ROBERT LONG, JR.	:	BEFORE THE
Appellant	:	HOWARD COUNTY
v.	:	BOARD OF APPEALS
HOWARD COUNTY, MARYLAND, DEPARTMENT OF PLANNING AND ZONING	:	HEARING EXAMINER
	:	BA Case No. 719-D
Appellee		

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DECISION AND ORDER

On February 25, 2016, 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 Robert Long, Jr. (Appellant). Appellant is appealing a October 22, 2015 letter to Robert P. Long, Jr. and Leslie P. Long from Grace Fielhauer, Special Assistant to County Executive Alan Kittleman.

Mr. Long was not represented by counsel. Melissa Goldmeier, Esq., Assistant County Solicitor, represented the Department of Planning and Zoning (DPZ).

As a preliminary matter, DPZ moved for dismissal of the appeal. Upon consideration of DPZ's motion to dismiss, Appellants' response to the motion and oral arguments heard on February 25, 2016, and for the reasons stated below, the Hearing Examiner is granting the motion and dismissing the appeal.

BACKGROUND

On December 2, 2014, DPZ served Robert Long, Jr. a notice of violation (NOV) for multiple violations of the Howard County Zoning Regulations (HCZR) at 2701 Woodbine Road (the

Property). On October 6, 2015, Mr. Long met with officials from the Office of the County Executive to discuss the NOV. By follow up letter of October 22, 2015 (the Constituent Letter), Grace Fielhauer, Special Assistant to County Executive Alan Kittleman, listed the status of the violations and the actions taken or required. The sole "live" violation identified is "maintain[ing] more than one single-family detached dwelling on RC (Rural Conservation) zoned property" in violation of HCZR §§ 104.0.B.3 and 101.0.0. The action to be taken or required is 1) apply for and receive nonconforming use confirmation for the dwellings, or 2) provide the Executive Office and/or DPZ with "signed, notarized statements from present and all future tenants giving a detailed list of the work duties they perform on the farm and the form of compensation for those duties." Below Ms. Fielhauer's signature is this statement.

> A person aggrieved by a decision of the Department of Planning and Zoning may file an appeal to the Board of Appeals. An appeal to this letter must be filed within 30 days of the date of the notice and must state the alleged error or other grounds for the appeal. Instructions and forms for filing an appeal may be obtained from the Department of Planning and Zoning.

Mr. Long filed an administrative appeal petition on November 18, 2015. The petition identifies the date of the ruling or action as December 2, 2014 to October 22, 2015.

DISCUSSION

I. The October 22, 2015 Constituent Letter

The threshold inquiry in this appeal is whether Ms. Fielhauer's October 22, 2015 Constituent Letter is an appealable decision. The Hearing Examiner is permitted to hear only matters authorized by the Howard County Code (HCC) or HCZR that are otherwise within the

jurisdiction of the Board of Appeals. HCC § 16.302(a). Md. Code (2013, 2013 Repl. Vol.), § 10-305 of the Local Government Article (LG) creates the Board of Appeals. LG § 10-305(b)(2) 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.)[1]

Pursuant to this enabling authority, Howard County Charter (Charter) § 501 establishes a Board of Appeals. Charter § 501(b) defines the Board'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 Article 25A, Subparagraph (u) of the Annotated Code of Maryland [now LG § 10-305(b)(2)], excluding those matters affecting the adopting of or change in the general plan, zoning map, rules, regulations or ordinances.

HCC § 16.301(b) implements Charter § 501(b) to authorize the Board of Appeals to "[h]ear 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

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[1] In 2013, the General Assembly added new Local Government Article to the Annotated Code of Maryland. The Article restates and recodifies state law relating to local government. The Article in pertinent part repealed in its entirety, Article 25A, Chartered Counties of Maryland, the statute for the establishment and jurisdiction of a board of appeals and reenacted it as Md. Local Government Code Ann. § 10-305. The HCC retains the reference to Article 25A.

enforcement of this title or of any regulations adopted pursuant to it" (emphasis added). The Hearing Examiner characterizes HCC § 16.301(b) as a catchall statutory provision assigning to the Board of Appeals subject-matter jurisdiction to hear and decide appeals of administrative and adjudicatory orders.

