

IN THE MATTER OF

* BEFORE THE HOWARD COUNTY

AGILA SUNDARAM, et al.

* BOARD OF APPEALS

3956 Old Columbia Pike
Ellicott City, MD 21043

* BA CASE NO. 818-D

*

* * * * *

MEMORANDUM OF POINTS AND AUTHORITIES

Petitioners, Agila Sundarum et al., by and through their undersigned counsel, hereby submits this Memorandum of Points and Authorities in the above-captioned matter.

OVERVIEW

The powers not expressly delegated to the United States by the Constitution . . . are reserved to the States to the Federal government are reserved to the States. US Constitution, 10th Amendment. The power for the government to zone and regulate land uses is a power reserved to the States. Maryland has sought to further delegate such authority to its localities under, as pertinent to Howard County, the Express Powers Act, now codified under the Maryland Local Government Code. Within the Express Powers Act is also the specific delegation to a citizen Board of Appeals for Howard County (the “Board”) and the reservation to the Board of both original and appellate jurisdiction matters to review and re-decide the decisions of Howard County agencies below based on the standards as provided in the Board’s Rules of Procedure 2.209 and 2.210.

The right of a Howard County citizen to seek a quasi-judicial hearing in front of the Board of Appeals is guaranteed by State law and cannot be denied based on local law or any

interpretation thereof. A clear conflict of laws would require the Board of Appeals to execute its responsibilities under the Express Powers Act.

The Board of Appeals is the highest administrative agency and has *de novo* appellate review to be the first trier of fact and the creator of the final administrative record that would be subject to Court review. *See Maryland Rules of Court Sect. 7-201 et seq.*

QUESTIONS PRESENTED & ANALYSIS

1. Does the Howard County Board of Appeals have the authority to grant waiver /alternative compliance applications following a de novo appeal of DPZ's decision to deny the waiver/alternative compliance?

Yes, the Howard County Board of Appeals has the legal authority to grant waiver petitions. The Howard County Board of Appeals derives its authority to grant waiver petitions from Maryland's Express Powers Act, now codified as Maryland Local Government Code § 10-305(b)(2). This statute provides that county boards of appeals may have original jurisdiction or jurisdiction to review the action of an administrative officer or unit of county 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). The express inclusion of waiver within this jurisdictional grant provides clear statutory authority for the Howard County Board of Appeals to grant waiver applications.

Maryland appellate courts have directly confirmed this authority, most notably in *Hikmat v. Howard County*, 148 Md. Appl. 502, 532 (2002). In *Hikmat*, the Court of Special Appeals

(now Appellate Court of Maryland) directly addressed this question when a property owner appealed the County Department of Planning and Zoning's denial of a waiver request to permit disturbance of a stream and buffer area. The Board of Appeals reversed the department's decision and granted the waiver petition. The Court of Special Appeals held that the Board had the authority to grant the waiver if its own findings were sufficient to support such a conclusion.

“[I]n the absence of any express language in any of the Code provisions suggesting that the Board's power was limited to the determination of whether DPZ's decision was arbitrary or unlawful, there is no reason to believe that the Board did not have the substantive power to fashion an appropriate remedy.” *Id.* at 529. The Court also noted Section 2.210(c) of the Howard County Board of Rules Procedure and held further that this section’s language (“ . . . [t]he Board may dismiss the administrative appeal or may affirm, reverse, or modify the agency’s action, remand the action to the agency for further proceedings, or an appropriate combination of the above”) is clear language providing the Board of Appeals with the authority to grant the waiver. *Id.*

2. Does the Howard County Board of Appeals review the agency’s record below in order to make its determination under 2.210(a) (De Novo Appeals)?

No. The Board of Appeals creates the final administrative record in a 2.210(a) de novo appeal. Under the Board’s Rules, the Board has de novo appellate jurisdiction over any case where there was no contested hearing before the agency below. The Hearing Examiner is not an agency under the Howard County Code. Howard County Code Section 2.101(a). The Hearing Examiner never produces a record that becomes the final record for court review. In the event that the Hearing Examiner’s decision for a 2.210(a) case is appealed, it is as if the Hearing Examiner hearing has never occurred. *See* Memorandum from Former Councilman Vernon

Gray dated September 20, 2001 a copy of which is attached hereto as part of Exhibit A. The cases that provide that review of the County agency decision is the final administrative agency and the record that the record reviewed is the record created at the Board of Appeals are too numerous to cite.

