6317 MACAW, LLC & FRACO PRODUCTS, INC. Appellants	:	BEFORE THE HOWARD COUNTY
vs.	:	BOARD OF APPEALS
DEPARTMENT OF PLANNING AND ZONING HOWARD COUNTY, MARYLAND Appellee	:	HEARING EXAMINER BA Case No. 557-D

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DECISION AND ORDER

On May 15, 2006, 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 6317 Macaw, LLC and Fraco Products, Inc. (the "Appellants"). The Appellants are appealing from a Subdivision and Land Development Regulations Violation Formal Notice issued by the Howard County Department of Planning and Zoning ("DPZ") dated January 6, 2006. The Notice notified the Appellant that the property located at 6317 Macaw Court, Elkridge, Maryland (the "Property") is in violation of Sections 16.155(a)(1)(ii) and 16.106(a) of the Howard County Subdivision and Land Development Regulations (the "Regulations").

Richard B. Talkin, Esquire, represented the Appellant. Lynn A. Robeson, Senior Assistant County Solicitor, represented DPZ.

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

Steve Rolls and Charles Dammers testified on behalf of DPZ. No one testified for the Appellants.

FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, I find the following facts:

1. The Property, known as 6137 Macaw Court, is located in the 1st Election District at the terminus of Macaw Court about 1,200 feet north of South Hanover Road in Elkridge (the "Property"). The Property is referenced on Tax Map 38, Grid 14 as Parcel 853, Parcel C.

2. The Property is roughly pentagonal in shape and consists of 7.471 acres. The lot is about 720 feet wide at its widest span and 600 feet deep. The north and northwest perimeters of the Property, comprising 916 feet, or 40% of the lot's perimeter, are adjacent to residentially zoned property. The topography of the Property is fairly level, but slopes up steeply along the northern boundaries.

The Property is improved by a 210' deep by 70' wide one-story building located about 75 feet from the Macaw Court cul-de-sac in the southern portion of the site. A trailer mounted on blocks is located to the east of the building. Most of the southern and central portions of the site are paved; the paving ends about 150 feet from the northeast and northwest boundaries. A roughly 250' wide by 50' deep stone-covered area is located at the northwest edge of the pavement. The remainder of the northern portion of the site is grass-covered. An 8' tall chain and barbed wire fence begins at a point about 100 feet north of the Macaw Court entrance, runs east about 225 feet to a point 100 feet

from the northeast boundary, then runs northwest to a point 35 feet from the northwest boundary. The fence then turns west and extends to the western lot line where it is about 32 feet from the northwest lot line.

3. On June 19, 1984, DPZ approved a site development plan for the property (SDP 84-253, Exhibit 1) which shows, among other things, a 150' building restriction line and limit of paving in the north and northeast areas of the site. The SDP indicates that the proposed land use is a "truck transit terminal."

3. Mr. Rolls, a regulations inspector for DPZ, testified that he inspected the Property on November 3, 2005. He observed that an area in the northwest portion of the Property had been covered in stone and large machinery and scaffolding materials were being stored on top if it. This gravel storage area was not shown on the original SDP, nor has it been subsequently approved by DPZ.

4. Mr. Rolls testified that he met with representatives of the Appellants and advised them to meet with the County's Subdivision Review Committee to determine if an amended SDP would be required. He was told that the storage area was being used by Fraco Products, Inc., a tenant of the Property, which is a multi-national firm that sells and rents scaffolding and hoists.

5. On or about January 4 or 5, 2006, Mr. Rolls visited the site again and found the same conditions existed. He issued a Subdivision and Land Development Regulations Violation Formal Notice on January 6, 2006, which stated that the Property was in violation of two provisions of the Regulations, i.e.: (1) "Establishing a new use (contractor's storage yard) in M-1 (Manufacturing: Light) Zoning District without

obtaining a site development plan" (Section 16.155(a)(ii)), and (2) "Development or use of property not in accordance with Site Development Plan 84-253" (Section 16.106(a)).