HCZR § 130.0.A.3 specifically applies to the Hearing Authority's jurisdiction with respect to certain Zoning Regulations matters and provides,

> Appeals to the Hearing Authority may be taken by any person aggrieved, or by any officer, department, Board or bureau of the County affected by any *decisions of the Department of Planning and Zoning.* Such appeal shall be filed not later than 30 calendar days from the date of the action of the Department of Planning and Zoning and shall state the reasons for the appeal. Appeals with a deadline falling on a weekend or holiday must be filed prior to that deadline (emphasis added).

In support of its motion to dismiss, Appellee DPZ argues the Constituent Letter is not a final decision under these laws for the purposes of appeal, but rather nothing more than a constituent service letter provided to Mr. Long by the Office of the Howard County Executive. The Hearing Examiner agrees.

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 is an "appealable event" within then Art. 25A. 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 approval decision. When the neighboring landowners took an appeal from the response letter, the Board of Appeals ultimately ruled on the merits of the case and determined 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 (emphasis added). The Court reasoned an appealable 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, 195, 422 A.2d 55, 58-59 (1980), cert. denied 289 Md. 738 (1981). See also *Meadows of Greenspring Homeowners Association v. Foxleigh Enterprises*, Inc., 133 Md. App. 510, 758 A.2d 611 (2000).

In the instant appeal, applying the court's reasoning in *UPS*, the Constituent Letter, too, is not an operative event. It confirms to Mr. Long only that to abate the violation, he must either apply for and receive nonconforming use confirmation for the dwellings, or provide the Executive Office and/or DPZ with "signed, notarized statements from present and all future tenants giving a detailed list of the work duties they perform on the farm and the form of compensation for those duties." Additionally, Ms. Fielhauer being neither the DPZ Director nor the Director's

designee, she had no authority to make a decision or order pertaining to the enforcement of the HCZR.

II. On the Matter of the Appealability of the NOV Vis-à-Vis the Constituent Letter Reference to an Appeal by a Person Aggrieved by a DPZ Decision

We now address what appears to be Appellant's alternative identification of the decision being appealed, the NOV itself, challenged as a DPZ decision by piggybacking on the Constituent Letter's recitation of an aggrieved person's right to take an appeal from a DPZ decision. "A person aggrieved by a decision of the Department of Planning and Zoning may file an appeal to the Board of Appeals. An appeal to this letter must be filed within 30 days of the date of the notice and must state the alleged error or other grounds for the appeal. Instructions and forms for filing an appeal may be obtained from the Department of Planning and Zoning." The Hearing Examiner gathers this language refers to HCZR § 130.0.A.3.

This piggyback appeal of the NOV fails, for two reasons. First, by action of law, HCC § 16.1602(g), as restated in HCZR § 102.0.B, bars an alleged violator from appealing an NOV.

Second, had Appellant read the Constituent Letter reference to HCZR § 130.0.A.3 as conferring an aggrieved person right of appeal from an NOV, this very zoning provision noticed him of the futility of the appeal. HCZR § 130.0.A.3 plainly states, all appeals of DPZ final decisions must be filed "not later than 30 calendar days from the date of the action of the Department of Planning and Zoning and shall state the reasons for the appeal." The appeal petition filing deadline would have been January 11, 2015, DPZ having served Mr. Long the NOV on December 2, 2014. The administrative appeal petition itself recognized the 30-day filing constraint on the

NOV piggyback appeal by lengthening the date of the decision being appealed, identifying it as "12/02/2014 ----- 10/22/2015." A document attached to the administrative appeal petition form similarly stretches the operative 30-day window through cut and paste. The document's top section is copied from the Constituent Letter and includes the County Executive letterhead, the October 15, 2015 letter date and the Letter's first paragraph, "[t]his letter is follow up to our meeting on October 6, 2015 in regard to the above mentioned property. The bottom section cuts and pastes the Letter's reference to the violations, "the current status and actions taken or required." Below the words "Municipal Code 104.0.b.3 & 101.0.O," is cut and pasted the "more than one family dwelling" violation abatement information noted in the Constituent Letter. While imaginative, these efforts to render timely the NOV appeal are unavailing.

This is the short, legally sufficient answer to Appellant's industry to challenge the NOV via the administrative appeal route. This case being the first administrative appeal presumably seeking to appeal an HCZR NOV, however, an extended response is warranted to properly situate NOVs and the civil citation administrative process within procedural due process doctrine and through which the Hearing Examiner will endeavor to clarify why an NOV is not appealable.

