PAUL S. DIMARCO	:	BEFORE THE
Appellant	:	HOWARD COUNTY
v.	:	BOARD OF APPEALS
HOWARD COUNTY DEPARTMENT OF PLANNING & ZONING	:	HEARING EXAMINER
	:	BA Case No. 722-D
Appellee		

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DECISION AND ORDER

On July 11, 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 Paul S. DiMarco (Appellant). Appellant is appealing a January 15, 2016 Department of Planning and Zoning (DPZ) decision letter denying multiple waivers from the Howard County Subdivision and Land Development Regulations and a February 2, 2016 DPZ email informing him it would not reconsider or reverse the waiver decision.

Sang Oh, Esquire, represented the Appellant. Paul Johnson, Deputy County Solicitor, represented DPZ. Paul DiMarco and Chris Ogle testified on behalf of Appellant. Kent Sheubrooks, DPZ's Division of Land Development (DLD) chief and DPZ Director Valdis Lazdins testified on behalf of the department.

Appellant introduced into evidence the exhibits as follows.

1. October 8, 2014 waiver petition letter from Kent Sheubrooks to Howard Streaker, Jr., re: WP-15-034 Streaker Property-Parcel 2
2. January 28, 2016 meeting minutes prepared by Paul DiMarco, re: WP-16-065 Willow Brooke (formerly Streaker property) denial
3. December 10, 2015 internal memo from Chad Edmondson, Chief, DED, re: subdivision waivers
4. Chart depicting processing time for WP 15-034
5. Environmental Concept Plan, Willow Brooke, Lots 1-4, August 2015

DPZ introduced into evidence the exhibits as follows.

1. September 12, 2014 waiver petition application, WP 15-034
2. Email thread between Chris Ogle and Kent Sheubrooks, October 27-28, 2015

I. STATEMENT OF THE CASE

The subject property is identified as Tax Map 0009, Grid 0021 & 0015, Parcel 0328, Lot 2 and also known as 1751 S. Underwood Road. It was also Parcel 2 of a 1980s resubdivision of central import to this appeal. For consistency, the subject property is referred to as Parcel 2.

Sometime after July 1, 2012, Howard Streaker sought to resubdivide the 16.328-acre Parcel 2 off Underwood Road into multiple lots. To this end, Mr. Streaker and his engineering consultants, apparently, met with DPZ officials from DLD and DED on June 17, 2014 for a presubmission meeting. DPZ Exhibit 1, pg. 4. On September 12, 2014, he submitted waiver petition application WP-15-034 to DPZ requesting the Planning Director to waive Subdivision Regulations § 16.108(b)(46), the definition of "Resubdivision." DPZ Exhibit 1. By letter of October 8, 2014, DLD Chief Kent Sheubrooks advised Mr. Streaker then DPZ Director Marsha McLaughlin approved the WP-15-034 waiver request to resubdivide recorded Parcel 2 as a "minor subdivision in this unique case" subject to four conditions:

1. The minor subdivision plat for Parcel 2 must be submitted within one year of approval of this waiver, **on or before October 8, 2015**.
2. An Environmental Concept Plan must be submitted and approved by DPZ prior to submission of the minor subdivision for Parcel 2.
3. A pre-subdivision community meeting must be held prior to submission of the minor subdivision plat for Parcel 2 in compliance with Section 16.128 of the Howard County Subdivision and Land Development Regulations.
4. In consideration of Parcel 2 as a minor subdivision and to ensure compliance with SB-236, "The Sustainable Growth and Preservation Act of 2012" Parcel 2 may not be subdivided into more than 3 additional lots, for a total of 4 lots.

(Emphasis in original.) The letter explains the waiver approval decision is based on the following:

> Extraordinary Hardships or Practical Difficulties:
>
> Strict compliance with the Regulations, in this case, will create inequity and an undue hardship between the two Streaker brothers and their respective parcels. William E. Streaker, owner of Parcel 1, was permitted to subdivide, but Howard Streaker, Jr., owner of Parcel 2, now is not. The purpose of the court-ordered Consent Decree was to provide equity between the Streaker Brothers. Due to the unusual circumstances, strict compliance with the Regulations in this specific case will create extraordinary hardship and inequity between the two brothers as a result of the Court order Consent Decree (Equity No. 9651 dated December 27, 1976.

