompliance with this category of "claims processing" regulations does not compromise procedural due process absent a showing of substantial prejudice. The Hearing Examiner reviewed the Accardi doctrine and its exceptions in code enforcement case no. CE 10-072, as adopted in a modified version in Pollock v. Patuxent Inst. Bd. of Review, 374 Md. 463, 823 A.2d 626 (2003).

> As adopted by the Court, the Accardi remedy is not triggered when agency departure from purely procedural rules does not result in prejudice from the violation of the rule. Perforce of this Accardi exception, in the absence of a showing of substantial effect, agency inattention to or transgression of its rules will not render the agency action void. See also A. Rochvarg, Maryland Administrative Law 131 (2001) ("A party aggrieved by an agency decision must demonstrate in order to have a court reverse and vacate the agency decision that the party was prejudiced by the error.")
>
> The Maryland courts have addressed what constitutes prejudice or substantial effect within the context of administrative hearings on land use matters. In McLay v. Maryland Assemblies, Inc., 269 Md. 465, 306 A.2d 524 (1973), the court held the administrative board of appeal's failure to hold a hearing on a code enforcement matter within the time prescribed by county ordinance was not prejudice where the appellee property owner had actual knowledge of the hearing, appeared at, and participated in the hearing. Where there is compliance with the substance of the requirements of statutes or rules by one party and the other party has not been prejudiced, technical irregularities cannot be made the basis for depriving persons an opportunity to assert their legal rights. McLay v. Maryland Assemblies, Inc., 269 Md. At 476-77, 306 A.2d at 530-31 (internal citations omitted.)

HCZR § 100.0.I, for example, is a routine claims processing regulation and ministerial action, not an appealable decisional action.

> I. Inactive Petitions
> 1. For the purposes of this Subsection, an inactive petition is a petition submitted for hearing authority cases, Zoning Board cases, or Department of Planning and Zoning administrative hearing cases:

a. Which is not accepted for scheduling purposes due to a need for further information, clarifications and/or corrections as stated in a Department of Planning and Zoning written notification to the petitioner or the petitioner's representative, and the petitioner or the petitioner's representative has not provided the requested further information, clarifications and/or corrections within 180 days of the date of the Department of Planning and Zoning written notification; or
b. Which is placed on the "hearings unscheduled" docket of the Hearing Authority or Zoning Board upon a request from the petitioner or the petitioner's representative, and this petition remains on the "hearings unscheduled" docket for a period of 180 cumulative days.

The Court of Special Appeals' more recent review of the Accardi exception in McClure v. Montgomery Cnty. Planning Bd. of the Md.-Nat'l Capital Park & Planning Comm'n, 220 Md.App. 369, 385-388, 103 A.3d 1111, 1123 (2014), clarifies that nonregulatory agency internal documents or practices – "informal agency practice or policy" like DPZ's interested persons notice practice or giving them access to Pdox – never implicates procedural due process notice violations. McClure concerned a Planning Board's imposition of a $100,000+ civil administrative penalty on the property owner appellant and a requirement that he take remedial actions to correct his violations of a forest conservation easement on his property. The subdivision plat for Mr. McClure's property did not show the easement. At the hearing, Mr. McClure argued in pertinent part the Planning Board had no authority to enforce the un-plated easement based on its interpretation of a technical tree manual, which the Board had relied on in part to take the enforcement action, and it could only enforce the easement if the subdivision plat was re-platted to show it. The court held the Planning Board did not run afoul of the Accardi doctrine or its exception because the county code defined the manual as a guidance document. "It follows, then, that the Planning Board cannot violate its own rules where the guidance document does not impose any new duties on the Board that carry the force of law."

If the Massey dicta signals anything about appealable decisional actions in the instant motion to dismiss, it is to underscore how beyond the reach of procedural due process notice DPZ's informal "third party" notice practices are. These practices are not even rules or regulations tending to the orderly transaction of agency business, i.e., routine internal management. They are departmental courtesy. DPZ's informal practice of copying in persons on a development project appears on pg.4 of an informal department guidance document entitled "Development Review Process."[1]

> Citizens may request to be copied on all correspondence between DPZ and the developer by calling 410-313-2350 to leave contact information, the file name and number. If there is a great deal of community interest, it is helpful to DPZ for the community to designate a single person as the primary contact to be copied on correspondence who will share this information with others in the community.