A. Procedural Due Process

The due process clauses of the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights protect an individual's interests in procedural due process. See *Roberts v. Total Health Care, Inc.*, 349 Md. 499, 709 A.2d 142 (1998) (discussing procedural due process). Due process within administrative proceedings requires the opportunity to be heard "at a

meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545 (1965). The opportunity to be heard in a meaningful manner includes the right to "notice, including an adequate formulation of the subjects and issues involved in the case." *Boehm v. Anne Arundel County,* 54 Md. App. 497, 512 459 A.2d, 590, 599 (1983) (quoting B. SCHWARTZ, ADMINISTRATIVE LAW, § 67 at 192-93). An important component of the procedural due process right is the guarantee of an opportunity to be heard and its instrumental corollary, a promise of prior notice. *Reese v. Dept. of Health*, 177 Md. App. 102, 934 A.2d 1009, 1024 (2007) (quoting L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-15, at 732 (2d ed. 1988).

In plain English, due process requires the procedures by which laws are applied to be fair, so that individuals are not subjected to the arbitrary exercise of government power. At a minimum, procedural due process requires notice and the opportunity to be heard incident to the deprivation of life, liberty or property at the hands of the government. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court of the United States adopted a three-factor calculus for determining what procedures are warranted incident to such deprivations. "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Mathews*, 424 U.S. at 335. This

calculus now provides the analytical framework in cases where governmental procedures affecting an individual's life, liberty or property interests are challenged on due process grounds. *Reese v. Dept. of Health* offers an extended review of the *Mathews* test in Maryland procedural due process jurisprudence. For the purposes of the instant appeal, this characterization of the *Mathews* test as to what procedures meet due process muster suffices.[2] First, balance the importance of the interest to the individual. Second, balance the ability of additional procedures to increase the accuracy of the fact-finding. Third, balance the government's interest in administrative efficiency.

The *Mathews* calculus tells us procedural due process is not a rigid guarantee. It is a right of reasonable process. *Mathews*, 424 U.S. at 334-35 (discussing due process as flexible and calling for such procedural protections as the particular situation demands) (internal citations omitted). Two federal court cases closely analogous to Appellant's position illustrate how the *Mathews* reasonable due process calculus is to be applied to code enforcement procedures.

In *Fox v. Baltimore County*, 224 F.Supp.2d 1039 (D. Md., 2002), a Baltimore County code enforcement agent issued a uniform code enforcement correction action notice (Notice) directing a homeowner couple to perform certain repairs to the exterior of their dwelling. The couple sought redress through an as-applied due process challenge in the form of a declaratory judgment action in Baltimore County Circuit Court, which the County removed to the United States District Court for the District of Maryland. On the County's motion to dismiss and the

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[2] Erwin Chemerinsky, Procedural Due Process Claims, 16 Touro L. Rev. 871, 888 (2000).

homeowner's motion for summary judgement, the district court duly considered whether it should exercise jurisdiction over the "quixotic" declaratory judgment action and ultimately considered whether as applied to the plaintiffs, the relevant provisions of the Baltimore County Code ran afoul of the Due Process Clause of the Fourteenth Amendment. Concluding the code provisions did not, the court denied the motions and ordered that, as applied to plaintiffs, the Baltimore County code for the enforcement of residential dwelling safety and appearance provisions, including the prescribed uniform citation forms served on plaintiffs, was not unconstitutional. (The Hearing Examiner takes notice here that Subtitle 16 is modeled on Baltimore County's code enforcement law and regulations, which unlike Howard County, applies to the enforcement of a larger class of violations, not just zoning and subdivision regulations violations.)

Addressing the underlying challenges to the constitutionality of the county enforcement law, without reaching the merits of the homeowners' case, the court conceded this: "It is undisputed that enforcement of the County's Livability Code has the potential to effect a deprivation of a homeowner's interest in property, and that indeed, in the case at bar, an $8200 civil penalty assessment has been preliminarily entered upon plaintiffs' failure to comply with the Second Notice." "Undoubtedly, therefore, plaintiffs' interest in avoiding the imposition of a civil penalty for noncompliance with violation notices—and even their desire to avoid compelled expenditures of their own funds to repair their own property—entitles them to due process, that is, adequate and sufficient notice of the alleged violations and an opportunity to be heard 'at a

meaningful time and in a meaningful manner'" (internal citations omitted). Nevertheless, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands" (internal citations omitted.) *Fox,* 224 F.Supp.2d at 1040-1041.