Eight days after the WP-15-034 waiver approval, Appellant Paul DiMarco purchased Parcel 2.

On October 27, 2015, project engineer Chris Ogle requested by email a 90-day extension of WP-15-034 Condition #1. That same day, Kent Sheubrooks by email advised him to submit a new waiver petition application for processing and approval because he lacked authority to reactivate and extend the Condition #1 October 8, 2015 deadline for submission of the final plat application. DPZ Exhibit 2. Sometime thereafter, Appellant submitted a new DPZ waiver petition (WP-16-065 Willow Brooke) for 6 waivers. By letter of January 15, 2016, Kent Sheubrooks informed Appellant of Planning Director Valdis Lazdins' decision to deny these requested waivers:

> Section 16.108(b)(46), waiving the definition of "Resubdivision"
> Section 16.120(b)(6)(ii)(a), waiving the maximum length of a pipestem
> Section 16.120(b)(4)(i), requiring a regular, generally rectangular lot shape
> Section 16.120(b)(4)(iii)(b), requiring certain environmental features of be located on a lot not less than 10 acres
> Section 16.115(c)(2), waiving certain disturbances to floodplains and impervious paving on land within floodplain
> Section 1G.120(b)(5), waiving maximum dBA noise levels

This was the basis for the waivers denial decision.

> 1. The request to waive Section 16.108(b)(46) to consider the resubdivision of Parcel 2 as a minor subdivision was previously approved on October 8, 2014 under WP-15-034 in an effort to uphold the decision and intent of the Amended Circuit Court Consent Decree, which was to provide equity

between the owners of Parcel 1 & 2 (Streaker brothers). Following approval of the waiver, the property was sold and is no longer owned by Howard Streaker. The conditions of approval of WP-15-034 specified a deadline of October 8, 2015 to submit the minor subdivision plan for Parcel 2. The deadline was not met and the waiver was voided. The applicant failed to demonstrate that submission of the subdivision plan was not feasible prior to the deadline. Approval of this waiver request would not be consistent with the intent of approval of WP-15-034, which was to provide equity between the Streaker brothers.

2. The waiver request nullifies the intent and purpose of Section 16.101 of the Subdivision and Land Development Regulations, which is to ensure that the orderly development of land is consistent with the General Plan (Plan Howard 2030) and follows uniform procedures and standards for the processing of subdivision plans. As adopted by Howard County under Plan Howard 2030, the subject property was located in the Tier IV designated area of Howard County which permits only minor subdivisions of 4 lots or less. The Subdivision Regulations define a major subdivision as 5 or more lots either all at one time or on a lot-by-lot basis overtime derived from the original parcel of land. The grandfathering provisions as adopted under SB-236 require that properties located in the Tier IV designated area must have applied for subdivision plan approval by submitting a percolation test application to the local Health Department on or before July 1, 2012 to be considered exempt from SB-236. Therefore, in accordance with the adopted Growth Tier Map for Howard County and "The Maryland Sustainable Growth and Agricultural Preservation Act of 2012" (SB-236) the proposed resubdivision of the subject property is considered a major subdivision by definition and no further resubdivision is permitted to establish additional buildable lots.

3. Further subdivision of Parcel 2 into additional buildable lots is not permitted per SB-236. Therefore, the waiver requests to allow non-regular lot shapes, to allow environmental features on lots less than 10 acres, to exceed the maximum pipestem length, to disturb the existing floodplain, and to exceed the maximum noise levels are also denied. Parcel 2 may be designed to accommodate one residential dwelling in accordance with the Howard County Subdivision & Land Development Regulations and Zoning Regulations.

On February 2, 2016, Kent Sheubrooks by email informed Appellant of DPZ's decision to not reconsider or reverse the WP-16-065 denial and apprised Appellant of his right to appeal the January 15, 2016 decision. Appellant filed a timely administrative appeal on February 10, 2016.