This document also directs citizens interested in tracking a project are also directed to DPZ's website, under "Search Development Plans and Meetings" to determine whether the plans have been submitted and to determine the file number and project name.

To put all these defenses against dismissal in context, we have only to look at the procedural due process notice provisions in HCSLDR § 16.103 – Administration, which regulates what due process is due and to whom - "parties" of a subdivision or development. A "party" is the petitioner/developer. Subsection "(d) defines "final action."

> (a) *Provide Information to All Parties.* The Department of Planning and Zoning shall keep all parties to a proposed subdivision or development advised in writing of the Department's recommendations and actions.
> (b) *Department of Planning and Zoning Responsible for Final Action.* The Department of Planning and Zoning is responsible for the final approval or disapproval of proposed subdivisions and site

[1] Updated September 2014 (CB-33-2014). Available at https://www.howardcountymd.gov/Departments/Planning-and-Zoning/Land-Development/Development-Process-and-Procedures.

developments. In making its decision on a subdivision or site development plan the Department shall consider the reports and recommendations of the review committee and other appropriate agencies to which it has sent the plan for comment and recommendation.
(c) *Plans Approved If They Comply with Requirements.* The Department of Planning and Zoning shall approve a subdivision or site development plan which:
(1) Complies with the requirements of this Title and the provisions of subtitle 11, "Adequate Public Facilities"; subtitle 12, "Forest Conservation,"; and subtitle 13, "Cemetery Preservation," of this title; and
(2) Is consistent with the zoning regulations.
(d) *Plans Approved if No Action within Prescribed Time Limitations.* If the Department does not act on a subdivision plan or site development plan within the time limits of this subtitle, the plan shall have automatic approval.
(e) *Types of Final Action.* Final action by the Department of Planning and Zoning on a subdivision or site development submittal shall be:
(1) Approval;
(2) Approval with required modification; or
(3) Denial.

When DPZ intends to provide "Accardi" exception notice to third parties it does so through the adoption of a regulatory provision, as in HCSLDR § 16.125's scenic roads section.

(4) *Administrative waivers*.
(i) A developer seeking an administrative waiver from the scenic road requirements shall give written notice within one week of the filing date of the waiver petition, via first-class mail to:
a. All adjoining property owners identified in the records of the State Department of Assessments and Taxation; and
b. All attendees of record of the presubmission community meeting; and
c. All interested parties on file with the Department of Planning and Zoning.
(ii) The Department shall not approve any petition for a scenic road requirement waiver within 30 days of meeting the written notice requirement to allow for public comment.

II.
On the Relationship between HCSLDR Technically Complete, Later Major Subdivision Approval Letters & Planning Board Review of Growth Tier III Major Subdivisions

Although this appeal is narrowly decided on Appellants' obligation to timely appeal DPZ's decisional, technical final action on F-16-123 under HCSLDR § 16.144 et al., the Hearing Examiner generally acknowledges the gist of Appellants' assertion, as set forth in their motions to dismiss response, that the relationship between the issuance of technically complete and later letters is

not so straightforward when the Planning Board must hold a LU § 5-104 hearing. The intent here first to clarify the growth tier III major subdivision administrative review "regime" as procedurally two-staged, and second, that SB 236 never contemplated a wide-ranging an "environmental" review as Appellants would like. Because this is an appeal of "first impression," Part 1 surveys the state legislative history and statutory framework propelling the Planning Board's public hearing on a growth tier III major subdivision. Part 2 looks at this Planning Board public hearing within existing HCSLDR procedures for processing subdivision plans.

1. SB 236: the Sustainable Growth and Agricultural Preservation Act of 2012

The Maryland General Assembly's SB 236, the Sustainable Growth and Agricultural Preservation Act of 2012 (aka the "Septic Law") was then Governor O'Malley's second stab at codifying large-lot residential development on septic systems to reduce a major source of nitrogen pollution deposited into the soil by these systems and the resultant impacts on the Chesapeake Bay and other waterways.[2] Of import to this appeal is SB 236's mandate that Planning Boards hold a public hearing on major subdivisions on septic systems in growth Tier III designated lands, resource areas dominated by agricultural and forest lands, and certain grandfathering provisions. The Shepherd Property is located in a Tier III area on the PlanHoward2030 revised Map 6.3. Had Howard County not adopted growth tiers through an amendment to the county

[2] Stiff opposition caused bill sponsors to withdraw a 2010 bill, SB 846, banning development on septics that do not use nitrogen removal technology. The Governor subsequently formed a septic issues task force, whose final report informed SB 236.

general plan, SB 236 barred major subdivisions on septic. SB 236 is codified in pertinent part as Md. Code Ann., Land Use Art. Title 1, Subtitles 5 and § 5-104. Major subdivision – Review.