About how much constitutional due process was due the homeowners, the court found the county citation process reasonable due process. The Notice provided them with a clear explanation of the property defects the County sought to compel them to remedy. The County also had a quasi-judicial hearing procedure through which, if the homeowners elected, the County would shoulder the burden of establishing the truth of the allegations made by the enforcement officer who issued the violation notice and the homeowners had the right to present witnesses, to introduce evidence and cross-examine adverse witnesses. "The Due Process Clause requires no more." *Id.*

The more recent case of *Snider Int'l Corp. v. Town of Forest Heights*, 739 F.3d 140 (4th Cir. 2014) is apt because the appellants argued due process violations issuing from automated speeding tickets; Mr. Long in his response to DPZ's motion to dismiss analogized his situation to a person charged with a traffic offense: "Due Process requires a fair hearing. Dismissal of Farmer's Petition would violate due process. Even a person charged with a traffic offense is entitled to a fair hearing."

In *Snider*, the United States Court of Appeals, Fourth Circuit, affirmed the District Court of Maryland's grant of summary judgment in favor of two Maryland towns in a § 1983 class action suit challenging the constitutionality of electronically-signed speeding tickets generated by

automated speed monitoring systems—speed cameras—and authorized by state law.[3] The Appellants alleged due process violations arising from the system. Because the court concluded in pertinent part it could not enforce state constitutional laws through a § 1983 action, it reviewed Appellants' procedural due process claims under the Fourteenth Amendment. The *Snider* court found Appellants had received constitutionally sufficient notice of the citations and potential penalties (setting forth the basis for the adverse action). It also found Appellants could elect a trial prior to being assessed the penalty, wherein they could call witnesses and rebut the state's evidence with their own. Concluding there was reasonable due process within the system, the court said "[i]t is difficult to see how additional process could significantly reduce the chance of erroneous deprivation, especially given the trial mechanism already in place."

> In fact, the mere availability of a trial in which to present their grievances undermines Appellants' argument. Notwithstanding the fact that Appellants predicate their challenge on a violation of state law rather than federal law, "the availability of state procedures [to address Appellants' arguments] is fatal" to their procedural due process claims. Appellants had adequate opportunity in the state courts to argue the sufficiency of electronically-signed citations as an affidavit or otherwise admissible evidence. Having forgone the opportunity to object to the use of electronically-signed citations as evidence, Appellants may not first cry foul in a federal court on this issue (internal citations omitted.)

Snider, 739 F.3d 149-150.

B. Procedural Due Process in Subtitle 16

With this constitutional, procedural due process backdrop to guide us, we consider the procedural due process elements of Subtitle 16.

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[3] "§ 1983" refers to 42 U.S.C. §1983, a federal statute authorizing civil actions for deprivation of constitutional and federal statutory rights by persons acting under "color of law," including 14th Amendment claims of due process violations.

Subtitle 16: Legislative History & the Distinction between HCZR § 130.0.A.3 & HCZR § 102.0.B

In 2008, the County Council through CB 3-2008 added new Subtitle 16. - Enforcement of the Howard County Subdivision and Land Development Regulations and the Zoning Regulations, to HCC Title 16, Planning, Zoning and Subdivisions and Development Regulations (Subtitle 16 or HCC § 16.1600 et seq.). Subtitle 16 gave the county a new tool to enforce the Zoning Regulations and the Subdivision and Land Development Regulations: the civil citation administrative hearing process. Until the enactment of Subtitle 16, DPZ could enforce these regulations only in court.[4]

HCC § 16.1600 et seq. contains the statutory requirements in the county's enforcement of the HCZR through the civil citation administrative hearing process and which are taken up in the next subsection.[5] Central to this appeal is HCC § 16.1602(g): Notice of Violation Not Appealable. An alleged violator may not appeal a notice of violation issued under this section [§ 16.1602.]