II. BACKGROUND

In 1976, the Howard County Circuit Court issued a Consent Decree order (Equity No. 9651) dividing an approximately 33-acre parcel (the Original Parcel) north of US 70 in western Howard County to be divided equally between William E. Streaker and Howard Streaker as Parcels 1 and

2. William Streaker subsequently re-subdivided Parcel 1 twice in the 1980s to create three lots under the Minor Subdivision provisions of the Howard County Subdivision and Land Development Regulations (Subdivision Regulations), resulting in 4 total lots on the Original Parcel.

In 2012, the Maryland General Assembly passed SB 236, the Sustainable Growth and Agricultural Preservation Act of 2012, effective July 1, 2012, aka the "Septic Law." SB 236 limits the impact of large subdivisions served by individual septic systems on farm and forest land, streams, rivers and Chesapeake and Coastal Bays. Of import to this appeal is SB 236's prohibition of major subdivisions on septic systems in Tier IV designated lands, resource areas dominated by agricultural and forest lands, and certain grandfathering provisions.

Pursuant to SB 236, the Howard County Council on February 8, 2013, adopted Council Bill 1-2013 (effective date April 8, 2013) amending its General Plan, PlanHOWARD 2030, to define "growth tiers." The 4-lot Original Parcel was placed in Tier IV on the PlanHOWARD 2030 revised Map 6.3, with the consequence, but for one exemption, that SB 236 and PlanHOWARD barred any further resubdivision of the Original Parcel for additional lots, because any further act of resubdivision would be a major subdivision under Subdivision Regulations definitions 16.108(b)(60) and 16.108(b)(46).

> (60) *Subdivision* means any division of a lot or parcel of land into lots or parcels for the immediate or future transfer of ownership, sale, lease or building development. The term includes lot mergers and resubdivision and, when appropriate to the context, shall relate to the process of subdivision or to the land subdivided.
>
> (46) *Resubdivision* means a further division or modification of an existing subdivision previously approved by the County and recorded in the Howard County Land Record Office.

The one exemption, set out in CB 1-2013's Growth Tier grandfathering provisions, allowed properties with major subdivision potential and otherwise subject to the major subdivision prohibition in SB-236's limitations on septic system development, to proceed with development if the project met three requirements:

1. A soil percolation test application including full payment of fees and a percolation test plan must have been submitted to Howard County Health Department on or before July 1, 2012, and Preliminary Equivalent Sketch Plan must have been submitted to DPZ within 18 months of the Health Department's soil percolation test approval.
2. The Preliminary Equivalent Sketch Plan must receive signature approval by DPZ by no later than October 1, 2016.
3. *SB 236 exempts major subdivision if the percolation test application was submitted to the Health Department after July 1, 2012, and the final subdivision plat was recorded on or before December 31, 2012.* (Emphasis added.)

APPLICABLE LAW

Subdivision Regulations § 16.104 contains the standards for granting waivers.

(a) *Authority to Grant.* So that substantial justice may be done and the public interest secured, the Department of Planning and Zoning may grant waivers of the requirements of this subtitle in situations where the Department finds that extraordinary hardships or practical difficulties may result from strict compliance with this subtitle or determines that the purposes of this subtitle may be served to a greater extent by an alternative proposal.
(b) *Conditions under Which Waiver May Be Granted.* The Department of Planning and Zoning may approve a waiver to a provision of this subtitle provided that:
(1)The developer has presented a petition demonstrating the desirability of waiver; if the county requests additional justifying information, the information must be submitted within 45 days of the Department's letter of request. If the information is not submitted by the deadline, the Department shall deny the petition.
(2)The waiver shall not have the effect of nullifying the intent and purpose of this subtitle.
(3)Within 30 days of the date of the Department's decision letter regarding a waiver petition, the developer may submit additional information to support a request for the Department to:
(i)Modify any approval conditions;
(ii)Reverse the Department's denial; or
(iii)Add or delete specific waiver requests.
(4)After 30 days, requests for reconsideration will require a new petition for a waiver and payment of fees in accordance with the adopted fee schedule.
(5)Any waiver to the minimum requirements of this subtitle in regard to a particular subdivision or development shall be appropriately noted on the final plat or site plan.