6. Mr. Rolls re-inspected the site on February 9, 2006 and took photographs of the gravel storage area (see Exhibits 4A-4H). The photographs show large stacks of scaffolding, wood materials, orange-colored machinery identified as hoists, wood crates marked "Fraco," and other materials situated on the gravel area. Mr. Rolls determined that the gravel storage area measures about 12,500 square feet.

7. Mr. Rolls re-inspected the Property on April 6 and 7, 2006, and found the storage area in the same condition. He observed standing, pooled water in several parts of the stone-covered area (see Exhibits 5A-5F). Mr. Rolls also noted that a truck driving school (North American Trade Schools) as located in the eastern portion of the Property. The school's trailer and driving instruction area eliminates at least 15 truck parking spaces that were shown on the SDP.

8. Mr. Rolls re-inspected the Property on May 12, 2006 and observed standing water and granulated asphalt in the stone storage area. He also noted remnants of tarp laid under the stone and water run-off from the storage area (see Exhibits 6A-6F). He stated that it had rained the previous night.[1]

9. Mr. Dammers, chief of the Development Engineering Division of DPZ, testified that he visited the site on April 6, 2006 and also observed the pooled areas of water on the stone storage area. He noted that the stone appeared to be hard-packed. He testified that in his opinion the stone was impervious and would require stormwater

[1] Mr. Rolls also testified concerning the unauthorized parking of vehicles in the northeast area of the site. As this alleged violation had not been observed prior to the issuance of the Notice of Violation, and therefore was not a subject of the Notice, it cannot be a subject of this hearing. Mr. Rolls' testimony and all evidence concerning this issue were excluded.

management. As time goes by, such areas become more impervious. He stated that the Design Manual does not allow stone storage areas and would require that this area be paved unless otherwise allowed under a waiver. He stated that in his opinion the stone storage area is a "site disturbance."

CONCLUSIONS OF LAW

1. Section 16.105(a) of the Regulations authorizes appeals of DPZ decisions, including violation notices:

"A person specially 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 in accordance with Section 501 of the Howard County Charter."

2. Rule 10.2(b) of the Hearing Examiner Rules of Procedure provides in pertinent part that "in an appeal of an administrative agency's issuance of a violation of a County law or regulation, the agency must show by a preponderance of evidence that the respondent has violated the law or regulation in question. The respondent must prove all affirmative defenses, such as nonconforming use, by a preponderance of the evidence."

3. DPZ alleges that the Appellants have violated Section 16.155(a)(1)(ii) of the Regulations,[2] which states:

> (a) A site development plan, approved by the Department of Planning and Zoning, is required prior to the issuance of grading permits or building permits for:
>
> (1) Nonresidential:
>
> (i) New or expanded nonresidential development, including commercial, industrial, institutional and utility development,

[2] The Notice of Violation also cites Section 16.106(a), which authorizes the County to take certain enforcement action if property is developed, used or maintained in violation of or without obtaining an approved site development plan. As this is a procedural provision that does not describe a violation, it cannot by itself support a claim of violation.

> plus public buildings, schools and other public facilities, but excluding road, water, sewer or drainage improvements and development associated with a use permit approved by the department in accordance with Section 128 of the zoning regulations.
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> (ii) A site development plan is required unless the Department of Planning and Zoning determines that less than 5,000 square feet of site disturbance, no significant alteration to access, parking, circulation, drainage, landscaping, structures, or other site features are required, and the proposed use does not qualify as redevelopment that requires stormwater management in accordance with the design manual.

4. In this case, there is no dispute that the Appellants have established an approximately 12,500 square foot stone storage area on the Property that is not shown on the 1984 SDP or any subsequently approved SDP. DPZ alleges that this storage area constitutes a new or expanded development[3] that requires a site development plan because it represents more than 5,000 square feet of site disturbance.