3. Does the Howard County Board of Appeals review the decision of the Hearing Examiner in a 2.210(a) appeal?

No. As stated above, the Hearing Examiner is not an agency. The legal misnomer that the Board is to decide a matter in reference to arbitrariness, capriciousness, legality or contrary to law on evidence that may have never been presented below is offset by the principle that due process was not afforded below as there was no quasi-judicial hearing before an agency and, more importantly, evidence before the Board is not limited to evidence that was presented to the agency below. The Board creates an opportunity to create a complete record and detailed findings of fact and conclusions of law employing due process as guideposts.

4. Does the Howard County Board of Appeals owe any deference to DPZ's decision?

No. The concept of judicial deference emanates from the standard of court review where the Court will not substitute its decision for the final administrative agency. In this matter and any 2.210(a) case, the Board is the final administrative agency that is owed deference by the Court. There is not law – statutory or case law – that replaces the standard of review under 2.210(a). The substantial evidence test has no application to the Board's review in a 2.210(a) appeal. The Board can absolutely substitute its decision for the agency's decision below, which was devoid of procedural due process.

5. Does the Howard County Board of Appeals review any of the decisions below (DPZ or the Hearing Examiner) utilizing the substantial evidence test?

As explained above, the substantial evidence test or fairly debatable standard is reserved for courts reviewing agency decisions. The substantial evidence test is more about the judicial branch not invading the province of the legislature or executive branches. Court judges are supposed to call ball and strikes not substitute their personal opinions for an agency decision resulting from a quasi-judicial hearing.

6. Is the inclusion of an easement for ingress/egress and utilities for landlocked properties with development potential a requirement of a lawful subdivision plan or is it optional?

The requirement to provide an access and/or utility easement for adjacent land-locked parcels is mandatory and required by Howard County Code Sec. 16.119(b)(8).

Respectfully submitted,

TALKIN & OH, LLP

A handwritten signature in blue ink that reads "Sang W. Oh / AA". The signature is written over a horizontal line.

Sang W. Oh
5100 Dorsey Hall Drive
Ellicott City, MD 21042
soh@talkin-oh.com
(410) 964-0300
Counsel for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 23, 2025, a copy of the foregoing was sent via electronic mail, to:

Howard County Board of Appeals
3430 Court House Drive
Ellicott City, MD 21043
kberg@howardcountymd.gov


Sang W. Oh

LAW OFFICES OF
TALKIN & OH, LLP
COLUMBIA OFFICE
5100 DORSEY HALL DRIVE
ELLCOTT CITY, MARYLAND 21042-7870

(410) 964-0300
(301) 596-6500
Fax: (410) 964-2008

September 7, 2023

VIA ELECTRONIC MAIL (kberg@howardcountymd.gov) (*Original Will Not Follow*)

Steve Hunt, Chairman
Howard County Board of Appeals
c/o Kel Berg, Administrator
3430 Courthouse Drive
Ellicott City, MD 21043

RE: Michelle and Bradley Kline, *et al.*
BA Case No. 796D

Dear Mr. Hunt:

This correspondence is being provided to you in accordance with Board of Appeals Rules of Procedure Section 2.204(i)(correspondence with the Board) and, if determined to be applicable, Section 2.207(e)(motions).

This office represents Edmund Pollard and Joyce Adcock, the property owners and interested parties in the above-referenced matter, which arises from the approval of an alternative compliance application for specimen tree removal by the 3 member panel comprised of Howard County's Department of Planning and Zoning, Department of Recreation and Parks and Office of Community Sustainability (the "Panel"). The Panel's decision was heard in a *de novo* appeal by Hearing Examiner, Joyce Nichols, Esq., who rendered a decision and order on August 4, 2023, reversing the Panel's approval and remanding the case to the Department of Planning and Zoning for action in accordance with her decision.

This office filed an appeal of the Hearing Examiner's decision on or about August 16, 2023, pursuant to the provisions of Howard County Code Sec. 16.304:

A person aggrieved by a decision of a Hearing Examiner may, within 30 days of the issuance of the decision, appeal the decision to the Board of Appeals. Unless the appeal is of a citation issued under subtitle 16 of this title, the Board will hear the appeal *de novo* in accordance with section 2.209 or subsection 2.210(a) of the Code, as amended, as applicable.

Exhibit A

and Section 12.1 of the Howard County Board of Appeals Hearing Examiner Rules:

12.1. Appeals to Board. A person aggrieved by a decision of the hearing examiner may appeal it to the Board within 30 days of the issuance of the decision. An appeal must be submitted to the clerk on a form provided by the clerk.