A "Minor Subdivision" "means the division of a residential or agricultural parcel that has not been part of a previously recorded subdivision, into four or fewer residential lots (including buildable preservation parcels but excluding open space and nonbuildable preservation parcels), either all at one time or lot by lot." Subdivision Regulations § 16.108(b)(32). Minor subdivision plans are processed by DLD and DED and subject in pertinent part only to the final plan stage procedures contained in § 16.147 (exempting them from the sketch and preliminary plan procedures). Subdivision Regulations § 16.102(c)(1). Section 16.147(b), Procedures, requires in pertinent part a presubmission, "noticed" community meeting and ECP approval. Because § 16.147(c)(19) requires a final plat to depict the location of approved private sewerage soil percolation tests, the pre-plat submission process also necessitates a Health Department-approved percolation certification plan.

DISCUSSION

Appellant makes three arguments going to his claim of the waiver petition denials being clearly erroneous, arbitrary, capricious, and contrary to law and fact. First, Appellant's "active processing" of the project foreclosed the WP-16-065 denials. Second, the denied requested WP-16-065 waiver to the definition of "Resubdivision" was an "impermissible change of mind." Lastly, any DPZ attempt to assert the waiver petition could be denied on the basis of the other waivers "would ring hollow" because DED had already approved them. For the reasons set forth herein, the Hearing Examiner is denying the appeal, finding no mistake of fact or error of law.

Appellant Was Not "Actively Processing" a Final Minor Subdivision Plan/Plat

Appellant asserts in the appeal petition supplement that on taking ownership of Parcel 2

eight days after DPZ approved WP-15-034, he "immediate[ly] and [d]iligently began and proceeded through the subdivision process taking multiple steps." However, due to the "length of time necessary for approval of the Percolation Plan and ECP [Environmental Concept Plan], Appellant was unable to satisfy the Plat Submission Deadline." Appellants rely on the last sentence in the last paragraph of the WP-15-034 waiver approval letter to argue that waiver is still properly and actively being processed: "This requested waiver will remain valid for one year from the date of this letter or as long as this subdivision is being remains in active processing."

The petition supplement describes the three processing steps before submitting the Parcel 2 minor subdivision plat subject to the WP-15-034, October 8, 2015 submission deadline: Health Department percolation certification plan approval, ECP concept plan approval and the required presubmission community meeting. Appellant introduced into evidence a "Gant" chart visually representing his account of the project's processing time for the purpose demonstrating the alleged lengthy period the project was under county control. Appellant Exhibit 4. He testified to the Health Department's Bureau of Environmental Health (BEH) delaying at length soil percolation testing due to inspector cancellation for bad weather. The appeal supplement states the first available BEH testing date was February 19, 2015, which was postponed to March 23, 2015. The Health Department issued an approved Percolation Plan on May 2, 2015. Kent Sheubrooks testified to the Health Department requiring Appellant to submit a revised plan. Chris Ogle testified about the processing of the ECP, which proved challenging, and required extra time to address the site's difficult environmental features, including "unanticipated" floodplain revisions/additions. Appellant expended additional time complying with the three-week notice

presubmission community meeting requirement, having failed, it seems, to meet the notice requirements for a scheduled May 2015 meeting.

None of these actions is regulated "active processing" per Subdivision Regulations § 16.108(b)(1).

> Active processing time means the period of time after formal application for approval of a sketch plan, preliminary equivalent sketch plan, preliminary plan, final plan and plat, or site development plan during which the County is required to determine whether or not the development or subdivision plan or plat and attendant documents conform to County regulations. If a reviewing agency makes a written request to the developer for additional data or information, the time between issuance of the request and receipt of the reply is not part of the active processing time.

Chris Ogle himself expressed doubt as to whether the presubmission community meeting and ECP approval qualified as active processing to satisfy the last sentence in the WP-15-034 waiver approval letter, in an October 28, 2015 email to DLD Chief Kent Sheubrooks. Mr. Sheubrooks explained in his response that the closing sentence is a "standard comment when the actual subdivision or site development plan is in process. Be advised that Section 16.144 doesn't mention or reference the ECP Plan as part of the subdivision process. Therefore the ECP Plan is not recognized by the County Code as an official subdivision plan and in accordance with Section 16.104(c) that section explained the period of validity for waiver petitions and active processing is determined by Section 16.144."