(a) Definitions. –
(1) In this section the following words have the meanings indicated.
(2) "Community sewerage system" means a publicly or privately owned sewerage system that serves at least two lots.
(3) "Major subdivision" has the meaning stated in § 9-206 of the Environment Article.
(4) "On-site sewage disposal system" has the meaning stated in § 9-206 of the Environment Article.
(5) (i) "Planning board" means a planning board established under this article.
(ii) "Planning board" includes a planning commission or board established under Division II of this article or Title 10 of the Local Government Article. 10-324
(6) "Shared facility" has the meaning stated in § 9-206 of the Environment Article.
(b) Scope of section. – This section applies only to a residential major subdivision in a Tier III area served by:
(1) on-site sewage disposal systems;
(2) a shared facility; or
(3) a community sewerage system.
(c) Review by planning board. – If a local jurisdiction establishes the growth tiers under Title 1, Subtitle 5 of this article, a residential major subdivision in a Tier III area may not be approved unless the planning board has reviewed and recommended the approval of the major subdivision in the Tier III area.
(d) Public hearing required. –
(1) Before recommending the approval of a proposed major subdivision in a Tier III area, the planning board shall hold at least one public hearing.
(2) The planning board shall conduct the public hearing in accordance with its rules and procedures.
(e) Scope of review. – The review of a residential major subdivision by the planning board shall include:
(1) the cost of providing local governmental services to the residential major subdivision unless a local jurisdiction's adequate public facilities law already requires a review of government services; and
(2) the potential environmental issues or a natural resources inventory related to the proposed residential major subdivision.
(f) Resolution. – The planning board shall recommend the proposed residential major subdivision by resolution of the planning board.

Three aspects of the legislative history of LU § 5-104's Planning Board hearing are of bear on this appeal. First, the "development septics" regime as introduced through SB 236 made the Maryland Department of the Environment (MDE) the approving authority (in pertinent part) for major residential subdivisions in a Tier III area served by on-site sewage disposal systems, shared facilities, or community sewerage systems. Hence the qualification in proposed LU § 5-104 that

a growth Tier III major subdivision with on-site septic be *recommended* by the local Planning Board following review.

Second, the Planning Board as a recommendation of approval could have required the developer to purchase State-defined nutrient offsets if warranted to mitigate post-development, on-site environmental or natural resources impacts, per regulations to be promulgated by the MDE, as provided for elsewhere in SB 236.[3] The imposition of nutrient offsets as a recommendation of approval would nudge developers to plan a major residential development to minimize post-development wastewater load pollution from on-site septics with greater consideration of pollution reduction practices in the design and management of septic fields, and wastewater systems. On this, the Department of Legislative Services Fiscal and Policy Note for SB 236 summary explained:

> [A]residential major subdivision must be served by a publicly owned sewerage system, or a community sewerage system, a shared facility, or a multiuse sewerage system that meets specified conditions. The community sewerage system, shared facility, or multiuse sewerage system must be managed, operated, and maintained by a controlling authority or a third party under contract with the controlling authority. "Controlling authority" is defined as a unit of government, a public corporate body, or an intercounty agency authorized by the State, a county, or a municipality to provide for the management, operation, and maintenance of a community sewerage system, shared facility, or multiuse sewerage system.
>
> Additionally, the community sewerage system, shared facility, or multiuse sewerage system must discharge to surface waters in accordance with an MDE discharge permit or through land application under a nutrient management plan that assures that 100% of the nitrogen and phosphorus in the applied effluent will be taken up by vegetation.[4]

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[3] The offset was for any increase in load (any remaining pollution) and would be implemented by purchasing reductions elsewhere and the site and would need to be covered under a Maryland Department of Environment discharge permit to protect water quality based on best science (best available technology or BAT) septic systems. The BAT regulations as adopted were recently revised to eliminate BAT nitrogen septic systems with certain exceptions.

[4] Available at http://mgaleg.maryland.gov/webmga/frmMain.aspx?ys=2012rs%2fbillfile%2fsb0236.htm (last visited November 10, 2017).