On August 17, 2023, this office was informed by Kel Berg, Board of Appeals Administrator, that Hearing Examiner Nichols had instructed to not allow the scheduling of BA 796D for a hearing before the Board of Appeals because such appeal "is an interlocutory appeal." A copy of the Board of Appeals Administrator's e-mail is provided herewith. It is our understanding that the Board of Appeals Hearing Examiner is of the opinion that she maintains jurisdiction in this case despite our office's proper filing of a timely appeal. It is the Hearing Examiner's position that Mr. Pollard and Ms. Adcock cannot appeal her decision and order; rather, they must await action by the Panel in accordance with the decision and order. Only after the Panel renders its new decision can either party appeal the new decision with such appeal again proceeding to the Hearing Examiner. If there is an alternative explanation for the Hearing Examiner's position, our office has not been provided with such information.

The declination to set a properly filed appeal for a hearing before the Board of Appeals is both unprecedented and in contravention of Howard County law. In addition to the clear deprivation of the express right of appeal as provided in the plain language of the code provisions cited above, the history and legislative intent of the Howard County Hearing Examiner position is counter to the position taken by the Board of Appeals administrator. The Hearing Examiner position was created for the purpose of alleviating the workload of the Board of Appeals. The Hearing Examiner process was never intended to create an administrative appellate process that would replace the Board of Appeals' review of administrative decisions. As a reference, I provide a September 20, 2001 Memorandum from C. Vernon Gray, the County Councilman who proposed the legislation creating the Hearing Examiner position. As Dr. Gray noted in his explanation/justification for the then-new Hearing Examiner position, "[i]f any party is dissatisfied with the hearing examiner's decision, it may appeal directly to the Board of Appeals, which will hear the case *de novo* – that is, the Board will hear testimony, take evidence, and decide the case as if the hearing examiner's hearing had not occurred." The Board of Appeals' administrator's refusal to set a hearing date for the properly filed appeal of the Hearing Examiner's decision is a retreat from the representation made by Dr. Gray in his justification for the Hearing Examiner legislation, which has, heretofore, never been permitted.

Support for this original and what we assert must be the continuing and enduring purpose of the Hearing Examiner position has also been provided by the Howard County Office of Law in prior administrative and court proceedings. Dr. Gray's September 20, 2001 Memorandum was submitted by the Howard County Office of Law to the Howard County Circuit Court in Howard County Circuit Court Case No. 13-C-07-68144.

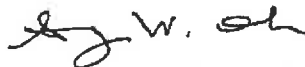
While any party to an appeal is free to raise whatever arguments it determines appropriate, such arguments should be raised at a hearing before the Board of Appeals by the parties to the case. A unilateral decision by the Hearing Examiner, who without jurisdiction and without the benefit of a hearing to consider the arguments of the parties to the matter, determines that an appeal of her decision to the Board of Appeals should not be scheduled is violative of due process, an affront to the statutory framework and usurps the Board of Appeals' of its responsibility to manage its own docket. We fail to understand how this can be the proper role of the Howard County Board of Appeals Hearing Examiner.

Lastly, we are concerned about the delay being effected by the collective decision of the Board of Appeals Administrator and Hearing Examiner to not allowing the scheduling of the appeal. The instant appeal is the second time that Mr. Pollard and Ms. Adcock's proposed development will be before the Board. Additional appeals will most certainly follow. This case is a contentious matter that has and most likely be resolved at the highest levels of appellate review including the Board of Appeals and courts of law. Artificially creating more duplicative processes that exacerbate delays inherent in Howard County's administrative appeal process is unnecessarily punitive to Mr. Pollard and Ms. Adcock.

We request that the Chair take timely action to schedule this appeal for a hearing before the Board. Thank you for your time and consideration.

Very truly yours,

TALKIN & OH, LLP



By: Sang W. Oh

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 7th day of September 2023, a copy of the foregoing correspondence was forwarded in the manner denoted below, to:

Attorney for Michelle and Bradley Kline, *et al.*
G. Macy Nelson (via email: gmacynelson@gmacynelson.com)
600 Washington Avenue, Suite 202
Towson, MD 21202

Barry Sanders, Esq. (via email: bsanders@howardcountymd.gov)
David Moore, Esq. (via email: dmoore@howardcountymd.gov)

Steve Hunt
September 7, 2023
Page 4 of 4

Gary Kuc, Esq. (via email: gkuc@howardcountymd.gov)
George Howard Building
3430 Courthouse Drive
Ellicott City, MD 21043

Pursuant to Rule 2.207(e) of the Rules of Procedure of the Board of Appeals, any person interested in responding to this correspondence shall file a written response with the Board within fifteen days of the date that this correspondence was filed.