Certainly, the appeal petition supplement's seeming reliance on the start date of any alleged active processing based on Appellant's purchase date of the Property is of no effect. Moreover, Mr. Sheubrooks testified to Mr. DiMarco being actively and financially involved with the project as the contract purchaser before he took legal title to Parcel 2.

Appellant's Impermissible "Change of Mind" Claim

Appellant also asks the Hearing Examiner to find effectively error in the WP-16-065 petition denial decision to waive the definition of "resubdivision" under authority of the impermissible "change of mind" rule applied in *Schultze v. Montgomery County Planning Bd.*, 230 Md. 76, 185 A.2d 502 (1962). At issue in *Schultze* was a Planning Board's refusal to reconsider its disapproval of a preliminary resubdivision plan despite the property owner's claim the disapproval was arbitrary and capricious because the board had previously permitted similar resubdivision within the subdivision. Subsequent to the owner's appeal to circuit court, the board authorized and approved a resubmission of the preliminary plan on discovering staff error in failing to apprise it of the previous resubdivision approvals. The board then disapproved the final plan, even after considering the additional new facts, for the same reasons it originally disapproved the preliminary plan. On final appeal to the Court of Appeals, that court reversed the lower court decision affirming the board's final plan disapproval. In reversing, the court relied in part on its "change of mind" rule adopted in *Board of Zoning Appeals v. McKinney*, 174 Md. 551, 199 A. 540 (1938) to hold the zoning board's final plan denial, was beyond its powers and void, where there was no change in conditions.

> [I]t seems rather clear that while the reversal from the original disapproval to approval of the preliminary plan was based on the existence of mistake or inadvertence, i. e., ignorance of information later supplied by an assistant engineer that there had been resubdivisions in the same block in which is located the property under consideration, *the disapproval of the final plan amounted to a mere change of mind on the part of the board as it is apparent from the record that it was not founded upon fraud, surprise, mistake or inadvertence, or indeed upon any new or different factual situation.* (Emphasis added.)

Schultze, 230 Md. 76 at 80, 81, 185 A.2d at 504, 505.

Key to the courts' "change of mind" review in *Schultze* and *McKinney* was the procedural posture of the boards' decisions: the boards were exercising their quasi-judicial function when they issued their final decisions and later reconsidered them for fraud, surprise, mistake, inadvertence or different factual situation. The Hearing Examiner therefore questions whether the *McKinney* rule extends to this appeal. DPZ's Director was not acting in a quasi-judicial capacity when he denied the WP-16-065 waiver petition; he was taking agency action in the application of the regulations he administers. Another missing *McKinney* element in this appeal is a contrary reconsideration decision of the same planning action. The DPZ Director was not reconsidering WP-15-034; he was denying a discrete waiver petition, WP-16-065, for six waivers. A third missing element in this appeal is the regulatory absence of a formal reconsideration procedure. The Subdivision Regulations expressly authorize reconsideration requests, as discussed below.

Assuming arguendo the *McKinney* rule is germane to this appeal, the waiver petition denial passes muster because the factual situation in WP-16-065 is different from WP-15-034. The first waiver approval was uniquely specific to the facts of a court consent order as it affected Howard Streaker, resulting in the October 8, 2015 "drop-dead" plat submission deadline. DPZ's Director predicated the WP-16-065 denial on a new set of facts—the first waiver having been voided for failing to meet the October 8, 2015 deadline to submit the Parcel 2 subdivision plat and for the further reasons stated in Part I above.

Again, in the Hearing Examiner's view, the *McKinney* rule is arguably inapposite, because this appeal is about the DPZ Director's application and interpretation of his department's waiver standards to a discrete action. To be sure, there has been a change in decision-makers, making

for superficial comparison to another *McKinney* rule case, *Kay Const. Co. v. County Council for Montgomery County,* 227 Md. 479, 177 A.2d 694 (1962). In *Kay*, the court found impermissible change of mind in the quasi-judicial council authority's reconsideration denial of an approved rezoning case, arising from the substitution for one council member for another who held views contrary to those of his predecessor. But the DPZ Director's denial of the WP-16-065 petition to waive the definition of "resubdivision" was not a corrective or incorrect exercise of quasi-judicial decision-making; it was an administrative policy application of § 16.104.

