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| **LNC HOMES, LLC**<br>Appellant | : | BEFORE THE |
| | : | HOWARD COUNTY |
| vs. | | |
| | : | BOARD OF APPEALS |
| **DEPARTMENT OF PLANNING AND ZONING HOWARD COUNTY, MARYLAND**<br>Appellee | : | HEARING EXAMINER<br>BA Case No. 582-D |

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| **LNC HOMES, LLC**<br>Appellant | : | BEFORE THE |
| | : | HOWARD COUNTY |
| vs. | | |
| | : | BOARD OF APPEALS |
| **DEPARTMENT OF PLANNING AND ZONING HOWARD COUNTY, MARYLAND**<br>Appellee | : | HEARING EXAMINER<br>BA Case No. 587-D |

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## DECISION AND ORDER

On May 15, 2007, 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 departmental appeals of LNC Homes, LLC ("the "Appellant").[1] The Appellant is appealing the Department of Planning & Zoning's ("DPZ") speed memo dated December 1, 2006, which rejected red-lined site development plan ("SDP") revisions submitted with a letter dated November 8, 2006, for SDP-97-003, New Colony Village, Phase 1, proposing five mobile home units and the elimination of an approved convenience store and daycare center (BA 582-D). The Appellant claims DPZ's basis for the rejection is legally insufficient and charges the decision is in error in its conclusion and misapplies the Adequate Public Facilities Act ("APF Act").

[1] The two appeals were heard together because they involve related issues.

The Appellant is also appealing a DPZ letter dated February 20, 2007, which referenced DPZ's speed memo of February 9, 2007, wherein DPZ stated the Appellant could use the red-line process for three units, but not for the remaining two units, commenting that a new SDP was required for these units. The Appellant alleges DPZ is in error for requiring a new SDP for revisions that are minor in nature and conform to Howard County policies and procedures. The appeal claims DPZ's ruling is otherwise contrary to law, policies, and procedures.

The Petitioner certified that notice of the hearing was advertised and that the subject property was posted as required by the Howard County Code.

I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Richard Talkin, Esquire, represented the Appellant. Paul T. Johnson, Esquire, and Deputy County Solicitor, represented DPZ.

Mark Levy testified on behalf of the Appellant. Charles Dammers, Chief of DPZ's Development Engineering Division, testified on behalf of DPZ.

As a preliminary matter, DPZ moved for dismissal of the cases. Upon consideration of DPZ's motion to dismiss, the Appellant's response, and oral arguments heard on May 15, 2007, and for the reasons stated below, I have determined to grant the motion and dismiss.[2]

## Background

DPZ approved SDP-96-061, a sales center for the New Colony Village mobile home development. The five model mobile home units were not processed for or did not pass required APF tests for residential housing unit allocations, schools, or residential unit roads in connection with the SDP because the B-1 zoning of the sales center property at the time of approval did not

[2] I orally stated at the proceeding that the Appellant could go forward with the appeal of the two units under BA 582-D. However, Hearing Examiner Rule 10.4 expressly states that a decision is not final until made in writing.

permit mobile home units. The Appellant subsequently desired to transfer the five model units to an area approved for convenience store and daycare center uses in SDP-97-003, New Colony Village, Phase 1. To this end, the Appellant submitted red-lined SDP revisions to SDP-97-003 and a letter dated November 8, 2007 to DPZ's Development Engineering Division ("DED") showing the transfer of the five units and the elimination of the two approved uses.

On December 1, 2006, DPZ rejected the proposed revisions to SDP-97-003 by speed memo, wherein DED stated a revised APF study reflecting the revisions was required. The Division of Land Development ("DLD") commented that APF housing unit allocations were not available at the time of review. The Appellant filed an administrative appeal petition to the December 1 action on December 20, 2006 (BA 582-D). The petition described the action being appealed as DPZ's letter of December 1, 2006 rejecting the proposed SDP revision to SDP-97-003, New Colony Village.