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[4] See HCC § 16.1601. - Authority of the County; nature of equitable relief.
(a)*County Authority.* In addition to any other remedy authorized by law, the County may:
(1)Enforce the subdivision and land development regulations set forth in title 1 of this subtitle and the Howard County Zoning Regulations in accordance with the procedures set forth in this subtitle;
(2)Abate a violation of the subdivision and land development regulations set forth in title 1 of this subtitle or the Howard County Zoning Regulations as provided in this subtitle; and
(3)Maintain an action in a court of competent jurisdiction for an injunction; or
(4)File a petition for equitable relief in the District Court.
(b)*Nature of Equitable Relief.* The County may request the court to:
(1)Enjoin a violation;
(2)Require the restoration of a property, to the extent possible, to its condition before the violation, including the removal of the source of the violation; and
(3)Order other relief as may be necessary to remedy a violation.

[5] HCC § 16.1600 et seq. contains procedures for enforcing both the HCZR and the Subdivision and Land Development Regulations. Because the instant appeal involves an NOV issued for violations of the HCZR, only the pertinent provisions are cited.

For consistency with new Subtitle 16, companion bill CB 4-2008 (ZRA 93) amended HCZR Chapter 102.0, Violations, Enforcement, and Penalties. New language was added to HCZR § 102.0.B to incorporate the county's option to enforce the HCZR in court or in administrative proceedings and to include notice that NOVs issued under the Chapter are not appealable pursuant to HCZR § 130.0.A.3.

B. Enforcement

> Upon becoming aware of any violation of these regulations, the Department of Planning and Zoning may institute an injunction, mandamus, abatement or any other appropriate action to prevent, enjoin, abate or remove such erection, construction, alteration, enlargement, conversion or use in violation of any of the provisions of these regulations. The Department of Planning and Zoning may give notice that activities on the premises are in violation of the Zoning Regulations and may order an end to these activities within 10 days, or a reasonable specified time. The Department of Planning and Zoning shall serve the notice personally, or by Registered Mail addressed to the premises of the violation, or to the person or corporation committing or permitting the violations, or by posting the premises. If the violation does not cease within the time specified by the Department of Planning and Zoning, the Department of Planning and Zoning shall take whatever action necessary to end the violation. *A Zoning Violation Notice issued under this section is not appealable pursuant to Section 130.0.A.3 of these regulations* (emphasis added).
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> The Department of Planning and Zoning may enforce the Zoning Regulations by issuing *citations* to alleged violators to be heard in Court or in Administrative Proceedings as provided by Law (emphasis added.)

In this first scrutiny of an NOV's non-appealable status, it is important to recognize that HCZR § 130.0.A.3 and HCZR § 102.0.B operate in different statutory and regulatory regimes. As noted out in Part I, HCZR §§ 130.0.A.1 and A.2 of the Hearing Authority Chapter recite the County Charter and County Code's establishment of the Hearing Authority and its general subject-matter jurisdiction powers. HCZR §§ 130.0.A.3 refines these general powers to assign to the Hearing

Authority the specific power to hear and decide appeals in pertinent part from a person aggrieved from a DPZ decisional *application* of the Zoning Regulations.

HCZR Chapter 102.0, generally, contains the rules pertaining to DPZ's *enforcement* of the HCZR, including the option of enforcing these regulations through *citations* to alleged violators to be heard in Subtitle 16 administrative proceedings. The HCZR § 102.0.B proscription against notice of zoning violation appeals does not abridge the HCZR § 130.0.A.3 aggrieved person appeal regulation; it is, rather, a procedural reference to the controlling statutory section, HCC § 16.1602(g). It is also to be read together with the next paragraph clarifying that DPZ may enforce the HCZR by "issuing *citations to alleged violators to be heard in [] in Administrative Proceedings* as provided by Law" (emphasis added.) Perhaps a reference in HCZR § 102.0.B to HCC § 16.1602(g) would have added transparency.[6]

The next subsection outlines the relevant provisions of Subtitle 16. Section C. outlines the different sorts of hearings afforded under the two regimes. Here it suffices to note that the right of persons to a Hearing Authority evidentiary hearing to contest DPZ action under HCC § 16.301(b), as implemented through HCZR § 130.0.A.3, is conditional: subject to proof of aggrievement, the DPZ decision being final and timely filing. The Subtitle 16 administrative hearing process set out in HCZR § 102.0.B, on the other hand, gives alleged violators an unconditional statutory right to an administrative hearing before a Hearing Examiner on the issuance of a civil citation. HCC § 16.1609(1), in turn, provides for the same unconditional