Administrative agencies are not endlessly constrained by the policy regimes of former administrations, but policy departures must be reasonable. Discrete decisional changes in administrative policy-making judgments are not arbitrary if agencies implement changes consistently. Said a leading administrative law scholar of this administrative agency procedural context, "agencies should be allowed to depart from interpretations by prior administrations, certainly in the face of changed conditions, but also to reflect new views about policy . . . [But] new departures should be accorded somewhat less deference than longstanding interpretations, for reasons analogous to those that justify stare decisis in the judicial context." Cass R. Sunstein, Law and Administration After Chevron, 90 Colum. L. Rev. 2071, 2104 (1990). These changes in direction of an agency's former views have been conceptualized as "administrative change." See Randy J. Kozel & Jeffrey A. Pojanowski, Administrative Change, 59 U.C.L.A. L. Rev. 112 (2011).[1]

[1] The authors formulated the term "administrative change" in reference to the Supreme Court's administrative law decision in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). Decided one year before *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (establishing a two-step process for the

The authors' interrogation of the United States Supreme Court's major administrative law decisions pilot their position that courts will sustain challenges to shifts in policy judgments—oscillations in policy precedent—if the administrative changes are supported by clearly articulated "prescriptive" reasoning. "An agency that exercises its discretion to implement a legislative directive by weighing evidence, utilizing technical expertise, and making policy choices engages in what we describe as prescriptive reasoning . . . Because the agency's prior rationale was predicated upon policy judgments, it is neither surprising nor destabilizing for new agency personnel with their own worldviews to revise agency policy—provided that the agency acknowledges its shift, considers the implicated reliance interests, and respects the procedural and substantive requirements applicable to all forms of agency action." Id. at 114.

The lawfulness of a shift in administrative interpretative policy is generally reviewed by the Maryland courts of appeal under the "administrative due deference" rule. An administrative agency's interpretation and application of the statute, which the agency administers, should ordinarily be given considerable weight by reviewing courts. *Marzullo v. Kahl*, 366 Md. 158, 783 A.2d 169 (2001) (internal citations and quotations omitted). An administrative agency's policy framework application to its regulations is entitled to deference if based on a permissible construction of the statute.

The Hearing Examiner finds a parallel in DPZ's policy rationale for its waiver denial in her

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juridical review of agency interpretations), the most famous administrative law case in American legal history, *State Farm* invalidated the National Highway Traffic Safety Administration's regulatory reversal mandating the phasing in passive restraints (airbags and seatbelts). An agency "changing its [current policy] course" must "supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *State Farm,* 463 U.S. at 42, quoted in Administrative Change at 123.

own policy decision to strictly apply Howard County Zoning Regulations § 100.0.I, which requires the Hearing Authority (the Hearing Examiner and Board of Appeals) to dismiss a petition placed on the unscheduled docket after 180 cumulative days. Until adopting this policy, administrative appeal petitions remained on the unscheduled docket for years. My reason for this change in policy application was to institute "quasi-judicial consistency" in the policy application of the Zoning Regulations and the Hearing Examiner procedures. DPZ must similarly be able to change course for legitimate reasons to manage policy change.

Appellant's Third Argument:
Denying the Waiver Petition on the Basis of the Other Waivers

Appellant challenges any DPZ attempt to assert the waiver petition could be denied based on the other waivers because DED had already approved them. This claim is meritless. DLD Chief Kent Sheubrooks testified the DPZ Director issued no such approvals, as evidenced by Appellant Exhibit 1, which he explained was but an internal memo from Chad Edmondson, DED Chief, noting no objection to the technical subdivision waivers.

On the Matter of the DPZ Email Denying Any Reconsideration

Appellant is also appealing a February 2, 2016 DPZ email from DLD Chief Kent Sheubrooks informing him DPZ would not reconsider or reverse the WP-16-065 waiver petition decision. Neither party briefed this issue at the hearing. The matter is moot, based on the Hearing Examiner's conclusions as to the WP-16-065 waiver petition denial. Still, the Hearing Examiner briefly addresses it to provide future guidance to DPZ. Subdivision Regulations § **16.104** is a statutory right. The department may establish consistent internal policy for how it processes

these requests, but it may not foreclose them, which would be an abuse of discretion. If DPZ by its waiver petition denial is signaling a policy intent to change course and strictly construe the Subdivision Regulations, it must do so steadily or else risk charges of arbitrariness.