After DPZ rejected the proposed red-lined SDP revisions and before the hearing on the appeal, the Appellant proceeded to submit a second SDP-97-003 red-line revision and letter dated February 2, 2007, which again showed in main part the addition of five residential units. On February 9, 2007, DED rejected the revisions. The "rejection" section of the form speed memo, where reviewing agency comments are set forth, referred the Appellant to DLD's attached comments.

These comments, dated February 8, 2007, were a qualified rejection informing the Appellant that it may use the red-line revision process for three of the five modular dwelling units proposed to replace the approved daycare center and convenience store uses. DLD reasoned the three units had been effectively APF-tested because the entire New Colony Village project was

approved for 230 units, of which only 227 were built.[3] DLD further commented that the red-line revision process could not be used for the remaining two units, for which a new SDP was required, and that this SDP must pass the APF tests and obtain housing unit allocations. The new SDP was required, DLD explained, because the units to be transferred had been approved under SDP-96-061 as a sales center use, not a residential use, and therefore had not been APF-tested.

On February 20, 2007, DED's Jimmy Witmer, the reviewer on both red-line revision speed memos, facsimiled a letter also dated February 20 to Mr. Timothy Madden, of Morris & Ritchie Associates, the Appellant's representative. The letter provided three additional red-line revision comments from Soil Conservation Service (SCS). Mr. Witmer asked Mr. Madden to make the three revisions, "along with the requested revisions from our February 9, 2007 memo before resubmitting."

On March 16, 2007, the Appellant filed a second administrative appeal petition (BA 587-D). The petition describes the ruling or action being appealed as DPZ's letter of February 20, 2007 and states the date of the ruling or action as February 20, 2007. Appellant's Supplemental Statement contends the red-line revisions are minor, reflecting engineering and field changes to a active development plan reflecting engineering and field changes as stated in the September 5, 2006 speed memo,[4] for which a new SDP is not required; that not to allow the relocations of the occupied dwelling units from the model home sales center would constitute an undue hardship, and; that excess residential housing units and allocations exist for Section II of the Village Towns Community.

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[3] DLD bases this comment on its calculation of the total number of units approved for the project as phased in. Colony Village, Phase 1/SDP-97-003 was approved for 63 units, Phase 3/SDP-97-114, 81 units, and Phase 4/SDP-97-115, 86 units.

[4] Neither DPZ nor the Appellant addressed the petition's reference to a September 5, 2006, speed memo.

## DISCUSSION

### I. BA 587-D -- The March 16, 2007 Appeal

The threshold decision in this appeal is whether the portion of DPZ/DED's February 20, 2007 letter referencing "the requested revisions from our February 9, 2007 memo" is an appealable decision. As Hearing Examiner, I am authorized to hear only matters that are otherwise within the jurisdiction of the Howard County Board of Appeals. Section 16.302(a) of the Howard County Code. The Board is authorized to hear such matters as set forth in Article 25A, Section 5(U) of the Annotated Code of Maryland, as defined by implementing legislation enacted by the County Council. Section 501(b) & (f) of the Howard County Charter. Article 25A, Section 5(U) authorizes boards of appeal to hear and decide applications for zoning variations or exceptions, 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; and the assessment of any special benefit tax. With respect to actions taken by DPZ in the subdivision process, the Council has enacted implementing legislation to authorize appeals of such actions.

> A person aggrieved by an *order* of the Department of Planning and Zoning may, within 30 days of the issuance of the *order*, appeal the decision to the Board of Appeals. (italics added)

Section 16.105.(a) of the Howard County Code.

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) defined what is an "appealable event" under Article 25A, § 5(U) of the Maryland Code. In that case, neighboring landowners appealed from the zoning commissioner's letter responding to their objection to his previous approval of a building permit application, explaining and defending that approval decision. The Court held the

response letter was not an "approval" or "decision," but merely a reaffirmation of his prior approval or decision. 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.'" 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). *See also* Meadows of Greenspring Homeowners Association v. Foxleigh Enterprises, Inc., 133 Md. App. 510, 758 A.2d 611 (2000).