Third, to this same end, SB 236 mandated Planning Board review of a growth tier III major residential subdivision to consider potential "environmental issues" or the "natural resource inventory related to the development on septic site design.

This is the mark-up of SB 236, including all proposed amendments and deletions to LU § 5-104 and the MDE approval section.

Note: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW. [Brackets] indicate matter deleted from existing law. Underlining indicates amendments to bill. Strike out indicates matter stricken from the bill by amendment or deleted from the law by amendment. Italics indicate opposite chamber/conference committee amendments.

(A) (1) IN THIS SECTION THE FOLLOWING WORDS HAVE THE MEANINGS INDICATED.
(2) "COMMUNITY SEWERAGE SYSTEM" MEANS A PUBLICLY OR PRIVATELY OWNED SEWERAGE SYSTEM THAT SERVES AT LEAST TWO LOTS.
(3) "MAJOR SUBDIVISION" MEANS THE SUBDIVISION OF LAND INTO NEW LOTS, PLATS, BUILDING SITES, OR OTHER DIVISIONS OF LAND DEFINED IN LOCAL LAW AS A MAJOR SUBDIVISION IN EFFECT BEFORE JANUARY 1, 2012 HAS THE MEANING STATED IN § 9–206 OF THE ENVIRONMENT ARTICLE.
(4) "ON–SITE SEWAGE DISPOSAL SYSTEM" HAS THE MEANING STATED IN § 9–206 OF THE ENVIRONMENT ARTICLE.
~~(5) "SHARED FACILITY" HAS THE MEANING STATED IN § 9–206 OF THE ENVIRONMENT ARTICLE~~.
~~(6)~~ *(5)* (I) "PLANNING BOARD" MEANS A PLANNING BOARD ESTABLISHED UNDER THIS ARTICLE.
(II) "PLANNING BOARD" INCLUDES A PLANNING COMMISSION OR BOARD ESTABLISHED UNDER ARTICLE 25A OR ARTICLE 28 OF THE CODE.
(6) "SHARED FACILITY" HAS THE MEANING STATED IN § 9–206 OF THE ENVIRONMENT ARTICLE.
(B) THIS SECTION APPLIES ONLY TO A RESIDENTIAL MAJOR SUBDIVISION IN A TIER III AREA SERVED BY:
(1) ON–SITE SEWAGE DISPOSAL SYSTEMS;
(2) A SHARED FACILITY; OR
(3) A COMMUNITY SEWERAGE SYSTEM.
(C) IF A LOCAL JURISDICTION ESTABLISHES ~~TIERS FOR~~ THE GROWTH ~~IN THE LAND DEVELOPMENT ELEMENT OF THE PLAN~~ TIERS UNDER ~~§ 1.04~~ § 1.05 OF THIS ~~SUBHEADING OR § 3.05 OF THIS~~ ARTICLE, A RESIDENTIAL MAJOR SUBDIVISION IN A TIER III AREA MAY NOT BE APPROVED UNLESS THE PLANNING BOARD HAS REVIEWED AND RECOMMENDED THE APPROVAL OF THE MAJOR SUBDIVISION IN ~~A~~ THE TIER III AREA ~~SERVED BY~~:
~~(1) ON–SITE SEWAGE DISPOSAL SYSTEMS;~~
~~(2) A COMMUNITY SEWERAGE SYSTEM; OR~~
~~(3) A SHARED FACILITY~~.

~~(C)~~(D)(1) BEFORE RECOMMENDING THE APPROVAL OF A PROPOSED MAJOR SUBDIVISION ~~SERVED BY ON-SITE SEWAGE DISPOSAL SYSTEMS, A COMMUNITY SEWERAGE SYSTEM, OR A SHARED FACILITY~~ IN A TIER III AREA, THE PLANNING BOARD SHALL HOLD AT LEAST ONE PUBLIC HEARING.

(2) THE PLANNING BOARD SHALL CONDUCT THE PUBLIC HEARING IN ACCORDANCE WITH ITS RULES AND PROCEDURES.