On the Matter of Waiving a Subdivision Regulations Definition

This case comes on appeal to the Hearing Examiner consequent to a 2014 DPZ Director decision waiving the definition of "resubdivision" to accommodate former Parcel 2 owner Howard Streaker and his particular circumstances. The Hearing Examiner prudently declines to weigh in on whether this personal accommodation was warranted. (More interesting is the manner of division of the Original Parcel into two parcels, with only Parcel 1 having development potential.)

It must be emphasized here that this prior waiver decision can have no precedential weight, no policy judgment reliance, as intimated by Appellant's "change of mind" argument. Waivers may be granted only from the "requirements of this subtitle." § 16.104(a). These "requirements" are the land development controls and administrative approval procedures contained in the Subdivisions Regulations, as reflected in the five WP-16-065 "technical" waiver requests. A "definition" is not a "requirement." Neither the DPZ Director nor the Hearing Authority on appeal may grant waivers to Subdivision Regulations definition; it would have the "effect of nullifying the intent and purpose of this subtitle." § 16.104(b)(2). Put bluntly, waiving the definition of "resubdivision," which is also a "subdivision," renders nugatory the whole body of law that is the Subdivision and Land Development Regulations. These definitions are gateway statutory provisions, which if bypassed procedurally through waiver, would remove statutory

definition barriers to certain types of land development, as might have occurred with Parcel 2. Such administrative regulatory misapplications are due no deference despite Appellant's attempts to harmonize the two definitional waivers. The original decision to waive a Subdivision Regulations definition constituted an inconsistent, illegitimate defacto "equitable" policy application that was improper for a DPZ Director to change nonlegislatively.

Even before Mr. Streaker submitted the September 12, 2014 WP-15-034 waiver petition application, DPZ had spoken definitively on SB 236 in its Summer 2014 Homebuilders Newsletter. These Homebuilder Newsletters are a major vehicle through which DPZ pronounces policy on the regulations it administers. Pages 2-3 of the Summer 2014 Newsletter present the agency's SB 236 implementation rules, including the application of its grandfathering provisions, explaining: "[I]n addition, there was an exemption to SB-236 for a subdivision if the percolation test application was submitted to the Health Department after July 1, 2012 and the final subdivision plat was recorded on or before December 31, 2012. Please note that this time period has elapsed and is no longer valid." The 2014 definitional waiver cannot be squared with this pronouncement.

A Final Note

The appeal petition raises the specter of a takings action. "[D]enial of the WP and other waivers would work as an as-applied regulatory taking of the Property . . ." There can be no as-applied regulatory taking where there are no distinct investment backed expectations. The development potential (lot yields) of Parcel 2 is not fixed thus far through Appellant's actions. On this point, the Hearing Examiner notes here her dicta questions during the proceeding as to whether Parcel 2 was even a buildable lot before Mr. Streaker sought to resubdivide it. This

concern is borne out in the WP-15-034 waiver petition, where Mr. Streaker in Part I of the form identifies the existing use as "non-buildable residential" and the proposed use as "residential." A 16-acre, non-buildable residential lot in rural Howard County has many permissible uses. It also appears DPZ would permit Mr. DiMarco to construct one single-family residence on non-buildable residential Parcel 2 for him and his family, as stated in the WP-16-065 waiver petition denial letter. By Mr. DiMarco's testimony, his interest in purchasing Parcel 2 was for a new home for his family, including a child soon to be of school age, because his current home was in Baltimore City's Hampden neighborhood. By Appellant's admission in his own minutes of the January 28, 2016 meeting with DPZ, the WP-15-034 October 8, 2015 submission deadline was "unattainable to begin with." Mr. DiMarco still purchased the property. You pays your money and you takes your choice.

ORDER

Based upon the foregoing, it is this **8th Day of August 2016**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of Appeal of Paul S. DiMarco is hereby **DENIED.**

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 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.