DPZ bases its motion to dismiss on the argument that the February 20, 2007 letter from Mr. Witmer merely references the February 9 speed memo comments. DPZ further argues that if the relevant language in the February 20 letter is not an appealable decision, then the March 16 appeal is untimely because the order or final decision from which an appeal could be taken within 30 days is the February 9 speed memo. The Appellant responds to DPZ's motion to dismiss by arguing the February 20, 2007 letter incorporates DPZ's February 9 speed memo comments, inclusive of DLD's February 8 comments. I conclude the portion of the letter at issue is not an "appealable event" within the meaning of *UPS* and I therefore have no jurisdictional authority for the purposes of Article 25A to hear the March 16 appeal.

Mr. Witmer's letter to the Appellant's representative merely alluded to revisions from the February 9, 2007 memo. These revisions, as they pertained to DLD's SDP and APF comments, had already been independently conveyed to the Appellant. In mentioning them in his February 20 letter, Mr. Witmer did not "grant, decide, deny, or order anything," to apply the Court's

language in *UPS*, he simply reminded the Appellant that future SDP red-line revisions must reflect the comments of SCS, DED, and DLD. The Appellant's argument that the February 20 letter incorporates the February 9 speed memo comments is unavailing.

Consequently, because the language in the February 20 letter is not an appealable event, Appellant's challenge to the February 9, 2007 letter in the March 16 appeal petition is further dismissed as untimely.

**II. BA 582-D -- The December 20, 2007 Appeal**

In its motion to dismiss BA 582–D, DPZ contends the appeal was superceded or merged with BA 587-D or, alternatively, that there is no order to appeal within the meaning of Section 16.105.(a). The Appellant contends BA 582–D remains alive if the March 16 appeal fails.

I am persuaded I also lack jurisdiction to hear the December 20 appeal petition (BA 582-D),. There is logic to DPZ's argument that the first appeal merged with or mooted the second appeal because the petitions involve the substantially the same issue (hence the consolidated hearing). The Court of Appeals reasoning in *UPS* applies here by analogy. If a developer or a developer's attorney could appeal an agency action on the same substantive issue repeatedly, the right of appeal could continue endlessly, circumventing mandatory appeal filing deadlines and creating multiple bites at the same apple. For this reason, I determine the Appellant is procedurally barred from reviving the first appeal.

However, in my view, the principal reason for not reaching the merits of this appeal is this: DLD's APF comments in the December 1 memo--and the February 9 memo as well--and in a more limited way, DED's APF comments,[5] are not appealable events within the meaning of Section 16.105.(a). The Court of Special Appeals in *Meadows of Greenspring*, relying on *UPS*,

[5] Mr. Dammers testified it is DED policy to apply the APF roads test through the SDP red-line revision process.

held there was no final action to be appealed in relation to a letter from Baltimore County's Department of Permits and Development Management director, where the director requested the developer to submit new plans under the former plan review process, not the newly adopted one. Although the letter determined the proposed development was a material change from an approved plan, the Court reasoned the determination was not an "operative event" or final action ripe for appeal to the board of appeals. The director's letter did not make any decision and it was not an order, it only informed the developer that the proposed plan is a material change from the previously approved plan and that, in order to be approved, new plans must be submitted for consideration under the old review process.

Following this reasoning, DLD's comments in the speed memos are not appealable events. The time has not occurred where there is a final order or decision ripe for appeal. DLD's APF comments, and to a more limited degree DED's, merely informed the Appellant that any non-APF tested units would have to be submitted through the SDP process, not the red-line revision process.

The Court observed in *Meadows of Greenspring* that the developer was not without a remedy. Here, too, the Appellant has a remedy. It could decide not to submit non-APF-tested units, or if it submitted the two-unit SDP, the SDP could pass the necessary APF tests and receive housing unit allocations or fail the tests and not receive housing unit allocations.

## ORDER

Based upon the foregoing, it is this **18th day of June 2007**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petitions of Appeal of LNC Homes, LLC, in BA Cases Nos. 582-D and 587-D are hereby **DISMISSED.**

**HOWARD COUNTY BOARD OF APPEALS**
**HEARING EXAMINER**

_____
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.