~~(D)~~ (E) THE REVIEW OF ~~THE~~ A RESIDENTIAL MAJOR SUBDIVISION BY THE PLANNING BOARD SHALL INCLUDE:

(1) THE COST OF PROVIDING LOCAL GOVERNMENTAL SERVICES TO THE RESIDENTIAL MAJOR SUBDIVISION UNLESS A LOCAL JURISDICTION'S ADEQUATE PUBLIC FACILITIES ORDINANCE ALREADY REQUIRES A REVIEW OF GOVERNMENT SERVICES; AND

(2) THE POTENTIAL ENVIRONMENTAL ~~IMPACT~~ OF ISSUES OR A NATURAL RESOURCES INVENTORY RELATED TO THE PROPOSED RESIDENTIAL MAJOR SUBDIVISION; AND

~~(3) ANY NUTRIENT OFFSETS, ACCORDING TO IF REQUIRED BY STATE POLICY, THAT WILL BE REQUIRED FOR THE AS A RESULT OF THE APPROVAL OF THE PROPOSED RESIDENTIAL MAJOR SUBDIVISION~~.

~~(E)~~ (F) THE PLANNING BOARD SHALL RECOMMEND THE PROPOSED RESIDENTIAL MAJOR SUBDIVISION BY RESOLUTION OF THE PLANNING BOARD.

~~SECTION 4. AND BE IT FURTHER ENACTED, That the Department of the Environment shall adopt regulations requiring major residential subdivisions served by on-site septic systems to receive a permit.~~

Lastly, one amendment that died in committee, SB0236/503529/1, would have added language to LU § 5.104 requiring local jurisdictions to establish a subdivision review and approval process for growth Tier III major subdivision Planning Board public hearings.

SB 236 as enacted and codified as LU § 5-104 still instructs a Planning Board to conduct a public hearing on a growth tier III major subdivision in accordance with its rules and procedures and "recommend" "approval" by resolution after review of potential environmental issues or the on-site natural resource inventory, sans subsequent Maryland Department of Environment permit approval and enforcement or nutrient pollution offset conditions. The resultant local government Catch-22 was, then, how to incorporate a Planning Board public hearing into development processing and defining the scope of its now unmoored review for potential

"environmental issues" and "natural resources inventory related to proposed residential major subdivision."

This was no easy task. A Planning Board's authority over subdivision plans is contingent on the interplay of the local government's planning and zoning authority under state and local law, local subdivision/development/zoning regulations, and Planning Board rules of procedure. The Maryland Department of Planning's Implementation Guidance for SB 236 (Version 2.0, August 12, 2012) (pg.24) confesses to the administrative challenges confronting some local governments.[5]

> Charter and non-charter county planning boards, as well as municipal government planning boards must conduct the public hearing and make a recommendation. Since most charter county planning boards do not approve subdivisions, SB236 now requires them to conduct a public hearing and then make a recommendation to the administrative official within the local jurisdiction that approves subdivisions served by on-site sewage disposal systems. A non-charter county or municipal planning board can both make a recommendation for approval as well as approve residential major subdivisions within Tier III.

In Howard County, the Planning Board has no oversight role on major subdivision plans absent authorization in the Howard County Zoning Regulations (HCZR). The HCSLDR consequently incorporate this role in HCSLDR § Sec. 16.144(f).

> (f) Planning Board Approval:
> (1) If the subdivision requires Planning Board approval, the Department of Planning and Zoning shall advise the developer of the location, time and date of the Planning Board meeting after the Department notifies the developer that the sketch plan or preliminary equivalent sketch plan has been approved or approved with modifications by the Department.
> (2) The Planning Board shall indicate to the developer in writing whether the sketch plan or preliminary equivalent sketch plan is approved, approved with modifications or denied.

This section also applies to subdivision plans for which DPZ has granted a waiver from sketch plan

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[5] Available at http://planning.maryland.gov/OurWork/SB236Implementation.shtml (last visited Nov. 10, 2017).

or preliminary equivalent sketch plans through an alternative compliance provision in the HCSLDR. The Hearing Examiner infers the F-16-123 subdivision plan was subject to a waiver or alternative compliance approval because the "F" designation indicates it is a "final plan."

LU § 5-104 being a state law mandate, not an HCZR directive, Howard County's management response to the LU § 5 -104 Planning Board public hearing mandate was to utilize this HCSLDR § Sec. 16.144(f) Planning Board approval procedure, and to conduct the Planning Board public hearing under the Board's quasi-judicial rules of procedure. This is the process followed for subdivision plans requiring Planning Board approval for residential development in the HCZR § 107.0, R-ED (Residential: Environmental Development) and HCZR § 111.1, R-H-ED (Residential Historic: Environmental Development) zoning districts. Lands zoned R-ED or R-H-ED contain environmentally sensitive areas or natural resources (like forests) regulated by state or county law. When the Planning Board reviews plans in these districts, it evaluates the plan under this criteria:

> a. The proposed lay-out of lots and open space effectively protects environmental and historic resources.
> b. Buildings, parking areas, roads, storm water management facilities and other site features are located to take advantage of existing topography and to limit the extent of clearing and grading.
> c. Setbacks, landscaped buffers, or other methods are proposed to buffer the development from existing neighborhoods or roads, especially from designated scenic roads or historic districts.