[6] For such transparency, some jurisdictions use an electronic code publisher that provides a hyperlink to referring code sections.

statutory right of an on-the-record appeal from a Hearing Examiner civil citation order to the Board of Appeals. DPZ has no right of appeal from an adverse Hearing Examiner final civil citation order. (For this reason, the office of the Hearing Authority retains custody of all exhibits from the hearing for Appellant review until the time to appeal runs.)

The County Council enacted a third statutory right of appeal within the civil citation administrative hearing process in 2011. CB 8-2011 (ZRA-128) added new language to the HCZR § 102.0.B enforcement section to change and clarify how DPZ notifies persons submitting zoning complaints and adding a statutory right of appeal from the complainant to the Hearing Examiner if DPZ closes the complaint on finding the alleged violation does not exist. This right of appeal, too, is immune from the conditional appeal predicates of HCZR § 130.0.A.3.

> If the Department of Planning and Zoning does not issue such a zoning violation notice within 60 days of receiving the written request, this shall be considered to be a final decision of the Department that the alleged violation does not exist, and the [known] complainant shall have a right to appeal this decision to the Hearing Authority, provided that an appeal petition is filed with the Clerk of the Hearing Authority within 30 days after the final decision to not issue a Zoning Violation Notice. If such an appeal is taken, the Department of Planning and Zoning shall send a copy of the appeal petition to the owner and occupant of the premises.
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> . . . The written notice to a complainant about the closing of a zoning violation case shall briefly describe the reason(s) the case was closed, shall advise the complainant that the closed case file may be reviewed for more details; and shall advise the complainant of the right to appeal the decision to close the case to the Hearing Authority.

Due Process Notice within Subtitle 16

In Howard County's quasi-judicial civil citation administrative hearing process, the procedural due process doctrine of fair notice and an opportunity to be heard is embedded within

HCC § 16.1600's primary statutory mechanisms.

➢ Fair Notice. Fair notice is accorded in the service of notice provisions, the content of NOVs section and the content of civil citations section.

a. Service of Notice. The mechanism of due process directs the means by which DPZ is to notify—serve notice to—alleged violators. The notice of service requirement for NOVs are contained in HCC § 16.1602(e). These same service of notice requirements apply to civil citations and the citation administrative hearing.

HCC § 16.1602(e). Service of Notice of Violation. A notice of violation shall be served in one of the following methods:
(1) Personal service;
(2) Certified or registered mail, restricted delivery, return receipt requested;
(3) First class mail to the last known address of the alleged violator; or
(4) When service cannot be obtained by one of these methods, a copy of the notice of violation may be posted in a conspicuous place on the property.

HCC § 16.1603(c). Service of Citation. A citation shall be served in the same manner as a notice of violation as set forth in subsection 16.1602(e) of this subtitle.

HCC § 16.1605(c). Notice of a hearing shall be served in the same manner as a notice of violation as set forth in subsection 16.1602(e) of this subtitle.

b. The Notice Content of NOVs, HCC § 16.1602(d)

(d) Contents of Notice of Violation. A notice of violation:
(1) Shall be in writing;
(2) Shall contain the name and address of the alleged violator;
(3) Shall contain the time when the violation occurred and the place;
(4) Shall include certification by the inspector, attesting to the best of the inspector's knowledge, that a violation exists or has occurred;
(5) Shall describe with particularity the nature of the violation, including a reference to the Code or county provision allegedly violated, and the manner of abatement;
(6) Shall include a reasonable time to abate the violation or prevent future violations;
(7) May include an order to stop work and abate any violations; and

(8) Shall include a statement that failing to comply with the notice may result in one or all of the following:

(i) Civil penalties; and

(ii) A lien on the property for civil penalties and costs of compliance if the county corrects the violation.

c. The Notice Content of Civil Citations, HCC § 16.1603(b)

(b) *Content of Citation.* A citation shall:

(1) Be in writing;
(2) Include certification by the inspector, attesting to the best of the inspector's knowledge, that a violation exists or has occurred;
(3) Contain the name and address of the alleged violator;
(4) Describe in particularity the nature of the violation, including a reference to the Code or County provision allegedly violated;
(5) Contain the time when the violation occurred and the place;
(6) Include any fine to be assessed including a statement that a lien may be placed on the property for civil fines and costs of compliance if the County corrects the violation;
(7) Contain the manner, location, and time in which a fine may be paid; and
(8) Include a statement that the alleged violator has the opportunity to be heard before the Hearing Examiner (emphasis added).