Sang W. Oh

Sang Oh

From: Berg, Kel <kberg@howardcountymd.gov>
Sent: Thursday, August 17, 2023 3:57 PM
To: Sang Oh
Subject: RE: BA-796D (Edmund Pollard & Joyce Adcock)

Hi Sang, no worries about the confusion....we have a lot of cases to keep straight!

To answer your question, this case is not appealable because the Order is to remand to DPZ, which does not finally dispose of the case. If you look at the end of the D&O there is no notice regarding instruction on appealing the decision. The remand requires that action be taken or problems be fixed and once those corrections are made, that new decision may be appealed to the HE for a final appealable decision.

Kel L. Berg
Board Administrator
Howard County Boards Office
410 313 3114

From: Sang Oh <soh@talkin-oh.com>
Sent: Thursday, August 17, 2023 2:49 PM
To: Berg, Kel <kberg@howardcountymd.gov>
Subject: FW: BA-796D (Edmund Pollard & Joyce Adcock)

[Note: This email originated from outside of the organization. Please only click on links or attachments if you know the sender.]

I'm sorry, Kel. We were talking about 2 different cases. I was talking about BA 795. Nevermind that.

I'm confused about this 796 appeal of the Hearing Examiner's decision. Why is this an interlocutory appeal? Would a call be easier? Thank you.

Sang W. Oh
Talkin & Oh, LLP
5100 Dorsey Hall Drive
Ellicott City, MD 21042
410-964-0300
410-964-2018 (f)

pronouns: he, him, his

From: Gina Pagani <gpagani@talkin-oh.com>
Sent: Thursday, August 17, 2023 1:24 PM
To: Sang Oh <soh@talkin-oh.com>
Subject: FW: BA-796D (Edmund Pollard & Joyce Adcock)

Sang,

Toni just forwarded the below email.

Gina Pagani
Paralegal
Talkin & Oh, LLP
5100 Dorsey Hall Drive
Ellicott City, MD 21042-7870
410-964-0300
410-964-2008 fax
gpagani@talkin-oh.com

CONFIDENTIALITY STATEMENT: This electronic message contains privileged and confidential information. This information is intended solely for the use of the intended recipient above. If you have received this message in error, please be aware that any disclosure, copying, distribution or use of the contents in this message is prohibited. Please notify us immediately by telephone at 410-964-0300 or by email reply if you have received this message in error. Thank you.

From: Sieglein, Toni <tsieglein@howardcountymd.gov>
Sent: Thursday, August 17, 2023 1:22 PM
To: Gina Pagani <gpagani@talkin-oh.com>
Subject: FW: BA-796D (Edmund Pollard & Joyce Adcock)

From: Berg, Kel <kberg@howardcountymd.gov>
Sent: Thursday, August 17, 2023 1:11 PM
To: Sieglein, Toni <tsieglein@howardcountymd.gov>
Cc: Conrad, Peter <pconrad@howardcountymd.gov>; Miller, Kiasten <kmiller@howardcountymd.gov>
Subject: RE: BA-796D (Edmund Pollard & Joyce Adcock)

Hi Toni. This was an interlocutory order and therefore cannot be appealed.

Kel L. Berg
Board Administrator
Howard County Boards Office
410 313 3114

From: Sieglein, Toni <tsieglein@howardcountymd.gov>
Sent: Thursday, August 17, 2023 12:53 PM
To: Berg, Kel <kberg@howardcountymd.gov>; Miller, Kiasten <kmiller@howardcountymd.gov>
Cc: Conrad, Peter <pconrad@howardcountymd.gov>
Subject: BA-796D (Edmund Pollard & Joyce Adcock)

Hi Kel & Kia,

This case got appealed to the Board of Appeals. Please schedule a hearing date.

Thank you,

Toni Sieglein
Public Service and Zoning
3430 Court House Drive, Ellicott City, MD 21043 | [Website](http://www.howardcountymd.gov)
[410-313-2424](tel:410-313-2424)



Howard County Council

George Howard Building
3430 Court House Drive
Ellicott City, Maryland 21043-4392

COUNCILMEMBERS

Guy Guzzone, Chairman
District 3
C. Vernon Gray, Vice Chairman
District 2
Allan H. Kittleman
District 5
Mary C. Lonsung
District 4
Christopher J. Merdon
District 1

MEMORANDUM

To: Planning Board Members

From: C. Vernon Gray, Vice Chairman
County Council

Date: September 20, 2001

Re: Hearing Examiner Legislation

Please find attached for your review proposed legislation that I have pre-filed to establish a hearing examiner for the Howard County Board of Appeals. This bill is pursuant to an earlier bill establishing the position of hearing examiner. The goal in introducing this legislation is to alleviate the backlog of cases heard by the Board of Appeals and to expedite and improve the process by which citizens may have land use and other administrative issues heard and decided.

