

**HOWARD COUNTY BOARD OF APPEALS HEARING EXAMINER**

In the Matter of

**MICHAEL J. BENKO, JR. &  
SHARON LEES-BENKO**

Respondents

Civil Citation Nos. CE 12-02a & CE12-02b

Date of Citations: December 24, 2013

**Request for Reconsideration & Revised  
Order**

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**RECONSIDERATION ORDER**

On January 23, 2015, Respondents Michael J. Benko, Jr. and Sharon Lees-Benko, through counsel Thomas Meachum, submitted a request to reconsider the Hearing Examiner Order in Code Enforcement Case Nos. CE 12-02a & CE12-02b, which Order was issued as supported by findings and facts set forth on January 5, 2015. DPZ counsel David Moore, Senior Assistant County Attorney, timely filed DPZ's opposition to the request on February 2, 2015.

By February 11, 2015, the Hearing Examiner had drafted, but not yet issued, her Reconsideration Order, taking note of the untimeliness of the reconsideration request, finding that under § 11.2 of the Hearing Examiner Rules of Procedure, the pleading filed on January 23, 2015 was three days after the January 20, 2015 filing deadline, but further stating she nonetheless would consider the parties' request for clarification of the second remedial abatement order No. 7 in the Order and address the general issue of remedial abatement orders (Respondents' counsel referred to these as paragraphs in the reconsideration request) in the interest of quasi-judicial efficiency. (The Order included two No. 7 remedial abatement orders. The second No. 7 which concerns employee parking, is referenced here as Paragraph 7a.)

On the afternoon of February 11, 2015, the Hearing Examiner received a reply from Respondents to DPZ's opposition to the request for reconsideration. Because the Hearing

Examiner's Rules of Procedure as to reconsideration requests authorize only the right of any party to make such request (Rules 11.1 & 11.2) and the right of any party to timely respond to such request (Rule 11.3), the Hearing Examiner would have disregarded the reply. However, the reply put the Hearing Examiner on notice that DPZ had not mailed Respondents' counsel Thomas Meachum a copy of the Order sent to Respondents on January 7, 2015. The reply explains that when Mr. Meachum called attention to this, DPZ emailed him a copy of the Order on January 12, 2015, including a January 7, 2015 cover letter on Enforcement Supervisor Tony LaRose's signature. The reply further alleges the request is timely because the issuance date for calculating the time to request a reconsideration springs from the date it was issued "to whom it should have been issued" not from the date of a decision and order.

As an initial matter, the Hearing Examiner disagrees with this computation of time assessment. In her eight-year tenure as Hearing Examiner, the computation of every filing subject to a timely submission requirement has been calculated as commencing on the day after the actual date of an decision or order. It is also unclear why, as a practical matter, counsel did not apprise the Hearing Examiner of the late "service" of the order to him as other counsel have done in similar circumstances. Regardless of the circumstances by which counsel received the Order, the issue is moot, the Hearing Examiner having already determined to address what she considers the key legal arguments raised in the reconsideration request. The Hearing Examiner declines to address those issues apparently alleged to be mistakes of facts, there being none. DPZ's burden

of proof under HCC § 16.1605(d) was to show a preponderance of the evidence, that the alleged violator has violated the laws or regulations, which it met.

### **I. Remedial Abatement Orders**

The purpose of a civil citation Order is to ensure the timely and efficient abatement of a violation. The most common zoning violation enforcement case before the Hearing Examiner involves unlawful conditions on a property – unregistered vehicles, dumping, too many commercial vehicles, illegal storage structures/uses. Typically, the abatement Order objective in these cases is to allow the violator to self-abate the unlawful condition – remove offending vehicles, clean up the property, remove shipping containers. On occasion, the Hearing Examiner issues a preliminary order wherein she retains jurisdiction over the case during the abatement process because the violator is unlikely to self-abate the unlawful condition. The remedial abatement orders in a Preliminary Order allow DPZ enforcement inspectors to work with the violator to bring the property into compliance. A compliance hearing is then held, during which the violator and DPZ present evidence of compliance and a final abatement Order is issued. Howard County Code (HCC) Subtitle 16.000 et seq., which contains the administrative proceedings for enforcement of the Howard County Zoning Regulations (HCZR) and the Subdivision and Land Development Regulations (SLDR), including in pertinent part, civil citation administrative hearing procedures, do not expressly authorize the Hearing Examiner to issue preliminary orders or to convene compliance hearings, which effectively comprise an abatement plan.