5. The Appellants counter that (1) because the 1977 Zoning Regulations listed "truck terminals" and "storage establishments" under the same category of permitted uses in the M-1 zone, the gravel storage area should not be considered the establishment of a new use under the SDP, and (2) DPZ failed to show that there is more than 5,000 square feet of impervious area within the stone storage area.

6. With respect to the Appellants' first argument, I find that whether the storage area constitutes a new "use" is immaterial to the issue of whether it violates Section 16.155(a). That section proscribes any new or expanded "development" without an approved site development plan. "Development" is defined in the Regulations to include not only the establishment or change of a use, but also "the improvement or alteration of

[3] The Notice of Violation inartfully described the violation as the establishment of a new "use," that of a contractor's storage yard, without obtaining a site development plan. Of course, the Regulations do not govern "uses," which are regulated by zoning, but development. It is clear on its face, however,

a site by the construction, enlargement, or relocation of a structure; the provision of storm water management or roads; the grading of existing topography; the clearing or grubbing of existing vegetation; or any other non-farming activity that results in a change in existing site conditions." Section 16.108(b)(15). In this case, the establishment of the stone-covered storage area on the Property where none was shown on the SDP indubitably qualifies as a change in the site conditions. Consequently, unless it falls under one of the delineated exceptions under Section 16.155(a), the storage yard is a "development" requiring a site development plan.

7. The Appellants next contend that, because DPZ failed to show that there is at least 5,000 square feet of impervious area within the stone storage area, DPZ has failed to meet its burden to show that the Property does not qualify for the exception listed in Section 16.155(a)(1)(ii). This argument fails in two respects. First, to qualify for the exception does not merely require that the activity entails less than 5,000 square feet of "impervious area;" rather, it requires less than 5,000 square feet of "site disturbance." The undisputed testimony proved that the area of disturbance, i.e., the entire stone-covered storage area, covers approximately 12,500 square feet. Consequently, the evidence was sufficient to show that the storage yard is not excepted from the site development plan requirement of Section 16.155(a)(1)(ii).

Even without this evidence, however, the Appellants argument would fail because they have misread Section 16.155(a)(1(ii). The exceptions listed in that section apply only if "the Department of Planning and Zoning determines" that they do. Thus, the 5,000 square foot exception does not apply automatically; that is, it is not up to the

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that the Notice uses the words "use" and "development" interchangeably and that the intent and effect of the Notice was to notify the Appellants that the storage area violated Section 16.155(a)(1).

developer to decide if a site development plan is required. Rather, the provision requires that, if a developer intends to undertake any activity that might be considered a "development," it must first seek a determination from DPZ as to whether the activity meets the exception under Section 16.155(a)(1)(ii). In this case, the evidence indicates that the Appellants never sought such a determination. This is the essence of the violation. DPZ met its burden by simply showing that the Appellants failed to inquire, regardless of whether or not the storage yard in fact failed to qualify for the site development plan exception.

8. That the Appellants have a duty to inquire to DPZ before undertaking a development activity is more than a matter of mere semantics or "red tape." As the evidence and Mr. Dammers' testimony showed, the establishment of the stone storage area may have created an impervious surface that could result in stormwater runoff problems. While the Appellants may qualify for a waiver, it is important that these issues be reviewed and resolved *before* the activity is undertaken. If developers are allowed to determine for themselves whether the site development plan requirement (and therefore the panoply of development regulations) applies to a particular activity, many such violations of far greater magnitude would undoubtedly ensue.

9. For the foregoing reasons, I conclude that DPZ has shown by a preponderance of evidence that the Appellants have violated Section 16.155(a)(1) of the Regulations.

ORDER

For the foregoing reasons, it is this **22nd day of June 2006**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the petition of appeal of 6317 Macaw, LLC and Fraco Products, Inc., in BA Case No 557-D is hereby **DENIED.**

HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER

_____
Thomas P. Carbo

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.