You will note that, under my bill, the hearing examiner will hear and decide all land use cases, including conditional uses. If any party is dissatisfied with the hearing examiner's decision, it may appeal directly to the Board of Appeals, which will hear the case *de novo* - that is, the Board will hear testimony, take evidence, and decide the case as if the hearing examiner's hearing had not occurred.

The advantage of this structure, which is based on the experience of other jurisdictions, is that most land use cases will be scheduled, heard, and decided far more expediently than under the current system. Non-controversial cases can be resolved quickly, and will not have to wait in line with other cases to be heard. Other jurisdictions indicate that only about 10-20% of the hearing examiner's cases are appealed to the Board. Thus, the more complex and controversial cases will still have full benefit of a hearing before the Board of Appeals, whose caseload will be greatly reduced.

You will also note that my bill eliminates the Planning Board's role of reviewing and making recommendations to the Board on land use cases. While the Board's review has no doubt been a valuable step in the process, I think you will agree that replacing it with the hearing examiner process provides the parties with the same, if not a greater, opportunity to air and refine the issues. It will also free the Planning Board to concentrate on its other important functions.



Memorandum
September 20, 2001
p. 2

I have also attached for your information a summary of this legislation. I welcome your thoughts and comments.

cc: Council Members
Board of Appeals
Barbara Cook
Joseph Rutter

SUMMARY OF PROPOSED HEARING EXAMINER LEGISLATION

Jurisdiction of the Hearing Examiner [§16.302]

- ⇒ Provides that all cases currently heard by the Board of Appeals will first be heard by a hearing examiner, except:
 - Administrative appeals heard on the record, e.g., appeals from the Animal Matters Board, the Human Rights Commission, or Planning Board final decisions.
 - Cases in which the hearing examiner is disqualified. If the Board must hear a land use case because the hearing examiner is disqualified, the Planning Board will first review the case and give its recommendation.

Procedures [§16.303]

- ⇒ Provides that cases heard by the hearing examiner must be advertised and posted as currently provided in the Board's Rules of Procedure.
- ⇒ Allows the hearing examiner to determine the time and place of hearings.
- ⇒ Provides that the Office of Law will provide legal advice as needed.
- ⇒ Authorizes the hearing examiner to issue subpoenas and administer oaths.
- ⇒ Provides that the same burden of proof shall be applied to cases heard by the hearing examiner as is currently established for cases heard by the Board of Appeals.
- ⇒ Requires that other rules of procedure established by the hearing examiner must be approved by resolution of the County Council.

Appeals [§16.304]

- ⇒ Provides that an appeal of a hearing examiner's decision will be heard *de novo* by the Board of Appeals - that is, the Board will hear it as if it were newly filed with the Board and never heard by the hearing examiner. The Board will not review the decision of the hearing examiner, but will take evidence and make its own decision in accordance with its current Rules of Procedure.
- ⇒ Provides that the person taking the appeal will pay the costs of providing notice and advertising the appeal hearing.

SUMMARY OF PROPOSED HEARING EXAMINER LEGISLATION

Jurisdiction of the Hearing Examiner [§16.302]

- ⇒ Provides that all cases currently heard by the Board of Appeals will first be heard by a hearing examiner, except:
 - Administrative appeals heard on the record, e.g., appeals from the Animal Matters Board, the Human Rights Commission, or Planning Board final decisions.
 - Cases in which the hearing examiner is disqualified. If the Board must hear a land use case because the hearing examiner is disqualified, the Planning Board will first review the case and give its recommendation.

Procedures [§16.303]

- ⇒ Provides that cases heard by the hearing examiner must be advertised and posted as-currently provided in the Board's Rules of Procedure.
- ⇒ Allows the hearing examiner to determine the time and place of hearings.
- ⇒ Provides that the Office of Law will provide legal advice as needed.
- ⇒ Authorizes the hearing examiner to issue subpoenas and administer oaths.
- ⇒ Provides that the same burden of proof shall be applied to cases heard by the hearing examiner as is currently established for cases heard by the Board of Appeals.
- ⇒ Requires that other rules of procedure established by the hearing examiner must be approved by resolution of the County Council.

Appeals [§16.304]

- ⇒ Provides that an appeal of a hearing examiner's decision will be heard *de novo* by the Board of Appeals - that is, the Board will hear it as if it were newly filed with the Board and never heard by the hearing examiner. The Board will not review the decision of the hearing examiner, but will take evidence and make its own decision in accordance with its current Rules of Procedure.
- ⇒ Provides that the person taking the appeal will pay the costs of providing notice and advertising the appeal hearing.