In other cases, the nature of the violation involves unlawful activity and violators need to be compelled to cease the activity. In these cases, the Order must ensure the cessation of the activity giving rise to the violation/s. The solution to this code violation problem is more complex and consequently, often involves remedial abatement orders that violators, usually property owners, must meet in order to bring the property into compliance and remain in compliance with the HCZR or the SLDR. Enforcement, after all, is the process by which the County ensures that its citizens abide by the law. The process may sometimes require an abatement plan.

In code enforcement argot, this is "active enforcement." One goal of active enforcement is the deterrence of repeated or ongoing enforcement actions against a violator until abatement finally takes place; active enforcement becomes a tool of quasi-judicial efficiency in the code enforcement administrative hearing process. As a practical matter, this lawful tact relieves the violator, DPZ's enforcement inspection section and the Hearing Examiner from the difficult remedy of successive enforcement actions, a situation with which this Hearing Examiner is too familiar. Active enforcement is also utilized in enforcement cases where violators' activities evince blatant disregard of the HCZR or the SLDR and where a comprehensive remedy or abatement plan is merited to protect the public interest, the community and persons negatively affected by the violation/s.

The remedial abatement orders imposed in CE 12-02a & b are practical abatement directives to Respondents to bring their property into compliance and remain in compliance with the HCZR. In DPZ's words, one remedy is the provision of documentation by Respondents to the County necessary for the County to monitor compliance with the Order. DPZ bluntly gauged the

compliance situation and the documentation required (in Paragraph 7) as "entirely appropriate given the nature of the violation and the 'shell game' efforts of the Respondents to avoid compliance with the County Regulations."

Unquestionably, Respondents themselves necessitated the remedial abatement orders, which the Hearing Examiner intentionally fashioned to protect their property right under HCZR § 128.0.C.1 to operate a lawful home occupation business at Wellworth Way. But for their "shell game" efforts to avoid compliance, the remedial abatement orders may have been unnecessary. Respondents had ample time to prepare their defense in the ten-month interim between the original January 7, 2014 hearing date and the actual October 10, 2014 hearing, including the preparation of exhibits going toward legitimate truck deliveries to the Wellworth Way property and employee information (including their names and vehicles), and an honest account of illegal commercial vehicle usage in the illegal use of the property for the contractor business. No such probative evidence was provided.

Respondents' claim that § 16.1607.(b)(1) is limiting language, under which the Hearing Examiner can only order stopped a particular conduct or action that is deemed in violation of the HCZR but no more, effectively, and which the Hearing Examiner presumes is an assertion to the effect that the Order is in error as a matter of law, one of the standards in Hearing Examiner Rule 11.5 under which the Order may be revised, takes root in a spurious parallel to the Hearing Authority's statutory authorization under HCZR §130.0 to impose conditions or restrictions in the

grants of variances and conditional uses, which is allegedly lacking under § 16.1607.(b)(1).<sup>1</sup> This parallel is deepened through Respondents' questioning about who handled the conveyance of the Order, DPZ's enforcement section, not its administrative section (which distributes variance and conditional use orders).

The parallel has some superficial pull were we to accept Respondents' characterization of the 11 remedial abatement orders in the CE 12-02a&b Order as conditions, which they are not. There is no equation between the variance and conditional use administrative hearing process and the Subtitle 16 enforcement administrative civil citation hearing process. Likening the express authority to impose conditions on approved variance and conditional use petitions and the absence of such authority in the issuance of abatement Orders is false logic. A remedial abatement order directive is not a condition of approval.

Used as a transitive verb "abate" means "to put an end to <abate a nuisance>" or to "nullify." Used as noun, "abatement" is "the act or process of abating: the state of being abated." <http://www.merriam-webster.com/dictionary/abate> (site visited February 11, 2015). The objective of ordering the abatement of a zoning violation is to put an end to it. Sometimes an abatement Order is more complex when it involves illegal activity/uses, not just a static unlawful

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<sup>1</sup> HCC Sec. 16.1607. - Final order.