➢ The Right to be Heard. The second procedural due process aspect of the civil citation administrative hearing process is the administrative hearing authorized by HCC § 16.1605. The proceeding is a quasi-judicial evidentiary hearing. On the issuance of a civil citation, an alleged violator has the right to request a hearing. If the alleged violator does not request a hearing, DPZ may request a hearing. DPZ may also request a hearing if the civil citation imposes a fine that is not paid by the date set forth in the citation.

Sec. 16.1605. - Hearing.

(a) *Hearing Scheduled.* The Hearing Examiner shall schedule a hearing on a citation issued under section 16.1603 of this subtitle if:

(1) A hearing is requested by the alleged violator or the Department; or
(2) The alleged violator fails to pay any fine assessed in the citation.

(b) *Procedures.* A hearing under this subtitle shall be held in accordance with the procedures set forth in subsection 2.210(a) and section 16.303 of this Code.

C. The *Mathews* Test Applied to Appellant's Circumstances

With this understanding of Subtitle 16's procedural due process content and the companion HCZR § 102.0.B enforcement section, we at last assess whether the non-appealability of an NOV satisfies procedural due process through the *Mathews* calculus. *Nota Bene*: all references to the alleged violations in the NOV are described herein only in relation to the non-appealability of the NOV to safeguard Mr. Long's due process rights in the event of an actual evidentiary hearing. As a further safeguard, the Hearing Examiner informed the parties at the outset of the motion hearing that she would not permit testimony about the underlying alleged violation, as it could be used against him in any future hearing. This safeguarding began even before the hearing, when the Hearing Examiner denied Mr. Long's request for additional time to respond in writing to the motion to dismiss. Time-sensitive deadlines are always strictly applied, but the denial also took into account, and sought to forestall, the practice of alleged violators without legal representation exposing their defenses in late responses to preliminary motions. Mr. Long submitted an untimely response and did indeed argue his defenses therein.

1. The importance of the interest to the individual. Appellant's alleged property interest is, generally, "certain detached dwellings." He seeks to protect this interest.

2 & 3. Balance the ability of additional procedures to increase the accuracy of the fact-finding and balance the government's interest in administrative efficiency. Mr. Long argued in his response to the motion to dismiss, "[d]ue [p]rocess requires a fair hearing." But whereas the

objective of the *Fox* and *Snider* appellants was a judicial order striking down the enforcement statutes as unconstitutionally applied to them, Mr. Long's objective in this "quixotic" appeal as a person aggrieved by the NOV—to paraphrase the *Fox* court's description of the homeowner's declaratory judgment action—was to dispute the alleged violation. A decision favorable to him would have quashed further enforcement action against him, including, on the issuance of civil citation, a DPZ-requested hearing and a Hearing Examiner order, pursuant to HCC § 16.1607, requiring him to abate a violation, including, potentially, requiring him to restore the property to a lawful condition and civil fines. This legal tactic misses the mark.

Subtitle 16 does not grant alleged violators the opportunity to be heard on the issuance of the NOV because an HCC § 16.1602 NOV does not deprive them of any property interest that would trigger the procedural safeguard of a due process evidentiary hearing. An NOV informs an alleged violator as certified by the inspector, of a violation, the code or county law allegedly violated, and how and when to abate the violation. While undoubtedly an NOV seeks to compel compliance (and many alleged violators voluntarily abate acknowledged violations noted in an NOV), alleged violators suffer no unconstitutional due process protection of a property interest because they are able to use the existing civil citation evidentiary hearing as a procedural safeguard.[7]

There is, accordingly, no actual mistaken or unjust deprivation of a property interest when DPZ serves an alleged violator a notice of a violation. Such deprivation is pendent. Appellant has

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[7] Embedded in the code enforcement decision and orders posted on the County Council web site is the sociology of how alleged violators respond to NOVs.

suffered no change in status. A change of status would occur through a civil citation imposing fines and/or acting to abate the violation and placing a lien on the property for the fines and any costs of abatement. Failure of due process would then be triggered if Appellant were not provided the election of an evidentiary hearing remedy. At that hearing, DPZ bears the burden of proving the violation. The procedural protection owed alleged violators at the NOV phase of a Subtitle 16 administrative enforcement action is fair notice—due service of notice in the mailing of the NOV and notice of the alleged violations in the content of the NOV.