What Appellants miss is that the keystone of a LU § 5-104 Planning Board review is the public hearing itself, to be held in accordance with a Board's rules and procedures. In a growth tier III public hearing, the Board's principal duty is public oversight: confirmation of the proposed major residential subdivision location in a tier III area and a checks and balances review of the

site design of a residential development with on-site septic. The Planning Board does not perform a redundant appraisal of the proposed development for compliance with the HCSLDR. With the elimination of the nitrogen pollution and MDE approval component in LU § 5-104, technical review of the proposed septic system development remains the sole province of DPZ's development review division and related county agencies. In the Hearing Examiner's view, this "regime" would not have barred Appellants from presenting testimony or calling witnesses at the Planning Board hearing to testify about potential stormwater management issues on-site as it related to site design, particularly the location of the driveway and culvert, to the extent their proposed location would not impair on-site environmentally sensitive areas or natural resources like floodplains, buffers, streams, wetlands, and forested areas.

On balance, the Hearing Examiner concludes there is no legal foundation within this public hearing process or the legislative history of SB 236 to expand the Planning Board's LU § 5-104 public hearing oversight review of a growth tier III major subdivision on septic to nonregulated environmental concerns or off-site impacts. This includes Appellants' speculations about "grievous environmental damage to the appellant's property (adjacent to the proposed subdivision) due to intensified and improperly managed storm water runoff." On this point, the Hearing Examiner took notice during the hearing of her exclusion of "grievous environmental damage" concerns in conditional use petition hearings, specifically the effect of the July 2016 1000-year storm/flood in Howard County and worries about potential adverse impacts from another 1000-year flood if the requested use were approved. The Hearing Examiner

acknowledges the anxiety this flooding caused, but even in the watershed master plan process for Ellicott City, which bore the brunt of the July 2016 flood, the mitigation of new development will be defined as managing the volume of storm water caused by a 100-year storm, which is the current requirement for all new projects in the watershed.[6]

The quasi-judicial proceeding before the Planning Board, which denied Mr. Magan's request to the Board to take additional time be taken to more thoroughly and comprehensively review the plan, afforded Appellants the right to present evidence and call witnesses to testimony on land use and site design issues, and potential design alternatives properly before the Board, which they did not. DPZ granted them access to Pdox to track F-16-123, but, apparently, they did not follow the project closely. They could also view all the letters DPZ sent to the developer on DPZ's public web site, including the issuance of the technically complete letter and the F-16-123 Environmental Concept Plan, with its design narrative describing how natural areas will be preserved and how Environmental Site Design may be achieved for meeting stormwater requirements. In short, the forum for a review of Appellants' concerns about the projects' conformance with technical stormwater management design requirements as it related to the driveway/culvert was through timely appeal of the F-16-123 technically complete letter.

A FINAL NOTE

As remarked above, this is one of many appeals from a later ministerial agency action where Appellants defended against dismissal because DPZ had not copied them in a technically

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[6] See https://www.howardcountymd.gov/Departments/Planning-and-Zoning/Community-Planning/Community-Plans/EC-Master-Plan (last visited November 10).

complete letter as requested. During the proceeding, the Hearing Examiner commented on Baltimore County's citizen access approach, the use of the Acela e-government platform and portal as a publically accessible development tracker showing all development plan actions, due dates, appeal deadlines, and actual development plans. Below is a screenshot of the development tracker for a controversial growth tier III major subdivision (although it does not identify the date or action of the Planning Board public hearing.)[7] The Acela, Inc. website highlights its use a "citizen relationship management" tool and a means to promote citizen engagement.[8] Howard County's Department of Inspections, Licenses, and Permits uses Acela to provide public access to building permit, licenses and code enforcement information.[9] The expansion of the Acela portal to include a development plan tab may better assist DPZ in its efforts to increase citizen access and transparency.