(a) *Requirement to Issue.* After the conclusion of a hearing, the Hearing Examiner shall issue a written final order.

(b) *Contents.* A final order may include:

(1) A requirement to abate a violation including a requirement to stop work or restore the property to a lawful condition;

(2) A requirement to reimburse the County for any fees or costs incurred; and

(3) A civil fine in accordance with section 16.1608 of this subtitle.

condition; hence the abatement plan in this case. Nothing in the Howard County Code, the HCZR or the SLDR limits the Hearing Authority from imposing specific remedial abatement orders—what in many Maryland jurisdictions is termed "corrective orders"—in an abatement Order proportionately crafted to the violation/s. HCC § 16.1607.(b)(1) is permissive language; it does not narrowly circumscribe the content of an abatement Order. In DPZ's words, the HCZR "cannot possibly detail in every remedy appropriate to ensure compliance with their mandates . . . ." Without these remedial orders, DPZ explained, "the County is fated to encounter continuing efforts to evade compliance . . . ." An abatement Order may instruct violators to take reasonable measures to abate the violation, including an abatement plan imposing reasonable instructions as to the time and manner of correction so the Property comes into compliance and remains in compliance.

## **II. Remedial Abatement Order No. 4: UPS Deliveries**

Turning now to remedial abatement order No. 4, which bars all UPS deliveries to Wellworth Way, the Hearing Examiner emphasizes that this order does not bar all home occupation business-related two-axle truck deliveries impermissibly, only UPS deliveries, which the evidence showed was overwhelmingly in support of the now off-site (hopefully) contractor business, Mrs. Benko having testified that the home office use receives a UPS delivery only about once a week. She also testified that UPS deliveries intended to go to Berger Road were in fact being delivered to her home because no one is at the Berger Road location. The Hearing Examiner suggests that with the cessation of the unlawful activities related to the contractor business at

Wellworth Way, Respondents could easily resolve their UPS delivery intake dilemma by recruiting Mr. Benko, Sr. to take delivery at Berger Road, since his presence at Wellworth Way in connection to the contractor business is no longer necessary.

Still, in the interest of minimizing further litigation in this case, which the Hearing Examiner forthrightly ranks as one of the two most egregious violations of the HCZR in the approximately six-year history of the civil citation administrative hearing process, the Hearing Examiner is revising remedial abatement order No. 4 by striking the second sentence, which reads: "Respondents shall maintain copies of all personal UPS deliveries to their residence for DPZ inspection if a zoning complaint alleging UPS business deliveries to Wellworth Way is made, for as long the home-occupation use continues."

### **III. Paragraph 7a. (as to employees parking vehicles before 6:00 pm)**

It is FURTHER ORDERED that no work crew employee shall park their vehicles at Wellworth Way for personal visits before 6:00pm, except holidays.

Respondents claim there is no legal basis upon which this condition could be sustained. Nevertheless, they request this order of condition be amended to include Saturday and Sundays as days to which this restriction does not apply. DPZ also requested clarification of the condition order.

Having reviewed the initial Order and in consideration of remedial abatement order No. 7, which inherently addresses the issue of work crew employee parking at Wellworth Way, the Hearing Examiner has determined to strike 7a (the second No. 7) in the interest of quasi-judicial



efficiency. Compliance with remedial abatement order No. 7 should ameliorate the need for the additional monitoring of employee parking at Wellworth Way.

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To avoid any confusion as to the controlling Order in CE 12-02a & b, the formal Order is revised as follows.

**ORDER**

It is therefore this **25<sup>th</sup> day of February 2015**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED** that:

1. Respondents shall abate the violations immediately.
2. A civil fine is imposed in the amount of two thousand dollars.
3. It is **FURTHER ORDERED** that the civil penalty/fine shall be paid no later than thirty calendar days from the date of this Order. A failure to pay the fine by the due date may result in a lien being placed on the property for the fine amount, per Section 16.1611(a)(1) of the Code.
4. It is **FURTHER ORDERED** that no UPS deliveries for the contractor business, including the home business support use for the off-site contractor business, shall be made to 2622 Wellworth Way. All UPS business deliveries shall be routed to the Berger Road shop or alternatively to a UPS pickup facility.
5. It is **FURTHER ORDERED** that Respondents cease all use of the premises for all but the home occupation business support use (American Storefront Glass and Door Products). Per HCZR § 128.0.C.1.h.(8), which regulates and permits home occupations and permits business or professional offices, including administrative offices associated with an off-site business, and § 128.0.C.1.e, the home occupation use shall be confined to the 225-ft. area in the residence and limited to these activities: processing orders by mail, telephone or computer, storage of catalogues, samples, and office functions such as telephone, computer, and record keeping.
6. It is **FURTHER ORDERED** that no rack van shall be parked at Wellworth Way, including the storage of any spare rack van. The Hearing Examiner is imposing this restriction to ensure the cessation of all non-home office contractor business uses at the premises.
7. To ensure Respondents' compliance with the two commercial vehicle parking limitation, it is **FURTHER ORDERED** as follows.