Fox and *Snider* teach the varieties of ways alleged violators seek pre-deprivation vindication of alleged property interests. *Fox* and *Snider* also teach the venue for seeking redress in Howard County is the civil citation administrative hearing.

In the parlance of administrative law, no procedural deprivation exists at the NOV stage because Appellant has not exhausted his administrative remedies; this renders the alleged violation non-justiciable, out of the reach of the Hearing Examiner's subject-matter jurisdiction. For these reasons, the content of an NOV form may not give the impression that an enforcement proceeding is being commenced or has already been commenced. However, an NOV may state, as provided by statute, that if the property is not compliant by a reasonable date prescribed in the NOV, enforcement proceedings may commence after that date. An NOV may be used in a civil citation hearing as evidence of the duration of a violation or of notice to the alleged violators of the allegations or facts contained therein.

2. & 3. Balance the ability of additional procedures to increase the accuracy of the fact-finding and balance the government's interest in administrative efficiency. An unintended consequence of this appeal is that it presents a window on the second and third *Mathews* calculus factors. The hearing process that would attend to an appeal of an NOV if authorized by law, would be, procedurally, very different from the right to an evidentiary hearing mandated by HCC § 16.1605. As with this appeal, the appellant would bear the costs of filing an administrative appeal petition and providing public notice of the appeal. No such costs apply to a request for a hearing on a civil citation. The alleged violator checks the box on the citation form to elect a hearing and returns it to DPZ. (Alleged violators or their attorneys often submit letters requesting a hearing.) The burden of production and persuasion would shift to the alleged violator to dispute the violation by proving by substantial evidence the action taken by the administrative agency was clearly erroneous, arbitrary and capricious, or contrary to law.

Another difference is that when an alleged violator is not represented by counsel in a civil citation administrative hearing, the presiding Hearing Examiner carefully reviews DPZ's adherence to every due process notice requirement imposed under Subtitle 16 and will dismiss a citation on finding a failure of notice. Alleged violators in an administrative appeal hearing may not be knowledgeable enough about Subtitle 16 to present testimony, cross-examine or subpoena DPZ witnesses to fully defend their interests and challenge any notice infirmity. The government's costs in such an appeal are the administrative hearing costs. The probable value of

any additional safeguards—reasonable process—at the NOV stage are questionable, in light of the nature of the administrative appeal process.

Even with this exegesis, Mr. Long at this phase of the civil citation administrative hearing process might well believe the NOV may lead inexorably to a deprivation (mistaken or real) of his alleged property Interest. This may explain the meeting with Howard County officials, which led to this appeal. But as of the issuance of this Order, Appellant has suffered no change in status and no failure of due process that would command a quasi-judicial hearing.

Still, Mr. Long is not without recourse waiting to see if DPZ issues him a civil citation (other than self-abating the violation). Alleged violators have a right of "limited discovery" under HCC § 16.1606.

Sec. 16.1606. - Inspections.
On request of an alleged violator, the Director shall:
(a) Make any material or information in the custody of the County available to the alleged violator; and
(b) Allow the alleged violator to inspect and copy:
(1) Any portion of a document that contains a statement or the substance of a statement made by the alleged violator to an inspector that the inspector intends to use at a hearing; and
(2) Each written report or statement made by an expert whom the inspector expects to call as a witness at the hearing.

A FINAL COMMENT

To avert unnecessary future litigation over the appealability of an NOV, the Hearing Examiner shall recommend to the Department of Planning and Zoning that the NOV form be

amended to notify alleged violators that they may not appeal a notice of violation issued under HCC § 16.1602, as is set forth in HCZR § 102.0.B.

ORDER

Based upon the foregoing, it is this **17th Day of March 2016**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of Appeal of Robert Long, Jr. 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 calendar 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.