It may also be a means for providing electronic access to Hearing Authority petitions and plans. Like DPZ, the Hearing Examiner has for the last few years sought to make transparent, i.e., publically available, information about petitions before her. The current approach is to add this information below a technical staff report, which is posted on the County Council calendar on the date of the initial hearing. The Hearing Examiner encourages DPZ to explore the expansion

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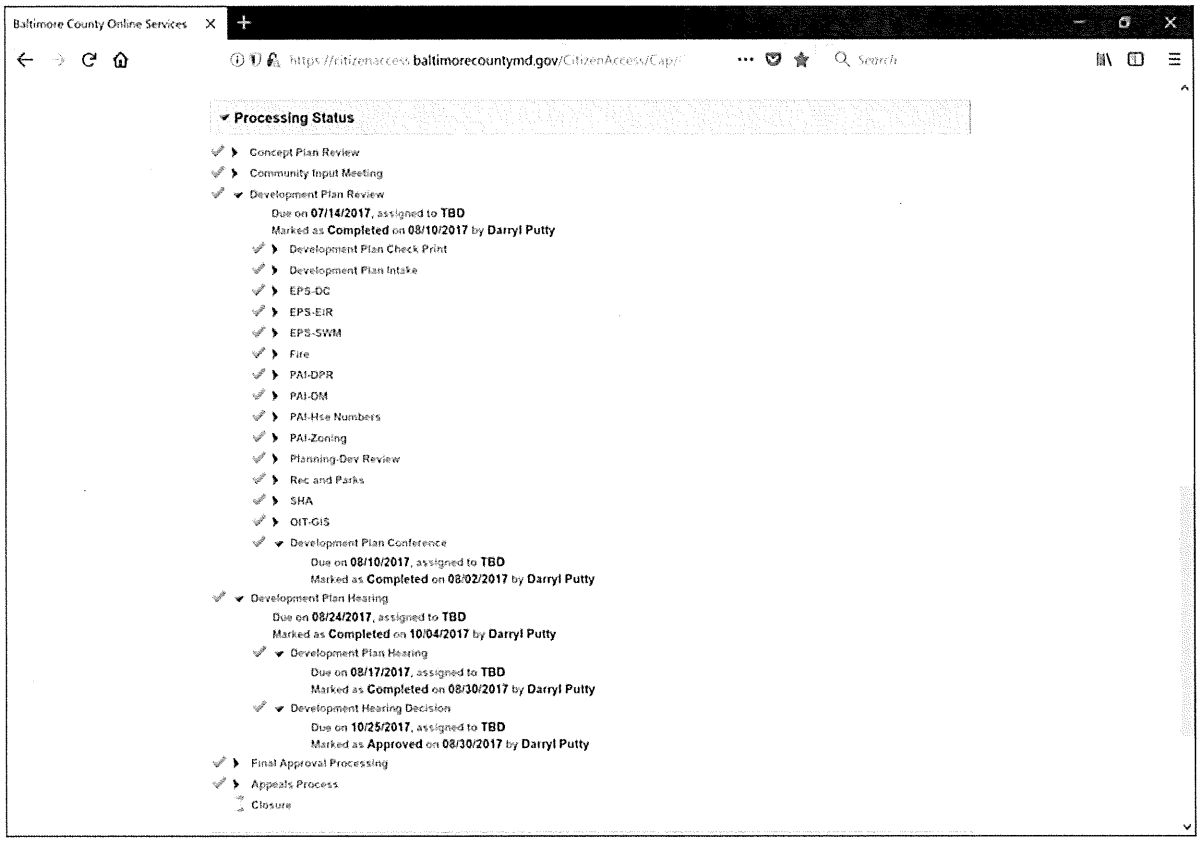
[7] Available at https://citizenaccess.baltimorecountymd.gov/CitizenAccess/Cap/CapHome.aspx?module=LandManagement&TabName=LandManagement (last visited October 10, 2017).
[8] See www.accela.com (last visited November 10, 2017).
[9] https://accela1.howardcountymd.gov/citizenaccess/ (last visited November 10, 2017).

of Acela and electronic submission requirements during its review and rewrite of the Howard County Zoning and Subdivision regulations to increase transparency and citizen access.



ORDER

Based upon the foregoing, it is this **1st day of December 2017,** by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the administrative appeal of Alan and Geralyn Magan is hereby **DISMISSED**.

HOWARD COUNTY BOARD OF APPEALS

HEARING EXAMINER

Michele LeFaivre

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.