No later than seven calendar days after the date of this Order, Respondents shall schedule a meeting with Zoning Enforcement Supervisor Anthony LaRose and provide the information as follows.

- a. Photographs and vehicle identification (VIN nos. and tags) of all vehicles owned by Michael and Sharon Benko, Hank Heath and Jarrett (Jerret) Carr (the two resident employees).

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- b. Photographs and vehicle identification (VIN nos. and tags) of all non-resident vehicles (office workers and the work crew) and all vehicles owned by Michael Benko, Sr. (VIN nos. and tags).
  - c. Respondents shall identify the two (non-rack van) commercial vehicles to be used to transport goods and equipment in furtherance of the business and parked at Wellworth Way.
  - d. Respondents shall update Zoning Enforcement Supervisor LaRose (or his successor) upon any changes to the vehicle information document provided to him and upon any employee changes.
8. It is **FURTHER ORDERED** that all activities at Wellworth Way related to the Benko's business relationship with Brian Smith and Chip Olsen, including their companies, and all related vehicular traffic, shall cease immediately.
9. It is **FURTHER ORDERED** that any replacement or substitution of the vehicle/employee information provided to DPZ without updating the document information and any business activity on the premises unrelated to the home occupation office use, is an ongoing violation of HCZR §§ 105.0.B&C and 101.0.O.
10. It is **FURTHER ORDERED** that the Respondents permit the County to inspect the property to determine whether the violations have been corrected.

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Michele L. LeFaivre

NOTICE TO RESPONDENT/S: Respondents are advised that pursuant to Section 16.1608.(c) of the Howard County Code, all fines are due and payable by the date indicated in the citation; and are payable to the Director of Finance of Howard County. Pursuant to Section 16.1609, a final order issued by the Hearing Examiner may be appealed within 30 calendar days of the date of this order by the alleged violator to the Board of Appeals in accordance with Section 16.304 of this title.\*

If an alleged violator appeals the final order of the hearing examiner, the alleged violator may request the stay of any civil fine imposed by a final order pending the final resolution of an appeal. Pursuant to Section 16.1610, if a final order of the Hearing Examiner includes a civil fine and the order is appealed to the Board of Appeals, the alleged violator shall post security in the amount of the civil fine to the director in a form

acceptable to the Director of Finance. After all appeals are exhausted, if a civil fine is reduced or vacated, the security shall be reduced proportionately; any surplus shall be returned to the alleged violator; and any balance shall be used to satisfy the civil fine; or is not reduced or vacated, the security shall satisfy the fine assessed and accrue to the benefit of the county. Pursuant to Section 16.1611, if a final order issued by a Hearing Examiner assesses a civil fine and the alleged violator does not pay the fine within the time required by the order, the Hearing Examiner shall certify to the Director of Finance the amount owed that shall become a lien on the property on which the violation existed; and be collected in the manner provided for the collection of real estate taxes. Pursuant to Section 16.1612, if an alleged violator fails to comply with an order to correct a violation within the time provided in the order, the county may seek a court order authorizing entry on to the property to correct the violation and may procure the performance of the work by county employees or by contract to correct the violation. The cost and expense of work performed under this section a lien on the property on which the violation exists upon certification to the Director of Finance of the amount owed.

\* Howard County Code Sec. 16.304.(a), Appeal to Board of Appeals, provides in pertinent part that the Board will hear the appeal of a citation issued under subtitle 16 of this title on the record in accordance with section 2.210(b) of this Code (Section 2.210(b) of the Board of Appeals Rules of Procedure.)